**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 252 OF 2019**

**IN THE MATTER OF ARTICLES 22(1), 23, 27, 47, 50 (1)**

**AND 163 (3) (B) (D) & (E) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE BETTING, LOTTERIES AND GAMING ACT, CAP 131 OF**

**THE LAWS OF KENYA AND THE BETTING, LOTTERIES AND GAMING REGULATIONS**

**AND**

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 10, 20, 21, 27, 40 & 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF BREACH OF SECTION 4 (1) & (6) OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**PEVANS EAST AFRICALIMITED.....PETITIONER**

**VERSUS**

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

**CYRUS MAINA.....2ND RESPONDENT**

**LITI WAMBUA.....3RD RESPONDENT**

**AND**

**SAFARICOM LIMITED.....1ST INTERESTED PARTY**

**AIRTEL NETWORKS KENYA LIMITED.....2ND INTERESTED PARTY**

## JUDGMENT

**THE PARTIES**

1. The Petitioner is a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies Act.[1]

2. The first Respondent is a statutory body established under section 3 of the Betting, Lotteries and Gaming Act [2](herein after referred to as the Act).

3. The second and third Respondents are the Chairman and Acting Director of the first Respondent respectively.

4. The first and second Interested Parties are limited liability companies and licensed mobile network operators carrying on telecommunication business. Their systems support the Petitioner's money transfer platform through business Pay Bill Numbers and short codes.

**Court's directions**

5. At the request of the parties, the court directed that this Petition be heard alongside Petition numbers 256 of 2019 and 271 of 2019. The three Petitions raise identical issues. The Petitioner's advocates in the three Petitions in their submissions addressed substantially similar issues. The Respondents' and the first Interested Party's pleadings and written submissions in the three Petitions are strikingly similar. Inevitably, the judgments in the three Petitions will in many respects be identical.

6. In order to expedite the cases, the court directed that all pending interlocutory applications be compromised and the Petitions do proceed for hearing.

7. At the close of the case, I directed all the Parties to submit soft copies of all their pleadings within two days from the date of conclusion. This was to enable the court to expedite the determination in view of the large volumes of documents filed by the parties. All the parties complied with this requirement except the Petitioner's counsel in this Petition.

8. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner.

**Factual Matrix**

9. The Petitioner states that it is aggrieved by the Respondent's refusal to consider and process its application for renewal of its license. In addition, it states that the Respondents have severally renewed its Off the Course Bookmakers license and that it has consistently complied with all the license conditions.

10. The Petitioner states that by a letter dated 26$^{th}$February 2019, the first Respondent requested the Petitioner to furnish its office with substantial information on how the Petitioner ensures seamless online gaming while addressing the issues raised in the said letter. The Petitioner states that on 6$^{th}$March 2019, it furnished the Respondents with details regarding its compliance on customer deposit protection, prevention of underage gambling, customer data protection, prompt and accurate customer payments, fair gambling, responsive marketing, customer satisfaction and secure operating environment.

11. The Petitioner further avers that by a letter dated 8$^{th}$May 2019, the first Respondent asked the Petitioner to submit "…duly endorsed bank slip evidence of tax payment at the current applicable rates…" for the period up to April 2019. The Petitioner states that on 10$^{th}$ May 2019, it submitted the requested information relating to withholding tax for the period in question, but, by a letter dated 31$^{st}$ May 2019, the first Respondent informed the Petitioner that it had not yet fulfilled the requirements because it had not provided "evidence of payment of withholding tax" and that its application would only be considered upon fulfilment of the said condition.

12. The Petitioner further states that in responses dated 4$^{th}$ and 11$^{th}$ June 2019, it provided the requested information including pleadings and court orders among them:-

> *a. A court order issued on 11$^{th}$December 2018 in High Court Petition No. E421 of 2018 restraining the first Respondent from demanding from the Petitioner withholding tax on winning for the period May 2014 and March 2019, hence, the Petitioner cannot demand proof of withholding tax for the entire period.*
>
> *b. An order issued in HC JR No 180 of 2019 staying the enforcement action in respect of withholding tax for the period April 2019.*

13. The Petitioner states that despite providing the above information, the Respondent unreasonably and inexplicably failed or refused to process the application for renewal of the license for undisclosed reasons. The Petitioner further states that the refusal is an attempt to run it out of business, which will lead to loss of jobs for 347 employees with a ripple effect to their families, dependents, government revenue and affect those in the supply chain.

14. The Petitioner states that by letters dated 10th July 2019 and 11th July 2019, the Respondents directed the first Interested Party to suspend the pay-bills and short codes used by the Petitioner's customers and allow the said customers to withdraw funds deposited with the first Interested Party within 48 hours. The Petitioner avers that it was not served with copies of the said letters despite their adverse effect on its business. It further avers that the first Interested Party has in compliance with the said directive suspended its Pay bill numbers and short codes.

**Legal foundation of the Petition**

15. The Petitioner states that the Respondents' actions are unreasonable, irrational, high handed and a deliberate abuse of power to achieve ulterior ends.

16. The Petitioner also states that the Respondents' actions violate national values and principles enshrined in Article 10(1) of the Constitution, namely, the rule of law, integrity, transparency and accountability.

17. The Petitioner also states that having complied with all the requirements of the law, it had the reasonable and legitimate expectation that the Respondents would process its application instead of placing illegal hurdles and conditions. In addition, the Petitioner states that it has a legitimate expectation that the Respondent's would comply with the requirements of the governing statute, treat the Petitioner fairly, process its application in a manner that is reasonable, expeditious, and procedurally fair. The Petitioner averred that the actions complained of offend the Petitioners fundamental rights and legitimate expectation guaranteed under Articles 22(1), 25(c), 48 and 50(1) of the Constitution.

18. The Petitioner also states that this court has both the exclusive jurisdiction under Articles 22(1), 23(1) and 165 (3) of the Constitution to determine whether the Petitioner's fundamental rights and freedoms under the Bill of Rights have been denied, violated, infringed or threatened.

19. In addition, the Petitioner states that this court has the jurisdiction under Article 165 (3) (d) of the Constitution to determine the legality of the refusal by the first Respondent to process and issue the license.

20. Further, the Petitioner states that the decision by the first Respondent to unfairly treat the Petitioner's application differently from that of the other tax payers amounts to a clear case of discrimination contrary to Article 27(4) of the Constitution.

21. Lastly, the Petitioner states that by it actions, the Respondents have infringed and threaten to further infringe or continue infringing constitutional provisions and the Petitioner's fundamental rights and freedoms enshrined in Articles 10, 27, 40, 47 and 48 of the Constitution.

**The Reliefs sought**

22. As a consequence of the foregoing, the Petitioner prays for:-

*i. A declaration that failure and or refusal by the Respondent to consider and process the Petitioner's application for renewal of its license infringed on the Petitioner's rights under Articles 10, 27, 40, 47 and 48 of the Constitution.*

*ii. A declaration that by refusing to process the Petitioner's application for renewal of its license or to renew the same despite the Petitioner's compliance with the law, the Respondent's acted improperly and failed to discharge their statutory duty to fairly consider the Petitioner's application for renewal of its license and thereby acted in breach of Article 47 of the Constitution.*

*iii. That this honourable court be pleased to issue a mandatory injunction to compel the Respondents to process and grant the Petitioner's application for renewal of its license in accordance with the provisions of sections 4 and 5 of the Betting, Lotteries and Gaming Act.*

*iv. That this honourable court be pleased to issue an order restraining the Respondents from demanding from the Petitioner evidence of payment of withholding tax or any other condition not contained in the Betting, Lotteries and Gaming Act as a precondition for processing the application for renewal or renewing the Petitioner's license.*

*v. That this honourable court be pleased to issue an injunction to restrain the Respondents from interfering with the Petitioner's operations by requiring the Interested Parties to suspend its money transfer platform used by the Petitioner for receiving and payment of money.*

*vi. That this honourable court be pleased to issue an order of certiorari to bring into the high court for the purpose of being quashed, the first Respondent's letter dated 10th and 11th July 2019 issued to the first Interested Party.*

*vii. That in the alternative to prayer (vi) above, this honourable court be pleased to issue an order of mandamus compelling the Respondents to forthwith withdraw, retract or vacate the letters dated 10th and 11th July 2019 issued to the first Interested Party.*

*viii. That this honourable court be pleased to issue an order restraining the Interested Parties from acting on or otherwise implementing the directives contained in the first Respondent's letters dated 10th and 11th July 2019 or any other directives that are violative of the conservatory orders made on 28th June 2019 and extended on 4th July 2019 and to forthwith restore the applicant's pay bill numbers and short codes.*

*ix. That this honourable court be pleased to award the Petitioner damages for loss of business and breach of its fundamental rights.*

*x. That this honourable court be pleased to grant any such other or further orders as it may deem just and appropriate in the circumstances.*

*xi. That this honourable court be pleased to order that the Respondents to pay the costs of these proceedings on a full indemnity basis.*

23. The annexed Affidavit of Ronald Karauri, the Petitioner's Chief Executive Officer, supports the Petition. The affidavit essentially adopts and reiterates the contents of the Petition. The crux of the affidavit is that the Petitioner has fully complied with the requirements of the law and has provided the comprehensive details and additional documents requested including its tax compliance certificate.

24. The Petitioner also filed the supplementary Affidavit dated 12th July 2019 in which he attached a letter dated 12th July 2019 from the first Interested Party confirming that it had suspended its pay bill numbers.

**Respondent's Replying Affidavit**

25. Cyrus Maina, the second Respondent herein and the first Respondent's chairperson swore the Replying Affidavit dated 19thJuly 2019. He averred that a registered company such as the Petitioner must lawfully authorize, by way of a resolution under its seal, the institution of any suit against any party or person. He deposed that, such authority, which must be under the seal of the Petitioner Company, has not been availed in the instant case.

26. He deposed that it is the statutory duty of the first Respondent to issue, renew, vary and/or cancel licesnces and permits required under the act. He further averred that an application for a bookmakers licence is considered and/or determined by the first Respondent in accordance with *inter alia* the provisions of Sections 4, 5 and 5A of the Act. In addition, he averred that a bookmaker's licence issued under the Act at any particular time unless otherwise provided expires on the 30th of June next following the date of issue.

27. Mr. Maina further averred that under the law, the first Respondent is statutorily empowered to *inter alia* control and regulate the operations of betting and gambling in the country. He deposed that once a bookmaker's licence has expired, a party has to make a fresh application for its renewal in accordance with the law and such an applicant has to meet all the legal and regulatory requirements for it to be considered.

28. Mr. Maina also averred that the renewal after expiry is not automatic unless an applicant complies with all the necessary regulatory requirements. He added that the license cannot be renewed if an applicant has not complied with any of the requirements for renewal. He deposed that the Petitioner was well aware of the regulatory requirements, and, that, the conditions were brought to its attention at the time of obtaining the licence for the year 2018/2019.

29. He added that the renewal of the licence is also determined against an applicant's compliance with the conditions that had previously accompanied the expired licence. He deposed that the Petitioner submitted its application for renewal and after analysis and consideration, it was established that the Petitioner had not fulfilled its tax payment obligations. He deposed that the Petitioner does not have a valid license, since the same expired on 30th June 2019.

30. Mr. Maina averred that Petitioner's license was not renewed for want of compliance with the set conditions and regulatory requirements. He averred that the first Respondent established that the Petitioner had not fulfilled its licence renewal requirements being *inter alia* tax payment obligations amounting to billions of shillings it had collected from the gambling public. He added that the Petitioner was aware of the consequences of not complying with the said conditions, and, despite the foregoing, the Petitioner failed to avail evidence of payment of the applicable taxes.

31. He added that the Act empowers the first Respondent to conduct due diligence to determine and or ascertain whether the applicant is fit and proper to hold the license.

32. In addition, he averred that once an application for renewal of a bookmakers licence has been received, the first Respondent is also empowered by the act to conduct due diligence to determine and/or ascertain whether an applicant is fit and proper to hold a bookmakers licence.

33. He added that this Petition was filed before a decision on the Petitioner's application for renewal of its bookmakers licence was determined. He stated that the Petitioner's application was eventually determined and found to lack merit on account of noncompliance with the law by failing to avail evidence of payment of the applicable betting taxes and/or failing to meet its tax obligations and the said decision was effectively communicated to the Petitioner vide a letter dated 1st July, 2019.

34. He deposed that any licensee who fails to pay the applicable betting/gambling taxes is not a fit and proper person to hold its licence as provided for under Section 5 of the Act, and, that, the first Respondent was not satisfied the applicant is a fit and proper person whose bookmakers licence should be renewed.

35. Mr. Maina deposed that the instant Petition is solely intended to circumvent the renewal process for the bookmakers licence and attempt to obtain a license without complying with the law and the set conditions thereof. He added that the first Respondent has no objection to renewing the Petitioner's licence subject to compliance with all the legal requirements and issuance of security vetting clearance for the directors.

36. He also averred that the investigations usually carried out by the security officers to determine fitness and applicant's suitability are usually intelligence and national security activities and as such, such information is exempt disclosure within the meaning of section 6 of the

Access to Information Act.[3]

37. In addition, he averred that all the applicants including the Petitioner whose licences were not renewed were kept informed of the status of their applications and that they have at all times been treated equally before the law.

38. He deposed that the Petitioner's constitutional rights have been threatened and/or violated and that the Petitioner, as a global gaming company, knows too well the strict regulation and compliance levels required which are meant to protect the State and public interests in the legalization and operation of gambling/betting activities and for national security reasons.

39. He also averred that this court must put the rights and interests of the wider public first in matters relating to the regulation of the gambling/betting industry, and, that, public interest must outweigh the private interest. In addition, he deposed that the rights alleged to have been violated are not absolute rights and any limitation imposed by the board by virtue of the challenged decision is reasonable in an open and democratic society.

40. He also deposed that the Petitioner could apply for a review of the decision once it is capable of demonstrating full compliance with the applicable laws, regulations and requirements; hence, this Petition should fail because of noncompliance with the doctrine of exhaustion of remedies. Alternatively, he averred that the Petitioner could present a fresh application for consideration by the first Respondent in accordance with *inter alia* Sections 4, 5 and 5A of the Act.

41. He also averred that no orders have been issued against the first Respondent suspending the operation of Section 29A of the Act, hence, the first Respondent's implementation of the said Section cannot be viewed as contemptuous, nor have the allegations of discrimination or denial of access to justice been proved.

42. Mr. Maina maintained that the impugned decision was arrived at in accordance with Sections 4, 5 and 5A of the Act, as well as other applicable requirements in relation to the same, hence, it did not violate Article 47 of the Constitution or the FAA Act as alleged or at all, or the alleged right to be heard.

43. Lastly, he deposed that the Petitioner seeks to prevent the Respondents and the Interested Party from lawfully dealing with those that are illegally operating betting/gambling activities, which would impede the first Respondent from ensuring that only lawfully, authorized entities carry out betting/gambling activities. He also deposed that the Petition seeks to exempt the Petitioner from the application of the law.

**First Interested Party's Replying Affidavit**

44. Isaac Kibere, the first Interested Party's Legal Counsel, Financial Services swore the Replying Affidavit dated 23rd July 2019. He averred that the Interested Party provides a platform for digital payment solutions and holds an M-pesa Account for the collection and disbursements of funds for the Petitioner's betting and gambling business. He deposed that the Petitioner was required at all material times to *inter alia* hold a valid license from the first Respondent.

45. Mr. Kibere averred that vide a letter dated 11thJuly 2019, the second Respondent informed the first Interested Party that licenses of various companies in the betting and gaming industry among them the Petitioner had expired. He deposed that the second Respondent informed it that the said licenses were not renewed until the affected companies met certain outstanding renewal requirements including the outcome of an ongoing due diligence to determine whether they were fit and proper to hold the said licenses.

46. He averred that the first Respondent directed the first Interested Party to suspend the Petitioner's Pay bill account and other short codes until otherwise advised. He referred to Article 12 of the Gaming Terms and Conditions, which provided that the Petitioner was required to hold a valid license as a precondition to holding the account for purposes of betting and gaming.

47. He further averred that under the contract between itself and the Petitioner, the Petitioner bound itself to obtain and renew all permits, licenses and authorizations required for the performance of its obligations under the agreement, hence, in absence of a valid agreement, the Interested Party was entitled to suspend the service either wholly or partially. He deposed that the Petitioner has not demonstrated that the Interested Party violated its rights.

**The second Interested Party**

48. The second Interested Party did not file any pleadings in this Petition nor did they participate in the trial.

**Petitioner's further Affidavit**

49. Robert Macharia, the Petitioner's Chief Legal Counsel swore the further affidavit dated 25thJuly 2019. In response to the first Interested Party's Affidavit, he averred that the affidavit failed to disclose that on 28th June 2019, this court issued orders restraining the Respondent from interfering with the Petitioner's business. He averred that the first Interested Party was precluded from taking adverse action against the Petitioner.

50. Mr. Macharia while admitting that the said order did not mention the Interested Party averred that once the first Interested Party was made aware of the court order and its implication, it had an obligation to unconditionally obey the same.

51. In response to the Respondents' Replying Affidavit, Mr. Macharia averred that it disclosed to the court that its license was due to expire on 30thJune 2019, and that the court was already aware of the said fact when it granted the said order. He added that by suspending the pay

bill numbers, the Interested Party contravened the said order.

52. He also averred that other developments had taken place among them a communication by the Central Bank of Kenya to financial institutions advising them that the Petitioner had not renewed its license, and, directing the second Interested Party to suspend the Petitioners Pay bill numbers and short codes. He also referred to pronouncements by state officers against the Petitioner's operations and pronouncements by the Cabinet Secretary that a number of foreign nationals in the gaming industry would be deported.

53. He deposed that the purported use of alleged failure to pay taxes to decline the license is misconceived and legally untenable because the Petitioner has paid the gaming tax as required. He also averred that the Respondents' mandate is limited to enquiring into payment of betting tax. He also averred that the tax statutes have an inbuilt mechanism for recovery of taxes; hence, payment of tax is not within the mandate of the Respondents.

54. In addition, he averred that the question of whether there are any taxes outstanding is pending determination before the court in E. No. 421 of 2018, Tax Appeal Tribunal Nos. 336 of 2018 and 304 and 305 of 2019. He averred that the existence of a tax dispute or pendency in court cannot be invoked by the Respondents as a justification to deny renewal of its license.

55. He also deposed that the Respondent has in a discriminatory manner selectively granted similar licenses to other companies suggesting ulterior motives on their part.

**Petitioner's second further Affidavit**

56. **Robert Macharia**, the Petitioner's Chief Legal Counsel swore the second further affidavit dated 29th July 2019 essentially responding to the Respondents' applications seeking to set aside the conservatory orders and responding to the Respondents Replying Affidavit. As far as, the deponent respondents to the Replying Affidavit, Mr. Macharia averred that the argument that no authority to swear the affidavit was filed, offends Article 159 (2) (d) of the Constitution and annexed the authority to his affidavit.

**Issues for determination**

57. Upon considering the respective party's cases, I find that the following issues fall for determination:-

*a. Whether the first Respondent erred by failing to consider the Petitioner's application for a license on grounds of non-compliance with tax payment.*

*b. Whether the first Respondent failed to provide reasons for the impugned decision.*

*c. Whether the first Respondent acted ultra vires its statutory powers.*

*d. Whether the first Respondent violated the Petitioner's right to legitimate expectation.*

*e. Whether the first Respondent abused its powers and or acted maliciously.*

*f. Whether the impugned decision violated the Petitioners right to be heard.*

*g. Whether the impugned decision is grossly unreasonable.*

*h. Whether the Petitioner's right to information was violated.*

*i. Whether the second and third Respondents are improperly joined in this Petition.*

*j. Whether the impugned decision violated the Petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution.*

*k. Whether the Petitioner is entitled to any of the prayers sought.*

***a. Whether the first Respondent erred by failing to consider the Petitioner's application for a license on grounds of non-compliance with tax payment.***

58. Mr. Muite, SC submitted that the purported justification proffered by the Respondents for their failure to renew the Petitioner's licence is that the Petitioner had allegedly failed to pay taxes. He argued that taxes are collected by the Kenya Revenue Authority and that, the Petitioner annexed documents showing that it has paid its taxes, and, that, they availed all the documents to the Respondents. On the issue of the withholding tax, he submitted the contention lies on what amount the 15% provided under the law is based on. He submitted that the tax dispute is before the Tax Appeal Tribunal and the Respondent signed a consent staying Agency Notices issued to the Bank pending hearing of the dispute. It was his submission that the issue of taxes cannot be used to decline the renewal of license.

59. He submitted that once it is established that there is a strong possibility that the Bill of Rights has been violated, this Honourable Court has the powers and discretion under Article 23 (3) (c) of the Constitution to restore the position in defence of the Constitution.

60. Mr. Macharia, appearing with Mr. Muite submitted that the taxes in question have been paid. He referred to section 69 of the Income Tax

Act,[4] which provides for the mechanism for collecting taxes including penalties for late payment. It was his submission that the Respondent cannot collect taxes, which is a function of the Kenya Revenue Authority.

61. In addition, Mr. Macharia submitted that a dispute arose on what constitutes a proper amount, it was referred to the Tax Appeals Tribunal, and an order was recorded by consent staying the enforcement notice. He relied on *Shimmers Plaza Limited v National Bank of Kenya Limited*,[5] which underscored the duty to obey court orders and the duty to obey the law. He pointed out that the tax dispute is before the Tax Appeals Tribunal and also before the High Court.

62. Mr. Ogosso, counsel for the Respondents cited the first Respondent's mandate under section 4, 5 and 5A of the Act. He cited the preamble to the act, and argued that it is not possible to delink tax issues from the first Respondent's operations, and, that, the first Respondent does not collect taxes, but only requires proof of payment.

63. The question that comes to mind is whether tax compliance is a relevant consideration while considering an application for the license in question. With tremendous respect, the parties did not address this question with sufficient detail yet it was one of the reasons cited for the refusal. Mr. Ogosso's position was that the first Respondent does not collect taxes, but only requires a tax clearance certificate from the Kenya Revenue Authority. Mr. Macharia's position was that a dispute on tax payment arose, and, that the same is pending in the High Court and before the Tax Appeal Tribunal. He argued that in those cases, the enforcement action had been staying pending determination. His argument as I understood it is that the function of collecting taxes falls under the mandate of the Kenya Revenue Authority and not the first Respondent.

64. If, in the exercise of its discretion, an authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identified as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

65. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings*[6] in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[7]

> *a) those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;*
>
> *b) those clearly identified by the statute as considerations which must not be had; and*
>
> *c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.*

66. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury* unreasonableness.

67. The Singapore case of *City Developments Ltd. v. Chief Assessor*[8] illustrates a similar point. The Court of Appeal stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It also said, "What is or is not a relevant consideration will depend on the statutory context."[9]

68. The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law; and, had in consequence taken into consideration the matters which upon the true construction of the Act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

69. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot*,[10] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[11]

70. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment*,[12] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."[13] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at. "*

71. Turning to the substance of the issue under consideration, the necessity to comply with the obligations imposed by Articles 209 and 210 of the Constitution has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of laws, rules and requirements. Among these is the common requirement that a person aspiring to occupy a public office, a

bidder seeking to participate in a public procurement process, an applicant for a business licence, or a person seeking to incorporate a company or even to open a bank account, submits a Certificate of Tax Compliance issued by the Kenya Revenue Authority.

72. In practice, public procuring entities and public bodies regulating various activities usually include a condition in their application documents that applicants must submit tax clearance certificates issued by the Kenya Revenue Authority among other requirements. Tax clearance certificates play an important role in our economy and are, almost without exception, a requirement when a person submits a tender or bid for doing business with government or applies for a business licence.

73. Our Constitution requires a purposive approach to statutory interpretation.[14] In this regard, I find useful guidance in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[15] where Ngcobo J stated:-

> *"The technique of paying attention to context in statutory construction is now required by the Constitution ... As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."*

74. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[16] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."**[17]***

75. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[18] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others**[19]*** Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

76. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the enabling Act, which reads *"an Act of Parliament to provide for the control and licensing of betting and gaming premises**; for the imposition and recovery of a tax on betting and gaming**; for the authorizing of public lotteries; and for connected purposes."* Differently put, from the clear wording of the preamble to the act, it is not possible to de-link the requirement for tax compliance from the license requirements under the Act. Thus, a purposive, contextual and faithful reading of the Act will inevitably conclude that proof of payment of taxes arising from gaming and betting business operated under the Act is a material and a relevant consideration while determining whether to grant or refuse to grant a license under the Act. To conclude otherwise is not only to be unfaithful construction of the statute but would amount to treason to the enabling statute.

77. Perhaps, it would be fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who remarked that "....we must always side with the Rule of Law." [20] This is because law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become a instrument of social change.[21]

78. Before I exist my exposition on the role of law, I find it fit to cite *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another**[22]*** in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[23] who said that:-

> *"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).*

79. Thus, when an application of a license under the Act is declined, the reasons for declining the license must be defendable in a court of law. The question is, whether the cited reasons in this case are defendable under the enabling statute. The converse is whether tax payment is not a relevant consideration while considering an application for the license. To address these questions, it is imperative to examine the relevant provisions. As discussed above, a reading of the preamble leaves no doubt that the purpose and scope of the Act includes *imposition and recovery of a tax on betting and gaming.*

80. Thus, when an application for a license under the Act is declined, the reasons for declining the license must be defendable in a court of law. The question is, whether the cited reasons are defendable under the enabling statute. The converse is whether that tax payment is not a relevant consideration in determining the success or otherwise of the license, and whether the decision is defendable in law. To address these

questions, it is imperative to examine the relevant provisions. As discussed above, a reading of the preamble leaves no doubt that the purpose and scope of the Act includes *imposition and recovery of a tax on betting and gaming.* Section 5 of the Act provides as follows:-

> *(1) A person who desires to obtain, renew or vary a licence or permit under this Act shall make application to the Board in the form and manner prescribed.*
>
> *(2) On receipt of an application under subsection (1), the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it to examine the application.*
>
> *(3) After making investigations and considering any information or declaration as may have been required in terms of subsection (2), the Board may either grant, renew or vary a licence or permit or refuse a licence or permit or renewal or variation thereof without reason given: Provided that—*
>
> *(i) no licence or permit shall be issued under this Act unless and until the Board has satisfied itself that the applicant is a fit and proper person to hold the licence or permit and that the premises, if any, in respect of which the application is made are suitable for the purpose;*
>
> *(ii) no licence shall be issued under this Act unless the Board has sent a copy of the application for the licence to the local authority within whose area of jurisdiction the applicant proposes to conduct his business and has given the local authority reasonable opportunity to object to, or make recommendations with respect to, the application.*
>
> *(4) A person who knowingly makes a false statement or declaration in an application for, or a renewal or variation of, a licence or permit shall be guilty of an offence and liable to a fine not exceeding five thou*

81. The above section provides *inter alia* that *the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it to examine the application.* The scope of this provision has not been challenged. I find no serious argument before me to suggest that proof of tax payment is not a relevant consideration within the ambit of the above provision, and bearing in mind the preamble statement discussed above.

82. An assessment of the fairness and lawfulness of the decision making process must be independent of the outcome of the process. In other words, what is important is not whether the application for the license was successful. What is relevant is the materiality of compliance with the application requirements.

83. The proper approach is to establish, factually, whether an irregularity occurred in processing the application and arriving at the impugned decision. Then the irregularity, if established, must be evaluated to determine whether it amounts to a ground for the court to annul the decision. This legal evaluation must, where appropriate, take into account the materiality of any deviance from the legal requirements, by linking the question of compliance to the purpose of the legal requirements, before concluding that a ground to annul the decision has been established.

84. Also relevant is sections 55A of the Act. It provides that (1) There shall be a tax to be known as gaming tax chargeable at the rate of fifteen per cent of the gaming revenue. (2) The tax shall be paid to the Collector by a person carrying on a gaming business on the 20th day of the month following the month of collection. The Act defines "Collector" as follows- *Means the Commissioner-General appointed under the Kenya Revenue Authority Act.* It also defines "tax" as follows- *Means any charges, fees, levies or impositions imposed under this Act*.

85. In addition, section 29A of the Act provides as follows:-

> *(1) There shall be a tax to be known as betting tax chargeable at the rate of fifteen per cent of the gaming revenue.*
>
> *(2) The tax shall be paid to the Collector by the licensed bookmaker on the 20th day of the month following the month of collection.*

86. A reading of the above sections leave me with no doubt that proof payment of gaming and betting tax is a relevant consideration while considering whether to grant the license in question. It is therefore my finding that any argument suggesting that proof of tax payment is not a legal requirement for the grant of the licence is legally frail. Such an argument flies on the face of the preamble to the Act and the purposive interpretation of the enabling statute. In addition, from the annexures to the Petitioner's Affidavit, it is evident that from the outset, the Petitioner was fully aware that proof of tax payment was among the requirements. The Petitioner states that it provided a Tax Compliance Certificate. That may be so. However, proof that it had paid gaming and betting tax was not provided.

87. Notable is the clear admission by the Petitioner that it has tax disputes with the Kenya Revenue Authority pending in courts. This admission, candid as it is, casts doubts on the Petitioner's tax compliance status. It also complicates the Petitioner's alleged compliance status considering the provisions of sections 29A and 55A of the Act and the preamble to the Act. Put differently, the pendency of the said cases are clear indications that its tax compliance is questionable until and unless the cases are resolved in its favour.

88. The existence of the said dispute is a confirmation that all is not well for the Petitioner. It cannot use disputes pending in court to obtain a license nor can it obtain a license on the strength of some interlocutory orders obtained in the said cases in which the Respondents are not parties. Its obligations under the Act cannot be suspended by the mere existence of a dispute with the Kenya Revenue Authority. The multiplicity of the disputes presents a disturbing trend and borders on abuse of court process.

89. The Respondent is not a party to the said cases, hence, the said orders do not affect its operations nor can they be used to permit the

Petitioner to be shielded from complying with its statutory obligations. Court orders are binding on the parties to the suit. Relevant to the instant case is my firm conclusion that the existence of the said cases is a clear manifestation that the Petitioner has unresolved tax disputes. So long as the Petitioner is unable to present prove from the Kenya Revenue Authority confirming that it has paid taxes as required, at the rate provided under the law, it will remain ineligible to qualify for the license. This is because under the Act, right from the preamble to sections 29A and 55A of the Act, payment of gaming and Betting Tax and withholding tax is a mandatory requirement, hence, a relevant consideration while considering the license.

90. In conclusion, proof of payment of taxes is not only a relevant consideration, but also a requirement under the Act; hence, the assault on this impugned decision on this ground fails.

***b. Whether the first Respondent failed to provide reasons for the impugned decision***

91. Mr. Muite placed reliance on Article 47 of the Constitution and submitted that the Petitioner made several inquiries on the renewal of his licenses, and, other than newspaper reports, they were never told officially why the licenses were not renewed. He submitted that the decision to refuse the license has never been communicated to them.

92. The Petitioner contended that by the impugned action, the Respondents contravened the rule of law and the obligation to conduct themselves transparently, with integrity and to be accountable as required in Article 10 of the Constitution. In addition, the Petitioner argued that by virtue of Article 27 of the Constitution, it was entitled to equal benefit and protection of the law. It is the Petitioner's further contention that the Respondents' conduct contravenes its right to administrative action that is lawful, reasonable and procedurally fair as required under Article 47 of the Constitution as read together with the FAA Act.

93. Mr. Ogosso argued that the Petitioner moved to court before it could be supplied with reasons, hence, the reason why the information was supplied in court. He pointed out that there is a distinction between issuance of a license and a renewal, and, in the instant case, the license had expired.

94. Section 4(2) of the FAA Act provides that "every person has the right to be given written reasons for any administrative action that is taken against him," a position that was reiterated by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other*.[24] However, cases are context sensitive. The Petitioner moved to court on 27th June 2019 seeking inter *alia* an order to compel the first Respondent to process its license. Simply put, the prayers sought confirm that the Petitioner moved to court before the decision was made. The decision was rendered on 1st July 2019, barely four days after the Petitioner moved to court.

95. The Petitioner also states that the first Respondent rejected its application citing alleged unspecified pending investigations. I have already reproduced section 5 of the act, which permits the first Respondent to *inter alia* undertake investigations before considering grant of a license.

96. From the correspondence annexed to the Affidavits, it is clear that the Petitioner was at all material times aware of all the requirements, including the requirements stated in the letter dated 19th March 2018. These were the requirements upon which the application was to stand or fall. In its letter dated 10thApril 2019, the first Respondent informed the Petitioner to *inter alia* provide evidence of tax payment at the applicable rates.

97. I have already held earlier that tax payment is a not only a relevant consideration while determining whether to grant the license in question, but also a legal requirement under the Act as appears in the preamble to the Act and sections 29A and 55A of the Act. The Petitioner did not provide proof of up to date tax payment. Instead, it anchored his inability to comply on the assertion that it had a pending dispute with the Kenya Revenue Authority. I have already concluded that the existence of the said cases is a clear admission of its inability to avail the required proof because of the existing tax dispute. I am unable to discern what other reasons the Petitioner wants, when it was told to provide prove of payment of tax at the current applicable rates.

98. There is evidence of correspondence between the Parties after this Petition was filed. Ideally, a person affected by an administrative decision is entitled to reasons in order to challenge the decision in court. The Petitioner is already in court. It moved to court three days before the decision was made. It has not demonstrated that absence of reasons prejudiced its right to exercise its right to file this Petition. For a court to up hold a plea for refusal to be provided with reasons, the nature of the impugned decision and the peculiar circumstances of the case are relevant.

99. In any event, section 5(3) of the Act permits the first Respondent to decline granting a license without giving reasons for the refusal. This section extinguishes the Petitioners argument that the first Respondent violated Article 47 of the Constitution by failing to provide it with reasons for its decision.

***c. Whether the first Respondent acted ultra vires its statutory powers***

100. Mr. Muite SC submitted that unless a licensee violates the terms of the license, he is entitled to a renewal upon its expiry. It was his submission that refusal to renew the license is a breach of the Petitioner's constitutionally guaranteed fundamental rights and violation of the enabling statute.

101. Mr. Muite submitted that the Petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution have been contravened. Reliance was placed on *Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others*,[25] where the Court considered the role of the court insofar as enforcing observance of the Constitution and the law and ensuring that basic human rights and fundamental freedoms guaranteed by the Constitution are respected and held as follows:-

> *"Where a legal wrong or legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has power to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by in action or omission."*

102. Mr. Ogosso's submission on the issue under consideration was that section 5A of the Act provides the applicable criteria. He maintained that the criteria is a statutory requirement. He submitted that section 5(3) of the Act applies where a license has been suspended; hence, quashing the decision cannot grant the Petitioner an expired license. He proposed that the court could direct the applicant to submit a fresh application in accordance with the law.

103. It is an established position that public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"* ***[26]***

104. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law. [27] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the first Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions and in particular grant or refusal of a license conform to the relevant provisions of the law governing the process.

105. The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law governing grant of the licenses under the Act. It would in general be wrong to whittle away the obligation of the first Respondent as a public body to uphold the law. A lenient approach could be an open invitation to the first Respondent to act against its legal mandate and pose a real danger of compromising both the process of issuance of the licenses and its mandate of regulating the betting and gaming industry.

106. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. A person applying for a license under the Act is bound to adhere to the terms of the licensing process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[28]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

107. In *Council of Civil Service Unions v. Minister for the Civil Service* ***[29]*** Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.[30]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as*"unreasonableness"* in *Wednesbury* Case.[31] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

108. The role of the court in such cases was well stated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[32]where it was held that once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

109. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

110. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given

to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

111. The constitutional and legislative licensing framework entails prescripts that are legally binding. The fairness and lawfulness of the licensing process and the ensuing decision must be assessed in terms of the provisions of the enabling statute and the FAA Act. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

112. I find no contest that the enabling statute confers mandate upon the first Respondent to grant or refuse to grant licenses under the act. It is required to conduct a full and complete evaluation of the application and satisfy itself that it complies with the law and the set requirements. It would be unlawful for the first Respondent to pass a decision awarding a license in circumstances where there has not been a full and complete compliance. Complete evaluation includes due diligence. To do otherwise is to engage in an illegality and such a decision will be tainted by an error of the law.

113. In order to give meaning to section **5** of the Act, regard must be had to its wording, read in context, and having regard to the purpose of the entire statute as discerned from the preamble to the Act and the dictates of Article, **10** and **47** of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of Act make it clear that the provisions are meant to ensure a fair and transparent licensing process. My reading of the act leave me with no doubt that it precludes an applicant who has not passed the due diligence test from being awarded a license. Consistent with above legal framework, prior to the award of a license, conduct of due diligence is legally permitted. The law permits refusal to grant a license where the conditions have not been met or cancellation of a license or refusal to renew where conditions are not satisfied.

114. There is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the application for a license. I am conscious of the ever-flexible duty of a public body to act fairly. However, fairness must be decided on the circumstances of each case.

115. True, a licensing body may condone some deficiencies. For example, a *bona fide* mistake should not in and of itself disqualify an applicant provided it is addressed. Substance should prevail over form. A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and compliance with legal requirements which involves a consideration of the degree of compliance with the law. Essentially, a failure to comply with prescribed conditions will result in an application for a license being disqualified unless those conditions are immaterial, unreasonable or unconstitutional. In the circumstances of this case, there is no convincing argument that the requirements are immaterial, unreasonable or unconstitutional. On the contrary, they are material and lawful considerations.

116. As a general principle, an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. My reading of the Act is that it does not grant the first Respondent any discretion when evaluating compliance with the law unless the requirements imposed are immaterial, unreasonable or unconstitutional.

117. The requirements of the act are in conformity with the obligation imposed by Articles **209** and **210** of the Constitution which requires taxes to be enforced by legislation. Therefore, the licensing process in the statute must be construed within the context of the entire Article **209** & **210** while striving for an interpretation, which promotes 'the spirit, purport and objects of the Articles. Therefore, it is my holding that the impugned decision was made in a manner that is in conformity with the enabling statute. Put differently, the Petitioner has *not* demonstrated that the first Respondent acted *ultra vires*.

***d. Whether the first Respondent violated the Petitioner's right to legitimate expectation***

118. Mr. Muite SC submitted that there is a difference between renewing a license and issuing a new license. He argued that once an applicant is granted a license, it employs labour and invests in the business. He submitted that the licensee does all these based on legitimate expectation and unless the licensee violates the law, it ought to be renewed annually. He relied on Article 47 of the Constitution. It is the Petitioner's further contention that the Respondents' conduct contravenes its right to administrative action that is lawful, reasonable and procedurally fair.

119. Mr. Ogosso's rejoinder to this submission was that the grant of the license requires full compliance with the law and applicable conditions. He added that where a license has expired, the court cannot renew a dead license. He submitted that section 9 of the Act provides for expiry of the license, hence, there is no legitimate expectation to continue trading with an expired license. He submitted that legitimate expectation cannot go against clear provisions of the law. To him, a party cannot continue to trade on an expired license.

120. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

121. The first step in the analysis has both an objective and a subjective dimension. *First,* it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[33] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

122. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[34] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[35] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> *"Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."*[36]

123. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[37] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[38] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

124. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[39] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

125. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth*[40] states thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

126. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. At the risk of repeating myself, I state that the doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification. Earlier in this judgment, I reproduced section 5 of the Act, which prescribes the legal requirements for the grant of the license. These being express requirements of the law, the doctrine of legitimate expectation cannot apply in the circumstances of this case. This is because the Petitioner has not demonstrated that it met all the requirements for the renewal or grant of the license. A case in point is absence of evidence that it paid taxes. Closely related to this is the Petitioner's own admission that it has pending tax disputes in court battling with the Kenya Revenue Authority. The interlocutory orders stopping or staying enforcement action are acknowledged. However, they cannot be used to obtain a license. The statutory scheme requires prove of payment of taxes and not the existence of a tax dispute. In addition, the fact that it held similar licenses cannot confer legitimate expectation that once its license expires, it would be renewed automatically. This is because the renewal is subject to the conditions being met. It follows that the allegation of violation of the right to legitimate expectation fails.

***e. Whether the first Respondent abused its powers and or acted arbitrarily***

127. Mr. Muite SC argued that we live in a country governed by the rule of law, that, the Constitution binds every person, and, that every person has an obligation to respect and uphold the Constitution. He faulted the Respondents for failing to obey the court order and argued that any action taken in violation of the court order is a nullity. He submitted that the first Respondent acted arbitrary.

128. Mr. Macharia cited *Real Deals Limited & 3 Others v Kenya National Highways Authority & Another*[41] in support of his submission that any decision made in violation of the Constitution or the enabling statute is a nullity. He added that where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute. In addition, he argued that administrative bodies must act lawfully. He added that the provisions of the Act are to be read together with Articles 47 and 232 of the Constitution.

129. Mr. Macharia maintained that the first Respondent is obligated to issue the license in accordance with the Act.

130. Mr. Ogosso submitted that the court cannot direct the Petitioner to continue trading on an expired license.

131. The crux of the submissions by counsel for the Interested Party Mr. Ohaga was that it was a term of the contract between the Petitioner and the Interested Party that the Petitioner would hold a valid license as a precondition to maintain an account with the Interested Party. He submitted that it was the Petitioner's obligation to obtain the license in accordance with the law. He maintained that the relationship between the Petitioner and the Interested Party is contractual and is governed by the agreement between the parties. He cited *Lalji Karsan Rabadia & 2 Others v Commercial Bank of Africa Limited*[42] and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd*[43] for the proposition that it is not the business of a court to rewrite a contract made by parties.

132. It is against the foregoing background that this court is invited to find bad faith, malice, arbitrariness and abuse of powers in the manner in which the application was declined and suspension of the Pay bill numbers. Differently put, was the decision arbitrary. This necessitates consideration of the elements of an arbitrary action. Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the "arbitrary and capricious" standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors is arbitrary, capricious, an abuse of discretion. So is an action not in accordance with law or if undertaken without observance of procedure required by law.[44]

133. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

134. A power is exercised fraudulently if its repository intends it for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

135. A decision based on malice is usually one that is directed to the person.[45] The malice may arise out of personal animosity built up over a series of past dealings.[46] For instance, in a Canadian case the cancellation of a liquor licence was held to be an abuse of power where the decision was prompted by the proprietor's support of a religious sect, which was considered a nuisance by the police.[47] In another Canadian case it was held that a local authority cannot use its licensing power to prohibit lawful businesses of which it disapproves.[48] In an English case the decision of Derbyshire County Council to cease advertising in journals controlled by Times Newspapers, which had written articles critical of its councillors, was explicitly held to have been motivated by bad faith and therefore declared invalid for that reason alone.[49]

136. I have diligently examined the circumstances of this case. I have placed the material before me side by side with the law and the jurisprudence discussed above. I am unable to locate any element of arbitrariness, capriciousness, malice, bad faith or abuse of power. Differently stated, the Petitioner has failed to demonstrate that the impugned decision was arrived at arbitrarily and in abuse of powers conferred by the enabling statute.

***f. Whether the impugned decision violated the Petitioner's right to be heard***

137. The Petitioner's case is that the Respondents' actions offend the its rights guaranteed under Articles 22(1), 25(c), 48 and 50 (1) of the Constitution.

138. Mr. Ogosso's did not expressly address this issue.

139. In recent years, the common law relating to Judicial Review of administrative action based on procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[50] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such that the person appealing has not had his case properly considered by the decision maker.

140. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[51]Further, there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[52]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions. In *Local Government Board v. Arlidge*,***[53]*** Viscount Haldane observed, *"...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made*. *The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice."*

141. The constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects a person's rights, interests or legitimate expectations.[54] Procedural fairness contemplated by Article **47** and the FAA Act demands a right to be heard before a decision affecting ones right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[55]

142. However, what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[56] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."*

**Wade** in *Administrative Law*[57] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

143. However, the standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. [58]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[59]

144. The Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[60] is instructive. The Court of Appeal held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. It stated that fair administrative action broadly refers to administrative justice in public administration. It added that it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional and statutory duties. It opined that such bodies exercise their functions guided by constitutional principles and policy considerations. In addition, it stated that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. [61] On the other hand, the Court of Appeal stated that fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

145. The decision complained of is refusal to grant or renew a business license. The requirements for the license are specified in the Act. An applicant submits his or her application and all the required documents. The first Respondent reviews the application to confirm conformity with the prescribed requirements and communicates the decision to the applicant. Such an exercise does not require a hearing. In fact, to require the first Respondent to hear each applicant just to confirm conformity with the set requirements would in my view not be reasonable and would unnecessarily place a heavy burden on the first Respondent. The crux of my above observation is supported by the fact that the enabling statute should be construed as granting discretion to the decision maker to satisfy himself that the requirements of the license have been met. I find fortress in the following passage from the South African Court of Appeal in the judgment of Nugent JA in *Kemp and Others v Wyk and Others*[62]

> "*A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammeled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in Britten and Others v Pope* **1916 AD 150** *and remain applicable today.*"

***g. Whether the impugned decision is grossly unreasonable.***

146. The Petitioner contended that the impugned decision is not only unreasonable and highhanded but also clearly amount to deliberate abuse of office and state power to achieve ulterior ends.

147. The Petitioner contends that it complied with all the requirements for renewal of its licence under the governing statute and that there was no justifiable reason as to why the Respondents did not process its application or renew its licence before its expiry date or even thereafter. It was argued that failure by the Respondents to consider and process the Petitioner's application for renewal of its licence, contravened Section 5 of the Act and amounted to the Respondents shirking their statutory duty and/or responsibility.

148. The Petitioner also argued that it has approximately 347 employees who depend on its business to earn a livelihood for themselves, their families and dependents, and, that it is a corporate sponsor of various sports activities and teams.

149. It was argued that the refusal to renew the license thus portends far-reaching social and economic consequences including, among others the complete shutdown of the Petitioner's business; loss of jobs for its employees; inability to comply with its sponsorship requirements; permanent loss of government revenue; and loss of business for all those businesses in the Petitioner's supply chain. It further argued that the decision is oppressive, illegal and malicious.

150. Mr. Ogosso did not directly address this ground of assault.

151. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[63] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[64]

152. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[65] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[66]This stringent test has been applied in Australia[67] where the Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case, and the mandatory requirements in the enabling statute, I am not persuaded that a different person or tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion.

153. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law.

154. The following propositions can offer guidance on what constitutes unreasonableness. *First*, *wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. *Second*, this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. *Third*, the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it.

155. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

156. Legal unreasonableness as I understand it comprises of any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[68]

157. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

158. Guided by the jurisprudence discussed above, and applying the above legal tests and principles to the facts and the circumstances of this case, it is my firm conclusion that the Petitioner has not demonstrated that a reasonable person properly directing his mind to the facts, circumstances and the law could have arrived at a different conclusion. Put differently, the Petitioner has failed to demonstrate the decision is unreasonable.

***h. Whether the Petitioners right to information was violated***

159. The Petitioner argued that the impugned decision violated its rights to a fair administrative action act. This includes the right to be provided with reasons for the decision. It was argued that the reason for declining the license was alleged pending investigations details of which were not revealed. Counsel argued that the Respondents declined the application and went to fish for reasons. Differently put, the Petitioner's argument as I understood it is that details of the alleged investigations ought to have been disclosed.

160. Mr. Ogosso's response was that the information in question is in the nature of intelligence and security investigations, hence, it cannot be released because it is privileged under section 6 of the Access to Information Act.[69]

161. Access to Information Act[70] was enacted to give effect to the constitutional right of access to any information held by the State. The formulation of the provisions of the Act casts the exercise of this right in peremptory terms – the requester ?must be given access to the information so long as the request does not fall within the exceptions in section **6** of the Act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

162. Under section **6** of the Act, that there are ?reasonable and justifiable limitations on the right of access to information. The purpose of section **6** is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

163. The burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South African in *President of the Republic of South Africa & Others vs M & G Media Limited* [71] where it was held that:-

> *"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ....the evidentiary burden rests with the holder of information and not with the requester."*

164. Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption and whether the reasons cited fall within the ambit of section 6 of the Act. The reasons cited are intelligence reports and security investigations. A reading of section 6 leaves me with no doubt that the information in question fall within the permitted exceptions.

165. In need not add that section 5 (3) of the Act permits the first Respondent to decline the license without giving reasons for the refusal. This provision extinguishes the argument that the Respondents acted illegally by failing to disclose details of the investigations.

***i. Whether the second and third Respondents are improperly joined in this Petition***

166. Mr. Ogosso submitted that section 3 (12) of the Act shields the first Respondent's employees from personal liability where they act in good faith and urged the court to strike off their names from these proceedings.

167. The Petitioner's counsel did not address this issue.

168. Section 3 of the Act establishes the Betting Control and Licensing Board, consisting of— (a) a chairman, not being a public officer, to be appointed by the Minister by notice in the Gazette; (b) the Permanent Secretary to the Treasury or a person deputed by him in writing in that behalf; (c) the Permanent Secretary of the Ministry for the time being responsible for the Police or a person deputed by him in writing in that behalf; (d) the Permanent Secretary of the Ministry for the time being responsible for Betting, Lotteries and Gaming or a person deputed by him in writing in that behalf; and (e) such other persons, not exceeding five in number, as the Minister may, by notice in the Gazette, appoint.

169. Section 3 (8) provides that the chairman of the Board may, with the approval of the Minister, appoint such persons to act as officers and servants of the Board as he considers requisite to enable it to discharge its duties under this Act. Subsection (10) provides that all permits and licences issued under this Act and all communications from the Board shall be under the hand of the chairman or of some person duly authorized by the chairman, notification of that authorization being published in the Gazette under the hand of the chairman.

170. Lastly, sub-section provides that no member of the Board, nor any officer or servant thereof, shall be personally liable for any act or default done or omitted to be done in good faith in the course of his duties under this Act.

171. I am alive to the fact that statutory provisions ousting the court's jurisdiction must be read restrictively. This is because the right to access the courts is constitutionally guaranteed. However, a clear reading of the above provision shows that any officer or servant of the first Respondent cannot be liable for any act or default done or omitted to be done in good faith in the course of their duties under the act.

172. *First,* a fundamental principle flowing from the above provision is that an officer or servant of the first Respondent cannot be sued where he acts in good faith. It has not been alleged or demonstrated that the second and third respondents acted in bad faith.

173. *Second*, the use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[72]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[73] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

174. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

175. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[74] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[75] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

176. A proper construction of section **3 (12)** above leads to the conclusion that it is couched in mandatory terms. It follows that by dint of the said provisions, the suit against the second and third Respondents is unsustainable.

***j. Whether the impugned decision violates the Petitioner's rights under Articles 27, 40, 47 of the Constitution***

177. The Petitioner's counsel submitted that the impugned decision violates the Petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution. On his part, Mr. Ogosso argued that the impugned decision does not violate any of the Petitioner's constitutional rights.

178. Louis Henkin wrote in *The Age of Rights*:-[76]

> *"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

179. Constitutional analysis under the Bill of Rights takes place in two stages. *First,* the applicant is required to demonstrate that his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes

the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this *second* stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article **24** analysis test.[77]

180. In this regard, the standards of review laid down by courts when the determining constitutionality of a decision or a statute include two main standards:-

> *a. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;*
>
> *b. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."*

181. It is important for the court to determine whether the reason offered is "reasonably related" to a legitimate purpose, that is to enable the first Respondent fulfill its statutory mandate. In determining reasonableness, relevant factors include: - **(a)** whether there is a "valid, rational connection" between the limitation and a legitimate public interest to justify it, which connection cannot be so remote as to render the decision arbitrary or irrational. **(b)** the second consideration is whether there are alternative means of exercising the asserted right that remain open to the first Respondent.

182. A common way of determining whether a law that limits rights is justified is by asking whether the law or decision is proportionate. Established jurisprudence on proportionality has settled on the following tests:- *(i) Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?(ii) Are the means in service of the objective rationally connected (suitable) to the objective?(iii)Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? (iv) Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?****[78]***

183. Limitation of a constitutional right will be constitutionally permissible if **(i)** it is designated for a proper purpose; **(ii)** the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; **(iii)** the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally **(iv)** there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.'

184. The Canadian Supreme Court[79](Dickson CJ) stated that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

> *a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*[80]
>
> *b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'*[81]

185. When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as *'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected.'* ***[82]***

186. The question to answer is whether the objective of section 5 (3) is necessary, that is, minimally impairs the rights, taking into account alternative means of achieving the same objective. The function in question is processing of licenses. The requirements are listed in the Act. Some reasons fall under the exceptions provided for in section 6 of the Access to Information Act[83] discussed above details of which cannot be divulged. I have already discussed the question of relevant considerations and the exercise of discretion conferred by the Act. In such circumstances, the beneficial effects of the limitation of the right outweigh the deleterious effects of the limitation. In short, there is a fair balance between the public interest and the private right.[84]

187. First, the objective, which the measures responsible for the said limitation is designed to serve is of sufficient importance to warrant overriding a constitutionally protected right or freedom. I find that the said section meets this test.

188. Second, the section is carefully designed to achieve the objective in question. It is not arbitrary, unfair or based on irrational considerations.

189. Third, the first Respondent is required to balance the interests of society with those of individuals. It is not in public interest to disclose intelligence and security investigations. In any event, as said above, these are exempted from disclosure by section 6 of the Access to Information Act. [85] Further, there is a public interest and benefit in regulating the business in question. Further, it is a constitutional imperative that all persons including companies to pay taxes.

190. Fourth, Access to Information Act[86] flows from Article 35 of the Constitution, so, it has a Constitutional under pinning. Hence, information excepted under section 6 of the Act cannot be said to be unconstitutional. Lastly, denial of a license for failure to meet the statutory requirements cannot amount to violation of constitutional rights.

191. Regarding the alleged violation to property, a violation of the right to property occurs when there is an unjustifiable interference with property rights. It follows that the relevant questions to be asked when considering whether there has been a violation of the right to property guaranteed by Article 40 of the Constitution are: (i) Is there a property right, or possession, within the scope of Article 40? (ii) Has there been an interference with that possession? (iii) Does the interference serve a legitimate objective in the public or general interest? (iv) Is the interference proportionate? That is, does it strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights? (v) Does the interference comply with the principle of legal certainty, or legality?

192. First, the property in question in the instant case is alleged investment to undertake betting and gaming license. It is not in dispute that to operate the business, the Petitioner is required to have a valid license. It is also not in contention that without the license the Petitioner cannot operate the business. The license is issued subject to conditions imposed by a statute. In ability or failure to meet, the conditions led to the refusal of the license. The licensing body cannot be accused of violating the Petitioner's right to property in the circumstances of this case. Refusal to grant a license cannot amount to unfair interference with property rights.

193. The Petitioner maintains that other persons in similar positions were issued with licenses, hence, the refusal is discriminatory and a violation of its rights under Article 47 of the Constitution.

194. I am fully aware that the Right to equality and freedom from discrimination is a question of grave constitutional importance, hence, I approach it with trepidation, extreme care and sensitivity. The claim of direct or indirect unfair discrimination implicates the right to equality in our Constitution.[87]This is a fundamental right entrenched in our Bill of Rights, and therefore this claim intrepidly raises a constitutional issue.[88]

195. The guiding principles in a case of this nature are clear. The first step is to establish whether the refusal to grant the license differentiates between different applicants. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair.

196. If the discrimination is based on any of the listed grounds in Article 27 (4) of the Constitution, it is presumed to be unfair. It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in article 27 (4) of the Constitution is made and established, the burden lies on the Respondent to prove that such discrimination did not take place or that it is justified.

197. On the other hand, where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.

198. Our Constitution forbids unfair discrimination regardless of the context in which it occurs and irrespective of whether the perpetrator is the state or a private person. Article 27(1) provides that provides that a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). These grounds are discrimination directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

199. The Right to equality and Freedom from discrimination is protected by International and legal frameworks that Kenya is a signatory. Article 2(5) and (6) of the Constitution provides that general rules of international law, treaties and conventions ratified by Kenya shall form part of law of Kenya. Equality is one of the philosophical foundations of human rights and it is intimately connected to the concept of justice. The concept is expansive, but at its core, it speaks the language of the Universal Declaration of Human Rights (UDHR) of 1948, which stipulates that: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Equality at its core, communicates the idea that people who are similarly situated in relevant ways should be treated similarly.

200. A distinction must be drawn between formal and substantive equality. Formal equality simply means sameness of treatment. It asserts that the law or conduct must treat individuals in like circumstances alike. Substantive equality on the other hand requires the law or conduct to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal. Simply put, formal equality requires that all persons are equal bearers of rights. Formal equality does not take actual social and economic disparities between groups and individuals into account.

201. In *Willis vs The United Kingdom*[89] the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. From the above definition, it is safe to state that the law prohibits unfair discrimination.The prohibition of unfair discrimination in the Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups or status. To this extent, the goal of the Constitution should not be forgotten or overlooked.

202. Unfair discrimination is differential treatment that is demeaning. This happens when law or conduct, for no good reason, treats some

people as inferior or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization. The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other groups.

203. The questions as to whether ( a certain act) can properly be said to (violate the Constitution) is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilized international community which Kenyans share.[90]

204. The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in *Harksen v Lane NO and Others*[91] cited above in which the Court said:-

*They are:-*

> *(a)Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-*
>
> *(i)Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…*
>
> *(c)If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (.of the ..Constitution).*

205. The clear message emerging from the authorities is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct complained of cannot amount to discrimination.

206. The jurisprudence on discrimination suggests that law or conduct, which promotes differentiation, must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but unfair discrimination. Unfair discrimination principally means treating people differently in a way which impairs their fundamental dignity as human beings.

207. The Petitioner's application was considered against the criteria laid down under the law. Refusal cannot amount to discrimination as contemplated under Article 47 or any of the cited constitutional provisions.

***k. Whether the Petitioner is entitled to any of the prayers sought***

208. The Petitioner prays for a declaration that failure and or refusal by the Respondent to consider and process its application infringed its rights under Articles 10, 27, 40, 47 and 48 of the Constitution. It also seeks a declaration that by refusing to process its application despite its compliance with the law, the Respondents acted improperly and failed to discharge their statutory duty to fairly consider the application and thereby acted in breach of Article 47 of the Constitution.

209. The tests for granting declaratory reliefs were settled in *Durban City Council v Association of Building Societies*[92] and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd.*[93]The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.

210. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied, does it proceed to the second leg of the enquiry.

211. The other stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs of State and public officials are creatures of statute. Unlike natural persons who may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality. The answer to this test lies in the first Respondent's statutory powers. I have no doubt in my mind that sections 4, 5 and 5A grant powers to the first Respondent to grant or refuse

to grant a license under the Act.

212. Applying the above tests to this case, I am not persuaded that the Petitioner has established grounds for the court to grant the declaratory reliefs sought.

213. The Petitioner also prays for an order of *certiorari* to quash the first Respondent's letter dated 10th and 11th July 2019 issued to the first Interested Party.

214. An order of *Certiorari* issues to review a decision and proceedings in a lower court or a public body and determine whether there were any irregularities. I have already found that there were no irregularities. In any event, *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

215. The circumstances of this case are that the Petitioner's license has expired. Even if the court quashes the decision, (which I found there is no basis), the Petitioner cannot operate on an expired license. It will remain unable to operate for want of a license. As counsel for the first Interested Party correctly submitted, the relationship between the Petitioner and the first Interested Party is contractual. It is not contested that it was a term of the contract that the Petitioner would hold a valid license to maintain the Pay bill numbers and short codes. This court cannot rewrite a contract wilfully entered by the parties nor can it quash the said letter to open the door to the Petitioner to operate without a license.

216. In any event, the Respondents are on record stating that the Petitioner can apply for the licenses afresh once they meet the set conditions, and, the same will be considered in accordance with the law.

217. As an alternative to the prayer for *certiorari*, the Petitioner prays for an order of *Mandamus* compelling the Respondents to forthwith withdraw, retract or vacate the letters dated 10th and 11thJuly 2019 issued to the first Interested Party.

218. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[94] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[95]

219. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[96]

220. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[97] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[98] The eight factors that must be present for the writ to issue are:-

*(i) There must be a public legal duty to act;*

*(ii) The duty must be owed to the Applicants;*

*(iii) There must be a clear right to the performance of that duty, meaning that:*

a. *The Applicants have satisfied all conditions precedent; and*

*b. There must have been:*

I. *A prior demand for performance;*

*II. A reasonable time to comply with the demand, unless there was outright refusal; and*

*III. An express refusal, or an implied refusal through unreasonable delay;*

(iv) *No other adequate remedy is available to the Applicants;*

*(v) The Order sought must be of some practical value or effect;*

*(vi) There is no equitable bar to the relief sought;*

*(vii) On a balance of convenience, mandamus should lie.*

221. In the instant case, no material placed before me to demonstrate that the above tests have been satisfied. The first Respondent in exercise of its statutory duty insisted that the Petitioner complies with all the statutory requirements. In addition, there is nothing to demonstrate that there has been "an express refusal, or an implied refusal through unreasonable delay" to grant the license. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. The Petitioner moved to court while its application was still pending. Consequently, I find and hold that the applicant has not satisfied the conditions for grant of order of *Mandamus*.

222. The Petitioner prays for a mandatory injunction to compel the Respondents to process and grant its application for renewal of its license in accordance with the provisions of sections 4 and 5 of the Act.

223. The test whether to grant a mandatory injunction or not is correctly stated in Halsbury's Laws of England[99] which reads:-

> *'A mandatory injunction can be granted on an interlocutory application as well as at hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided on once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs….a mandatory injunction will be granted on an interlocutory application.' "*

224. In *East African Fine Spinners Ltd and 3 Others –v- Bedi Investment Ltd,**[100]* the Court of Appeal stated that mandatory injunctions are often a means of undoing what has already been done so far as that is possible. A request for a mandatory injunction (as opposed to a freezing order or a prohibitory injunction) is an extraordinary remedial process and the court should grant such an order only in clear and exceptional circumstances. I am afraid the Petitioner never addressed the question whether there exists clear and exceptional circumstances in this case nor do I glean any.

225. The Petitioner prays that this court issues an order restraining the Respondents from demanding from the Petitioner evidence of payment of withholding tax or any other condition not contained in the Act as a precondition for processing the application for renewal or renewing the Petitioner's license. It also prays for an injunction to restrain the Respondents from interfering with its operations by requiring the Interested Parties to suspend its money transfer platform used by the Petitioner for receiving and payment of money. In addition, the Petitioner seeks an order to retrain the Interested Parties from acting on or otherwise implementing the directives contained in the first Respondent's letters dated 10th and 11th July 2019 or any other directives that are violative of the conservatory orders made on 28th June 2019 and extended on 4th July 2019 and to forthwith restore the applicant's pay bill numbers and short codes.

226. The above prayers if granted will not only be a direct affront to the express provisions of sections 4, 5, 5A, 29A and 55A of the Act discussed earlier. An injunction cannot be issued contrary to express provisions of a statute.

227. The Petitioner prays for damages for loss of business and breach of its fundamental rights.

228. *First*, I have already held that the Petitioner has failed to demonstrate that the Respondents violated its constitutional rights. *Second*, having so found, there would be no basis for this court to award damages. Third, the claim for damages for alleged loss of business is legally frail. There was no attempt at all to place material before the court to make such a determination. *Fourth*, damages must be pleaded and proved. The Petitioner never pleaded with specificity the alleged loss or details to form a basis for the claim. *Fifth*, a claim for loss of business by its nature requires oral evidence which was not offered in this case.

**Disposition**

229. In view of my analysis enumerated herein above, and my conclusions herein before detailed, I find and hold that this Petition fails in its entirety. Accordingly, I hereby dismiss the amended Petition dated 12th July 2019 with no orders as to costs.

Signed and dated and at **Nairobi** this day of 2019

**JOHN M. MATIVO**

**JUDGE**

Signed, dated and delivered at **Nairobi** this **30th day of August 2019**

**J. A. MAKAU**

**JUDGE**