



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Judicial Review 191 of 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**IN THE MATTER OF ORDER 53 OF CIVIL PROCEDURE RULES**

**IN THE MATTER OF SECTION 3, 37(1) A, B, 37(2) A, 37(4) OF THE BETTING, LOTTERIES & GAMING ACT CAP 131**

**IN THE MATTER OF ARTICLES 22(1), 23(1) (3), 27(1) AND 165 OF THE CONSTITUTION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup>RESPONDENT

BETTING CONTROL AND LICENSING BOARD.....2<sup>ND</sup> RESPONDENT

AND

AMAYA GAMING GROUP KENYA LTD.....1<sup>ST</sup> INTERESTED PARTY

INTERACTIVE MEDIA SERVICES LTD.....2<sup>ND</sup> INTERESTED PARTY

### R U L I N G

What falls for determination by this court is the 1<sup>st</sup> interested party's application dated 8<sup>th</sup> March 2012 filed under certificate of urgency on 9<sup>th</sup> March 2012.

The first two prayers in that application are already spent and what is pending determination by this Court is Prayer 3, 4 and 5 in which the 1<sup>st</sup> interested party (*hereinafter referred to as the applicant*) seeks the following orders:

3. **This matter be confirmed as withdrawn and determined.**
4. **The 2<sup>nd</sup> Respondent be ordered to release all the funds owing to the Applicant which it had withheld by reason of orders of stay granted herein dated 26<sup>th</sup> August 2011.**
5. **Costs be provided for.**

The application is supported by an affidavit sworn on 8<sup>th</sup> March 2012 by Scott Campell Cowan, the General Manager of the Applicant and annexures thereto.

The two further affidavits sworn by Scott Campell Cowan on 26<sup>th</sup> March 2012 without leave of the court were withdrawn from the court record by Mr. Alibhai, learned Counsel for the interested party on 27<sup>th</sup> March 2012 when the application was scheduled for interpartes hearing.

The application is opposed by both the exparte applicant, the Lions Heart Self Help Group (*herein after referred to as the Lions Group*) and the 2<sup>nd</sup> respondent, the Betting Control and Licensing Board. A replying affidavit sworn on 20<sup>th</sup> March 2012 by Mr. David Onyango was filed on behalf of the exparte applicant on even date while a replying affidavit sworn on behalf of the 2<sup>nd</sup> respondent by Hon. Lucas Mweni Maitha on 21<sup>st</sup> March 2012 was filed on 21<sup>st</sup> March 2012.

The application was not opposed by the 1<sup>st</sup> respondent, the Hon. Attorney General and the 2<sup>nd</sup> interested party as no replying affidavit or grounds of opposition were filed by either of them. A Mr. Mwenga representing the 2<sup>nd</sup> interested party attended the court on 27<sup>th</sup> March 2012 and informed the court that the 2<sup>nd</sup> interested party was willing to release the money in question to any party identified by the court since it was holding the money in compliance with a court order.

The background against which the instant application was filed can be discerned from the supporting affidavit sworn by Scott Campell Cowan on 8<sup>th</sup> March 2012 in which he deponed that the applicant

obtained permit No.2665 from the 2<sup>nd</sup> respondent on 6<sup>th</sup> December 2010 for the purpose of raising money for charitable purposes under Section 36 of the Betting Lotteries and Gaming Act, Cap 131 of the Laws of Kenya (*hereinafter referred to as the Act.*).

The Lions Group was identified as the object for which the lottery would be promoted and for this reason the Lions Group was by law entitled to 25% of the gross proceeds of the lottery once it was concluded.

The 2<sup>nd</sup> interested party, Interactive Media Services Ltd was contracted to co-ordinate and receive money generated from the lottery and by the time the lottery was concluded sometimes in May 2011, the 2<sup>nd</sup> interested party had received Kshs.41,639,845.53 on behalf of the 1<sup>st</sup> interested party.

It is the applicant's case that following the conclusion of the lottery, there was a dispute between the Lions Group and the applicant regarding the meaning of "**gross proceeds**" of the lottery and exparte applicant subsequently filed a Notice of Motion (exparte) dated 11<sup>th</sup> August 2011 seeking leave to commence judicial review proceedings for orders of Mandamus and Prohibition against the 2<sup>nd</sup> Respondent herein.

A perusal of the court record shows that leave was granted as prayed on 26<sup>th</sup> August 2011. In granting the said leave, J, Wanjiru Karanja directed that the substantive motion commencing the judicial review proceedings should be filed and served within 14 days of that date. The leave granted was to operate as stay of the release of any funds held by the 2<sup>nd</sup> interested party to the applicant pending the hearing and determination of the judicial review application or further orders from the court.

In paragraph 6, 7, 8 and 9 of the applicant's supporting affidavit, it is averred that during the pendency of the judicial review application, the exparte applicant and the applicant executed a settlement agreement on the basis of which the exparte applicant was paid Kshs.28,000,000 as full and final settlement of all proceeds due to it from the lottery (*meaning its entitlement of 25% of gross proceeds*) after which it filed through its advocates, a notice of withdrawal of the judicial review proceedings dated 22<sup>nd</sup> September 2011.

Mr. Alibhai, learned Counsel for the applicant submitted that as the exparte applicant had already been paid its entitlement under the lottery and had duly filed notice of withdrawal of the proceedings pursuant to the parties settlement agreement dated 22<sup>nd</sup> September 2011, the judicial review proceedings had been determined and the interim orders of stay prohibiting the 2<sup>nd</sup> interested party from releasing to the applicant monies held on its behalf generated from the lottery were already spent. The applicant urged the court to formally declare the proceedings determined and order the 2<sup>nd</sup> interested party to forthwith release the said monies amounting to Kshs.41,639,843.53 to the applicant.

In opposing the application on behalf of the exparte applicant, Mr. David Onyango explained in his replying affidavit the circumstances surrounding the Lions Group through its advocates Mr. Anunda executed the settlement agreement and received Kshs.28,000,000/- trusting the applicant's word that the amount represented 25% of the gross proceed generated by the lottery popularly known as "**Kwachu Mamili**". He deponed that on 1<sup>st</sup> November 2011, their advocates were served with a replying affidavit sworn by the Chairman of the 2<sup>nd</sup> respondent in JR. Misc.219/11 in which the applicant's revenue report was annexed. From this report, they discovered that the applicant had sold a total of 8,085,026 tickets at Kshs.50 each which translated to gross proceeds in the sum of Kshs.404,251,300. In its computation, 25% of the said gross proceeds amounted to Kshs.101,062, 825 and that therefore the applicant still owed the exparte applicant Kshs.73,062,825 which it was statutorily mandated to pay.

Mr. Anunda, learned Counsel for the exparte applicant submitted that in view of the revelations in the applicant's revenue report though no formal audit report from the appointed auditors had been received, the settlement agreement which the exparte applicant had allegedly executed in good faith showing that Kshs.28,000,000/- paid to the Lions Group represented 25% of the gross proceeds was an illegality, which was against public policy and that the court should not be used to aid its enforcement. He further

submitted that the Kshs.28,000,000/- received should be treated as advance payment and that since there was no consent judgment or order of the court withdrawing the suit, the case had not been determined. He further argued that as the case was still pending hearing, interim orders of stay were still in force as no further orders varying the same had been issued by the court.

The 2<sup>nd</sup> respondent on its part opposed the release of the monies held by 2<sup>nd</sup> interested party to the applicant on grounds owing to depositions by the applicant in JR.219/11 showing that the lottery had sold 8,085,026 tickets at Kshs.50 translating to Kshs.404,251,300, the issue of gross proceeds of the lottery and the amount payable to the exparte applicant had not been resolved. Hon. Lucas Maitha in his replying affidavit deponed that the 2<sup>nd</sup> respondent was not involved in the negotiations leading to the signing of the settlement agreement between the applicant and the exparte applicant which was in his view unlawful and against public policy. He invited the court to order that the monies held by the 2<sup>nd</sup> interested party be deposited in an interest earning account held between the 2<sup>nd</sup> respondent and the court pending the hearing and determination of JR. Misc. Appn. No.219/2011.

Having carefully considered the application and the submissions made by counsel for the respective parties herein, I find that it is not disputed that the exparte applicant was the only object of the lottery promoted under permit No.2665.

It is also common ground that following the grant of leave to commence judicial review proceedings in this case, the exparte applicant and the applicant executed a settlement agreement on the basis of which the Exparte Applicant (Lions Group) was paid Kshs.28,000,000 said to be 25% of gross proceeds of the lottery.

It is however disputed that the said Kshs. 28,000,000 represented 25% of the lottery's gross proceeds to which the applicant was entitled as a matter of law since the applicant had allegedly conceded through a report in JR.219/2011 to having received a far greater amount than the Kshs.86,116,282 disclosed to the applicant in this case.

Though it is claimed by the applicant that following the execution of the settlement agreement, it filed a notice of withdrawal of the proceedings in court which position is not disputed by the exparte applicant, I have gone through the entire court record and I have not come across a copy of the said withdrawal notice filed by the applicant.

Even if the said withdrawal notice was actually filed in court, it is clear from the submissions made by the parties that the said withdrawal was not formally effected by the court with the result that there is no court order marking the proceedings herein as withdrawn. It is my considered view that the mere filing of the notice of withdrawal of the suit did not by itself amount to a withdrawal of the proceedings. The filing of the withdrawal notice could only have the desired effect if and when the intended withdrawal was effected by way of a court order.

I have gone through the court record in this case and I concur with the

2<sup>nd</sup> respondent and the exparte applicant that no such order was issued by the court in this case.

Even if such an order was issued, it is my finding that the same would have been superfluous as by the time the notice of withdrawal was allegedly filed in court, there were no pending proceedings which were capable of being withdrawn as the exparte applicant had not commenced judicial review proceedings as per leave granted on 26<sup>th</sup> August 2011. The terms conditional to which leave was granted required the exparte applicant to file and serve the substantive motion within 14 days of 26<sup>th</sup> August 2011.

In the course of hearing the instant application, I did not hear any party making reference to a Notice of Motion filed by the exparte applicant seeking judicial review remedies pursuant to grant of leave.

The court record does not show that any such motion was filed by the exparte applicant either prior to the

expiration of leave granted or today.

Order 53 Rule 3(1) of the Civil Procedure Rules provides that once leave is granted, the substantive motion commencing the intended judicial review proceedings must be filed within a maximum of 21 days but the court granting leave has discretion to direct filing of the substantive motion within a period lesser than 21 days.

Leave in judicial review is everything and if the Notice of Motion instituting the actual judicial review proceedings is not filed within the time limited in the grant of leave or within 21 days after grant of leave, the Ex parte Applicant's case is automatically determined by operation of the law.

In this case, it is my finding that leave granted in this case lapsed/expired 14 days after 26<sup>th</sup> August 2011 and since the ex parte applicant did not file a Notice of Motion to commence judicial review proceedings before then, its case terminated after expiration of leave and therefore there were no proceedings pending before the court within which the applicant could have filed the ex parte applicant's notice of withdrawal on 11<sup>th</sup> November 2011.

It is also my finding that by this date, there were no proceedings before the court which were capable of being withdrawn.

The interim orders of stay similarly lapsed when the applicant's case came to an end.

Given my finding that the applicant's case now stands determined and that the orders of stay granted together with leave are now spent, I find and hold that there is no longer any basis or justification for the 2<sup>nd</sup> interested party to continue holding any money on behalf of the applicant.

Though very serious issues and concerns were raised by the parties regarding the legality or otherwise of the settlement agreement executed by the parties and whether the Kshs.28,000,000 paid to the ex parte applicant amounted to 25% of gross proceeds generated by the lottery, I do not find it necessary to make any findings on those issues in this ruling since the applicant's case has now been prematurely terminated by operation of the law and such findings will not serve any useful purpose.

Had the judicial review proceedings been instituted in good time, these are the issues that would have been ventilated and fully investigated during the hearing of the substantive motion to enable the court make a final determination on the same.

For all the foregoing reasons, the applicant's prayer that this court confirms that the applicant's case has been determined succeeds but I hasten to add that the determination of the ex parte applicant's case was brought about by completely different reasons from the ones advanced by the applicant in the instant application.

In Prayer 4, the applicant petitions the court to order the 2<sup>nd</sup> interested party to release to it all the funds it had withheld by reason of orders of stay granted in this case on 26<sup>th</sup> August 2011.

It is noted that the 2<sup>nd</sup> interested party has not denied that it was holding some monies generated from the lottery on behalf of the applicant.

Though it is evident that there is controversy regarding whether the ex parte applicant has a stake on the monies held by 2<sup>nd</sup> interested party or not, it is unfortunate that there are no proceedings in this case within which such controversy can be resolved and since the interim orders which had prohibited the release of the said monies to the applicant are now spent, this court has no alternative but to order the 2<sup>nd</sup> interested party to release the said monies to the applicant as prayed in Prayer 4. It is so ordered

Finally, since the applicant has succeeded in its motion not because of the merits of the application but because of a fatal omission by the ex parte applicant which had the same legal effect as that desired by

the applicant, I will not make any order on costs.

Each party to bear its own costs.

**Dated, Signed and Delivered** by me at Nairobi this 12<sup>th</sup> day of June, 2012.

**C. W. GITHUA**  
**JUDGE**

***In the presence of:***

Florence – Court Clerk

Mr. Adunda for Applicant

Mr. Kamau for 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent

Mr. Desai for 1<sup>st</sup> Interested Party

N/A for 2<sup>nd</sup> Interested Party