



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CONSTITUTIONAL PETITION NO 9 OF 2018

BETWEEN

GEORGE LESALOI SELELO.....PETITIONER

AND

- 1. COMMISSIONER – GENERAL, K R A**
- 2. CABINET SECRETARY, NATIONAL TREASURY**
- 3. ATTORNEY–GENERAL.....RESPONDENTS**

AND

- 1. PEVANS E A LIMITED (T/A SPORTPESA)**
 - 2. BLUEJAY LIMITED (T/A BETWAY)**
 - 3. ACUMEN COMMUNICATION LIMITED**
- (T/A CHEZA).....INTERESTED PARTIES**

CONSOLIDATED WITH

NANYUKI H C CONSTITUTIONAL PETITION NO 10 OF 2018

(FORMERLY NAIROBI HIGH COURT CONST PETITION NO 65 OF 2018)

BETWEEN

BLUE JAY LIMITED (T/A BETWAY).....PETITIONER

AND

- 1. CABINET SECRETARY, NATIONAL TREASURY**
- 2. COMMISSIONER GENERAL, KRA**
- 3. THE NATIONAL ASSEMBLY**
- 4. SPEAKER OF THE SENATE**
- 5. ATTORNEY – GENERAL.....RESPONDENTS**

AND

CHAIRMAN, BETTING CONTROL &

J U D G M E N T

1. These two consolidated constitutional petitions allege violation of and infringement upon certain articles of the *Constitution of Kenya, 2010* on account of certain amendments to tax laws by the *Tax Laws (Amendment) Act, 2018* and certain provisions of the *Income Tax Act Cap 470*.

2. The specific reliefs sought in the two petitions are –

(i) A **declaration** that winnings from betting, lotteries and/or gaming is not an income and therefore not subject to tax either under the **Income Tax Act** as amended by the **Finance Act, No 38 of 2013**, the **Tax Laws (Amendment) Act, No 9 of 2018** and the **Finance Act, No 10 of 2018** or any other laws, within the intendment of **Article 40** of the **Constitution of Kenya**.

(ii) A **declaration** that the amendment of section 2 of the Income Tax Act either by the Tax Laws (Amendment) Act, No 9 of 2018, the Finance Act, No 38 of 2013 and/ or the Finance Act, No 10 of 2018, the Finance Act, No 38 of 2016, or through Act No 15 of 2017 defining “winnings” as taxable income, is unconstitutional within the intendment of **Articles 40** and **201** of the Constitution.

(iii) An order of **permanent injunction...** to restrain the Respondents, their agents and persons acting with the authority of the Respondents, including the Interested Parties herein, from collecting and/or purporting to collect, any monies defined as “winnings” under the Finance Act, No 38 of 2013, the Tax Laws (Amendment) Act, No 9 of 2018 and/or the Finance Act, No 10 of 2018 from the Petitioners herein and/or any other punter.

(iv) An order of **mandamus** to compel the Respondents to refund any taxes unconstitutionally collected as a result of the provisions of the Finance Act, No 38 of 2013, the Tax Laws (Amendment) Act, No 9 of 2018 and/or the Finance Act, No 10 of 2018.

(v) An **interpretation** by the court of the term “winnings” as defined under **section 2(b)** of the **Finance Act, 2018** for purposes of taxation.

(vi) A **declaration** that the Petitioners’ fundamental rights and freedoms under **Articles 27, 40 and 47** have been violated.

(vii) A **declaration** that the actions of the Respondents are in violation of **Articles 1, 2, 3, 10, 24, 27, 40, 48, 73, 93, 94, 95, and 201** of the Constitution of Kenya as well as the **Fourth Schedule** thereto.

(viii) A **declaration** that the effective date of implementation of **section 1(c)** of the Finance Act, 2018 is 21st September 2018.

(ix) A declaration that section 1(c) of the Finance Act, 2018 is retrospective and therefore unconstitutional in its entirety.

3. The Petitioners’ case as set out in their petitions is as follows -

(a) That winnings from betting and gaming was not charged as income up to and until the *Tax Laws (Amendment) Bill* sailed through Parliament and was assented to on 18th July 2018, and the provision on the amendment on the Income Tax Act came into operation on the 1st July 2018.

(b) That the Act known as the Tax Laws (Amendment) Act, No 9 of 2018 amended the Income Tax Act by deleting section 2 of the Income Tax Act, 1973’s definition of “winnings” and substituted therefor the definition that, “**winnings**” means “the positive difference between pay-outs made and stakes placed in each month, for each player, payable to punters by bookmakers licensed under the *Betting, Lotteries and Gaming Act*.”

(c) That the Act further amended **section 10(1)** of the Income Tax Act by introducing paragraph (f) and listing “winnings” to be considered same as income from management or professional fees, royalties, interest and rents.

(d) That the Tax Laws (Amendment) Act, No 9 of 2018 went further and amended **sections 34 and 35** of the Income Tax Act to include “winnings” as income that is to be subjected to taxation and the tax rates prescribed therein.

(e) That the Tax Laws (Amendment) Act, No 9 of 2018 amended the Third Schedule, Head B, Paragraph 3, to the Income Tax Act and introduced subparagraph (i) which subparagraph imposes a twenty percent (20%) rate of taxation on winnings of non-residents.

(f) That the Tax Laws (Amendment) Act, No 9 of 2018 amended the Third Schedule, Head B, Paragraph 5, to the Income Tax Act and introduced subparagraph (i) which subparagraph imposes a twenty percent (20%) rate of taxation on winnings of residents.

(g) That there is now the Finance Act, No 10 of 2018, which has amended **section 2** of the Income Tax Act by defining “winnings” to mean: “winnings of any kind and a reference to the amount or the payment of winnings shall be construed accordingly”.

(h) That with the new definition of winnings as amended by the Finance Act, No 10 of 2018, income tax is now to be charged per “winnings” transaction, and this does not take into account the expenses of the punter as per the provisions of the Income Tax Act.

- (i) That these new taxes assume that a punter is a professional in the same league as managers, professionals such as lawyers, doctors and accountants, musicians and other performers of diverse areas of arts, banks or landowners collecting rent from tenants occupying their land.
- (j) That according to section 3(1) of the Income Tax Act, it is clearly stated that a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya. This means that income tax as contemplated in section 3(1) of the Income Tax Act is to be charged for each year of income of a person.
- (k) That according to **section 29A** of the Betting, Lotteries and Gaming Act, there shall be a tax to be known as the betting tax chargeable at the rate of thirty-five per cent of the gaming revenue, and that the tax shall be paid to the Collector by the licensed bookmaker on the 20th day of the month following the month of collection.
- (l) That this provision contradicts section 3(1) of the Income Tax Act which provides that income tax shall be chargeable for each year of income and not every month as provided for by the Betting, Lotteries and Gaming Act.
- (m) That **Article 209** of the Constitution of Kenya is very clear that the national government has the authority to collect tax, excise duty and any other taxes that an Act of Parliament may allow. As such, the **National Treasury** is enjoined to collect income tax from those activities that generate income such as those previously listed under section 10 of the Income Tax Act.
- (n) That the new taxes assume that a punter makes an income with every win without taking into consideration that winnings are windfalls and that most punters engage in the exercise occasionally and are not professionals. It also assumes that punters usually enter lotteries, gaming and betting activities after having paid an entry fee.
- (o) That the Petitioners are not in formal employment nor do they engage in gambling as a full-time engagement. Therefore, taxation on their income ought to be measured upon their total declared annual income, taking into consideration of their assets and liabilities for the year of income as provided for under section 3(1) of the Income Tax Act.
- (p) That by purporting to deduct their money on windfalls and in total disregard of established principles of income tax law, this is deprivation of property, an act that is prohibited by **Article 40** of the Constitution.
- (q) That the tax procedure in cases where windfalls are involved, that is, in cases such as gifts, inheritance, gambling or lottery winnings, is that such windfalls become taxable as income where such windfalls are invested somewhere, and the wealth gained from such investment is what is taxable, and it is taxable for each year of income.
- (r) That therefore, by purporting to levy income tax monthly, the Tax Laws (Amendment) Act, No 9 of 2018 by amending section 10 of the Income Tax Act and the Third Schedule of the Income Tax Act, violates the principles of legislation which dictate that statutes must be rational and that a system of norms must lack contradictions. Two legal norms are contradictory and can therefore not both be valid at the same time, if the two rules of law that describe them are contradictory. In this case, section 10 of the Income Tax Act contradicts the provisions of section 3 of the Income Tax Act.
- (s) That therefore, it behoves us to resolve the conflict, if at all possible, by applying the principle of statutory interpretation **lex posterior derogate priori** and, in that regard, state that section 29A of the Betting, Lotteries and Gaming Act as read with the Tax Laws (Amendment) Act, amends section 3(1) of the Income Tax Act, thus making the charging of income tax annually illegal as winnings from lotteries are not income.
- (t) That nevertheless, if that is not the case, then the legislator created something meaningless; we have a meaningless act of norm creation and therefore no act at all [**that is, nothing that can be called a norm**] whose subjective meaning can be interpreted as its objective meaning; no objectively valid legal norm is present.
- (u) That it is expected that any tax measures imposed and applied by the state, and any law providing such a measure, must comply with the Constitution in terms of fairness, reasonability and strictly adhere to the process provided for in its enactment, such as the promotion of an equitable society, and in particular, that the burden of taxation shall be shared fairly.
- (v) That the provisions imposing tax on winnings are unfair in that they impose tax on un-generated property courtesy of a windfall as opposed to profit earned, hence it amounts to forceful deprivation of property.
- (w) That the Tax Laws (Amendments) Act, in as far as it amends section 10(1) of the Income Tax Act, No 9 of 2018 and the provisions of the Third Schedule to the Act, is vague and as such has a constitutional significance. One such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. That uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using ordinary tools.
- (x) That according to the **ejusdem generis** rule of interpretation, one of the ordinary tools of statutory interpretation, when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified.
- (y) That the **ejusdem generis** rule strives to reconcile the incompatibility between specific and general words. The doctrine applies when -

- (i) the statute contains an enumeration of specific words;
- (ii) the subjects of the enumeration constitute a class or category;
- (iii) that class or category is not exhausted by the enumeration;
- (iv) the general term follows the enumeration; and
- (v) there is no indication of a different legislative intent.

(z) That however, the provisions of section 10(1) of the Income Tax Act and the Third Schedule, as amended by the Tax Laws (Amendment) Act, No 9 of 2018, go against the *ejusdem generis* rule by listing winnings from betting in the same class with management or professional fees; a royalty interest; the use of property in Kenya; an appearance at, or performance in a public or private place for the purpose of entertaining, instructing, taking part in any sporting event or otherwise diverting an audience, or an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (e) of section 10(1) (e) which are all income-generating activities in the context of a skill or professional engagement.

(aa) That a look at the amendment to tax winnings points towards uncertainty in the operation of the amendment as to be incapable of being interpreted so as to constitute any restraint on government power. The amendment is obscure in the sense that it is incapable of any degree of precision when interpreted using the ordinary tools of interpretation.

(bb) That it is also trite under tax laws that there ought to be economic efficiency in how taxes are imposed. This means that markets do a fairly good job in making economic decisions about such choices as consumption, production and financing. Thus, tax policy should generally refrain from interfering with the market's allocation of economic resources. That is, taxation should entail a minimum of interference with individual decisions. It should not discriminate in favour of, or against, particular consumption expenditures, particular means of production, particular forms of organization, or particular industries. Therefore, it is discriminatory because there is no law that provides for taxation of winnings in other games save for betting games.

(cc) That the imposition of the 'winnings tax' is also discriminatory in the sense that as much as "winnings" are treated as similar to income accrued from professional activities, the tax on winning is not being treated like other professional fees in section 10 of the Income Tax Act. That is, income accrued from other professional activities under section 10 of the Income Tax Act are allowed to offset losses or rather other sources of income.

(dd) That the Petitioners and any occasional punter, in similar fashion, merely bets. Each time he puts on his money, at whatever the starting price, does not organize his effort in the same way that bookmaker does his. He plays day to day and he plays tomorrow, and he plays the next day and he is skillful in each of the three days, more skillful on the whole than the people with whom he plays and wins. There is nothing in what he does that can fit the conception of a trade. He can be said to be addicted to betting and cannot confidently reveal to anyone that his vocation is betting. One may levy tax on a trade, a profession, adventure or vocation but one cannot tax a habit for there is no tax on a habit.

(ee) That to require a punter to provide his or her PIN for the purposes of taxation, the Respondents are setting ground for situations whereby persons will be required to register with the **Kenya Revenue Authority** for engaging in activities that can hardly be described as professional activities such as visiting night clubs.

(ff) That a punter, just as the Petitioners herein, participates in an online betting because of a need to do things privately. Indeed, no one wants to reveal what he or she is addicted to and there are many addictions; and some are considered immoral, some of which are suffered in silence and in privacy. Thus, the idea that he has to disclose his PIN number and of the identity documents to third parties entails forceful revelation of his personal details contrary to the spirit of the Constitution.

(gg) That to the extent that these new taxes assume that a punter is a professional in the same league as that of managers, professionals such as lawyers, doctors and accountants, musicians and other performers of diverse areas of art, banks or landowners collecting rent from tenants occupying their land, the Respondents have, in their enactment and enforcement of the Tax Laws (Amendment) Act, No 9 of 2018, made the assumption that "winnings" are income and in doing so violated **Article 40** of the Constitution which provides for the protection of right to property.

(hh) That to the extent that the amendments introduced by the Tax Laws (Amendment) Act, No 9 of 2018 to the Income Tax Act make it impossible for one to apply the ordinary rules of statutory interpretation. The provisions of **Article 2(4)** of the Constitution have been violated.

(ii) That the actions by the Respondents to implement a law retrospectively is to violate the Petitioners' freedom from discrimination, right to own property, right to fair administrative action, and protection against unfair tax burden under **Articles 27, 40, 47 and 201(1) (b)** of the Constitution of Kenya, as well as the Petitioners' right to have their interests protected as provided for by law, and as the Respondents are specifically enjoined by **Article 93(2)** to perform their functions in accordance with the Constitution of Kenya.

(jj) That the Petitioners' tax compliance conduct is and has been without fault yet they are unfairly targeted by the Respondents.

(kk) That the Petitioners have a right to own property, right to be protected against discrimination, right to fair administrative action, as well as a right to be protected against unfair tax burden, all which are guaranteed under the Constitution of Kenya, 2010.

(ll) That the actions by the Respondents to implement a law retrospectively is a violation of the Petitioner's freedom from discrimination under Article 27 of the Constitution of Kenya, 2010 in view of the fact that other legislative provisions require taxpayers to pay their taxes prospectively with the tax burden shared fairly.

(mm) That the actions by the Respondents to implement a law retrospectively is a violation of the Petitioners' right to fair administrative action under **Article 47** of the Constitution of Kenya, 2010 in view of the fact that the Petitioners have a legitimate expectation that the 3rd and 4th Respondents will perform their administrative functions lawfully and not in a manner that will adversely affect the right of a person.

(nn) That the actions by the Respondents to implement a law retrospectively is a violation of the Petitioner's right to own property under Article 40 of the Constitution of Kenya, 2010, in view of the fact that the retrospective effect of the law unfairly takes away property in liquidated, monetary amounts that rightfully belong to the Petitioners.

(oo) That the actions by the Respondents to implement a law retrospectively is a violation of the Petitioners' protection against unfair tax burden under **Article 201(b) (i)** of the Constitution of Kenya, which requires that the burden of taxation be shared fairly. The imposition of more tax occasioned by the retrospective effect of the amendment of section 1(c) of the **Finance Act, 2018** creates an unfair burden in tax for the Petitioners.

4. In Petition 9 of 2018 the Kenya Revenue Authority filed Grounds of opposition on 30/10/2018. The 2nd and 3rd Respondents filed joint Grounds of Opposition on 15/11/2018. All those grounds of opposition are as follows -

(i) That the Petitioner seeks to challenge the existence of taxation on winnings and not the constitutionality or otherwise of the same.

(ii) That the Petitioners are seeking for the court to bequeath itself with both executive and legislative powers in contravention of the doctrine of separation of powers.

(iii) That under **Article 209** the Constitution grants the national government powers to impose income tax, value-added tax, excise duty, custom duty and other duties on import and export goods.

(iv) That the imposition of tax on winnings is as per the Income Tax Act and the Betting, Lotteries and Gaming Act, as elaborately stated by the Petitioners themselves.

(v) That at all times the Kenya Revenue Authority has drawn its powers to levy taxes from legislation as enacted by the National Assembly, the body mandated to make and enact laws as per **Articles 94, 95, 109 and 116** of the **Constitution of Kenya, 2010**.

(vi) That a provision imposing tax cannot be said to be unconstitutional for reason only that the same is deemed oppressive or unfair. Indeed in its very nature tax is punitive.

(vii) That the national government derives its powers to impose income tax, value-added tax and other taxes under Article 209 of the Constitution.

(viii) That Cabinet Secretary for Finance is the head of the National Treasury, which is an entity of the national government established under **Article 225** of the Constitution and the **Public Finance Management Act** for purposes of formulating financial policies that facilitate social and economic development.

(ix) That all legislative powers are exercised by the National Assembly through Bills passed by Parliament and assented to by the President as provided under **Article 109** of the Constitution.

(x) That Bills which have been passed by Parliament and assented to by the President come into force as Acts of Parliament within 14 days after being published in the Kenya Gazette pursuant of **Article 116** of the Constitution.

(xi) That consequently, the continued enforcement and implementation of the Tax Laws (Amendment) Act, 2018 and the Finance Act, 2018 by the 2nd Respondent does not constitute a violation or infringement of the Petitioners' constitutional rights as alleged or at all, both having come into force following their gazette into law on 25 July 2018 and 21st September 2018 respectively.

(xii) That the petition offends the doctrine of separation powers.

5. Kenya Revenue Authority also filed a replying affidavit on 14th November 2018. It is sworn by one Mose Maina, who describes himself as the chief manager in the **Strategic Innovation and Risk Management Department** of the Authority in which he argues at length the Authority's case.

6. The Interested Parties in the two petitions did not file any substantive pleadings. However, it was stated by their learned counsels that they supported the Petitioners' cases.

7. With the consent of the parties and directions of the court, the petitions were heard by way of both written and oral submissions.

8. The petitioner in Petition 9 of 2018 filed his submissions and list of authorities on 19/12/2018. On 21/12/2018 the petitioner in Petition 10

of 2018 likewise filed its submissions and list of authorities.

9. On 04/02/2019 the Cabinet Secretary for Finance and the Attorney-General filed their joint submissions and list of authorities. On 12/02/2019 Kenya Revenue Authority filed its submissions and list of authorities. On 05/03/2019 the National Assembly filed its submissions. The learned counsels highlighted the written submissions on 05/03/2019.

10. I have considered the respective submissions of the parties and authorities cited by them. I need not repeat those submissions in this judgment.

11. The broad issues raised in these two petitions are as follows-

(a) The Role of the Legislature in enactment of relevant tax laws.

(b) The “withholding tax” regime under the Income Tax Act, Cap 470.

(c) The definition of “winnings” under section 2 of the Income Tax Act.

(d) Whether section 1(c) of the Finance Act, 2018 is retrospective, and if so, the effect thereof.

(e) The alleged constitutional violations of the rights of the Petitioners.

Role of the Legislature in Enactment of Tax Laws

12. Article 209(1) of the Constitution gives the national government power to impose income tax, value-added tax, customs duties and other duties on import and export goods, and excise tax. An Act of Parliament may authorize the national government to impose any other tax or duty, except those that may be imposed by a county government (Article 209(2)).

13. Under Article 210(1) of the Constitution, no tax may be imposed, waived or varied except as provided for by legislation. It is apparent therefore that under the Constitution the power to impose tax reposes with the National Assembly. Such power, needless to say, will normally be exercised in consonance with the economic and other policies of the country.

14. The National Assembly, in exercise of that power, has to determine how taxes are to be imposed, administered, calculated, collected and enforced.

15. The obligation to pay tax is thus constitutional, and it is not open to this court to look into or question the wisdom of the legislation behind the taxation as long as that taxation is within the ambit of Articles 209 and 210 of the Constitution.

The “withholding tax” regime under the Income Tax Act, Cap 470

16. Parliament in its wisdom enacted the various legislations that have been impugned in these petitions. By those legislations Parliament decided to tax winnings from betting, lotteries, and gaming. It then provided a mechanism for how this tax was to be administered. That mechanism was by way of withholding tax under sections 34 and 35 of the Income Tax Act. Withholding tax, of itself, is not a tax; it is a collection mechanism. It merely places an obligation on somebody else other than the person who has accrued the income, to collect and remit that tax to the national government through the mandated agency, the Kenya Revenue Authority.

17. This collection mechanism, at enactment, would no doubt be guided by the doctrine of efficiency, and it is the peculiar province of the legislature to determine the most efficient method of collection of the tax and legislate the same. It cannot be for the court to determine that.

18. This court therefore does not find that by legislating a collection method for tax on winnings from betting, etc. the National Assembly has violated any constitutional right of the Petitioners. Likewise, by enforcing that collection method mandated by law duly enacted, it cannot be said that Kenya Revenue Authority has violated any constitutional rights of the Petitioners.

19. Taxes are not meant to be fair. They are always a burden that the society must bear, and which members of the society must share equitably. It is a constitutional obligation for all to pay taxes as may be established by legislation. The impugned provisions of the Finance Act 2018, and other laws are thus not unconstitutional.

Definition of “Winnings” under section 2 of the Income Tax Act

20. The Petitioners have challenged the definition of “winnings” in section 2 of the Income Tax Act as amended by the Finance Act, 2018. The intention of the legislature in enacting the new definition was to widen the tax base. It is not for this court to determine if “winnings” from betting, etc should be taxed, or how such tax should be collected or administered. That is the province of the National Assembly.

21. I do not find any ambiguity or un-constitutionality in the new definition of winnings at all. Any practical difficulty in collection of the withholding tax that may come to light will not amount to un-constitutionality; it will be a matter to be taken up with Kenya Revenue Authority for better management of the tax.

Whether Section 1(c) of the Finance Act, 2018 is retrospective in effect?

22. There does not seem to be any dispute that the effective date will fall prior to coming into effect of the Finance Act, 2018. As a general principle enacted Laws should not have retrospective effect. But there may be exceptions to this principle. It is up to the person urging any retrospective effect to demonstrate acceptable (that is, constitutional and legal) exception to this well know principle. None has been demonstrated by the Respondents.

23. To the extent therefore that any effective date for the taxation on “winnings” as expanded by the new definition would fall outside the coming into effect of the Finance Act, 2018, that would be illegal and unconstitutional.

Alleged constitutional violations of the rights of the Petitioners

24. I have said enough elsewhere above to show that I am not persuaded that there has been any violation of any constitutional rights or freedoms of the Petitioners. The imposition of tax by legislation that has been duly enacted, and the collection of such tax, cannot amount to infringement of the constitutional right to own and hold property, or any other constitutional right or freedom.

25. In summary therefore, except for the issue of the retrospective imposition of the tax, I find no merit in these two petitions, and they are hereby dismissed. Parties shall bear their own costs of the proceedings. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 7TH DAY OF AUGUST 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 8TH DAY OF AUGUST 2019