



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.295 OF 2014**

**AS CONSOLIDATED WITH PETITION NO.1 OF 2015 AND PETITION NO.315 OF 2014**

**BETWEEN**

**AFRICA RAFIKI LTD.....1<sup>ST</sup> PETITIONER**

**ASSOCIATION OF GAMING OPERATORS IN KENYA.....2<sup>ND</sup> PETITIONER**

**WYCLIFFE INDALU ADIENO.....3<sup>RD</sup> PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**AND**

**TRANSITIONAL AUTHORITY.....INTERESTED PARTY**

**INTERIM JUDGMENT**

**Introduction**

1. Prior to the promulgation of the **Constitution 2010**, betting, lotteries, gaming and other forms of gambling business, both at the national and local levels were exclusively governed by the **Betting Control and Gaming Act, (Cap 131 Laws of Kenya) (National Legislation)**, under the stewardship of the Betting, Control and Licensing Board established pursuant to **Section 3 of Cap 131 Laws of Kenya**.
2. Sometimes in 2014, the 3<sup>rd</sup> Respondent, The Nairobi City County Assembly enacted a legislation known as **Nairobi City County Betting, Lotteries and Gaming Act as Act No. 5 of 2014** as a County legislation to control the business of gaming, lotteries and betting within the Nairobi City County. In addition, the 3<sup>rd</sup> Respondent published a Bill called the **Nairobi City County Finance Bill 2014/2015** in which it made provisions requiring that any person engaging in gaming, lottery

and betting should pay for certain permits and licenses.

3. Subsequently, on 21<sup>st</sup> August 2014, the 1<sup>st</sup> Respondent, the Nairobi City County Government, caused to be published in the “Daily Nation” newspaper a notice requiring all gaming operators to apply for issuance of licenses from it. The Petitioners claim that prior to the said advertisement, they had already applied and had been issued with permits by the **Betting Control and Licensing Board** established under **Cap 131 Laws of Kenya**.
4. The consolidated Petitions before me now challenge the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** (hereinafter “the County Legislation”) on two fronts; firstly, that the legislation is in breach of **Articles 186, 191, 199, 209 and 210** of the **Constitution**. Secondly, that the legislation is in conflict with a national legislation, to wit, the **Betting, Lotteries and Gaming Act (Cap 131)**.

### The Petitions

5. In **Petition No.295 of 2014**, the Petitioner, African Rafiki Ltd, is a limited liability company operating a gaming business under a license issued by the **Betting Control and Licensing Board** established under the **Betting, Lotteries and Gaming Act**.
6. In its Petition dated 1<sup>st</sup> July 2014, it seeks for the following orders;

*“(1) A declaration that provisions of the Betting Lotteries and Gaming Act Cap 131 prevail over those of the Nairobi City County Betting, Lotteries and Gaming Act, 2014.*

*(2) A declaration that the requirement that the Petitioner is obliged to apply and pay for a license from the 1<sup>st</sup> Respondent concurrently with the one issued by the Betting Control and Licensing Board is inconsistent with the provisions of Articles 209 and 210. [of the Constitution].*

*(3) A declaration that the requirement that the Petitioner is obliged to apply and pay for a license from the 1<sup>st</sup> Respondent concurrently with the one issued by the Betting Control and Licensing Board is in breach of the Petitioner’s constitutional rights to fair administrative action as enshrined by Article 47. (sic)*

*(4) An order prohibiting the 1<sup>st</sup> Respondent, its officers, employees and or agents from enforcing the Nairobi City County Betting, Lotteries and Gaming Act 2014 against the Petitioner its agents employees and/or servants.*

*(5) Cost of this Petition be borne by the Respondents.”*

7. In **Petition No.1 of 2015**, the Petitioner, the Association of Gaming Operators, is a registered umbrella body of entities carrying out betting, gaming and lotteries business within the Republic of Kenya. Its case is that the 1<sup>st</sup> Respondent is not the body legally authorized to issue licenses to its members as the Petitioner’s members are issued with licenses by the **Betting Control and Licensing Board** established under the **Betting and Gaming Control Act**.
8. It also claims that the 1<sup>st</sup> Respondent has violated **Articles 209 and 201** of the **Constitution** for the reason that the Nairobi County Government has not enacted any law that authorizes imposition of any entertainment tax and contends that the **Nairobi City County Finance Bill of 2013** has never been gazetted and therefore does not have any effect. Further, that the **Nairobi City County Finance Bill 2014** has in any event not been passed by the 2<sup>nd</sup> Respondent. They therefore allege that the 1<sup>st</sup> Respondent has been enforcing Bills which had not become law against its Members.

9. In its Petition dated 31<sup>st</sup> December, 2014 it seeks the following orders;

*“(1) A declaration that the decision by the Governor of Nairobi City County contained in his letter to members of the Petitioner dated 10<sup>th</sup> December 2014 to the effect that they will not be allowed to do business unless they apply for and obtain a Gaming License from the Nairobi City County is null and void.*

*(2) A declaration that the Nairobi County Provisional Collection of Revenue Act, 2003 is inconsistent with Article 199 of the Constitution and is thus null and void.*

*(3) A declaration that the demand and receipt by the 1<sup>st</sup> Respondent for money from the members of the Petitioner with effect from 1<sup>st</sup> October 2013 is in breach of Articles 40(3) and 210(1) of the Constitution of Kenya and thus null and void.*

*(4) A declaration that all other demands for payment of licenses/permits, levies, charges and rates made by the 1<sup>st</sup> Respondent to residents, businesses and visitors to the 1<sup>st</sup> Respondent from 1<sup>st</sup> October 2013 that are not for property rates and for services actually rendered by the 1<sup>st</sup> Respondent are inconsistent with Article 209(3) and (4) and Article 210(1) of the Constitution of Kenya and thus null and void.*

*(5) An order compelling the 1<sup>st</sup> Respondent to refund to the payers/depositors all payments for licenses/permits and rates received by the said 1<sup>st</sup> Respondent from 1<sup>st</sup> October 2013 that are not for property rates and for services actually rendered.*

*(6) Cost of this Petition be borne by the Respondents.”*

10. In **Petition No.315 of 2014**, the Petitioner, Wycliffe Indalu Adieno, claims that **Section 4** of the **County Legislation** contravenes the provisions of **Article 191(2) (a)** of the **Constitution** in purporting to ensure that the County legislation prevails over National Legislation. According to him the **Betting, Lotteries and Gaming Act (Cap 131 Laws of Kenya)** as National Legislation is a legislation that applies uniformly throughout the Republic of Kenya and supersedes any County Legislation on any relevant issue.

11. In his Petition dated 9<sup>th</sup> July 2014, he therefore seeks the following orders;

*“(a) A declaration that Section 4 of the County legislation is unconstitutional, null and void to the extent that it purports to provide that the County legislation shall prevail over the National legislation in any way whatsoever contrary to Article 191(2)(a) of the Constitution.*

*(b) A declaration that the County legislation is unconstitutional, null and void as it contravenes Section 15(2)(b) of the Sixth Schedule to the Constitution to the extent that it was passed in disregard to the criteria being developed by the Transition Authority in exercise of its constitutional function as provided under Section 7(2)(h) of the Transition Act.*

*(c) A declaration that any act done pursuant to the County legislation prior to the publication in the Gazette is unconstitutional, null and void as it contravenes Article 199(1) of the Constitution.*

**(d) A declaration that the national legislation shall prevail in all respects over the County legislation on all matters it makes provision for, pursuant to Article 191(2)(a) of the Constitution.**

**(e) Costs of this Petition.”**

12. On 27<sup>th</sup> January, 2015 this Court ordered that the three Petitions be consolidated with **Petition No.295 of 2014** as the parent file.

### **The Petitioners' case**

13. The Petitioners case is as contained in their respective Petitions and on the affidavits of Joyce Aluoch Omondi, the General Manager of the 1<sup>st</sup> Petitioner, sworn on 1<sup>st</sup> July 2014, David Moshi, the Chief Executive Officer of the 2<sup>nd</sup> Petitioner, sworn on 31<sup>st</sup> December 2014 and the 3<sup>rd</sup> Petitioner's affidavit sworn on 9<sup>th</sup> July, 2014.

14. Mr. Macharia, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners submitted that the County Legislation and by extension, the **Nairobi City County Finance Act 2014**, make charges which are beyond what is provided for under **Articles 209 and 210** of the **Constitution**. That the taxes imposed by those statutes are not property taxes and neither are they for any services rendered to the Petitioners and are thus unconstitutional. That the County Legislation has exposed the Petitioners to double taxation as they have already paid for and obtained licenses and or permits issued by the **National Betting Control and Licensing Board**. They therefore claim that the County legislation is unconstitutional as it violates their property rights as protected by **Article 40** of the **Constitution**.

15. It was his further submission that Section 34 of Part 1 of the **Fourth Schedule** to the **Constitution** as well as **Section 4(a)** of **Part II** of the **Fourth Schedule** thereof provide that the business of gaming, betting and lotteries is a function of both National and County Governments and because the business of gaming, lotteries and betting is also done online through money platforms and phone text messages, would be absurd to expect promoters of every lottery to take licences from each of the 47 Counties in Kenya.

16. He also submitted that **Section 4(1)** of the **County Legislation** is unconstitutional as it ousts the provisions of the National Legislation while in fact the National Legislation should prevail as it has met the requirements of **Article 191(2)** and **(3)** in that it applies uniformly throughout Kenya. Further it prevents a County from unreasonable action and it is necessary to have one legislation for purposes of maintaining security by monitoring flow of money to avert money laundering and terrorism and that there also is need to maintain norms and standards in the gaming industry which would be impossible if control was left to each County in Kenya.

17. Mr. Gitonga for the 3<sup>rd</sup> Petitioner associated himself with the submissions made by Mr. Macharia and added that the National Legislation is important to regulate the gaming and lotteries business in view of the tendency of criminals and or terrorist to use the industry as a conduit for money laundering and financing terrorists' activities. He thus opined that National Legislation is necessary for the maintenance of national security.

18. He also contended that the County Legislation is unconstitutional for the reasons that the **Transition Authority** had not established a criteria that must be met in devolving the function of betting, control and licensing in accordance with **Section 15(2) (b)** of the **Sixth Schedule** to the **Constitution** and also that the National Betting Control and Licensing Board has not finalized a national policy and legal framework to ensure effective management and control of gambling activities in the Counties and provide a model law to County Governments as mandated by the **Transition Authority**.

19. It was therefore Mr. Gitonga's submission that the passing of the County Legislation without following the criteria developed by the **Transition Authority** is unconstitutional.
20. The Petitioners urged the Court to grant their Petitions as prayed as prayed.

### **Respondents' case**

21. The 1<sup>st</sup> Respondent, the Nairobi City County Government, opposed the Petition through the Replying Affidavits of Lilian W. Ndegwa sworn on 4<sup>th</sup> September 2014, 16<sup>th</sup> January 2015 and a Further Affidavit sworn on 19<sup>th</sup> January 2015.
22. Ms Ndegwa deponed that pursuant to **Section 7** of Part 2 of the **Transition and Consequential Provisions of the Constitution**, (the Sixth Schedule) the provisions of the **Betting, Lotteries and Gaming Act** are only relevant in relation to regulation of betting, lotteries, gaming and other forms of gambling to the extent that the provisions of the 2<sup>nd</sup> legislation confirm to the **Constitution 2010**.
23. Further, that Part 2 of the **Fourth Schedule** to the **Constitution** mandates the 1<sup>st</sup> Respondent to regulate cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling and that the 3<sup>rd</sup> Respondent enacted the County Legislation in exercise of its constitutional mandate and pursuant to its legislative authority as expressly conferred by **Article 185(1) and (2)** of the **Constitution**.
24. It was also her position that **Section 34** of the **Fourth Schedule** to the Constitution mandates National Government to regulate betting, lotteries and gaming activities conducted nationally but the 1<sup>st</sup> Respondent has the mandate to control the same at the county level.
25. In addition, he claims that **Section 4** of the **Nairobi City County Betting, Lotteries and Gaming Act 2014** regulates betting, lottery, gaming and other forms of gambling exclusively conducted within Nairobi City County and no elsewhere in Kenya and that **Section 4** of the **County Legislation** was therefore consistent with the provisions of **Section 8(2)** of the **County Governments Act No 17 of 2012** which enjoins a County to import provisions of the corresponding National Legislation with necessary modifications to any matter in question in instances where a County Legislation does not provide a criteria for regulating a matter within its mandate. She claimed that **Section 5(b)** of the **Nairobi City County** legislation had also enjoined the 2<sup>nd</sup> Respondent and its relevant institutions to enforce National Government policy on the regulation of betting, lotteries and gaming and therefore the County Legislation has not ousted the National Legislation but is merely betting, lotteries, gaming and other forms of gambling exclusively conducted within Nairobi City County.
26. On the Petitioners' contention that criminals tend to use the betting, lotteries and gaming industry as a conduct to money laundering and financing of terrorist activities thus posing a danger to national security, Ms. Ndegwa deponed that the submission is speculative and hypothetical as it is not backed by credible evidence. In any event that the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** does not oust the enforcement of the **Prevention of Terrorism Act No. 30 of 2012**, the **Prevention of Organised Crimes Act No. 6 of 2010** or the **Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009**, which are the relevant National Legislations regulating tourism, financing and money laundering. She relied on the decision in **Mwau & 3 Others vs Attorney General and 2 Others[2012] eKLR** in making the above submission.
27. She further deponed that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents published the **Nairobi City County Betting, Lotteries and Gaming Act** in the Nairobi City County Gazette as Supplement No. 10 of 2014 and therefore the allegations of its non-gazettement cannot stand.
28. It is her other contention that the **Transition Authority** vide Legal Notice No.137 of 2013 devolved betting, lotteries and gaming functions to Counties and that the 1<sup>st</sup> Respondent is already

enforcing the **Nairobi City County Betting, Lotteries and Gaming Act 2014** as it is being necessary for the County Government to collect revenue that it needs to undertake its constitutional functions.

29. She further claims that it was within the mandate of the 2<sup>nd</sup> Respondent to enact the **Nairobi City County Provisional Collection of Revenue Act** pending the enactment of the **Nairobi City County Finance Act 2014/2015** and that pending the enactment of the Finance Act in any financial year, the Cabinet Secretary for Finance may issue a provisional collection of revenue order to enable collection of taxes or duties stipulated in the Finance Bill till it is passed into law. She therefore concludes that the **Provisional Collection of Taxes Duties Act, The Nairobi City County Betting Lotteries and Gaming (Licenses and other charges) Regulations 2014** and the **Nairobi City Provisional Collection of Revenue Act No. 3 of 2013** are all legislation within the meaning of **Article 210(1)** of the **Constitution** and by thus a constitutional basis for the imposition of taxes and duties as prescribed in the said legislation.
30. In its submissions, the 1<sup>st</sup> Respondent further contends that it was enforcing payment of single business permits under **The Nairobi City County Betting, Lotteries and Gaming (Licenses and other charges) Regulations 2014**. That the said Regulations were published on 5<sup>th</sup> July 2014 in the Nairobi City County Gazette Supplement No. 16 as Legal Notice No. 4 of 2014. It claims that the publication complied with the provisions of **Article 199(1)** of the **Constitution** and the said Regulations have not been challenged as being unconstitutional.
31. It is also its contention that the Regulations were enacted pursuant to the provisions of **Section 12** of the **Nairobi City County, Betting, Lotteries and Gaming Act, 2014** which empowers the 1<sup>st</sup> Respondents' Executive Committee Member responsible for Trade power to make licensing requirements under the Act.
32. It is its further submission that the licensing is a service function by the 1<sup>st</sup> Respondent carried out through verification of any entry into the betting, lotteries and gaming industry so as to ensure that applicants who seek to undertake betting, lotteries and gaming functions meet the threshold required of the industry. That **Section 7** of the **Nairobi City County Betting, Lotteries and Gaming Act further** sets out the functions that the **County Betting, Lotteries and Gaming Licensing and Regulation Board** performs and that the Board renders a service for which the County is entitled to levy tax under **Article 209(4)** of the **Constitution**.
33. On the contention by the Petitioners that the enforcement of single business permits against the Petitioners amounts to double taxation, the 1<sup>st</sup> Respondent submitted that the **Nairobi City County Betting, Lotteries and Gaming (Licenses and other Charges) Regulations, 2014** do not occasion double taxation to the Petitioners because they are at liberty to apply to the National Government for a refund because the 1<sup>st</sup> Respondent has the mandate to regulate the gaming business within its county.
34. As regards the submission that the Parties ought to pursue the dispute settlement mechanisms provided for under the **Intergovernmental Relations Act**, the 1<sup>st</sup> Respondent claimed that the Transitional Authority had already devolved to counties the function to regulate betting, casinos and other forms of gambling and there is no other role it can play in this dispute.
35. It is its further submission that the **Nairobi City County Betting, Lotteries and Gaming Act 2014** does not oust the **Betting, Lotteries and Gaming Act (Cap 131)** from applying in Nairobi but that its case is that **Section 4** of the **County Legislation** imports the National Legislation to apply and regulate betting, lotteries and gambling exclusively conducted within the Nairobi City County and that **Section 5(b)** of the **County Legislation** enjoins the 1<sup>st</sup> Respondent and its relevant institutions to enforce national government policy on the regulation of betting, lotteries and gaming. That the county legislation does not in any way therefore regulate national betting, casinos and other forms of gambling.

36. The 1<sup>st</sup> Respondent therefore urged the Court not to find the county legislation as unconstitutional and to dismiss the Petitions with costs.

### **The 2<sup>nd</sup> Respondent's case**

37. The 2<sup>nd</sup> Respondent, the Attorney General did not file a response to the Petition but made legal arguments on the same.

38. It is his submission that under **Section 34 of Part 1 and Section 4(a) of Part II of the Fourth Schedule**, gaming business is a function or power within the concurrent jurisdiction of each of the two levels of Government and that no level of Government can arrogate itself the gaming business, without in one way affecting the operations of the other.

39. He further submits that **Section 7 of the Transition to Devolved Government** gave the **Transition Authority** the mandate to facilitate transfer of functions as provided for under **Section 15 of the Sixth Schedule to the Constitution** and its function cannot be overlooked by either the National or County Government. That it is also the **Transition Authority** that has the constitutional and statutory duty to facilitate transfer of functions and that the transfer of functions as contemplated by **Section 15(1) of the Sixth Schedule** is not an event but a process that must be undertaken within three years transition period referred to under **Section 15(1) of the Sixth Schedule to the Constitution** and in compliance with **Section 7 of the Transition to Devolved Government Act**. It is also his contention that **Section 7 of the Transition to Devolved Government Act** contemplates an analysis of the transferrable functions, the development of a framework for the comprehensive and effective transfer of functions and the development of a criteria necessary for the determination of the said function. He summed up his submission on this limb by stating that the Nairobi City County has enacted the impugned legislation prematurely and it cannot operationalize it.

40. It is his further contention that the 3<sup>rd</sup> Respondent, in enacting the impugned legislation, usurped the constitutional and statutory mandate of **Transitional Authority** and therefore the said legislation is unconstitutional. Further, that any actions of 1<sup>st</sup> and 3<sup>rd</sup> Respondents pursuant to the provisions of the impugned Act are equally unconstitutional.

41. He further claims that so long as the impugned legislation arrogates to the County Government a concurrent function without reference to the **Transitional Authority**, the impugned Act violates **Articles 6(2) and 189 of the Constitution** in so far as the requirement to cooperate and coordinate between the two levels of Government is concerned.

42. He submits further that the provisions of **Section 4 of the Nairobi City County, Betting, Lotteries and Gaming Act** is unconstitutional as it has violated **Article 191(2)(a) of the Constitution** by making the National Legislation i.e. Cap 131 subordinate to the county legislation. That the provisions of Cap 131 cannot be ousted by a county legislation because Cap 131 is a national legislation applying uniformly across the country and its continued application is necessary for the maintenance of national security among other matters.

43. In the end, the 2<sup>nd</sup> Respondent supports the Petitions and urged the Court not to visit costs upon him while dismissing them.

### **The 3<sup>rd</sup> Respondent's case**

44. The 3<sup>rd</sup> Respondent, the Nairobi City County Assembly, opposes the Petition through the Replying Affidavit of its clerk, Mr. Muvengei Jacob Ngwele, sworn on 21<sup>st</sup> July 2014.

45. According to Mr. Ngwele, the concurrency of the regulatory and licensing powers of betting, lotteries, gaming and related activities pre-exist the devolved government structures set out in the

Constitution. On that point, he referred the Court to the provisions of Paragraph (ii) of the proviso to **Section 5(3), Section 57(1) of Cap 131 and Section 162(f) of the Local Government Act (Cap 265 now repealed)** as well as the Schedule to the **Local Government (Single Business Permit) Rules, 2008**.

46. He also states that the Petitions were not justiciable because the Petitioners had not demonstrated any interest in the regulation or licensing of betting lotteries activities and do not have the *locus standi* to institute the proceedings.

47. He further deposes that Courts do not have jurisdiction to declare any County Legislation null, void or unconstitutional on the ground that it conflicts with National Legislation even where the conflicts are established. That in that regard County Legislation supersedes National Legislation except where the conditions set out in **Article 191** of the **Constitution** are met and in addition, the National Legislation, cannot supersede County Legislation firstly because it pre-existed the creation of County Governments and could therefore not have been enacted with the specific aim set out in **Article 191** of the **Constitution** are met and in addition, that the National Legislation shared regulatory and licensing powers between national and local governments for more than 40 years implies that the conditions set out in **Article 191(3)** of the **Constitution** do not apply to the **Nairobi City County Betting, Lotteries and Gaming Act, 2014**.

48. It is his contention that the National Legislation was not enacted with the aim of maintaining national security but was enacted with the specific aim of providing for the control and licensing of the betting and gaming business. That the Court cannot read beyond the preamble of the Act and that it is merely speculative of the Petitioners to assert that where County Legislation supersedes National Legislation over National Legislation national security would necessarily be threatened. In any event, claims that National Assembly had enacted specific laws to safeguard national security concerns raised by the Petitioner such as the **Prevention of Terrorism Act of 2012, Prevention of Organised Crimes Act of 2010** and **Proceeds of Crime and Anti-Money Laundering Act of 2009**.

49. He also deposes that the Transition Authority had transferred the betting function from the national to County Governments vide Legal Notice No. 16 of 201 and so County Governments were properly exercising that function. Further, that **The Nairobi City County Betting, Lotteries and Gaming Act 2014** was published in the Kenya Gazette of 19<sup>th</sup> May 2014 vide the Nairobi City County Gazette Supplement No.10 and so any complaints of non-gazettment are baseless.

50. Mr. Muvengei therefore urged the Court to dismiss the Petition with costs.

### **The Interested Party's case**

51. The Transitional Authority was enjoined as an Interested Party on 27<sup>th</sup> January 2015 and in response to the Petition, filed a Replying Affidavit sworn by Kinuthia Wamwangi, its Chairman, sworn on 26<sup>th</sup> January.

52. He deposed that the matters raised in the Petition involve aspects of transition to the devolved system of Government within the mandate of the Transitional Authority. That in that regard on 1<sup>st</sup> February, 2013 the Interested Party vide Legal Notice 16 of 2013 transferred to the County Government certain functions in accordance with the provision of **Section 23(1)** of the **Transition to Devolved Government Act** and the functional analysis and competency assignment of the betting control and licensing is a concurrent function and thus an intricate process involving the two levels of Government.

53. He further states that that the Interested Party has numerously facilitated consultations between the **Betting Control and Licensing Board** and other key players in the industry including the Petitioners and Counties officials and that out of the various stakeholders meeting facilitated by the Interested Party, it was resolved at a meeting held from 8<sup>th</sup> to 11<sup>th</sup> July 2014, at Sentrim

Elementeita Lodge that the National Government would be responsible for:

- a. development of standards and norms
- b. Regulation of the gaming industry
- c. Licensing of the gaming activities, casino (public gaming licenses)
- d. Vetting, security checks and due diligence
- e. Enforcement and compliance, that is spot checks and daily

supervision of casinos

- f. Periodic monitoring and evaluation
- g. Statutory reporting
- h. Authorization of prize competitions a cross cutting several

Counties (on promotion of product and services)

1. Authorization of national lotteries
10. Authorization of on the course totali-sators
11. Authorization of the off course totali-sator
12. Authorization of book makers and
13. On line gaming

54. On the other hand the County Governments would be responsible for;

- a. Licensing of business premises
- b. Enforcement and compliance. That is spot checks, daily supervision of casinos
- c. Monitoring and evaluation of gaming activities
- d. Licensing of premises for totali-sators
- e. Authorization and issuance of pool table permits within the counties
- f. Authorization of prize competition for promotions within the counties
- g. Authorization of permit for amusement machines
- h. Authorization of lotteries within the counties; and
- i. Enforcement of compliance within the county e.g spot of checks on betting and other forms of gambling licensed by the County Government.

55. Further, the concurrent functions were delineated as follows;

- a. Implementation and customization of national policies
- b. Periodic monitoring and evaluation
- c. Legislation; and
- d. Handling of complaints and arbitration.

56. According to Mr. Wamwangi, therefore the subject matter in this Petition is a matter involving devolved governance and therefore requires settlement by both levels of government as provided for under **Article 189(3) and (4) of the Constitution** and he therefore proposes that the parties should have pursued the dispute resolution mechanism provided for under the **Intergovernmental Relations Act of 2012** before filing the present Petitions.

### **Determination**

57. The several issues raised in this Petition boil down to one large question; whether the **Nairobi City County Betting, Lotteries and Gaming Act 2014** is unconstitutional and it has been alleged in that regard that the said statute is unconstitutional on three fronts; firstly, that the 2<sup>nd</sup> Respondent exceeded its mandate as provided for under **Articles 209 and 210 of the Constitution** in enacting the impugned legislation; secondly, that the impugned legislation is in conflict with **Cap 131 Laws of Kenya** because **Section 4** thereof purports to make a County Legislation

prevalent over National Legislation thereby violating **Article 191** of the **Constitution** and lastly, that the County Legislation was not gazetted as required under **Article 199(1)** of the **Constitution**.

58. The determination of the above issue necessitates an examination of the construction of the relevant Articles of the Constitution which deal with the distribution of functions between National and County Governments and it is therefore important to act out the guiding principles in that regard.

#### **Guiding principles on the interpretation of the Constitution vis-a vis a Statute**

59. On the question of interpretation of a Constitution, in the case of **South Dakota vs North Carolina 192 US, 268 (1940) L ED** the Supreme Court of the USA stated at paragraph 465;

***“Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument.”***

The above principle was also enunciated in the case of **Tinyefunza vs Attorney General Const. Petition No. 1 of 1996 (1997 UGCC 3)** where the Court of Appeal of Uganda stated that;

***“The entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.”***

60. Further, it is a cardinal principle that in interpreting the Constitution vis-à-vis a provision of a statute, there is the general presumption that the Statute is constitutional unless proved otherwise. In that regard in **Hambarda Wakhana vs Union of India AIR (1960) AIR 554** it was observed as follows;

***“In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”***

In addition, here is also the principle that in construing the constitutionality or otherwise of a statute, regard must be paid to the purpose and effect of the legislation in question. Thus Court of Appeal in **Olum and Another v Attorney General of Uganda (2002) 2 EA 508, 518** held that;

***“To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”***

I am persuaded by the reasoning in the above cases and will apply the principles set out above in determining the Petition.

#### **Have Article 209 and 210 of the Constitution been violated?**

61. Turning back to the issue before me, it was the Petitioners contention that the County Legislation

is unconstitutional because the 3<sup>rd</sup> Respondent exceeded its mandate in enacting the said legislation. That the 1<sup>st</sup> Respondent does not have the mandate to levy taxes not authorized under **Article 209** and **210** of the **Constitution** and that the taxes levied under the County Legislation are neither property, entertainment nor taxes for a service rendered to the Petitioners by the Nairobi City County Government.

62. In that regard, **Article 209 (3)** of the **Constitution** provides that a County Government may impose the following taxes;

- a. **Property rates**
- b. **Entertainment taxes, and**
- c. **Any other tax that it is authorized to impose by an Act of Parliament**

**Article 209(4)** then states that “*the National and County Governments may impose charges for the services they provide.*” **Article 210(1)** is also to the effect that “*no tax or licensing fee may be imposed waived or varied except as provided by legislation*”

63. The above provisions of the law are plain and straightforward and require no more than a literal interpretation; that under **Article 209(3)** of the **Constitution**, a County Government has powers to impose property and entertainment tax. It also has powers to impose any other tax that has been authorized by an Act of Parliament. Undoubtedly, **Article 209(4)** of the **Constitution** also confers County Governments with discretionary powers to impose charges for services rendered but such a charge can only be imposed to the extent that it is provided in an existing legislation.

64. Of importance to this Petition also is the provision of **Article 210(1)** of the **Constitution** which has then made it clear that no tax can be imposed or waived unless it is provided for by legislation.

65. In the above context, it is undisputed by all the Parties that the 1<sup>st</sup> Respondent is not levying property or entertainment tax under the impugned County Legislation. It is also clear that an Act of Parliament authorizing the 1<sup>st</sup> Respondent to impose a tax in the betting, lotteries and gambling business does not exist. If I understood the Petitioners’ complaint, it is their case that the 1<sup>st</sup> Respondent is imposing a tax/fee that is beyond its mandate as the 3<sup>rd</sup> Respondent ought not to have enacted the **Nairobi City County Betting, Lotteries and Gaming Act 2014** since there is a national legislation regulating the betting, lotteries and gambling business.

66. In that regard and to my mind therefore, there are two questions that I must answer. Firstly, the question whether the County Government is providing a service in the betting, lotteries and gambling business so that it may impose a charge in that regard. Secondly, the question whether the impugned County Legislation has made provisions for imposition of a tax and or fee in the said business.

67. As regards the first issue above, I heard the 1<sup>st</sup> Respondent to submit that it is rendering the service of licensing betting, lotteries and gaming businesses as carried out by the Petitioners and hence has the mandate to impose a tax for that service. With respect, I do not agree with the 1<sup>st</sup> Respondent’s submission on that issue.

68. I say so because, **Black’s Law Dictionary, 8<sup>th</sup> Edition** defines ‘Licensing’ as follows; **a government’s body process of issuing a license.** ‘Licence’ has also been defined as “**a permission usually revocable to commit some act that would otherwise be unlawful.**” Given these definitions, it follows that the act of licensing cannot be deemed as a service rendered by the 1<sup>st</sup> Respondent. Licensing is a legal process and is not an event and before a license is issued an applicant makes an application which is then considered through a legal process which involves the application of various relevant rules and regulations which are already set out.

69. In the above regard, it is difficult to appreciate what services the 1<sup>st</sup> Respondent is providing the Petitioners in their business to warrant the imposition of a charge in that regard. Licensing cannot be a service under **Article 209(4)** and that is all there is to state at this stage but subject to what I shall state later in this judgment.
70. On the second question, **Section 6 of the Nairobi City County Betting, Lotteries and Gaming Act** establishes the **County Betting Licensing and Regulations Board**. Under **Section 8(1)** of the **Act**, the Board is granted powers to issue licenses and permits in accordance with the regulations made thereunder. In addition, **Section 12** of that Act has mandated the County Executive Committee Member for finance to make regulations prescribing the procedures for applications for licenses.
71. **Black’s Law Dictionary** 8<sup>th</sup> Edition defines ‘licensing fee’ or ‘license tax’ as; *“a monetary charge imposed by a governmental authority for the privilege of pursuing a particular occupation, business or activity.”*
72. Further, Pursuant to the provisions of **Section 12**, of the Act aforesaid the County Executive Member for Finance made the **Nairobi City County Betting, Lotteries and Gaming (Licenses and other charges) Regulations 2014** and **Section 2** of the said **Regulations** provides for the payment of fees and charges for services, permits and licenses. At **Section 5**, thereof, is a Schedule which sets out various fees, licenses and permits an applicant ought to pay to the 1<sup>st</sup> Respondent in respect to betting, lotteries and gambling business conducted within the Nairobi City County.
73. It is therefore clear that the **Nairobi City County Betting, Lotteries and Gaming Act** has provided for a licensing fee and or license tax to be charged to the applicants of carrying out the betting, lotteries and gaming business within the Nairobi City County and turning back to **Article 209(3)** as read with **Article 209(4)** of the **Constitution**, any tax to be imposed by a County may only be imposed as authorized **“an Act of Parliament”** and not a County Legislation. I will therefore address that issue while determining the question whether there is any conflict between the National and County Legislations.

**Is there any conflict between the National and County Legislation?**

74. It was the Petitioners contention that the County legislation is in conflict with the National Legislation i.e Cap 131 Laws of Kenya because **Section 4** of the County Legislation has made a provision that the County legislation prevails over National Legislation and in so doing violates the provisions of **Article 191** of the **Constitution**. The question that then arises is whether there is a conflict between the County and National Legislation and if so what is the effect of that conflict, if at all?
75. **Article 185** of the **Constitution** provides that the legislative authority of a County is vested in its County Assembly. The County Assembly is mandated to make laws that are necessary for, or incidental to the effective performance of the functions and exercise of the powers granted in the **Fourth Schedule** to the **Constitution**. Part 1 and Part II of that Schedule isolates the functions of the National and County Governments respectively. **Section 34** of the **Fourth Schedule** provides that the National Government has the function of; *“national betting, ..... and other forms of gambling”* while **Section 4 (a)** of **Part II** of the **Fourth Schedule** provides that the County Government has the function of *“cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling.”*

**Article 186(2)** of the **Constitution** further provides that *“a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.”* There is no doubt therefore that the function of betting, casinos and other forms of gambling is a concurrent function between the two levels of Government.

76. In that regard and according to Ms. According to Lillian Ndegwa, in exercise of its mandate as provided for under **Section 4(a)** of **Part II** of the **Fourth Schedule** to the **Constitution**, the 3<sup>rd</sup> Respondent enacted the **Nairobi City County Betting Lotteries and Gaming Act as Act No. 5 of 2014** as a County legislation to control the business of betting, lotteries and gaming activities within the Nairobi City County. The said Act was assented to on 15<sup>th</sup> May 2014. The objects of the Act are stated at **Section 5** of the **Act** as follows;

*“(a) give further effect to paragraph 4 of the Fourth Schedule to the Constitution which mandates the County Government with the function of betting, lotteries and gaming regulation and licensing;*

*(b) to ensure that the national Government policy on the regulation of betting, lotteries and gaming as set out in the national legislation is implemented at the county level in accordance with the requirements of the Constitution to the effect that Government at either level shall among other things, as appropriate, implement the legislation of the other level of Government; and*

*(c) to provide for the county institutions and for procedures applicable to the regulation and licensing of betting, lotteries and gaming within the County.”*

77. The Petitioners particularly have quarrels with **Section 4** of the **Act** which they claim ousts the provisions of the National Legislation i.e Cap 131 Laws of Kenya and makes it subsidiary to the County Legislation hence in violation of **Article 191** of the **Constitution**. The issue at hand therefore is whether the County Legislation as enacted violates **Article 191** of the **Constitution**.

78. At this stage, it is imperative to reproduce the provisions of **Section 4** of the County Legislation as enacted which provides that;

*4(1) The provisions of the National Betting, Lotteries and Gaming Act shall apply to any matter relating to betting, lotteries and gaming to the extent that this Act does not make provision for any such particular matter.*

79. As can be seen, the above and by simple interpretation, **Section 4(1)** above purports to subordinate the “**National Betting Lotteries and Gaming**” to the County Legislation and that is why **Section 4(2)** goes further to provide that the National Legislation would apply in the following instances;

*“(a) Offences created under that legislation and the punishment prescribed for such offences in such national legislation.*

*(b) Prohibitions as against certain types of activities.*

*(c) The regulation of certain activities, except that such regulation shall be carried out solely by the institutions of the Nairobi City County where such activities fall within the boundaries of the County.”*

80. To my mind the above provisions would only create confusion in the mind of the public because while both levels of Government undoubtedly have concurrent functions in the matter at hand, **Article 191(2) (3) and (4)** of the **Constitution** provide for the circumstances in which National Legislation prevails over County Legislation.

81. For avoidance of doubt, they provide as follows;

*“(1) ...*

2. *National legislation prevails over county legislation if—*

- a. *the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or*
- (b) the national legislation is aimed at preventing unreasonable action by a county that— Conflict of laws.*
- (i) is prejudicial to the economic, health or security interests of Kenya or another county; or*
- (ii) impedes the implementation of national economic policy.*
- (3) The following are the conditions referred to in clause (2)*
- (a) —*
- (a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;*
- b. *the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—*
- (i) norms and standards; or*
- (ii) national policies; or*
- (c) The national legislation is necessary for—*
- (i) the maintenance of national security;*
- (ii) the maintenance of economic unity;*
- (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;*
- (iv) the promotion of economic activities across county boundaries;*
- (v) the promotion of equal opportunity or equal access to government services; or*
- (vi) the protection of the environment.”*
- (4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.*

82. Looking at the above provision, it requires no more than a literal interpretation as it is simple and plain. To my mind, its import is that national legislation would apply if it applies uniformly throughout Kenya and satisfies the conditions specified in **Article 191(3)**. Secondly, National Legislation would prevail if it is aimed at preventing unreasonable action by a County. Thirdly, National Legislation would prevail if a County legislation is prejudicial to the economic, health or security interests of Kenya or another County and lastly, in circumstances where the County Legislation impedes the implementation of national economic policy. Applying all these conditions in the instant Petition, I would opine as follows;

83. Firstly, while it is obvious that **Cap 131 Laws of Kenya** applies uniformly throughout Kenya, I

also have no doubt that the said National Legislation is also necessary for the maintenance of national security because betting, lotteries and gaming business by their very nature can be a threat to national security. I say so because as correctly submitted by the Respondents it is now a matter of common knowledge and I dare add, that I take judicial notice of that fact, that terrorists and other agents of mayhem routine use all manner of businesses to sanitise money to be used in their heinous activities. This issue will be revisited shortly for emphasis.

84.Regarding the implementation of national economic policy, while to suggest that the County Legislation impedes such a policy would be far too outlandish in the present circumstances, the need for harmony in emotional economic policies including in the collection of taxes ought to be harmonised and geared inter-alia towards the avoidance of double taxation.

85.But that is not the end of the matter, I heard the Petitioners to be saying that they will be prejudiced and subjected to double taxation as they will have to apply for licenses from the two levels of Government.

86.On the question of double taxation, I have seen the provisions of the National Legislation **Section 3** thereof establishes the **Betting, Control and Licensing Board**. Under **Section 4(1)** of the **Act**, the Board has the powers to issue licences and permits for the purposes of carrying out any betting, lotteries and gaming activity. Similarly, **Section 6** of the **Nairobi City County Betting, Lotteries and Gaming Act** establishes a **County Betting, Licensing and Regulation Board**. Under **Section 8 (1)** of the **Act**, the Board has the powers to issue licenses and permits to persons desirous of carrying out betting, lotteries and gaming business and or activity within the Nairobi City County. It is therefore obvious that the Petitioners or any other person who is desirous of carrying out a betting, lotteries and Gaming business must apply for the licences and or permits from the two levels of government hence the prejudice complained of by the Petitioners.

87.To resolve that issue, I will revert to the depositions made by Mr. Wamwangi, the Chairman of the Interested Party, and for good reason.

88.The transition from the National to County Government was to be overseen by a body known as the **Transition Authority** established under **Section 4(1)** of the **Transition to Devolved Government Act, 2012**. The functions of the Authority under **Section 7(2)** of that Act are *inter alia* to ***‘facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments’***.

89. With that mandate in mind, vide Legal Notice No. 177 of 2013, the **Transition Authority** approved the transfer of functions specified thereunder to the Nairobi City County Government with effect from 9<sup>th</sup> August, 2013. One of the functions transferred to the 1<sup>st</sup> Respondent was the enforcement and compliance i.e. spot checks and daily supervision of casinos, authorization of lotteries within the County and spot checks on betting and other forms of gambling licensed by the County Government. On the other hand, the National Government would be responsible for the licensing of gaming activities, casino (public gaming licenses) and online gaming as is provided under **Section 34** of **Part 1** of the **Fourth Schedule** while Nairobi City County Government would be responsible for County betting, casinos and other forms of gambling.

90.In addition to the above, the Interested Party facilitated various stakeholders forums in which several deliberations were made. That is why in his Affidavit, Mr. Wamwangi deposed as follows;

***“(1) That on the 13<sup>th</sup> of May 2014, the Authority facilitated an inter-agency consultative meeting at the Authority’s Offices at Extelecoms House, Nairobi (“The Extelecoms House Meeting 1”) and representatives attended;***

- a. ***The authority Chairman, and relevant members and staff;***
- b. ***Relevant staff of the BCLB;***
- c. ***The Chief Executive officer of the Petitioner;***

- d. *Relevant County Executive Committee members and or other relevant County staff for Kisumu County, Nairobi City County, Kilifi County, Mombasa County, Kiambu County, Nakuru County; the six out of seven Counties where BCLB activities were previously executed;*
- e. *Commissioner and other relevant staff for the Commission for Revenue Allocation (CRA);*
- f. *Ag. Director and other staff of the Ministry of Devolution and Planning;*
- g. *Assistant Manager, Kenya Revenue Authority; and*
- h. *Senior Deputy Secretary, Ministry of Interior and Co-ordination of National government (State Department of Co-ordination).*

(2) *That at the Extelecoms House Meeting 1 it was observed that;*

(a) *The Betting function should be fast tracked but with a commitment by all parties to facilitate the settling of emerging transitional challenges harmoniously and that the Authority continues to guide and provide the necessary direction in this regard;*

(b) *The State Department of Co-ordination was concerned that in devolving the function, matters relating to security and financing of terrorism must be considered;*

(c) *The BCLB underlined the need to ensure that the function is regulated by a central oversight body to ensure the function is carried out in the best interests of the public in a crime free environment;*

(d) *The Petitioner recommended a classification of the gaming activities into low and high risk with respect to National security, and the National Government carries out policy, standards, regulatory functions and licensing.*

(e) *The authority recommended that under the County Government functions;*

i. *“Issuance of pool table permits’ be expanded to include ‘amusement machines’.*

ii. *The authorization of lotteries within the Counties be a function of the National Government.*

iii. *Issuance of premise fees and regulation of office hours be a function of the County Governments;*

iv. *There would be no ‘National Casino’ because all casinos are domiciled in a particular County.*

v. *The vetting and due diligence be a function of the National Government.*

vi. *Gaming supervision and enforcement be a concurrent function;*

*AND the Stakeholders agreed that the function assignment matrix be revised to reflect the Authority’s recommendations.*

3. *That at the Extelecoms House Meeting 1 the emerging challenges were noted inter alia as;*

a. *The probability that if not well controlled, the betting industry which controls a lot of*

money may be an avenue for money laundering , and also facilitate terrorism activities; and

- b. *Due to the concurrency, the necessity for clarity in unbundling and mapping out all activities in order to bring out clarity on function assignment to both levels of Government;*
  - c. *Enforcement of regulatory mechanisms in order to protect consumers from exploitation; and*
  - d. *Regulation of tourist gambling.*
4. *That by reason of the above concerns, the parties recommended;*
- a. *An inter-agency technical committee (the Technical Committee), to analyze the transition challenges and made recommendations;*
  - b. *The technical committee would draw representation from the Authority, BCLB, State Department for Co-ordination of National Government, Ministry of Devolution and Planning, the national Treasury, County Executive Committee Members for the Participating Seven Counties, Council of Governors, Commission for the Implementation of the Constitution, Commission on Revenue allocation, Association of Gaming Operators Kenya and Kenya Revenue Authority.*
  - c. *That BCLB expedites the finalization of the National Policy and Legal Framework to ensure effective management and control of gaming activities.*
  - d. *That the BCLB and or the Ministry fast tracks constitution and operationalization of the intergovernmental sectoral forum for consultation and co-operation between the two levels of government; and*
  - e. *The Authority spearheads a more comprehensive functional analysis/unbundling of the betting function in order to bring clarity on function assignment and transfer to the two levels of Government.*
5. *That on the 13<sup>th</sup> June 2014, another meeting was held at the authority's offices at Extelecoms House, Nairobi ('The Extelecoms House Meeting 2') and comprised representation for the authority, AGOK, Kiambu County, Nairobi County, the Kenya Revenue Authority, and the BCLB. That during this meeting, the draft of the terms of reference (ToRs) for the technical committee prepared by the authority was tabled for improvement and adoption; and consensus reached on the ToRs for the technical committee including.*
- a. *To clearly unbundle the functions assigned to the functions to the National and County Governments and determine the budgets/resources assigned to these functions;*
  - b. *To identity and comprehensively analyse the challenges facing the sector.*
  - c. *Review of existing, draft laws and regulations in the sector;*
  - d. *To benchmark on best practices to achieve optimal performance in the sector; and*
  - e. *To provide a comprehensive report and recommendations.*
6. *That furthermore, the Extelecoms House Meeting 2 proposed completion of the work within three months from the 11<sup>th</sup> of June 2014, and further requested the Authority to write a letter to all the Counties requesting them to put on hold any activity relating to the function until the technical committee completed its work.*
7. *That from the 8<sup>th</sup> – 11<sup>th</sup> July 2014, the Authority facilitated a retreat of the technical committee at the Sentrim Elementaita (the Sentrim Elementaita Meeting). The technical committee deliberated on the ToRs and prepared a report. The technical committee took cognizance that the Function was concurrent and the overall objective, therefore, was to ensure that the services in the sector continue being rendered seamlessly and that the public is protected from the undesirable outcomes of gaming activities.*
8. *That the Sentrim Elementaita Meeting determined as follows with regard to functional assignment to National Government, county Government and Concurrent functions; The*

*National Government would be responsible for;*

- a. *Development of standards and norms;*
- b. *Regulation of the gaming industry;*
- c. *Licensing of the gaming activities, casino (public gaming licenses);*
- d. *Vetting, security checks and due diligence;*
- e. *Enforcement and compliance, that is spot checks, and daily supervisions of casinos;*
- f. *Periodic monitoring and evaluation;*
- g. *Statutory reporting;*
- h. *Authorization of prize competitions cross cutting several Counties (on promotion of product and services);*
- i. *Authorization of national lotteries;*
- j. *Authorization of course Totali-sators;*
- k. *Authorization of the off course Totali-sator;*
- l. *Authorization of bookmakers; and*
- m. *On line gaming*

9. *That the County Governments would be responsible for;*

- a. *Licensing of business premises;*
- b. *Enforcement and compliance. That is spot checks, daily supervisions of casinos;*
- c. *Monitoring and evaluation of gaming activities;*
- d. *Licensing of premises for totali-sators;*
- e. *Authorization and issuance of pool table permits within the Counties;*
- f. *Authorization of prize competition for promotions within the Counties;*
- g. *Authorization of permit amusement machines;*
- h. *Authorization of lotteries within the Counties; and*
- i. *Enforcement of compliance within the County e.g. spot checks on betting and other forms of gambling licensed by the County Government.*

10. *That the concurrent functions were delineated as follows;*

- a. *implementation and customization of national policies;*
- b. *Periodic monitoring and evaluation;*
- c. *Legislation; and*
- d. *Handling of complaints and arbitration.*

11. *That the Sentrim Elementaita Meeting resolved that its Report would be subjected to the Sectoral Intergovernmental Forum for adoption and subsequent formalization of the agreement reached on the assignments of the various components for the function.”*

91. I decided to reproduce the above depositions verbatim and to add that at the time of writing this judgment, I did not have the final resolution and or outcome made by the Sectorial Intergovernmental Forum. This therefore means that while Transition Authority within its mandate has attempted to resolve the problem concerning betting, lotteries and gaming activities licensing the matter remains unresolved hence this Petition. I will make appropriate orders later in the judgment.

### **Whether the Nairobi City County Legislation was gazetted**

92. It was the Petitioners' contention that the **Nairobi City County Betting, Lotteries and Gaming Act 2014** was not gazetted as mandated under **Article 199** of the **Constitution** and therefore it did not take effect.

93. **Article 199 (1)** of the **Constitution** is crystal clear that “*a County Legislation does not take effect unless published in the Gazette*”. In addition, **Section 25 (1)** and **(2)** of the **County**

**Government Act** stipulates that;

**“25.(1) A legislation passed by the County Assembly and assented to by the governor shall be published in the County Gazette and Kenya Gazette within seven days after assent.**

**(2) Subject to subsection (3), the County Assembly legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.”**

94. From the evidence before me, the **Nairobi City County Betting, Lotteries and Gaming Act** was gazetted in the Special Issue of the **Nairobi City County Gazette Supplement No. 10** as **Nairobi City County Betting, Lotteries and Gaming Act No. 5 of 2014** published on 19<sup>th</sup> May 2014 and produced as annexure ‘LWN 5’ in the affidavit of Lillian W. Ndegwa sworn on 16<sup>th</sup> January 2015. I am therefore satisfied that the impugned statute satisfied the requirement of **Article 199** of the **Constitution**.

#### Other issues

95. Before I conclude this judgment, I also heard the Petitioners to claim that the 1<sup>st</sup> Respondent was using the provisions of a Bill in licensing the Petitioners. I have already stated that the Bill was enacted and was gazetted as required under the law and is therefore operational.

96. Further, the **Provisional Collection of Taxes and Duties Act Cap 415 Laws of Kenya** provides at **Section 2** that;

#### “Provisional collection orders

***If a Bill is published in the Gazettee whereby, if such bill were passed into law, any tax or duty, or any rate, allowance or allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any specified provisions of the Bill relating to taxes or duties shall have effect as if the bill were passed into law.”***

97. In the event that a law does not pass as anticipated, the **Provisional Collection of Taxes and Duties Act** has made appropriate provisions as follows;

#### “Refund of excess tax or duty

***Without prejudice to any provision of any law for the time being in force relating to the collection of any tax or duty, being a provision enabling a refund to be made of any tax or duty paid in compliance with such law and any order made under the Act in excess of the tax or duty payable immediately after such order has ceased to have effect, any such excess may, if it has not been so refunded, or to the extent to which it had not been so refunded, be refunded by either of the following methods-***

- a. ***In the manner set out in the first proviso to Section 15(1) of the Exchequer and audit Act (Cap.412); or***
- b. ***By being charged on and paid out of the consolidated fund.”***

98. Having said so however, I am satisfied that the County Legislation was passed without awaiting the outcome of the processes put in place by the Transition Authority and before a clear delineation of the concurrent functions elsewhere set out above. I say so because the language of **Section 4(1) and (2) of the County Legislation** does not seem to flow from the discussions at the Sentrim Elementaita Lodge meeting not indeed **Article 191(2) (3) and (4) of the Constitution**. Before coming to the end however, I deem it fit to reproduce **Article 191(5) of the Constitution**. It provides as follows;

(5) *“In considering an apparent conflict between legislation*

*of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.”*

99. What is before me is an obvious conflict of legislations and I am certain that the delineation of functions both in the Sentrim Elmentaita Meeting and **Section 4(1) and (2) of the County Legislation** only fuel that conflict because it is unclear what **“Enforcement of compliance e.g. spot checks on betting and other forms of gambling licensed by the County Government”** means when the licensing function has not been explicitly given to the County Government save that it can license business premises including those in the said business. I would have expected language such as **“licensing of and enforcement of compliance in the betting, gaming or lotteries business”** or stating categorically that **“licensing of casinos, gaming activities including online gaming shall be functions of the National Government”** and similar language used in the specific functions assigned to the County Governments e.g. **“licensing of licensing of business premises in which gaming, casino or betting and lotteries business are conducted shall be the function of a County Government”**. The said clarity is lacking as stated elsewhere above and therein lives the conflict.

### Conclusion

100. Having stated as above and mindful of my duty under **Article 191(5) of the Constitution**, it is the position of this Court that the dispute before me has not crystallised to the level where I should make a reasonable interpretation of the conflicting provisions that I have highlighted elsewhere above. Instead, I agree with the Interested Party that since it is its care mandate to resolve issues arising from the transition to devolved Government, **Article 189(4) of the Constitution** is relevant to the present dispute. It provides as follows;

*“National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”*

101. The Legislation that is applicable is the **Intergovernmental Relations Act 2012** as read with **Article 189(5)** above as well as **Article 159(2)(1) of the Constitution**.

102. The Legislation that is applicable is the intergovernmental Relation Act 2012 as read with **Article 189(5)** above as well as **Article 159 (2) (c) of the Constitution**.

### Disposition

103. In the above context, the proper reliefs to grant in this matter are that an interim judgment is entered in the following terms;

(i) Let this dispute be referred to the Transition Authority to clarify and delineate the licensing for betting, lotteries and gaming activities as between the National and County Governments.

(ii) The Transition Authority shall conclude the resolution of the dispute within days with the participation of all affected parties and subjected to the Sectoral Intergovernmental forum for adoption and formalization of any agreement reached. In doing so, the findings made in this judgment shall be taken into account.

(iii) Should the Sectoral Intergovernmental Forum have concluded its work as at the date of this judgment, its report shall be circulated to all affected parties and the Transition Authority shall in any even file a report on all resolutions reached including on any amendments to existing relevant legislation (National and County) within 90 days of this judgment.

(iv) In the meantime, the operation of the Nairobi City County, Betting, 2014 shall be suspended until further orders of this Court.

(v) This matter shall be mentioned after 90 days for final orders and judgment of this Court including on the matters of costs.

(vi) Any Party is at liberty to apply.

104.Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Macharia for 1<sup>st</sup> and 2<sup>nd</sup> Petition

No appearance for 3<sup>rd</sup> Petitioner

Miss Barasa for 1<sup>st</sup> Respondent

Mr. Moimbo for 2<sup>nd</sup> Respondent

Mr. Thiankolu for 3<sup>rd</sup> Respondent

No appearance for Interested Parties

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**