



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 56 OF 2014

BETWEEN

1. ASSOCIATION OF GAMING OPERATORS-KENYA
2. AFRICAN RAFIKI LIMITED
3. APOLLO LANDINGS LTD
4. BLOOMING STARS LTD
5. CHABLIS LTD
6. COTES DU RHONE LIMITED
7. FAMILY TOWN LIMITED
8. FASTRACK LEISURE ENTERTAINMENT
9. FINIX CASINO LTD
10. GAMAX (K) LTD
11. GOLDENKEY LTD
12. HARDWICK LTD
13. JARVIS LTD
14. KEN BOOKMAKERS (2002) LTD
15. KENYA CHARITY SWEEPSTAKE LIMITED
16. KENYA SPORTS BET LTD
17. KILUA LTD
18. LEISURE CASINOS LTD
19. MAGIC SLOTS LTD
20. MALINDI MANAGEMENT STRATEGY LTD
21. MANGA PWANI LTD
22. MOORGATE LTD
23. NAKURU LUCKY LTD
24. PARADISE INVESTMENT AND DEVELOPMENT KENYA LTD
25. PLYBOY CASINO LTD
26. RESORT KENYA LIMITED
27. SLOT GAME (K) LTD
28. SOUTHCAPES INVESTMENT LTD
29. WADERFUL JACKPOT LTD
30. WONDERLAND CASINO LTD
31. PEVANS EAST AFRICA
32. EASTLEIGH CASINO LTD
33. SEBORGAS LEISURE LIMITED
34. ACES PALACE LIMITED
35. BELCOY LEISURE LIMITED

36. JUMBO JACKPOT KENYA LIMITED
37. AGEN GAMING LOGISTICS LTD
38. GAMING LOGISTICS LTD
39. LUCKY TO YOU LTD
40. GAME ON SOLUTIONS LTD
41. LAKE VICTORIA SAFARIS LTD
42. REGENCY SLOTS LTD PETITIONERS

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY

OF FINANCE 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

AND

COMMISSION ON REVENUE

ALLOCATION 1ST INTERESTED PARTY

BETTING, CONTROL AND

LICENSING BOARD 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The 1st petitioner is a registered society which, as the name suggests, is the umbrella body for companies involved in the gaming industry. Some of the companies it represents are the 41 other petitioners.
2. The Kenya Revenue Authority (“KRA”) is established under the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)* and is the body charged with the collection and receipt of all revenue on behalf of the State. It has the responsibility of administering various taxes and implementing taxation measures enacted through legislation.
3. The Commission on Revenue Allocation (“the CRA”), the 1st interested party, is an independent Commission established under **Article 215** and **216** of the Constitution and its key mandate is to recommend the basis for sharing of revenues raised between the National and County governments. Although it was served with court process, it did not participate in these proceedings.
4. The 2nd interested party, the Betting Control and Licencing Board (“the BCLB”), is established under the *Betting, Lotteries and Gaming Act (Chapter 131 of the Laws of Kenya)*. It is the regulatory body with the responsibility of, inter alia, controlling and licensing betting and gaming within Kenya.
5. The petitioners’ case concerns the manner in which winnings from betting and gaming are taxed. The petitioners challenge the constitutionality of **sections 9, 11, 14, 15 and 23** of the *Finance Act (Act No. 38 of 2013)* which amended **sections 2, 10, 34, 35 and Head B** of the **Third Schedule** of the *Income Tax Act (Chapter 479 of the Laws of Kenya)*. The effect of these amendments is to

include ‘*winnings from betting and gaming*’ as one of the payments subject to 20% withholding tax. Under **section 1(d)** of the **Act**, the amendments took effect on 1st January 2014.

6. The gravamen of the petitioners’ case is that the **Finance Act, 2013** is unconstitutional on the ground that it was passed without public participation contrary to **Articles 10, 118 and 201** of the Constitution. That the **Act** violates **Article 205** as the recommendations of the CRA were not sought by the National Assembly as the tax on gaming is a matter for both National and County Government. The petitioners also attack the tax on the ground that its implementation is impracticable.

Petitioners’ Case

7. The petitioners’ case is set out in the petition dated 4th February 2014 and the supporting affidavit of David Moshi, the Chairman of the 1st petitioner, sworn on the same date. The petitioners rely on written submissions dated 27th February 2014. The issues raised in the petitioner are by and large matters of law.
8. The petitioners complain that during the legislative process leading to the enactment of **Finance Act, 2013**, the National Assembly did not comply with its constitutional obligation spelt out in **Articles 118 and 201** of the Constitution which require public participation in the legislative process and openness, accountability and public participation in matters of public finance respectively.
9. The petitioners submit that under **Article 118(1)(b)** of the Constitution, it is mandatory for Parliament to conduct its business in an open manner and its sitting and those of its committees to be open to the public. It is also required to facilitate public participation and involvement in its legislative and other business and that of its Committees. The petitioners thus submit that the National Assembly failed to comply with this obligation. They further submit that the facts alleged by the petitioners have not been rebutted by the respondents and the court should declare the law unconstitutional in that regard.
10. The petitioners contend that the National Assembly failed to invite written submissions and to conduct public hearings on the **Finance Bill, 2013**. They allege that prior to its enactment, the National Assembly did not consult with stakeholders in the gaming industry or the public. The 1st petitioner avers that while the Bill was being debated in Parliament it wrote to the Parliamentary Committee on Finance, Planning and Trade (“the Committee”) a memorandum dated 10th July 2013 highlighting the fact that the proposed introduction of the 20% withholding tax on winnings gained from betting and gaming was very astronomical and prohibitive and would have long lasting and drastic effects on the gaming industry as a whole. The petitioners aver that they were not granted audience by the Committee to elaborate their views by making oral submissions.
11. In their memorandum, the 1st petitioner highlighted the effects the legislation which include the following:-
 - a. Enforcement of the law would kill the gaming industry by driving away gamblers especially foreigners who would prefer neighbouring countries which do not impose withholding tax on players from winnings gained from betting and gaming.
 - b. Imposition of a 20% withholding tax on winnings gained from betting and gaming would discourage gambling hence drive casinos to close shop and inevitably lead to immense losses in revenue for both the operators and the Exchequer.
 - c. As gaming activities fall under the purview of both the National and County Government, the petitioners are apprehensive that their clients will be subject to double taxation in spite of the amendment to the **Income Tax Act** including the proviso stating that the tax deducted ‘*shall be final.*’

12. The second ground of attack by the petitioners is that provisions of the **Finance Act, 2013** relating to gaming violate the Constitutional provisions of revenue sharing between the National and County Government. The petitioners submit that under the **Fourth Schedule** to the Constitution, gaming activities fall under the jurisdiction of the National and County governments hence the matters are governed by **Article 205** of the Constitution. **Article 205** provides that when a Bill includes provisions dealing with sharing of revenue, or any financial matter concerning county governments is published, the CRA shall consider those provisions and may make recommendations which shall be tabled in Parliament and each House shall consider the recommendations before voting on the Bill.
13. The petitioners aver that the National Assembly failed to seek or consider the recommendations of the CRA when the **Finance Bill, 2013** was proposed. Therefore the withholding tax derived from betting and gaming has not been apportioned in accordance with such recommendations. The petitioners submit that the National Assembly, in failing to seek or consider the recommendations of the CRA whilst debating the **Finance Act, 2013**, acted contrary to the Constitution and undermined devolved government.
14. The petitioners' third complaint is that there are practical difficulties in administering the tax especially with casinos due to lack of clear guidelines, rules and regulations from KRA directing how to implement the tax. In support of their position, the petitioners point to the admission by the BCLB that there are indeed problems of administration of the provisions regarding collection of withholding tax. The petitioners contend that the provisions of the **Finance Bill, 2013** were not accompanied by the requisite rules, regulations and statutory forms which would assist in implementing the tax. The petitioners aver that their complaint in this regard buttresses their first complaint in that had the National Assembly complied with the dictates of public participation the problems of implementation would have been avoided.
15. In their petition dated 4th February 2014, the petitioners seek an order that **sections 9, 11, 14, 15, 23(1) and 23(b)** of the **Finance Act, 2013** are null and void as they were passed without public participation contrary to **Articles 10, 118 and 201** of the Constitution. They also seek a declaration that the **Finance Act, 2013** be declared unconstitutional as it was passed in violation of **Article 205** and without recommendations from the CRA as it is legislation that concerns National and County Government.
16. Due to the impracticalities of implementing the 20% withholding tax, the petitioners seek an order for the interpretation of the terms "winnings" introduced by the **Finance Act, 2013** and a declaration that the imposition of withholding tax on winnings from gaming and betting is impractical to achieve owing to KRA's failure to enact a regulatory framework on how the petitioners ought to collect and remit the tax.

Respondents' Case

17. KRA opposes the petition through the replying affidavit of **Evans Nyakango**, an officer of the Kenya Revenue Authority, sworn on 18th February 2014. It also relies on the written submissions dated 26th February 2014.
18. KRA's position is that while he was presenting the 2013/14 Budget Statement to Parliament, the Cabinet Secretary for the National Treasury proposed to amend the **Income Tax Act** so as to impose withholding tax on winnings from gaming and betting. It further submits that in passing the **Finance Bill, 2013**, the National Assembly complied with the duty to facilitate public involvement as the budget process is now conducted through Parliament where the public is represented. KRA submitted that the Committee spearheading the budgetary process sits in public to hear the concerns regarding various measures introduced for debate.
19. Mr Nyakango explained that even after the enactment of the **Finance Act, 2013**, KRA as an implementer of the law has continued to engage the petitioners through meetings in order to

resolve challenges of implementation. He denied that there was a lacuna in the law regarding implementation as the **Income Tax Act** has existing provisions for withholding tax including regulations and forms derived from **section 35** of the Act which can be used to declare and compute tax withheld and submitted on or before the due date.

20. The Attorney General, who also represented the 2nd interested party, opposed the petition on the grounds set out in replying affidavit of Professor Paul Musili Wambua, the Chairman of the BCLB, sworn on 25th February 2014. He deposes that the 1st petitioner first raised the issue of the 20% withholding tax in 2011 in a letter to the relevant Parliamentary Committee. Likewise, the BCLB has been engaged in the issue by communicating with the Office of the Vice-President and Ministry of Home Affairs, the Ministry of Finance and their successor ministries; the Ministry of Interior and Co-ordination of National Government and the Treasury. On 15th January 2014, BCLB wrote to KRA requesting guidelines for the implementation of the withholding tax and in the same vein it advised the 1st petitioner to liaise with KRA to resolve the matters. Prof. Wambua deposes that, *“I verily believe that the issues of implementation and practicability can be resolved by a tripartite meeting between the National Treasury, the Kenya Revenue Authority, BCLB and the operators.”*

21. Mr Kakoi, counsel representing the Attorney General, submitted that petition does not raise any constitutional issues for determination. Counsel argued that the Constitution does not define public participation and it is left to the legislature to define the nature and scope of public participation and it is clear in this case that the petitioner expressed its view to the legislature before the **Finance Act, 2013** was passed by submitting a memorandum.

22. Mr Kakoi noted that there were implementation hiccups but these could be resolved as pointed out in the affidavit of Professor Wambua. As regards the involvement of the CRA, counsel submitted that **Article 205** is not a mandatory requirement for the validity of legislation. He urged the court to dismiss the petition.

Determination

23. Having considered the petition, depositions and arguments three issues fall for determination in this matter as follows;

- a. Whether the **Finance Act, 2013** is unconstitutional, null and void for want of public participation.
- b. Whether the **Finance Act, 2013** is unconstitutional, null and void for want of compliance with **Article 205** of the Constitution.
- c. Whether the implementation of the **Finance Act, 2013** in so far as it concerns the petitioners gaming business is impractical and if so, what is the effect thereof.

Public participation

24. Public participation as a national value is an expression of the sovereignty of the people articulated in **Article 1** of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya and **Article 10** that makes public participation a national value is a form of expression of that sovereignty. **Article 94** vests legislative authority of the people of Kenya in Parliament. **Article 118** of the Constitution provides as follows;

118. (1) Parliament shall-

- a. *conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and*
- b. *facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*

(2) Parliament may not exclude the public, or any media, from any sittings unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

25. The public participation in matters of public finance is also reinforced in **Article 201(a)** which states that, “*there shall be openness and accountability, including public participation in financial matters.*”

26. In the ***Doctor’s for life International v The Speaker National Assembly and Others (CCT12/05) [2006] ZACC 11*** the South Africa Constitutional Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of state and enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information. The Court observed that, “*The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.*” (See also ***Kenya Small Scale Farmers and Others v Republic and Others Nairobi Petition No. 1174 of 2007 [2013]eKLR***)

27. In his submission Mr Wachira, counsel for the petitioner, illustrated how Parliament ought to have facilitated public participation. He referred to the manner in which the Nairobi County has implemented its obligation to ensure that there is public participation under the ***County Government Act*** by calling for submission of public memoranda through newspaper advertisements. He suggested that the National Assembly ought to have followed this process. How public participation is given effect will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. In ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*** 2006 (2) SA 311 (CC) at para. 630, Sachs J., noted that, “*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*”

28. I also share the view expressed by the South Africa Supreme Court of Appeal’s observation in ***King v Attorneys Fidelity Fund Bd of Control & Another*** 2006 (4) BCLR 462 (SCA) at 23-24 (S. Afr.) where it was stated, “*... Public involvement might include public participation through the submission of commentary and representations but that is neither definitive nor exhaustive of its contents. The public may become ‘involved’ in the business of National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on parliament the obligation to facilitate public involvement in its process, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it...*” In considering a similar issue where the statute was impugned on the basis of want of public participation I held as follows in ***Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2012 (Unreported)***, “[51] *In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the **Parliamentary Standing Orders** that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these **Standing Orders** provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.*”

29. The petitioners’ complaint is that the National Assembly did not consult with stakeholders in the

gaming industry or the public prior to the passing of the bill. The evidence presented is to the contrary. When the **Finance Bill, 2013** was published it elicited a response from the 1st petitioner who forwarded a memorandum to the Committee. Their complaint seems to be that they were not given an opportunity to make oral submissions. As the authorities I have cited show, an oral hearing is not necessary in every situation and the legislature has wide latitude to determine how to receive submissions. Although public participation in the law making process is required, essentially all that is required of the legislature is to provide opportunity for some form of public participation. This may be by allowing the public to make written or oral submissions at some point in the legislative process.

30. In my view the opportunity availed to the petitioners to forward their memorandum is ample demonstration that there was public participation. The fact that the outcome did not result in what the petitioners' wanted does not necessarily negate public participation.

31. I find and hold that the petitioners have not established that the **Finance Act, 2013** was passed in violation of the principles of public participation to be found in **Articles 10, 118 and 210** of the Constitution.

Violation of Article 205

32. Article 205 is titled, "Consultation on financial legislation affecting counties" and it provides as follows;

205. (1) When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.

(2) Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill.

33. As the headnote shows, the provisions of **Article 205** are intended to facilitate consultation between the Senate and the National Assembly in matters concerning county government. I agree with the petitioners that gaming is a matter for both the national and county government by virtue of the **Fourth Schedule** to the Constitution **Part 1, item 34** and **Part 2, item 4(a)** hence **Article 205** would ordinarily be applicable to such matter.

34. However, in this case the question is whether there is a violation of **Article 205**. A reading of the provision shows that it is the CRA which ought to consider the bill once it is published and make its recommendation. In this instance, there is no indication that the CRA considered the **Finance Bill, 2013** and made recommendations. In the absence of such recommendation by the CRA, **Article 205(2)** cannot come into play.

35. In the absence of recommendation by CRA, I do not think that the resultant legislation can be declared unconstitutional by reason of the CRA failing to discharge its duty to make recommendations on the **Finance Bill, 2013**.

36. I therefore find and hold that the **Finance Act, 2013** cannot be impugned on the basis of want of compliance with **Article 205**.

Interpretation of the Act and impracticability of implementation

37. The petitioners have attacked the **Finance Act, 2013** on the basis that it presents implementation problems. I must at once state that problems of implementation of the law are outside the Court's jurisdiction to resolve unless there is an allegation that there is a violation of the petitioners'

fundamental rights and freedoms or of the Constitution. There is no allegation in the petition that the implementation of **Finance Act, 2013** violates the Constitution.

38. I also reiterate what I stated in **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR** “[24] Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. **Article 209** of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under **Article 209** of the Constitution, the legislature retains wide authority to define the scope of the tax. (See **Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.**) ”

39. If indeed there are any difficulties of implementation, the BCLB has indicated that the same can be resolved through a tripartite process which it has initiated. I therefore decline to enter into an inquiry which would involve an interpretation of “winnings” as provided in the **Finance Act, 2013**. Acceding to such a request would amount to proffering what is in effect an advisory opinion as there is no real dispute between any of the petitioners and KRA. Should such a dispute arise in the collection of taxes there exist sufficient mechanisms under the **Income Tax Act** to resolve and interpret the law in light of the facts at hand.

Disposition

40. In summary my findings on the three issues framed for determination are as follows;

- a. The **Finance Act, 2013** is not unconstitutional, null and void for want of public participation.
- b. The **Finance Act, 2013** is not unconstitutional, null and void for want of compliance with **Article 205** of the Constitution.
- c. The Court declines to enter into an inquiry whether the implementation of the **Finance Act, 2013** is impractical.

41. In view of the findings I have reached, the petition lacks merit and is hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 17th day of March 2014.

D.S. MAJANJA

JUDGE

Mr Wachira instructed by Kipkenda and Company Advocates for the petitioner.

Mr Kakoi, Litigation Counsel, instructed by the State Law Office of for the 1st and 2nd respondent and 2nd interested party.

Mr Ontweka, Advocate, instructed by the Kenya Revenue Authority.