



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 115 OF 2011**

INTERACTIVE GAMING & LOTTERIES LIMITED.....PLAINTIFF

VERSUS

FLINT EAST AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT

SAFARICOM LIMITED.....2<sup>ND</sup> DEFENDANT

KENYA REVENUE AUTHORITY.....3<sup>RD</sup> DEFENDANT

**JUDGEMENT**

**Introduction**

1. This Judgement arises out of an interpleader proceedings under Section 60 of the ***Civil Procedure Act***, Cap 21 Laws of Kenya as read with Order 34 of the ***Civil Procedure Rules*** commenced by way of a Notice of Motion dated 11<sup>th</sup> May, 2011 filed by Safaricom, the 2<sup>nd</sup> defendant herein (hereinafter referred to as Safaricom) the same day.
2. Section 60 of the ***Civil Procedure Act*** provides as follows:

***Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:***

***Provided that where any suit is pending in which the rights of all parties can be properly decided no such suit of interpleader shall be instituted.***

3. Order 34 rule 1 of the ***Civil Procedure Rules*** provides that such an application ought to be made by Originating Summons or where the same is made in a pending suit it is by way of summons in the suit.
4. By the said Motion Safaricom therefore seeks a determination as to who amongst the parties to this suit is the rightful owner(s) of the monies held by Safaricom in the sum of Kshs

- 139,132,851.94 and that there be a provision for costs and charges properly due to Safaricom out of these funds.
5. According to Safaricom, pursuant to a Content Service Provider Licence granted to the 1<sup>st</sup> Defendant (hereinafter referred to as Flint) by the Communications Commissioner of Kenya, Flint entered into an agreement with Safaricom in terms of which the 2<sup>nd</sup> Defendant agreed to allow Flint the use of its network for the provision of certain premium rate services. Under the terms of the said agreement, Flint would provide certain services to subscribers using Safaricom's network on the understanding that Safaricom would collect on behalf of Flint the charges paid by the subscribers accruing out of the use of the services and remit the amounts collected to Flint within forty five days of receipt of an invoice from Flint. Pursuant to the foregoing Safaricom received two invoices from Flint dated 14<sup>th</sup> January 2011 and 15<sup>th</sup> February, 2011 for a total sum of Kshs 10,011,047.52 and Kshs 60,877,487.58 including VAT respectively totalling Kshs 139,132,851.94 exclusive of VAT and Withholding Tax
  6. By letters dated 14<sup>th</sup> January, 2011 the third defendant (hereinafter referred to as KRA) appointed Safaricom as agents of Flint for the purpose of remittance of unpaid taxes in the amounts of Kshs 22,858,408.00 and Kshs 121,911,510.00 pursuant to the provisions of section 96 of the **Income Tax Act**, Cap 470 and section 19 of the **Value Added Tax**, Cap 476 respectively.
  7. Notwithstanding the foregoing, Flint sued Safaricom in HCCC No. 161 of 2011 for the recovery of the invoiced amounts while in the instant case the plaintiff claims to be the true owner of the monies held by the 2<sup>nd</sup> Defendant on account of charges invoiced by Flint in respect of the provision of premium rate charges on the basis of a Memorandum of Understanding entered into between the Plaintiff and Flint. Accordingly this Court restrained Safaricom from paying any monies to KRA on the basis of the plaintiff's claim.
  8. According to Safaricom it has no claim whatsoever to the subject monies other than arising from costs and expenses incurred in defending the present suit and HCCC No. 161 of 2011 aforesaid. Safaricom's position was that there was no collusion between it and any claimants and that it was willing to transfer the amount held by it into court or to otherwise dispose of it as the Court may direct.
  9. By an order of this court made on 28<sup>th</sup> November 2011, this court directed that the sum in dispute be deposited in a joint interest earning account. The hearing of the interpleader then proceeded on the basis of *viva voce* evidence.

### **Plaintiff's Case**

10. The first witness to testify as PW1 was **Adil Ali Bashir**, a director of the plaintiff. Apart from relying on his statement filed herein on 29<sup>th</sup> June 2011 and further statement filed on 19<sup>th</sup> September, 2011 which were adopted as part of his examination in Chief, he also relied on as well as the affidavits and annexures filed herein and testified that the plaintiff applied to the Betting Licencing and Control Board (hereinafter referred to as BCLB) for a licence to promote a public lottery which was meant to run from 1<sup>st</sup> October 2010 to 31<sup>st</sup> December, 2010 but was later extended to 15<sup>th</sup> March 2011. According to him the lottery was short message based (also known as SMS based) in which the participant would be billed a certain amount with the first billing being in the sum of Kshs 50.00. The participant would receive questions and send answers by the short message (or SMS the answers) to the lottery number which was 6868. In the event of a win the participant was to get a price of a Motor Vehicle.
11. According to PW1, the plaintiff's Premium Rate Service Provider (hereinafter referred to as PRSP) agent was Interactive Media Services (IMS) which had the software to run the lottery. According to the witness all mobile service providers participated in the lottery and that roughly 50% of the total SMS would be taken by the promoter while the balance would be taken by the Government and KRA hence the Kshs. 50.00 would be apportioned between the Mobile Operator and all the government taxes which taxes would be deducted at source. The PRSP Agent would on the other hand have a portion of Kshs 2/= per SMS gross from the Kshs 50/=.
12. According to the witness the plaintiff operated the lottery from 1<sup>st</sup> October 2010 to 14<sup>th</sup> December, 2010 with IMS. Thereafter the plaintiff voluntarily terminated the agreement and nominated Flint as its agent vide short code 6969 which is the relevant code to this case.

- Accordingly a Memorandum of Understanding (hereinafter referred to as MOU) was signed with Flint on 7<sup>th</sup> December 2010. On the side of Flint, he testified that the plaintiff was dealing with two directors, **Iavor Kurtev** and **Ivaylo Buzoukov** who were the only people the plaintiff dealt with. According to him, he never dealt with **Mr Macharia** during the operation of the lottery and the first time he saw **Mr Macharia** was in Court.
13. According to PW1 lottery 6969 was started on 14<sup>th</sup> December 2010 and the participants were billed Kshs 69/= out of which the lottery owner, the plaintiff, was entitled to Kshs 38.33 while the PRSP agent was entitled to Kshs 2/= of the said gross payment. While Safaricom would get its revenue at source, the agent would deduct Kshs 2/= from the said Kshs 38.33 and leave the plaintiff with Kshs 36.33. He testified that it was the mobile operator who would receive the said sum of Kshs 69/= and do the deduction and that the plaintiff would receive its entitlement by way of an invoice at the end of the month and payment would be made between 45-60 days from the date of the invoice by the PRSP agent. According to the witness the Kshs 38.33 was the net after Safaricom had deducted their costs and various government taxes. The said net sum was to be remitted to Flint as the plaintiff's agent on Flint invoicing Safaricom. According to the witness the Plaintiff had no issue with the amount contained in the invoice sent to Safaricom by Flint and the issue is whether it is the Plaintiff or Flint which is entitled to the said sum. Whereas Safaricom would have the numbers of the participants and would liaise with Flint, Flint was never the owner of the lottery since the ownership of the lottery has to be licensed with the BCLB and it is the holder of the permit who is the owner of the lottery since there is an obligation to pay 25% thereof to a charitable organisation. According to him it is BCLB which must authorise one to run a lottery in Kenya for the stipulated period.
  14. PW1 testified that the lottery was operated till 17<sup>th</sup> January, 2011 when the licence was revoked by BCLB and the revocation was communicated to the Plaintiff and the lottery came to a halt. The Plaintiff however filed legal proceedings against BCLB relating to the said revocation. In his view the amount in question is in respect of the period between 14<sup>th</sup> December, 2010 and 17<sup>th</sup> January, 2011.
  15. The witness however denied that the Plaintiff owed any money to KRA though he was aware that KRA was demanding taxes as due and owing from Flint in respect of taxes accrued by Flint in respect of the Software and Professional Services which have nothing to do with the Plaintiff or the operation of the lottery. He was aware however that Flint filed judicial review proceedings contending that the taxes be determined by the High Court but the said proceedings were withdrawn. According to PW1 the taxes were payable from the source and that there is no claim by KRA regarding the same. To him KRA's demand from Flint was for the period May 2010 and November, 2010 a period when the relationship between the Plaintiff and Flint was not in existence.
  16. The Plaintiff's case was that the Plaintiff is not entitled to the money because it is not the owner of the lottery but was merely the Plaintiff's lottery PRSP agent. According to PW1, although **Mr Macharia** claimed to be a director and shareholder of Flint, PW1 knew him as the previous lawyer for Flint and his dual capacity in these proceedings have been questioned by the Court. According to him the two directors of Flint fled the Country at the end of January and early February, 2011 and have never been heard of since they have never come back.
  17. The Plaintiff however obtained a Court order allowing it to continue operating and despite communication the same to the two directors of Flint they did not resume operation of the lottery hence the Plaintiff lost a lot of revenue. Before they said directors left the Country they did not introduce **Mr Macharia** hence the subject money is due to the Plaintiff as the owner/promoter of the lottery and the said sum ought to be released to the Plaintiff.
  18. In cross-examination by **Mr Kabugu**, learned counsel for Flint, PW1 stated insisted that the Plaintiff was entitled to the money held by Safaricom. While admitting that there was a sum due to Flint he said that issue he would leave to his legal Counsel and that the share of Kshs 2/= ought to go to Flint who was the Plaintiff's agent. Referred to the Memorandum of Understanding (MOU) dated 7<sup>th</sup> December, 2010, he said that indicates the existence of agency relationship though there was no word "agency" or "principal". According to him there was no further agreement because the directors left the country. Although the MOU talked about a contract the parties had not gotten into that.
  19. Referred to the PRSP agreement between Safaricom and Flint PW1 confirmed that it indicated

- that the relationship between Safaricom and Flint for provision of SMS services and was signed at the bottom by **Michael Joseph** and **Buzoukov** on behalf of Flint. He admitted that he was not a signatory to the said agreement. He however admitted that Safaricom has the money and under the said agreement the money is owed though the plaintiff was not privy to the said agreement and was not mentioned therein. However under the said agreement Safaricom was to pay to Flint. He however stated that he never referred to Flint in any other capacity such as a partner other than as an agent. However referred to the letter dated 19<sup>th</sup> September, 2010, he said the contract was to make the new PRSP partner. He reiterated that the lottery was to work by participants sending SMS and earning prizes payable by the plaintiff. According to him the lottery called for a lot of advertisement and that the Plaintiff gave Flint a total of Kshs 95 million to run the promotion and towards the payment of the prizes.
20. On cross-examination by **Ms. Ngugi** learned Counsel for KRA, PW1 said that the MOU was signed on 7<sup>th</sup> December 2010 and there was no lottery between May and November, 2010 since the Plaintiff ran a lottery between October 2010 and December called **Mzalendo Bora** under the code 6868 which was run by IMS. He said that there was a contract between them and that when they engaged the agent for code 6969 the new name was **Mzalendo Bora** which was upgraded from 6868 to 6969. However code 6969 had been used before in **Shinda Smart** which was ran by Flint during the period May to December 2010 when Flint was both the PRSP agent and the lottery licence holders. According to him the Plaintiff upgraded because it was looking for a more successful PRSP agent. The plaintiff however did not import any computer software nor pay any consultancy fees.
21. In re-examination by **Mr Ngatia**, learned counsel for the Plaintiff, PW1 reiterated that the Plaintiff did not pay consultancy fees between May and November 2010 since they had not engaged Flint during that period when Flint was both their own agents and licence holders in respect of **Shinda Smart**. Therefore any taxes relating to that period ought not to be paid by the plaintiff. According to him PRSP means Premium Rate Service Provider and it means the entity allowed to enter into an agreement with mobile providers to run a lottery on their platform but have to get a licence from the BCLB. In this case PRSP agent was Flint. He confirmed that what he was shown in cross-examination was the PRSP Agreement. However in his bundle of documents there is a CSP which is Content Service Provider Agreement from Communications Company of Kenya (CCK) to Flint which enables the entry of PRSP Agreement with the service provider. In his view the first agreement is the CSP. According to him the BCLB license, the plaintiff herein, is not allowed to enter into an agreement with the Service Provider. According to him Flint never showed the Plaintiff that it had a licence from the BCLB which authorised Flint to operate the subject lottery.
22. According to him the Plaintiff had discussed to pay Kshs 2/= to the two directors, also referred to as the two Bulgarians orally. He reiterated that the plaintiff suffered loss when Flint did not run the lottery despite the Plaintiff securing the court order. However Flint has not claimed the said Kshs 2/= and that if they were to claim the said sum, the Plaintiff would sue them for the losses. He however denied that there was a lottery partnership relationship between the plaintiff and Flint but meant that there was a PRSP partner who was an agent and a revenue share. According to PW1, from December to January Flint was the only agent and that in the letters dated 12<sup>th</sup> January, 2011 to and from CCK Flint admitted that they were agents.

### 1<sup>st</sup> Defendant's Case

23. On the part of the 1<sup>st</sup> Defendant, Flint, **Robert Mcharia** testified as DW1. According to him he is an advocate of the High Court of Kenya and a director of Flint. He also filed his statement on 14<sup>th</sup> December 2011 which he relied upon and was adopted as part of the examination in chief. According to him there was a lottery being run between the Plaintiff and Flint beginning December 2010. Apart from that Flint was running a lottery between June 2010 and September 2010 known as **Shinda Smart 6969** which was a lottery via SMS where the participant would send SMS via number 6969 to either Safaricom, Airtel or Yu and would be entered into a draw whereby the plaintiff would offer a price of Kshs 500,000/= every day and a grand prize of Range Rover Sports 2010 model at the conclusion of the lottery. To be able to do that Flint had to seek a

- permit. According to him the lottery which was being run between June and September is however not the subject of the instant case since it was being run by Flint singlehandedly. According to him Flint had licences from CCK and a licence from BCLB. After September 2010 the licence issued by the BCLB to **Shinda Smart 6969** expired and could not be renewed and for that reason Flint came together with the Plaintiff to run a second lottery since the Plaintiff had the licence from BCLB while Flint had a licence from CCK and an existing Agreement with Safaricom to provide telephone line between Flint and the subscribers to Safaricom network.
24. According to DW1, the second lottery was dubbed **Shinda Smart 2** and was using the same line 6969. The first thing that was required was funding because prizes were being given on a daily basis and the arrangement between Flint and the mobile operators was that Flint would bring in the money, the prizes, the licence from CCK called Content Service Provider Licence. According to him the said lottery was being done by telephone lines and to do so one needed a licence from CCK to communicate Flint with the public. The said licence according to him was issued on 30<sup>th</sup> March 2010 to **Flint (EA) Ltd** and the agreement was to run for 10 years. Therefore Flint was to bring the agreement between Flint and Mobile Telephone Operators and they had one with Safaricom called PRSP Agreement. However before entering into the arrangement with the plaintiff it was required that Flint enters into an agreement with Safaricom to avail the short code 6969.
  25. According to him a participant would first register by sending SMS to 6969 which number could only be provided by the mobile operator and between the mobile operator and Flint which would then be taken to a draw conducted electronically and the winner would be notified. The system would recognise the senders of the SMS and Safaricom would be the one collecting the money but the system allowed Flint to know how many SMS had been sent. An SMS would cost Kshs 69/= and Safaricom would deduct taxes. The terms of the revenue collected according to him are contained in the Agreement. According to him before Safaricom would allow one to use the lines there was a default clause to obtain and maintain communication lines compatible with Safaricom lines and that this software was a requirement in the Agreement. According to him this Agreement was signed in March 2010 between Safaricom and Flint and it was an open agreement.
  26. To conduct the lottery one required a licence from BCLB and when Flint did the second lottery Flint did not have it but the Plaintiff had one which was to run up to 31<sup>st</sup> December 2010. According to DW1, had Flint had the licence Flint would not have entered into an agreement with the Plaintiff. To him this was a marriage of convenience. According to him Flint and the Plaintiff entered into an agreement which was signed but the copies thereof were retained by the plaintiff. Flint however had an unsigned copy which DW1 got from **Kristyan Ivanov**. According to him there was no agency relationship between Flint and the Plaintiff but what was there was a partnership in the ratio of 87.5 and 12.5 in favour of Flint and the Plaintiff respectively. This apportionment according to him was from the net proceeds. Although the agreement was between the two parties other parties such as BCLB would be involved.
  27. Pursuant thereto an MOU dated 7<sup>th</sup> December, 2010 was entered into signed by **Ivaylo Buzoukov** and **Adil Bashir** on behalf of Flint and the Plaintiff. This MOU was to confirm the already existing arrangement and contract which DW1 was unable to secure. According to him the executions would come into operation subject to the conditions therein being met. On the part of Flint the conditions were met by providing a letter from Safaricom. According to him a licence was provided expiring on 31<sup>st</sup> December, 2010 and not 15<sup>th</sup> March, 2011.
  28. The lottery was according to him run until 18<sup>th</sup> January, 2011 when CCK directed all telephone operators to shut down the short code 6969. Although the plaintiff brought a letter from the BCLB showing the validity was extended till 15<sup>th</sup> March 2011 in late December 2010 the BCLB wrote that the letter by the Chairman had been revoked by the Board and the plaintiff moved to Court in JR no. 370 of 2010 and secured an order for the maintenance of status quo on condition of depositing Kshs 50 million. Therefore the lottery ran on the basis of the status quo order. According to DW1 the security was supplied by Flint. Apart from that BCLB also demanded security deposit by way of a Bank Guarantee in the sum of Kshs 14 million which was provided by Flint. This was required in order for the prizes to be given and the sum was debited on Flint's account at Diamond Trust No. 0115745003. Upon expiry of the guarantee Flint sought for the return of the money but the Bank kept on taking Flint in cycles and the same is the subject of HCC

- No. 313. Flint's position was therefore that apart from the licences it also provided the guarantees.
29. It was Flint's case that the prizes were being given daily and Flint was to provide advertisements. The prizes according to him were BMW ex 62010, Ford Everest 2010 and Mercedes Benz as well as Kshs 16 million every week which prizes were provided by Flint. There were other expenses which were incurred by Flint apart from the said adverts.
30. The said licence according to DW1 was terminated by CCK due to a breach of the terms of the licence and a demand of authorisation from BCLB. Flint's mistake according to him was the bringing in of other parties. According to him HCCC No. 147 of 2011 is filed by the proprietor of Westmall claiming from Flint the sum in respect of advertisement.
31. On the claim by KRA, DW1's position was that, this claim was based on invoices attached to the statement which according to him cannot be a basis of assessing tax since they are not payments. Apart from this the amount is claimed from **Flint Gulf Limited**. The basis of the claim is a software and professional fees. According to him Safaricom was supposed to deduct Withholding Tax and VAT and any amount of tax due to the taxman would be remitted directly by Safaricom's position was that it was not a purchase but just an authority to use hence could not be subjected to tax. There was no payment for professional fees for the software however. With respect to the import duty for importation of the software his position was that there was no such importation. According to him the software remained the property of Flint Gulf Ltd and that Flint did not purchase it and that Flint just entered into a licence to use the same for the period of the lottery and that there was as such no importation of the software therefore Flint could not get the soft code for the software. He reiterated that Safaricom was withholding tax on behalf of Flint and that they were deducting and issuing certificates of taxes withheld and KRA supplied Flint with Tax Compliance Certificates up to 15<sup>th</sup> June 2011. Although the certificates had caveats the same have never been withdrawn. To the contrary Flint filed tax returns on 26<sup>th</sup> January, 2011 showing it had tax credits which have never been disputed. On the letter to CCK DW1 contended that the same was on without prejudice basis and reiterated that there was no agency relationship between Flint and the Plaintiff.
32. DW1 therefore urged the Court to find that there are no tax liabilities by Flint to KRA and that Flint is entitled to the sum in dispute. He however said that Flint has no problem with the application of the agreed percentage save that the money must first be given to Flint who is the rightful owner after which any claimant can claim its share.
33. In cross examination by **Mr Nganga**, learned counsel for the plaintiff, **Mr Macharia** stated that he was appointed by resolution in June. However referred to Flint's bundle of documents which were filed herein he said that he was appointed on 31<sup>st</sup> August, 2011 though prior to that he was given a power of attorney on 1<sup>st</sup> April 2011. He however admitted that as at the time of his appointment the lottery had taken place. According to him, the permit No. 1052 was issued to the Plaintiff on 27<sup>th</sup> September 2010 and by the time of his appointment 8 months later the permit had run its course. He admitted that he was not a signatory to the MOU as the Flint's representative was **Ivaylo Bozoukov** while the Plaintiff's representative was **Adil Bashir**. According to him **Ivaylo** in the United States and did not come to give evidence because he is not in the country though he gave DW1 the power of attorney. Once CCK stopped the lottery from running the directors had no other business left and they left.
34. According to DW1 he was the one who registered **Flint (EA) Ltd** through **Murima & Co**. He however admitted that his firm is **Macharia & Co. Advocates**. Referred to the Articles and memorandum of Association of Flint he confirmed that it was drawn by **Mwaniki Mwarima & Co Advocates** and did not bear his name. He however insisted that he took part in the incorporation and that the same was attested by his partner **Mr Gikaria**. He said that he was shareholder in the company holding shares in his personal capacity. However referred to a declaration of trust in the plaintiff's further list he admitted that it showed that it was declaration that he held 100 shares in trust for Flint. According to him there are two companies, **Flint (EA) Ltd** and **Bradley Ltd** and that it was agreed between the shareholders of the 2 Companies that Bradley would do a sports lottery but due to bad blood between the shareholders the shares held in **Flint (EA) Ltd** would be given to **Flint Gulf Ltd** and those of Flint Gulf would be transferred to Flint although this never materialised. However referred to a document in the bundle he admitted that it showed that he was discharged from holding the trust and that the issues he was raising were not part of this case. According to him **Flint Gulf Ltd** is not registered in Kenya and he was

- unaware whether the directors of **Flint (EA)** are the same as directors of **Flint Gulf Ltd**. Referred to a document in the bundle he confirmed that it showed that a **Mr Kurtev, Bozoukov** and DW1 were indicated as directors of **Flint (EA) Ltd** though at the time of the lottery only the first two were the directors and they are the ones who left the country. He admitted that there were existing and there still existed tax issues. Asked when the two left he said he did not know when they left but it was around January and February 2011 while the agency notice is dated 31<sup>st</sup> January, 2011 which coincided with the time they left the Country.
35. DW1 admitted that **Shinda Smart** is not the subject of the instant suit. He however asserted that Flint executed its part of the agreement. However when referred to the document in Flint's bundle of documents he admitted that the same was not executed by Flint and said instead that the document was forwarded to the Plaintiff while Flint retained the MOU. To him the contract was signed by Flint and sent to the Plaintiff. He admitted that there was an issue between Flint and CCK. According to him the Plaintiff was running a lottery known as *Mzalendo Bora* at the time when Flint was running *Shinda Smart 6969* after which the parties came to an arrangement that since the plaintiff had a licence the Plaintiff could provide the same. However CCK's problem was that the plaintiff was using the licence for 6969 in promoting 6868. The reason, according to him why Flint could not operationalised the agreement was the closure of the operations by CCK on 12<sup>th</sup> January, 2011 and that was the reason Flint could not comply with the plaintiff's demand. Referred to a letter from Flint in response to a letter by CCK, he said that the same was on without prejudice basis though it stated that the promoters were the plaintiff.
36. To him the licensee for the BCLB was the plaintiff while the licensee from CCK was Flint. DW1 contended that the only requirements were the licence issued to Flint and the letter. However the lottery could not continue was because the mobile operators were not permitted to operate. He admitted that there was no document signed between the Plaintiff and Flint on how the profit was to be shared and that the document showing apportionment was a document filed by KRA. Asked why **Ivaylo** was unable to come and give evidence the witness said he did not know. Although he admitted that he was aware of **Musinga, J's** decision in JR No. 370 of 2010 that there was no doubt that the Plaintiff borrowed Kshs 95 million and the sum of Kshs 50 million which was credited to Flint as he was the advocate for Flint in the matter he insisted that the security was paid by Flint though he was unaware whether an appeal had been lodged against the said decision. According to him, the dispute in Suit No. 313 is whether the sum of Kshs 14 million was repaid to Flint after it paid the same. He admitted that although Flint filed a suit against KRA with respect to the agency notices the same was withdrawn though according to him there is another pending suit. Referred to the bundle he admitted that JR No. 28 of 2011 was withdrawn while still insisting on the pendency of another matter. He conceded that when the Judicial Review matter was filed a condition was given which had not been complied with by the time of the withdrawal of the same. He also conceded that Flint filed another suit being 161 of 2011 seeking release of the funds after an injunction had been given in this suit against the release of the funds though the witness attempted to distinguish the two suits on the basis of different causes of action and parties.
37. When the witness was referred to the bundle he conceded that Flint confirmed in the letter dated 12<sup>th</sup> January, 2011 that the licence holder for the BCLB and the licence promoter was the Plaintiff but that the Plaintiff could not promote the lottery without a licence from the CCK.
38. On being cross-examined by **Ms Ngugi** for KRA DW1 admitted that Flint was the owner of *Shinda Smart 6969*. According to him there was a licence from BCLB which ran for three months and lapsed in August 2010 and the prizes were paid out. He confirmed that the Plaintiff was running *Mzalendo 6868*. According to him the MOU was signed on 7<sup>th</sup> December 2010 between the Plaintiff and the 1<sup>st</sup> Defendant. He admitted that they needed the software to run the lottery and they were sent the software. To him the taxes have not been paid. Nether have payments been made to Flint or the Plaintiff. He conceded that Flint filed JR No. 28 of 2011 seeking to quash the agency notices by KRA to Flint's Bankers and a conditional order was granted which condition was not complied with. He however contended that another cause was filed as the earlier one was not properly filed and the subsequent matter is still pending.
39. In re-examination by **Mr Kabugu**, DW1 reiterated that they required the software for the lottery and it was the same lottery that they used for *Shinda Smart 2* and it was created by **Flint Gulf Ltd** a shareholder of **Flint (EA) Ltd**. However it was never purchased since it was just a licence. According to him it was paid for and the payment is per use for a period of time called

- amortisation. He said that whereas a software is sold on a disc with respect to a licence you only receive a password.
40. According to the witness he has been Flint's director since July 2011. He reiterated that there were 2 companies Bradley and Flint (EA) and while the former was for sports betting the latter was a lottery. It was agreed that the local investors would take Bradley and relinquish the shares in Flint and hence there was a memo of trust which however did not materialise hence the reason why the document dated 29<sup>th</sup> November 2011 was not signed. According to him the document from the Registrar of Companies confirms that he is a shareholder and that he has always been Flint's officer and was mandated to register Flint (K) Ltd in 2010. However when he went to apply for 6969 the search found that there was another **Flint (K) Ltd** hence the change of the name to **Flint (EA) Ltd**. He contended that he was a legal adviser, a shareholder and director of Flint. He reiterated that the service contract was executed and sent to the Plaintiff but was never returned and that there was no agency relationship between the plaintiff and Flint.
41. According to him the other directors of Flint are in the United States and South Africa and they are in constant communication and since everything was reduced into writing they have no other evidence to offer. According to him there were letters confirming the existence of the contract. To run the lottery there had to be BCLB licence which was held by the plaintiff and was valid up to 31<sup>st</sup> December 2010 and a licence from CCK held by Flint issued on 30<sup>th</sup> March 2010 for 15 years. Apart from that one required to have a PRSP Agreement between the Service Providers and the party which was however between Flint and the service providers. There was also a short code number 6969 which was issued to Flint. Apart from this there were the prizes and the money. According to him the money held by Safaricom pursuant to the agreement between Safaricom and Flint is held by Safaricom on behalf of Flint.

### 3<sup>rd</sup> Defendant's Case

42. On its part, the third defendant KRA called **Kenneth Agola** who testified as DW2. According to him. He was a Principal Revenue Officer in the department of Investigation and Enforcement with the KRA and his duties were to investigate fraud cases and prosecute tax offenders.
43. According to him Flint's business was to run lottery competition in the mane of *Shinda Smart* competition on 6969 platform which ran from May 2010 to November, 2010. Flint according to him promised the winners Kshs 90 million which was equivalent to Kshs 1 million per day. In his view the lottery was successful. The tax review, he testified is the review of tax records or any other records. He testified that they examined the statement of account and software purchase agreement and management account and found that Flint had not accounted for the fees and the purchase fees for the software. According to him the software costs are indicated in Management Account and the cost of the software was Kshs 330,000,000/=. According to the witness software is an asset which only gives the user the right to user under a certain code. In his view what Flint ought to pay for was the right to use the software. However computer software are taxable under section 35 of the **Income Tax Act**.
44. Likewise when one buys a software one is supposed to pay customs duty at the rate of 25%. According to him the importation of the computer software was in September 2010. According to him the total amount owing was Kshs 82,450,632/= while the import duty was Kshs 93,317,400/= and a demand notice was sent to that effect to Flint. However Flint did not settle the same hence agency notices were issued to attach Flint's funds in respect of the taxes owed. The same were issued to Safaricom because it was believed that Flint and Safaricom had a revenue sharing agreement while ECO Bank were the Bankers. Safaricom, on its part stated that it did not have sufficient funds to cover the tax liability since according to them the entire amount had already been paid to Flint.
45. According to KRA's records Flint operated on behalf of the plaintiff. The promotion started in November, 2010 and there was a 80:20 share agreement between Flint and Safaricom and Flint. According to DW2, Flint ought to pay the taxes to KRA.
46. In cross-examination by **Mr Nganga**, DW2 stated hat there was an agreement between Safaricom and Flint and that the MOU came later. Referred to MOU dated 7<sup>th</sup> December, 2010 the witness stated that the same provided for revenue sharing in the ratio of 80:20 between the Plaintiff and Flint. He however asserted that Flint operated the lottery on behalf of the Plaintiff from November

2010. According to him KRA was however not concerned about the revenue for the time when the parties signed the MOU and it was not claiming taxes from the Plaintiff. He stated that *Mzalendo 6868* was the name of the lottery which was promoted by the Plaintiff and that for one to operate a lottery one needed a BCLB licence. According to him, he was not shown a licence for December by Flint.
47. In cross-examination by **Mr Kabugu**, DW2 confirmed that he was not the one who conducted the investigation but based his facts on the report by **Njoki Mwathia** who was the investigating officer. So what he had was just a report that a total sum of Kshs 175,768,032 was due in respect of customs duty and withholding tax from Flint based on invoices in respect of professional fees and the right to use the software. In his evidence withholding tax was Kshs 82,450,632 which Flint was supposed to withhold. He however had no evidence that the company was a foreign company or that the payment was made to foreigners. The sum of Kshs 93,317,400.00 on the other hand was in respect of custom duty charged on importation or exportation of goods. He however had no evidence of importation of goods. They however investigated the importation of the software and found that the same was imported
48. The witness admitted that he was aware of the Simba System which deals with both import and export information. He confirmed that he had access to the Simba System although he did not bring with him evidence from the Simba system showing that the software was imported. According to him Flint was doing business with Safaricom and that Safaricom always complied with its tax obligations though he was not sure of the same with respect to Flint. The witness said he only had invoices and statements in support of his evidence. According to him KRA relied on section 35 of the *Income Tax Act* which provides for withholding tax at the rate of 20% in respect of non-residents. He however confirmed that Flint was incorporated in Kenya and that one of the Directors **Mr Macharia** is Kenyan. The owners of the Company were however from Bulgaria and though he had no such evidence the investigating officer believed this was a foreign company. He however admitted that he had never seen the Certificate of Incorporation of Flint. With respect to the residents, it was his evidence that 5% ought to have been applied though he did not agree that there was a mistake in imposing the said 20%. According to him, for payments made outside the country the tax imposed is at the rate of 20% for non-residents. In his view Withholding Tax was payable on SMS and that the same was paid by Safaricom. Therefore what KRA was claiming was in respect of professional fees and software development as well as custom duty. While clarifying that he was an accountant, DW2 stated that the audited statement of accounts declares the income and expenditure and according to the audited accounts of Flint the expenses in respect of the software importation was Kshs 313 million to Flint by Safaricom dated 17<sup>th</sup> August 2010 and the assessment covered that period. Referred to the certificate for Kshs 8,319,518.83 the witness admitted that KRA had not given credit for the said sum in the statement. There were other similar figures which the witness confirmed that either credits were not given or that he was unsure whether credits had been given.
49. According to DW2 tax compliance certificates are issued by the Authority on an application hence it is not automatic and there are a number of officers who scrutinise the application and looks at the information though he had never worked in the relevant department. One however has to show that he has no tax liability and that there are no accrued taxes before it is issued and the certificate is to be issued by a senior officer. Referred to the tax compliance dated 15<sup>th</sup> December, 2010 issued to Flint he admitted that it is usually issued where there are no tax liabilities and that he had not investigated the issuance of the said certificates though he still insisted that Flint owed KRA Kshs 172 million.
50. In re-examination by **Ms Ngugi**, DW2 clarified that a software is like a coded thread which comes through online system. For the payment made they however assumed that what they had was a true account of the Company's expenditure. He however said that he knew what false clearance meant and that it meant carrying out audit after a certain activity has taken place. According to him after issuance of clearance it may be found that there was a false clearance audit. To him the period of the audit was May 2010 and November, 2010.
51. He confirmed that Flint filed a case against KRA but there was a guarantee for Kshs 60 million which was not paid and he was informed that there was a settlement proposal which was made. He confirmed that there was a contract between Flint and Safaricom.
52. To him Flint paid out the sum of money which it was supposed to withhold.

## **Plaintiff's Submissions**

53. On behalf of the Plaintiff it was submitted that the funds the subject of this suit were generated through an SMS based lottery pursuant to permit No. 1052 issued to the plaintiff by the BCLB on 27<sup>th</sup> September 2010 and subsequently extended to 15<sup>th</sup> March 2011. According to the plaintiff without a permit, which Flint did not have, one cannot promote a public lottery and section 5 of the ***Betting Lotteries and Gaming Act*** Cap 131 Laws of Kenya makes it mandatory that such a licence must be obtained. Such a licence it was submitted is under section 12 of the same Act not transferrable hence the Plaintiff's permit could not become Flint's and Flint cannot lay claim to funds generated through a permit which they did not hold. This fact according to the Plaintiff was confirmed in the letter dated 9<sup>th</sup> May, 2013 contained in Flint's bundle of documents at page 193. In the plaintiff's view the PRSP Agreement was between Flint and Safaricom and hence is not relevant in determining who owns the subject funds as it does not refer to the lottery herein. Where an agent is in possession as agent, it was submitted based on ***Bowstead and Reynolds on Agency***, he is estopped from asserting better title to it than the principal.
54. As Flint had no BCLB licence, it was submitted it was merely PRSP agent for the licences promoter. In the plaintiff's view the unsigned agreement relied upon by Flint is not an agreement as it was not even signed by Flint. It was submitted that in JR case No. 370 of 2010 – **Republic vs. Betting Control & Licensing Board, Flint East Africa Limited ex parte Interactive Gaming & Lotteries Ltd** the Court found that the funds were borrowed by the Plaintiff and credited to the account of Flint hence the same reasoning ought to be applied in this case.
55. It was submitted that DW1 who testified on behalf of Flint admitted that he became a director long after the relevant permit had run its course and that he was not a signatory to the MOU and offered no reason why **Iavor Kurtev** or **Ivaylo Bozoukov** did not come to testify yet they were the signatories to the MOU. The power of attorney which was given to the said witness, it was submitted did not encompass giving evidence on behalf of the donors. Therefore the witness cannot claim to have been privy to the discussions that led to the appointment of Flint by Plaintiff as its PRSP agent. Relying on **Republic vs. Betting Control & Licensing Board, Flint East Africa Limited ex parte Interactive Gaming & Lotteries Ltd** (supra) it was submitted that the court found that the effect of the power of attorney given to DW1 was to constitute him the sole director of Flint yet a limited liability company cannot validly exist with only one director in the absence of a secretary. It was further submitted that DW1's credibility was further doubtful taking into account his assertion in his statement that he was involved in the registration and incorporation of Flint when from the documents it was clear that the incorporation was done by a different firm of Advocates.
56. According to the plaintiff DW1 admitted that *Shinda Smart* is not the lottery the subject of the present suit and that the said lottery is the lottery the subject of the claim by KRA; that the licensed promoter of the lottery was the Plaintiff and that there was no document signed between the Plaintiff and Flint with respect to sharing of revenue between the Plaintiff and Flint; that the filing of case No. 161 of 2013 during the pendency of the restraining orders herein was evidence of lack of candour and fraud.
57. With respect to KRA's claim it was submitted that DW2 admitted that KRA has no claim against the plaintiff hence cannot be liable for Flint's tax liabilities. Further the statement of account the subject of KRA's claim relates to a different lottery not the subject of this suit. To the plaintiff the said liability cannot therefore be recovered from the funds belonging to the plaintiff.
58. Since on 20<sup>th</sup> February, 2012 this Court stayed HCCC No. 313 of 2011, HCCC No. 161 of 2011 and HCCC No. 281 of 2011, should this Court resolve that the funds herein are the property of the Plaintiff the said suits should similarly be resolved in favour of the plaintiff.

## **1<sup>ST</sup> Defendant's Submissions**

59. On behalf of the 1<sup>st</sup> Defendant it was submitted that this matter relates to an SMS based lottery carried out between Flint, Safaricom and the Plaintiff between December 2010 and January, 2011 organised under PRSP Agreement between Safaricom and Flint in which Safaricom was to provide the forum for conducting the lottery and collect participation charges. It was submitted

- that whereas the Plaintiff has laid claim to the subject funds, the Plaintiff does not claim to be part of the PRSP agreement which is the foundation upon which the 2<sup>nd</sup> defendant is in possession of the said funds. Relying on **Muchendu vs. Waita [2003] KLR 419**, it was submitted that the general rule is that a contract cannot confer rights or impose liabilities on a non-party thereto. According to 1<sup>st</sup> Defendant no evidence was adduced to support the allegation of agency relationship between the Plaintiff and Flint.
60. On the claim by KRA, it was submitted that the same was based on hearsay as the witness called on its behalf exhibited serious difficulties in justifying the amounts claimed and the assessment criteria used.
61. It was further submitted that the said witness admitted that KRA never gave credit to Flint with respect to taxes paid by Flint hence was unable to explain the tax compliance certificates issued by KRA and reliance was placed on **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2012] eKLR**.
62. It was therefore submitted that the subject funds are the property of Flint and the Court ought to find so.

### **Determinations**

63. As indicated at the beginning of these proceedings, these are interpleader proceedings in which the second Defendant, Safaricom admits holding the sum of Kshs 139,132,851.94 in respect of which it has no interest other than for charges or costs and is ready to pay or deliver it to the rightful claimant. The said sum is however being claimed by the Plaintiff, the 1<sup>st</sup> and the 3<sup>rd</sup> Defendants respectively.
64. Accordingly the main issue for consideration before this Court is to whom the said sum belongs as between the Plaintiff, the 1<sup>st</sup> and the 3<sup>rd</sup> Defendants in this suit. To determine the said issues this Court will have to make a finding with respect to the relationship between the parties herein in particular the relationship between the Plaintiff and the 1<sup>st</sup> Defendant; whether the Plaintiff and the 1<sup>st</sup> Defendant were partners and if so the ratio of apportionment of the revenue therefrom; whether the relationship was an agency relationship and if so the liability as between them.
65. From the evidence on record it is clear that the claim by the 3<sup>rd</sup> Defendant, KRA is against the 1<sup>st</sup> Defendant and not against the Plaintiff. It is in respect of the 1<sup>st</sup> Defendant's liability to pay taxes to KRA. Therefore the claim by KRA depends on the determination of liability between the Plaintiff and 1<sup>st</sup> Defendant. This is so because the claim by KRA can only succeed if the Court finds first that the 1<sup>st</sup> Defendant, Flint, is entitled to a sum, if any, accruing from the operation of the subject lottery and secondly if the Court finds that Flint is liable to pay tax to KRA.
66. It follows that this Court ought to first deal with the liability between the Plaintiff and the 1<sup>st</sup> Defendant and to that matter I will presently proceed.
67. That the Plaintiff was the holder of the BCLB licence in respect of the subject lottery is not disputed. Similarly, that the PRSP Agreement in respect of the same lottery was between Flint and Safaricom is not in doubt. It is when it comes to the status of the parties arising from the two documents and their respective contributions that the parties part ways. From the evidence on record it is clear that although the Plaintiff had the BCLB licence it could not operate the lottery since it had no soft-code which was the platform on which it could promote the lottery. On the other hand whereas Flint had the soft-code, it had no BCLB licence as its licence which was given earlier had expired. Both parties therefore needed each other in order to be in business.
68. The plaintiff's case is that Flint was its PRSP agent. According to the letter written by Flint to CCK dated 12<sup>th</sup> January, 2011 it was expressly stated that the licensed promoter providing the lottery service that CCK was referring to was the Plaintiff and that Flint was providing for the usage of the allocated 6969 short code merely as Content Service Provider to the licensed promoters of the lottery. In the said letter Flint indicated that it was filing with the CCK the licence of the Plaintiff. Whereas the purport of this letter was not expressly disputed by DW1, it was however contended that the said letter was written on without prejudice basis and hence ought not to be admissible. In my view, the law is not that any document expressed to be on "without prejudice is inadmissible. A document expressed to be on "without prejudice" may well be

admissible in evidence if the exceptions to the “without prejudice” rule are applicable. The legal provision which forms the basis of “without prejudice” rule in this country is Section 23(1) of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section provides as follows:

*“In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given”*

69. In the case of Geoloy Investments Ltd vs. Behal T/A Krishan Behal & Sons [2002] 2 KLR 447, Mwera, J (as he then was) referring to the case of Co-Operative Bank of Kenya Ltd vs. Shiraz Sayani MBA HCCC No. 23 of 1999; National Industrial Credit Bank Ltd vs. Yandal Enterprises Ltd & 2 Others HCCC (Mil) No. 213 of 1999 and *Sakar on Evidence 14<sup>th</sup> Ed Page 3591*, stated thus:

**“The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. The rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it is to have no effect at all”. It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements.....The rule, however is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof. Where this is not the case the sender of the letter cannot impose on the recipient any condition as to the mode in which it may be used by marking it “without prejudice”. [Underlining mine].**

70. In the case of Ongata Rongai Total Filing Station Ltd vs. Industrial and Commercial Development Corporation Nairobi (Milimani) HCCS No. 219 of 2007 (OS) Kimaru, J relying on Unilever vs. Proctor & Gamble [2001] 1 All ER 783; Rush & Tompkins Ltd vs. Greater London Council [1988] 2 All ER 737 at 739-40; [1989] AC 1280 At 1299; Cutts vs. Head [1984] 1 All ER 597 At 605-606; Scott Paper Co. vs. Drayton Paper Works Ltd [1927] 44 RPC 151 at 156 had this to say:

**“The ‘without prejudice rule’ is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule rests on public policy and the convenient starting point of the inquiry is the nature of the underlying policy which is that parties should be encouraged so far possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should be encouraged freely and frankly to put their cards on the table and the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. This rule is recognised as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations, should not be admissible in evidence if, despite the negotiations, a contested hearing ensues... It is therefore clear that as a general rule, communication between parties to a suit, made on “without prejudice” basis will not be admissible in evidence. However, there are exceptions to this general rule. Under section 23(2) of the Evidence Act, an advocate is not exempted from giving evidence in regard to any matter that he may be compelled to give evidence under section 34 of the said Act. Other examples are where the**

issue is whether the “without prejudice” communication had resulted in a compromise settlement; where it is admissible to show that an agreement concluded between the parties, during negotiations should be set aside on the ground of representation, fraud or undue influence; where a statement might be admissible as giving rise to an estoppel; where the exclusion of the evidence would act as a cloak for perjury, blackmail, threat or other unambiguous impropriety; where the evidence is admissible in order to explain delay or apparent acquiescence, for instance, in application to strike out proceedings for want of prosecution; and where in an action for negligence, the evidence is admissible to show that the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a third party”.  
[Emphasis mine].

71. Mbaluto, J on his part in *William Ochieng Mahinya vs. Kenya National Assurance Co.* Kisii HCCC No. 289 of 1995 citing *Lochab Transport Limited vs. Kenya Orient Arab Assurance Company & Green vs. Rosen* (1955) 1 WLR 741 and *Walker vs. Walker* 23 QBD 335 held:

**“When a claim is compromised, the cause of action becomes merged and is superseded by the compromise and the defence to the original cause of action is not a defence to an action brought to enforce the compromise... If an offer is made on “without prejudice” evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded and one can give evidence of the “without prejudice” letter of offer.”**

72. Since the rule is meant for the protection of the parties to the proceedings the said rule can be waived by a party in whose favour the rule would have been invoked. Once a party waives the rule, it is my view that any party to the proceedings is entitled to rely on those documents. Waiver, in my view, can be either express or by implication. Where for example the party in whose favour the rule applies introduces the said document in evidence, he would be deemed to have waived the rule since a party cannot act on a document marked “without prejudice” and at the same time preclude the other party from relying thereon. In this case the letter in question was part of Flint’s bundle of documents filed in this suit. It follows that Flint cannot now purport that the same cannot be relied upon by the other parties to the suit.

73. As is rightly stated in *Bowstead and Reynolds on Agency* 19<sup>th</sup> Edn. At page 275:

**“Where an agent is in possession of property in his capacity as agent, he is estopped from asserting that he has a better title to it than his principal for his possession is deemed to be that of his principal.”**

74. Flint has however alluded to payments made by it in respect of security as evidence that it was not an agent for the Plaintiff in the lottery. However **Musinga, J** (as he then was) in **Republic vs. Betting Control & Licensing Board, Flint East Africa Limited ex parte Interactive Gaming & Lotteries Ltd** (supra) a matter in which Flint and the Plaintiff were parties expressed himself as follows:

**“I have no reason to doubt that the 1<sup>st</sup> applicant [read the Plaintiff herein] borrowed a sum of Kshs 95,000,000/= from Roglico Limited and of that sum Kshs 50,000,000/= was credited to the account of the 2<sup>nd</sup> applicant [read Flint] for purposes of paying the same to court as ordered.”**

75. This sum is one of the amounts which Flint is claiming to have deposited. However, from the evidence of DW1 who was the lawyer for Flint in that case and who also claims to be a director and shareholder of Flint, in fact the only director of Flint, present in this country, he has no idea whether Flint has lodged an appeal against the said decision. It is clear from the evidence of DW1 that he was either being economical with the truth or he is not the one in charge of the management of Flint. Since that decision has not been appealed against to the knowledge of Flint, it must follow that Flint deposited the said sum on behalf of the Plaintiff, a further evidence that Flint was acting as the Plaintiff’s agent at least in so far as that transaction was concerned. That

- Flint has not attempted to explain the circumstances under the Plaintiff remitted to it the said sum is telling. It was therefore not surprising that at the end of the cross-examination by **Mr Nganga DW1** conceded that the licence holder for the BCLB and the licence promoter was the Plaintiff though the Plaintiff could not promote the lottery without a licence from the CCK.
76. According to the plaintiff, since the two directors who participated in the subject transaction never appeared to give evidence, the evidence of DW1 is unreliable. However, Flint is a limited liability company and as long as the witness giving evidence on his behalf is well versed with the facts of the case and can satisfactorily testify thereon, there ought to be no serious objection to such witness testifying on behalf of the Company.
77. I have considered the evidence adduced by DW1 and I have failed to understand the reason why Flint was unable to continue with the lottery even after the Plaintiff secured a Court order staying the decision of the CCK. He was unable to provide a satisfactory explanation as to why the lottery could not proceed thereafter taking into account the massive investment which Flint is claimed to have pumped into the lottery.
78. From the cross-examination it came out clearly that DW1's evidence was anything but consistent. Whereas he initially alleged that he was appointed a director of Flint in June 2011, when referred to the documentary evidence he admitted that he was actually appointed in August, 2011. In his statement he stated that he was then one who incorporated Flint. However, in cross-examination he admitted that Flint was in fact incorporated by a different firm of advocates. At the time of the said incorporation, DW1 was not a director of Flint and his reason for not using his firm to incorporate Flint was rather vague. Apart from that there was some evidence that some shares of Flint were held by DW1 on trust. However, DW1's explanation for this was rather convoluted and extremely difficult to follow. When asked whether he was aware that the directors of Flint East Africa Ltd were the same as the directors of Flint Gulf Ltd DW1 stated that he was unaware of the fact. Surely if DW1 was intricately involved in the affairs of Flint East Africa which had close connection with Flint Gulf Ltd he ought to have had some idea about both companies.
79. As I have held hereinabove, there was nothing inherently wrong in DW1 giving evidence on behalf of Flint as long as he was well versed with the facts relating to the transaction in question. However, from the foregoing, it is clear that DW1 was not sufficiently seized of the facts relating to the subject lottery. He admitted that he became a director of Flint some 8 months after the lottery had lapsed and that he was not a signatory to any of the documents which gave rise to the relationship between the parties. There however was not even a single document which supported his version of the said relationship which could be said to have been binding on the Plaintiff. In these circumstances one would have expected the persons who participated in the initial negotiations between the parties to appear and give evidence in this suit. Even DW1 when asked why the said persons did not appear to give evidence he was unable to explain only to say that they had nothing else to do in this country. Surely taking into account the sum in dispute it cannot be said that the said persons had nothing to do by coming back to testify in a claim of that magnitude. In my view, if they chose not to do so it was a risk which they took.
80. It is my view and I so hold that the evidence of **Iavor Kurtev** and **Ivaylo Buzoukov** and in particular the latter was crucial to Flint's case yet no explanation was given for their convenient and almost deliberate abstention from participating in these proceedings. In the case of **Green Palms Investments Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003**, it was held that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. In my view this is a classic case in which adverse inference ought to be invoked.
81. Therefore taking into account the totality of the evidence on record the inescapable conclusion I come to is that the Plaintiff was the promoter of the lottery the subject of this suit and that Flint was the Plaintiff's PSRP agent. Being the Plaintiff's said agent it was admitted by the Plaintiff that Flint was entitled to Kshs 2/= per SMS gross from the Kshs 50/=. In this case the court is only concerned with what is due to the parties from the subject lottery. In other words the issue of the loss if any sustained by the Plaintiff as a result of the failure by Flint to operate the lottery after the stay granted by the Court is not before me. Accordingly, I find that Flint is entitled to the said sum of Kshs 2/= per SMS gross from the Kshs 50/=.

82. That now brings me to the claim by KRA against Flint. KRA's case was presented to the Court by DW2. However in cross examination DW2 admitted that he was not involved in the investigation of Flint's liability to KRA. In the course of the hearing it turned out that the sum of money paid by Flint which was reflected in the certificates of compliance issued by KRA were not credited. That leaves the question begging how much, if any, is owed by Flint to KRA.
83. Apart from the foregoing, it is clear from the evidence that KRA supplied Flint with Tax Compliance Certificates up to 15<sup>th</sup> June 2011. Although the certificates had caveats the same have never been withdrawn. That tax compliance certificates are issued where KRA was satisfied that there are no liabilities was admitted by DW2
84. In **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2012] eKLR** this Court held that:

**“Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes.....Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1<sup>st</sup> respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant's tax compliance status and hear the applicant's side of the story before taking an action which was contrary to its earlier conduct.”**

85. In my view there was a dearth of evidence to support the claim by KRA as against Flint to the standard required. In other words based on the evidence on record I am unable to find exactly how much, if any, is due to KRA from Flint in respect of the unpaid taxes. It follows that KRA's claim against Flint must fail.

### **Order**

86. Accordingly I make the following orders:

- 1. That the Plaintiff is entitled to Kshs 139,132,851.94 less costs and charges due to Safaricom.**
- 2. That from the net proceeds, Flint is entitled to Kshs 2/= per SMS of Kshs 50/=.**
- 3. That the interests accrued as a result of the sum having been deposited is to be apportioned on a pro rata basis.**
- 4. The parties to appear before the Deputy Registrar of the Commercial Division of this Court for the determination of the actual figures due to each party.**
- 5. Liberty to apply granted.**
- 6. Apart from the costs due to Safaricom each party shall bear own costs of these proceedings.**
- 7. That the order staying related suits is hereby vacated. For avoidance of doubt since this suit was not consolidated with the said matters, this court cannot purport to determine the said suits in this case and the parties are left to take appropriate steps in light of the decision arrived at herein.**

**Dated at Nairobi this day 30<sup>th</sup> day of April 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Nganga for the Plaintiff***

***Mr Kabugu for the 1<sup>st</sup> Defendant***

***Mr Kirugi for the 3<sup>rd</sup> Defendant***