



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 2 OF 2018

SONALLA INVESTMENT LTD.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

BETTING CONTROL & LICENSING BOARD.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This ruling is in respect of a motion dated 25th of January, 2018 in which the petitioner who is also the applicant seeks, *inter alia*, conservatory orders restraining the respondents, their agents or servants from 'raiding' the petitioner's business premises, interfering with the applicants' clientele or confiscating the applicant's slot gaming machines or in any other manner interfering with the petitioner or its business pending the hearing of the substantive constitutional petition he has filed against respondents alongside the present motion.

The motion is based on the grounds that the petitioner is a limited liability company carrying on business in Nyeri within the County of Nyeri. That it has procured, for valuable consideration, slot gaming machines for carrying out gaming business in the property described as Land Reference No. Nyeri/Municipality/Block 3/43. However, although this sort of business is allowed by the Constitution and the laws of the land, in particular, the Betting, Lotteries and Gaming Act, cap. 131, the respondents have failed or refused to issue the applicant with the requisite licence or permit to conduct this business in its business premises. Instead, the 1st respondent has declared the applicant's slot gaming machines illegal and ordered closure of its gaming premises to the immense prejudice of the applicant; consequently, the applicant is suffering loss and damage and will continue to suffer such loss and damage unless the orders prayed for in this motion are granted. To make it worse, so the applicant has pleaded, the respondents have issued a fresh directive on confiscation of gambling machines and eradication of gambling without following the due process.

The motion is supported by the affidavit of James Mwaura Kigutu who has described himself as one of the directors of the applicant; in his depositions, he has more or less expounded on the grounds upon which the motion is based.

On their part, the respondents opposed the motion and to that extent, they filed their respective replying affidavits essentially acknowledging that while the applicant may be operating a gaming or gambling business, it has neither applied for the necessary permits or licences nor are the premises in which this business is being undertaken licensed gaming premises as understood in law. In their view, the applicant's business is illegal in so far as the applicant has not complied with the law.

As intimated by the applicant, the law that controls betting, lotteries and gaming in this country is the Betting, Lotteries and Gaming Act. For purposes of issuing licences and permits for betting, lottery and gaming activities, there is established under section 3 of the Betting Control and Licensing Board. According to section 4 (1) of the Act, the Board has power to issue licences and permits in accordance with the Act and any regulations made thereunder.

As far as the present application is concerned, section 54 (1) of the Act is clear that subject to any regulations made under the Act, the Board may issue a permit authorising the use of gaming machine on premises approved by it. And in section 53, it is an offence to use a gaming machine or premises that have not been authorised by the Board. It says: -

53(1) A person who—

(a) uses or permits the use of an unauthorized gaming machine; or

(b) knowingly allows premises to be used for the purpose of gaming by means of an unauthorized gaming machine; or

(c) knowing or having reasonable cause to suspect that premises would be used for gaming by means of an unauthorized gaming machine—

(i) caused or allowed the machine to be placed on the premises; or

(ii) let the premises, or otherwise made the premises available, to a person by whom an offence in connection with the machine was committed, shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both.

(2) In this section, “unauthorized gaming machine” means a gaming machine in respect of which a permit has not been issued under section 54.

By its own admission, the applicant acquired and has been operating gaming machines for profit in premises that are otherwise licensed to dispense alcoholic drinks. It is also clear from the applicant’s depositions that as much as it is operating the gaming business, it has not obtained the requisite licence, permit or any sort of authorisation to conduct such a business contrary to the provisions of section 53 as read with section 54 of the Betting, Lotteries and Gaming Act.

Despite this apparent flagrant disregard of the law, the applicant still seeks the intervention of this honourable court to issue an injunction or conservatory order restraining the respondents from interfering with its otherwise illegal gaming business in premises that have not been licensed to undertake such a business in any event.

I agree with the learned counsel for the 1st respondent that granting conservatory order in such circumstances would be tantamount to perpetuation of a crime under sections 53(1) and 45 of the Act. Section 45 provides that:

Offences relating to unlicensed gaming premises

45 (1) Subject to this Act, a person who—

(a) being the owner or occupier or having the use temporarily or otherwise thereof, keeps or uses unlicensed gaming premises; or

(b) permits premises of which he is the owner or occupier, or of which he has the use temporarily or otherwise, to be used as unlicensed gaming premises; or

(c) has the care or management of, or in any manner assists or is engaged in the management of, premises kept or used as unlicensed gaming premises; or

(d) announces or publishes or causes to be announced or published, either orally or by means of any print, writing, design, sign or otherwise, that any premises are opened, kept or used as unlicensed gaming premises, or in any manner invites or solicits any person to play in unlicensed gaming premises; or

(e) advances, furnishes or receives money for the purpose of establishing or conducting the business of unlicensed gaming premises, shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both.

(2) A person who games in unlicensed gaming premises shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both; and a person found in unlicensed gaming premises, or found escaping therefrom on the occasion of its being entered under this Act, shall be presumed until the contrary is proved to be or to have been gaming therein.

(3) A person who occupies or has the use temporarily of premises which are kept or used by another person as unlicensed gaming premises shall be presumed until the contrary is proved to have permitted that place to be so kept or used.

(4) In this section, “unlicensed gaming premises” means gaming premises in respect of which no licence is issued under this Part.

Considering that the premises in which the applicant is operating gaming activities are not licensed, they fit the description of unlicensed gaming premises as understood under section 45 of the Act. It may as well be that the applicant does not have any premises which could be licensed in any event; I say so because the lease agreement that has been exhibited to the affidavit in support of its motion shows that it was executed between the lessor or the landlord and one James Mwaura Kigutu who, no doubt, is a distinct and separate person from the applicant. I accept that James Mwaura Kigutu may be one of the directors of the applicant but considering that the applicant is a limited liability company, registered as such under the Companies Act, cap 486, it is obviously a distinct legal entity.

It follows that even if the applicant had made an application for gaming business as it has alleged, such an application would certainly have failed considering that the applicant has no premises from which to operate. In other words, there are no premises for the Board to consider

for issue of a licence; without the premises the question of whether an application could possibly have been made to license premises as 'licensed gaming premises' does not arise.

Still on this question of application, there is no evidence that the applicant has attempted to make any application of any sort to the Board. All it is alleged in a letter by its advocates dated 15th June, 2016 addressed to the Government of Nyeri County is that:

“our client has on several occasions been harassed by officers from Betting Control and Licensing Board assisted by local police officers for operating without a licence. The last such raid on his premises happened on 31.5.2016.

“Our client’s attempts to obtain a licence to operate the gambling machines have been unsuccessful. Our client feels aggrieved and has suffered loss and damages. Our instructions in the circumstances are to demand, as we hereby do, that you immediately arrange to licence(sic) our client to operate the said gambling machines. Our client is ready to pay the required charges.

We require your office to comply within the next 7 days from the date hereof failing which we shall proceed to court to obtain the necessary remedies at your client’s risk as to costs.”

As noted the letter was addressed, not to the Board, but to Nyeri County Government yet it is only the Board that can consider the sort of application that the applicant had in mind. And even if this letter had been addressed to the Board, it cannot, by any stretch of imagination, be deemed to have been the application for the requisite licences; it is largely a letter of demand notifying the addressee of an intended suit should it not issue the licence or permit notwithstanding the rules and regulations governing applications and issue of the permits or licences.

For avoidance of doubt, section 5. (1) of the Act is clear that any application for a licence or permit under the Act must be in the form and manner prescribed. This is what it says:

5. Application for licences and permits

(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.

Without belabouring the point, all I can say is that apart from the demand notice to the County government of Nyeri, there is no evidence that the applicant made an application to the Board for the necessary licenses or permits in the form and manner prescribed by the Act, or in any other form for that matter. In the absence of any application, neither the Board nor any other respondent can be faulted for not issuing permits or licences to operate gaming or gambling business.

And without the requisite permit or licence, the applicant cannot be allowed to carry out gaming or gambling business as if it has been so authorised. It’s incumbent upon the applicant to have complied with the provisions of the Betting, Lotteries and Gaming Act and applied for the relevant permit or licence; no doubt, the Board which has been established to consider such applications would have dealt with the applicant’s application and either granted the necessary authorisation or rejected it, as the case might have been.

The upshot is that the applicant does not deserve the conservatory orders is seeking for constitutionalism does not entail breach of the law. For this reason, I am inclined to reject the applicant’s motion dated 25th January, 2018 with costs to the respondents. It is so ordered.

Signed, dated and delivered in open court this 21st day of September, 2018

Ngaah Jairus

JUDGE