REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 21 of 2011

IN THE MATTER OF: AN APPLICATION BY INTERACTIVE GAMING AND LOTTERIES LTD FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: BETTING LOTTERIES AND GAMING ACT (CAP 131) LAWS OF KENYA

BETWEEN

REPUBLIC .....APPLICANT

AND

BETTING CONTROL AND LICENSING BOARD..... RESPONDENT

EX PARTE.....INTERACTIVE GAMING AND LOTTERIES LTD

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 16th February 2011 the applicant herein, **Interactive Gaming and the Lotteries Ltd**, seeks the following orders:

1) An order of certiorari do issue to remove to this Honourable Court for the purpose of being quashed, the Respondent's decision contained in a letter dated 13th January 2011 purporting to revoke the Permit No. 1052 as extended vide Respondent's letter dated 20th December 2010.

2) An order of prohibition do issue to prohibit the Respondent, its servants and/or agents or whomsoever from executing and/or enforcing the Respondent's decision communicated in a letter dated 13th January 2011 purporting to revoke the Applicant's Public Lottery Permit No. 1052.

3) Costs of this application be provided for.

APPLICANTS' CASE

2. The Motion is supported by Statement filed on 4th February 2011 as well as the affidavit verifying the facts relied on sworn by **Adil Bashir** a director of the ex parte applicant on the 3rd February 2011.

3. According to the deponent, the applicant is/was the promoter of a Public Lottery being carried out under a Public Lottery Permit number 1052 issued on 27th September 2010 by the Respondent to run for a period from 1st October 2010 to 31st December 2010 which term was subsequently extended by the Respondent to run up to 15th March 2011 (hereinafter referred to as the licence). On the 15th December 2010 whilst the lottery was still running, the Respondent's director unlawfully sought to rescind the licence extension previously given by the Respondent's chairman on the 6th December 2010 and due to the said action the applicant applied for judicial review proceedings being High Court Miscellaneous Application 370 of 2010 on 17th December 2010. On 29th December 2010, upon inter partes hearing in the presence of counsel for the parties, the High Court directed that the status quo be maintained subject to the applicant depositing Kshs 50,000,000.00 into court within 2 days a condition which the deponent avers was duly complied with. The applicant also complied with the Respondent's conditions contained in the letter dated 20th December 2010 as directed by the Court and vide the letters dated 11th and 13th January 2011, informed the Respondent accordingly.

4. Notwithstanding the said compliance, the Respondent vide a letter dated 13th January 2011 unlawfully issued the applicant and published in the media a purported letter of revocation of licence citing alleged non-compliance with the court order. As the applicant had complied with the Court order, it is deposed that there was no disobedience of the Court order and any attempt to found the revocation on such a ground is preposterous and belies malice and bad faith. According to the deponent, it is only the court upon application that could rule on the issue of compliance with its orders and if so minded discharge them and the Respondent cannot arrogate itself the role of a judge in its own cause.

5. Accordingly to the ex parte applicant, the respondent in revoking the licence acted ultra vires section 4(b) of Cap 131 and that the said action amounts to abuse of power yet the Respondent, a creature of statute is enjoined by law to act within it, failure to which its actions would become amenable to judicial review.

RESPONDENT'S CASE

6. Although the Respondent had filed a replying affidavit, the same was by a ruling dated 22nd February, 2011 expunged from the record. Accordingly, there is no replying affidavit from the Respondent.

INTERESTED PARTY'S CASE

7. The Interested Party opposed the application through an affidavit sworn by **Stephen Chege**, the Head of the Public Policy & Market Regulation Division in Safaricom Limited (hereinafter referred to as Safaricom) on 17th February 2011. According to the deponent, Safaricom being a telecommunications operator licensed under section 79 of the ***Kenya Information and Communications Act, No. 2 of 1998***, is subject to the regulatory authority of the Communications Commission of Kenya (hereinafter referred to as the Commission), a body corporate established under section 3 of the Kenya Information and Communications Act, No. 2 of 1998 and charged with responsibility for the licensing and regulation of inter alia the telecommunications industry within the Republic of Kenya.

8. By a letter dated 14th January 2011, the Commission required Safaricom to discontinue public access to the telecommunications short code 6969 with immediate effect and further required Safaricom's confirmation that this directive had been complied with. According to the deponent, Safaricom was not invited to participate in the previous proceedings relating to this matter relating to this matter being High Court Misc. Civil Application No. 370 of 2010.

EX PARTE APPLICANT'S SUBMISSIONS

9. It was submitted on behalf of the ex parte applicant, while reiterating the contents of the supporting affidavit that contrary to section 4(1)(b) of the ***Betting, Lotteries and Gaming Act***, the applicant was not given an opportunity to be heard as to why the licence should be not be revoked and that the purported revocation did not disclose any condition of the licence or provisions of the Act subject to which the

licence was issued that had been infringed as to warrant the said revocation hence the revocation was illegal. To the extent that the revocation was justified on grounds of non-compliance with the orders issued in Miscellaneous Application Non No. 370 of 2010, it is submitted that the decision was patently unlawful, callous and without factual foundation since the said conditions had been timeously complied with. It is therefore submitted that the revocation was ultra vires section 4(b) aforesaid and is otherwise an abuse of its powers and lacks any legal foundation. By denying the applicant an opportunity of being heard it is submitted that the respondent's decision was arbitrary.

10. Since the revocation sprung from a non-existent condition, it is grossly unreasonable and the court has jurisdiction to intervene and quash it and the oft-cited case of **Associated Provincial Picture House Ltd vs. Wednesbury Corporation [1948] 1 KB 223** is relied on in support of the submission. In the ex parte applicant's view, although the Respondent was under a duty to undertake sufficient inquiry into whether the Applicant had complied with the court orders, it failed to do so and failed to appreciate that the court order had been fully complied with hence its decision was grossly unreasonable and based on ***Judicial Review Handbook by F. Fordham at page 920*** it is submitted that the unreasonable list include conduct which no reasonable authority acting with due appreciation of its responsibilities would have decided to adopt. Having failed to take into account the drastic effects of the purported revocation, the irreparable loss that the applicant would incur and irreversible reputation damage, the action, the action by the Respondent was grossly unreasonable.

11. It is further submitted that the Respondent did not invite comments from the Applicant prior to revocation of the licence though it being a statutory body is mandated by law to carry out its functions with scrupulous fairness since section 4(1)(b) of the ***Betting, Lotteries and Gaming Act*** makes it mandatory that no revocation of licence can be done without giving the licence holder an opportunity to be heard. Therefore, it is submitted that a drastic action such as the one taken by the Respondent with the ramifications to kick out the applicant from business and take away his economic rights as enshrined in the Constitution which ought to have been preceded by due regard to the rules of natural justice as to fair hearing requiring the applicant not to be condemned unheard. Citing ***Judicial Review Handbook*** (supra) at page 1000 it is submitted that the general duty to act fairly will depend on the consideration of three factors (i) the nature of the decision (ii) the relationship existing between that body and the individual and (iii) the effect of that decision on individual right.

12. Therefore it is submitted that the Respondent's actions are in violation of the cardinal rule of fairness and expectation that the Respondent will respect the law and statutory mechanisms established to ensure due process and as such violated this legitimate expectation by acting as it did. Upon receiving the licence, the Applicant had a legitimate expectation that it would operate the public lottery for the period set out in the licence and the extension thereof without any interference from the Respondent.

13. By advertising the revocation in the Daily Newspapers when there is no provision in the ***Betting, Lotteries and Gaming Act*** requiring a revoked licence to be advertised, it is submitted the Respondent's decision was actuated by malice and bad faith and the decision of **Earl Fitzwilliams Wentworth Estates Co. Ltd vs. Minister of Town & County Planning [1951] 2 KB 284, 307** and **Congreve vs. Home Office [1976] QB 629, 651 AC**.

14. In conclusion, it is submitted that the Respondent's decision to revoke the Applicant's licence was done ultra vires the enabling provisions of the law and is a gross abuse of power; is unfair form lack of observance of due process and perpetuates an improper motive which is to kick the Applicant out of business; the Respondent being a creature of statute must be subservient to the law and must carry out its activities with scrupulous fairness and fidelity to the law. To callously violate and undermine the court process by unlawfully revoking a licence the subject matter of a pending suit that is J R 370/2010 is an affront to the court's authority and indeed would render mockery to the justice system hence the motion should be allowed as prayed.

RESPONSE TO THE APPLICATION

15. On behalf of the Respondent, its learned counsel **Mr Kaumba** informed the Court that although the

Respondent neither had a replying affidavit nor written submissions, he would rely on the contents of the replying affidavit filed on 21st February 2011.

16. On behalf of Safaricom, **Mr Muindi**, its learned counsel informed the Court that Safaricom's only interest in the matter was in respect of the stay.

APPLICANT'S REJOINDER

17. In a rejoinder, **Mr Ngatia**, learned counsel for the ex parte applicant was of the view that the application for stay cannot be an answer to the subject motion and that in any case the contents thereof do not answer the ex parte applicant's case. He, however, conceded that Safaricom's interest was in respect of the application for stay.

FINDINGS

18. As already stated hereinabove the replying affidavit that was filed on behalf of the respondent herein was expunged from the record. To permit the respondent's affidavit in respect of the application for stay to be relied upon as a reply to the application would amount to allowing a replying affidavit through the back door and that the Court cannot countenance.

19. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**

20. In **Republic vs. The Registrar of Companies Ex Parte Transglobal Freight Logistics Limited Nairobi HCMA No. 711 of 2005, Emukule, J** held *inter alia* that:

"Judicial Review, now regulated by Order 53 provides the means by which judicial control of administrative action is exercised, the subject matter of every judicial review is a decision made by some person or body of persons or else a refusal by him to make a decision. To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision- maker, although it may affect him too. It must affect such other person either (i) by altering rights or obligations of that person which are enforceable in or against him in private law, or (ii)by depriving him of some benefit or advantage which either (1) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which has been given an opportunity or (2) he has received an assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...The matter in question here qualifies for Judicial Review. It is a decision of the Registrar of Companies, a public body conveyed to the Interested Party by a letter without reference to the Applicant, a party already in Court over a previous decision by the same decision maker, the Registrar. The Applicant is a person who the

Registrar knew would be affected by that decision. The letters dubbed "without prejudice" and in part said that the Registrar would not insist on the change of name provided the interested party withdrew the application then before the Court. The letter was not copied to the Applicant as an interested party in that application. That decision is indicative of bias, unreasonableness and lack of even-handedness on the part of the Registrar, the decision-maker. As an interested party in the Application, the Applicant had a legitimate expectation that it would be informed and given opportunity to respond to the proposed decision... It is no answer to that legitimate expectation for the interested party to say that the Applicant was awarded costs upon the termination of the proceedings arising from the impugned decision contained in the said letter. It is also no answer to say that section 20(2)(b) of the Companies Act does not confer upon the Registrar power to consult or summon any one before exercising her discretion under that section... Under section 12 of the Societies Act, where in respect of any registered society the Registrar is of the opinion that the registration of a society should be cancelled or suspended for any of the stated causes or reasons, the Registrar is bound to give the notice to the Registered Society before exercising that discretion. The reason is that a Society upon registration acquired a protected interest, which cannot be taken away without due process as outlined in that section."

21. Similarly, in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

" The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

22. In this case the factual averments by the applicant are uncontroverted following the expunging from the record of the replying affidavit. Therefore the existence of the Court order in High Court Miscellaneous Application No. 370 of 2010 is not controverted. Similarly the applicant's contention that it complied with the conditions therein are unrebutted.

23. Section 4(1) of the aforesaid Act provides:

The Board shall have power—

(a) to issue licenses and permits in accordance with this Act and any regulations made thereunder;

(b) during the subsistence of a license or permit, to vary, or for good cause to suspend or cancel it; but the Board shall not suspend a license or permit for more than fourteen days and shall not vary or cancel a license or permit without giving the licensee or permit-holder opportunity to show cause against the variation or cancellation; and

(c) to inquire into complaints against licensees or permit-holders.

24. Under the foregoing provisions the Board has power to vary a licence issued pursuant thereto. However, with respect to suspension the Board cannot do so for more than 14 days and even then before the Board suspends or cancels the licence, there ought to be a good cause. The good cause ought to be a cause which can be subjected to objective scrutiny and ought not to be based on arbitrary or whimsical considerations. As was held by **Philips, J** in **Congreve vs. Home Office** (supra) at 637:

"I have read section 1(4) of the Act of 1949. It is clear that that power is a wide one. It is not unfettered, because no power is unfettered, and there is no power which the court cannot review; but the grounds of review are now well settled, and include cases where the powers are exercised in bad faith, or capriciously or arbitrarily or whimsically as is sometimes put, or for some ulterior purpose…It is now well understood, I think, that very often those descriptions overlap. They are merely ways of saying that the court is satisfied that there has been an abuse of power."

25. On appeal, **Lord Denning, MR** at 651 expressed himself as follows:

"I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the Courts can set aside his revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament: and these courts have the authority – and, I would add, the duty – to correct a misuse of power by a Minister or his department, no matter how much he may resent it or warn us of the consequences if we do. ..When a Minister is given discretion - and exercises it for reasons which are bad in law – the courts can interfere so as to get him back to the right road…A minister is a public officer charged by Parliament with the discharge of a public discretion affecting…subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly".

26. To justify the Board in cancelling or suspending a licence, Article 41 of the Constitution provides that the action must meet the criteria of being expeditious, efficient, lawful, reasonable and procedurally fair and where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. A holder of a licence granted by the Board legitimately expects that no adverse action will be taken to deprive him of the benefit of the licence during the period of the existence of the licence. Article 46(1)(c) of the Constitution protects the right to the protection of health, safety, and economic interests. That the Respondent's action had the effect of adversely affecting the applicant's economic interest cannot be in doubt.

27. In this case the Respondent's action affected the applicant by altering rights and deprived the applicant of the benefits accruing from and advantages which the applicant had hitherto been permitted through the said licence granted to it by the Board to enjoy and which the applicant legitimately expect to be permitted to continue to enjoy either until the expiry of the term thereof or until there was some rational ground for withdrawing it on which it ought to have been given an opportunity to present its version of the matter. I am accordingly convinced that the respondent's action justified the invocation of the Court's supervisory jurisdiction with respect to judicial review remedies.

28. It is my finding that the respondent never afforded the applicant the opportunity of being heard before taking the action that it took. By not bothering to investigate whether or not the applicant had complied with the conditions stipulated in the Court order, the respondent committed an error hence its decision was illegal. The said decision was further in defiance of logic and was therefore irrational. Without affording the applicant the opportunity to address it on the matter, it cannot be said that the Respondent had a good cause to suspend or cancel the licence. Accordingly, the Respondent's action was tainted with procedural impropriety.

29. However, the decision whether or not to grant judicial review orders is an exercise of discretion. As stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles would dictate where to grant the orders of judicial review even if merited is likely to substantially and materially and adversely affect the process, the Court would be reluctant to accede to the applicant's prayers. See **Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203.**

30. In the circumstances of this case the period for which the licence was to remain valid has long since lapsed. According to the ex parte applicant the last time the said licence was extended, it was to run up to 15th March 2011 (now past). For the remedies sought herein to be of any meaningful effect it would be necessary to also compel the Respondent to extend the period of the licence. That order has however not been sought and is incapable of being granted in the absence of leave having been sought to apply for the same. This difficulty was recognised by the **Hon. Mr Justice Musinga** in his ruling dated 13th March 2011 arising from an application by the applicant seeking the extension of the subject lottery permit. The learned Judge expressed himself thus:

"The main issue for determination is whether under the provisions of the law cited by the ex parte applicant, this court has jurisdiction to grant the orders sought. Order 53 rule 1(4) of the Civil Procedure Rules states that the grant of leave to apply for an order of Prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise. Section 3A of the Civil Procedure Act provides for the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. There is no denial that under the provisions of the Betting Lotteries and Gaming Act Cap 131 Laws of Kenya, the respondent is the sole licencing authority for lotteries in this country. According to the ex parte applicant, permit No. 1052 that had been granted to it was to run up to 15th March, 2011 but according to the respondent though the aforesaid date had initially been agreed upon, the expiry date was subsequently changed to 23rd February, 2011. Either way the permit is nolonger valid, its time of validity having expired…In the ruling delivered on 24th February, 2011, the court held that the purported revocation of the permit by the respondent on 13th January, 2011 was unlawful and ordered that the ex parte applicant be allowed to operate its lottery until 15th March, 2011 or until further orders. By the phrase "or until further orders of this court" there was no implication that the court was inclined to extending the validity of the said permit beyond the said date…The Court is not aware of the considerations that are taken into account by the respondent before it grants a lottery permit to an applicant. If the court were to accede to the ex parte applicant's application, it would be tantamount to imposing its will and power over that of the respondent and thereby purport to perform the functions of the respondent in granting or extending lottery permits. The court must decline the invitation by the ex parte applicant to do so as it would be improper and even unconstitutional. In the circumstances, I find and hold that the court lacks jurisdiction to grant the orders sought by the ex parte applicant and hereby dismiss the application with costs to the respondent".

31. I associate myself fully with the learned Judge's sentiments and hold that whereas I find that the applicant would have been entitled to the grant of the orders sought, to grant the same would not be

efficacious in the circumstances of this case.

32. I agree with the decision in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** that the court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.

33. In Raichand Khimji & Co. vs. Attorney-General Civil Appeal No. 49 of 1972 [1972] EA 536 the East African Court of Appeal held that the High Court's supervisory powers over administrative and quasi-judicial tribunals are discretionary and should only be used in exceptional cases, for instance if there has been a failure of justice or want of good faith.

ORDER

34. Accordingly, the order that commends itself to me is that the Notice of Motion dated 16th February 2011 be disallowed not on the ground that it lacks merit but on the ground that the efficacy of the orders sought may not be capable of being attained. The ex parte applicant will, however, have the costs of the application to be borne by the respondent.

Dated at Nairobi this day 15th day of March 2013

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Muli for the applicant.

Mr Kaumba for the Respondent

Mr Muindi for Safaricom