



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 462 OF 2014

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

NAIROBI CITY COUNTY.....RESPONDENT

EX PARTE: ZITRON LIMITED T/A SUNRICE CASINO

JUDGEMENT

1. By a Notice of Motion dated 16th December, 2014, the ex parte applicant herein **Zitron Limited T/A Sunrice Casino**, seeks the following orders:

1. THAT an order of certiorari be issued to remove to this Honourable Court for the purposes of being quashed the Respondent's decision communicated/contained in the Respondent's letters dated 5th December, 2014 purportedly withdrawing the ex parte applicant's Single Business Permit and closing down its business.

2. THAT an order of prohibition be issued to prohibit the Respondent, its servants, agents and/or whomsoever from executing and/or enforcing the Respondent's decision communicated/contained in the Respondent's letters dated 5th December, 2014 purportedly revoking the ex parte applicant's Single Business Permit and closing down its business operations or any other licence or permit issued by the Respondent or in any other way interfering with the ex parte applicant's business operations.

3. THAT the costs of and incidental to this suit be borne by the Respondent.

2. The application was based on the grounds *inter alia* that the Respondent lacks any power to withdraw a Single Business Permit under the guise of not being a bona fide casino operator; that the applicant is licensed by the statutory regulator, the Betting Control and Licensing Board (BCLB) to operate a casino which licence remains in force and has not been withdrawn by the licensing authority; that to purport to withdraw the said permit under the guise of the alleged violations of the BCLB Licence amounts to usurpation of the powers of another statutory body and is unlawful; that there exist no condition under the permit that can justify the impugned decision on account of the grounds cited by the respondent; and that the respondent's actions were without jurisdiction and were ultra vires the provisions of Cap 131.

3. In response to the application the Respondent contended that it derived its powers to regulate betting, lotteries, gaming and other forms of gambling exclusively conducted within Nairobi County from ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** (hereinafter referred to as "the Act"). It was therefore the Respondent's case that it undertook steps to close operations of the applicant to enforce compliance with the said Act and the Regulations thereunder.

4. By his decision in ***Africa Rafiki Ltd & 2 Others vs. Nairobi City County Government & 3 Others [2017] eKLR***, Lenaola, J (as he then was) held that:

"The orders suspending the operation of the *Nairobi City County, Betting, Lotteries and Gaming Act* shall remain in operation for a further 60 days to enable compliance with the requirement for its gazettelement in the Kenya Gazette. If the County Government fails to do so within that period, the said Act shall be deemed to be unlawful and invalid following the decision in H. C. Petition No.52 of 2016 - *James Gacheru Kariuki & Others vs AG & Others.*"

5. It is clear that the said 60 days have lapsed. I am informed by learned counsel for the Respondent that the orders of **Lenaola**,

J set out hereinabove have never been complied with. What then is the effect of the order? The word “deem” has been interpreted by the Court in Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135 where it was held by the Supreme Court of Uganda that:

“The word “deemed” is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

6. This position was appreciated in Prof. Peter Anyan'g Nyong'o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397 where the East African Court of Justice, citing St. Aubyn (LM) vs. AG [1951] 2 All ER 473 at 498 expressed itself as follows:

“The word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...”

7. The 60 days given by the Court having lapsed, it must necessarily now be legally assumed that **Nairobi City County Betting, Lotteries and Gaming Act, 2014** is unlawful and invalid. It follows that any decision based on it must similarly be unlawful and invalid.

8. In the premises the decision made by the Respondent herein communicated/contained in the Respondent's letters dated 5th December, 2014 purportedly withdrawing the ex parte applicant's Single Business Permit and closing down its business, based as it was on the said invalid instrument cannot be sustained.

9. Consequently I find merit in the Notice of Motion dated 16th December, 2014.

Order

10. In the result I issue the following orders:

1) An order of certiorari removing into this Court for the purposes of being quashed the Respondent's decision communicated/contained in the Respondent's letters dated 5th December, 2014 purportedly with drawing the ex parte applicant's Single Business Permit and closing down its business which decision is hereby quashed.

2) An order of prohibition prohibiting the Respondent, its servants, agents and/or whomsoever from executing and/or enforcing the same decision.

11. As this decision is based on the decision in Africa Rafiki Ltd & 2 Others vs. Nairobi City County Government & 3 Others (supra) in which there was no order as to costs, I similarly order that each party will bear own costs of these proceedings.

12. It is so ordered.

Dated at Nairobi this 20th day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamau for the applicant

CA Ooko