



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 370 OF 2010

REPUBLIC.....

APPLICANT

VERSUS

**HON. LUCAS M. MAITHA CHAIRMAN, BETTING CONTROL AND LICENSING BOARD.1ST
RESPONDENT**

**A.O. KWASI DIRECTOR, BETTING CONTROL AND LICENSING BOARD.....2ND
RESPONDENT**

AND

FLINT EAST AFRICA LIMITED.....

.....INTERESTED PARTY

EX

PARTE:

**INTERACTIVE GAMING AND LOTTERIES
LIMITED**

RULING

Introduction

1. By a Notice of Motion dated 5th May, 2011, the applicant herein, **Interactive Gaming and Lotteries Limited**, seeks an order that the sum of Kshs 50million held in the joint names of the applicant’s advocates and the Chief Registrar of the Judiciary be released to the applicant.
2. The cause of action herein arose when the applicant was issued with a public lottery permit to operate a lottery during the year 2010. However the said lottery licence was revoked by the Respondent herein and it was that revocation that provoked these proceedings. As a security for the said permit this Court on 30th December, 2010 ordered the applicant to deposit the said sum of Kshs 50 million.
3. It is not in dispute that the said lottery was intended to benefit a charity known as **Mama Fatuma Goodwill Children’s Home** (hereinafter referred to as the Home). The said home has objected to the release of the said deposit to the applicant and have urged the Court to release the same to the

- said home as part of the statutory 25% of the gross proceeds of the lottery under section 36(1)(b) of the **Betting, Lotteries and Gaming Act**, Cap 131 Laws of Kenya (hereinafter referred to as the Act).
4. It was ordered that pending proof that the said 25% had been paid to the said Home, the said Kshs 50 Million would be deposited in the said joint account with a reservation for the Court to make further orders.
 5. It was contended that in compliance with the said order the applicant and the home discussed the statements of accounts and the Trustees of the Home confirmed the statement filed by the applicant as reflecting the true and correct statement of accounts and the Home confirmed being aware of the said deposit and requested that the said sum be released to the applicant. The applicant therefore urged the Court to deduct a sum of Kshs 17,188,14.00 which is the sum due to the Home and release the balance to the applicant.
 6. According to the applicant, based on the admission of the Home the amount has now been determined. It was submitted that section 37(2)(a) of the Act entitles the Betting, Lotteries and Gaming Board (hereinafter referred to as the Board) to place a maximum ceiling on the expenses. Since there was no condition which capped the expenses, it was contended that operating expenses ought to be deducted which expenses the applicant had tabulated which according to the applicant came to the gross proceeds of Kshs 72,752,574.00. This sum deducted from a total turnover of Kshs 189,499,416.00 left the gross income, in the applicant's view at Kshs 72,752,574.00 and the 25% payable under the Act would come to Kshs 18,188,144.00 out of which a sum of Kshs 1 million had already been paid. It was therefore submitted that the applicant was willing to have a sum of Kshs 17,188,144.00 paid to the Home while the balance and interest be released to the applicant.
 7. It was submitted that the Act does not define what gross income proceeds is. Similarly, there is no such definition under the **Interpretation and General Provisions Act**. It was the applicant's case that it was in view of that that the applicant and the Home as they were entitled to, expressly agreed vide a deed on what is meant by "gross proceeds".
 8. On behalf of the Home, it was submitted that after the Trustees of the Home sought to better understand the provisions of the law governing the matter and after going through section 36 of the Act realised that it was clear that the law did not provide for a deduction of any expenses that had gone into the mounting of the lottery prior to the payment of the amount due.
 9. It was contended that since the law talks of "gross proceeds", even without a definition, one cannot deduct expenses incurred in the promotion of the lottery otherwise the section would have talked of the net proceeds. It was further contended that if that were the position, the licence could likewise be a conditional one which was not the case in the instant case.
 10. With respect to the issue of estoppel it was contended that estoppel cannot operate to annul statutory provisions and that the said principle cannot be urged to render a statutory provision redundant since there is no ambiguity in the legal provisions. It was therefore contended that the 25% due to the Home must be deducted from Kshs 189,499,416.00. It was contended that there is no scheme of things where a licence holder purports to do accounts and invites the beneficiary to agree on what is rightfully due because the interest of the two parties are conflicting. The Court was therefore urged to uphold the law and insist that the interest of the beneficiary be respected as provided under the law.
 11. The Respondent on its part was of the view that what is due to the beneficiary cannot be less than 25% as provided under section 36 of the Act. It was contended that since the total earning was Kshs 530,274,898.00 25% thereof would be Kshs 132,568,724.50.
 12. The Respondent contended that gross profit is the profit de by the Company before deductions. To the Respondent the provisions of the law cannot be ousted by agreement of the parties.
 13. It is not in dispute that there is no definition of the term "gross proceeds" in the Act. It is therefore important to revisit the rules which guide interpretation of statutes. The law on this issue is that if the words of an enactment are themselves precise and unambiguous, then no more is necessary than to expound those words in their ordinary and natural sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. But where the meaning is not plain, a court of justice is still bound to construe it, and, as far as it can, make it available for carrying out the objects of the Legislature, and for doing justice between the parties. When the words of an enactment are not clear, it is permissible to go to certain sources of information outside the

enactment for the purpose of throwing light upon its meaning. In construing Acts of Parliament, the words which are used are not alone to be regarded. Regard must also be had to the intent and the meaning of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject. In all cases the object is to say what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they are used. In construing any enactment regard must be had not only to the words used but to the history of the Act and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as to the cure provided. Under the ordinary rules for the construction of statutes the reports of commissioners are not admissible for the purposes of directly ascertaining the intention of the Legislature, though they may perhaps be looked at as part of the surrounding circumstances for the purpose of seeing what was the evil or defect which the Act under construction was designed to remedy. The statement of the objects and reasons for a bill are not admissible to aid in its construction; neither may reference be made to the proceedings of the Legislature which resulted in its passing. By analogy the Government's statement of intended policy presented to Parliament in the form of a White Paper would be equally inadmissible as an aid to construction of the resulting legislation. See **The Katikiro of Buganda vs. The Attorney General of Uganda Civil Appeal No. 11 of 1959 [1959] EA 382.**

14. In my view, the mere fact that the statute does not define a particular term does not necessarily render that term ambiguous.
15. **Blacks Law Dictionary** 9th Edn. page 831 defined "gross income" as "Total income from all sources before deductions, exemptions, or other tax deductions". Similarly "gross receipts" is defined at page 772 thereof as "The total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deduction." "Proceeds" on the other hand is defined at page 1325 as *inter alia* "Something received upon selling, exchanging, collecting, or otherwise disposing of collateral". "Net proceeds" on the other hand is defined at the same page as "The amount received in a transaction minus the costs of the transaction (such as expenses and commissions). Also termed net balance".
16. In this case the parties were agreed that section 36 of the Act applied to the lottery in question. That section deals with lotteries intended to raise funds for social service, public welfare, relief of distress or patriotic purposes or to provide recreational or sporting facilities. That being the object of the subject lottery the phrase "gross proceeds" must in my view be given an interpretation which promotes the object of the statute. If this interpretation is adopted it is my view that to interpret the phrase other than in the manner defined by **Blacks Law Dictionary** would defeat the purpose for which the lottery was licenced.
17. Section 36 of the Act provides as follows:

(1) The Board may issue a permit authorizing the promotion and conduct of a lottery (not being a lottery promoted and conducted under section 40, section 41 or section 42)—

(a) which is intended to raise funds for social service, public welfare, relief of distress or patriotic purposes or to provide recreational or sporting facilities; and

(b) at least twenty-five per centum of the gross proceeds of which is to be devoted to the object for which the lottery is promoted:

Provided that the Board may require as a condition that a specified proportion of greater than twenty-five per centum of the proceeds be devoted to the object for which the lottery is promoted, but in no case shall the Board require a proportion greater than forty-five per centum of the gross proceeds.

(2) Where in the case of a lottery authorized under this section less than twenty-five per

centum, or less than the proportion provided by the Board under the proviso to subsection (1), of the gross proceeds of the lottery is devoted to the object for which the lottery is promoted or any of the proceeds are devoted to a purpose, other than expenses and prizes, which is not such an object, each promoter of the lottery 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.”

18. It is therefore clear that no less than 25% of the gross proceeds is to be devoted to the object for which the lottery is promoted. However this percentage may be increased up to a maximum of 45%. It follows that the argument by the applicant that since there was no condition imposed the amount payable could go below 25% cannot be correct. To protect the promoters of the lottery, the section itself provides that the percentage devoted to the object for which the lottery is promoted cannot exceed 45% of the gross proceeds. Therefore the Act itself protects the interest of the promoter and that in my view bars the promoter from purporting to resort to self-protection as it were.
19. Accordingly, I have no hesitation in holding that under section 36 of the Act, 25% of the gross proceeds payable to the object for which the lottery is promoted is meant to be free from any deduction.
20. That then brings me to the issue whether the parties to which section 36 of the Act can contract or opt outside the ambit of the said provision. Firstly there was no agreement herein between the applicant and the Home. What is contended is that the Home swore an affidavit in which it expressed satisfaction with the statements of accounts presented by the applicant.
21. From the foregoing discourse is clear that statements of accounts in so far as it purported to exclude the expenses from “gross proceeds” was incorrect. Can it therefore be held that the position of the Home based as it were on an erroneous state of affairs amounted to estoppel? The law on admission is clear that an admission may be of no effect if it shown that it is made by mistake or under circumstances that would vitiate its import. This position was restated in **Pushpa D/O Raojibhai M Patel vs. The Fleet Transport Company Ltd Civil Appeal No. 5 of 1960 [1960] EA 1025** where it was held an admission based on an incorrect legal position is not binding. In **Ramus vs. Donaldson [1959] EA 355**, the Court expressed doubts on the wisdom of contracting out of statutory provisions.
22. I agree with the Home there can be no estoppel against a statute or the law. See **Manchester Outfitters Suiting Division Limited & Another vs. Standard Chartered Financial Services Limited & Another Civil Appeal No. 88 of 2000 [2002] 2 KLR 590**.
23. It was further held in **Republic vs. Public Procurement Complaints, Review And Appeals Board & Another Ex Parte Kenya Airports Authority [2005] 1 KLR 628** that:

“It is now settled law that there can be no estoppel against a statute, for estoppel cannot supersede the law of the land. An admission on a point of law cannot found an estoppel. Similarly representations of law, not fact cannot be found as an estoppel.”

24. In making the order for deposit, **Musinga, J** (as he then was) expressed himself as follows:

“The 1st applicant must comply with the request made by the Board by its letter dated 2nd December, 2010. In particular, it must satisfy the court that it has paid or is prepared to pay to the Children’s Home 25% of the gross proceeds of the lottery. The service providers will have to provide to the 1st applicant the total number of SMS received so that the total amount of money raised through the lottery can be computed. Without that information it may not be possible to determine what the gross proceeds were.”

25. It follows that without evidence that the applicant has remitted to the Home what the Home is entitled under section 36 of the Act, this Court by granting the orders sought herein would be reviewing and setting aside the orders made by **Musinga, J** when there is no application seeking the same.
26. The applicant ought to prove that that order has been complied with before the deposit herein can be released.

27. In propounding the argument that the Home by its affidavit released the applicant from liability, the applicant is in effect relying on the doctrine of accord and satisfaction since from what I have said hereinabove and the evidence placed before the Court does not prove that the Home has been paid its entitlement under section 36 of the Act. However, as was held in **Kimeu vs. Kasese (No. 2) [1990] KLR 35:**

“The agreement allegedly entered into between the plaintiff and the defendant gives rise to the defence of accord and satisfaction. But before such a defence can succeed, it must be shown that the agreement (accord) was valid in law. The agreement cannot be valid in the instant case unless it is supported by consideration. There was no benefit that the plaintiff was getting by promising to forebear from making further claim. It is an essential element of a valid accord and satisfaction that the agreement, which constitutes the accord, should itself be binding in law, and such agreement cannot be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance of an agreement of accord, does not provide retroactive validity of accord, but depends for its effect upon the validity of the accord as a binding contract at the time when it is made.... Since the defendant lost nothing the agreement has no legal validity. Even if it were valid the court would hesitate to enforce it as perhaps it would be against public policy in the sense that most illiterate accident victims would be denied fair compensation by unscrupulous actions of vehicle owners or insurance companies.”

28. The Court has been urged on behalf of the Home to direct that the said deposit be released to the Home instead. However, there is no application made for the said orders.

29. In the foregoing premises the Notice of Motion dated 5th May, 2011 fails and is dismissed with costs.

Dated at Nairobi this day 16th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ng'ang'a for the ex parte applicant.

Miss Kanini for Mr Kyalo for the Interested Party

Cc Patricia