REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Misc Civ Appli 1023 of 2005

CHARLES SHIKANGA & STEPHEN DICHU……..……APPLICANTS

Versus

BETTING CONTROL LICENSING BOARDS……...…DEFENDANT

JUDGMENT

By a Notice of Motion dated 7th July 2005 and filed in court on the same date, the ex parte Applicants, namely Charles Shikanga, Stephen Ndichu and Macharia, who are the Chairman, Secretary and Treasurer of the Association of Gaming operators, Kenya (AGOK) respectively, seek an order of certiorari to quash the decision of the Respondent, the Betting Control and licensing Board communicated to the Applicants via a letter dated 17th June 2005 directing specific operating hours for gaming premises. The Application is premised on an affidavit sworn by Charles Shikanga and a statutory statement dated 5th July 2006.

The Application was opposed and Joseph Isaac Adongo, the Chairman of the Betting Control and Licensing Board swore an affidavit dated 13th July 2005. On 15th July 2006, the Respondent also filed grounds of opposition.

Both the Applicants and Respondents also filed skeleton arguments on 6th February 2006 and 8th March 2006 respectively.

The Applicants were represented by Dr. Khaminwa while Mrs. Chesire urged the Application on behalf of the Respondents.

The Applicants have described themselves as an Association of Gaming Operators in Kenya (AGOK), a body representing Casino operators in Kenya. Their complaint is that they were not consulted prior to the Board taking the decision to change the terms of operating Casinos which was contrary to the rules of natural justice as they were denied the right to be heard, that the decision taken was arbitrarily and that the Board acted ultra vires its statutory powers in regulating operating business hours for gaming premises and lastly that the decision is punitive to the gaming industry and denies the public the right to freely pursue their economic, social and cultural development and will cause loss of revenue to the Government.

In opposing the Application, it is the Respondents contention that the time the Board made its decision on 15th December 2004, the Association was not registered and annexture ‘CS I’ to Charles Shikanga’s affidavit dated 7th July 2006 is the certificate of registration dated 1st March 2005. That the Association had therefore no legal right to be consulted on the matter as of 15th December 2004. Adongo also

depones that all Casinos were invited for the full Board meeting on 15th December 2004 (JIA 11) and that all Casino operators attended as evidenced by the minutes of the day (JIA 111) who made their contributions and none raised objection nor was there indication that their Association had been left out. That after the consultations, the Board made the decision to extend and harmonize the hours of operation of the Casinos in terms of paragraph 8 of the circular of 13th January 2005. According to the Respondents, they acted fairly and reasonably in the circumstances.

As to whether the Board acted ultra vires its powers the Respondents contended that S. 46 of the Betting Control & Licensing Board Act gives the Board power to regulate the operations of the gaming premises.

The Respondents deny that the decision was punitive because the Casino operators were present at the meeting of 15th December 2004 when all matters were considered and agreed upon by all.

It is also the Board's contention that they have always regulated the timings of the Casinos in order to regulate the industry in the interests of both casino operators and the public at large. That unregulated gambling would pose a threat to economic, social and cultural development.

In addition to the above submission, the Respondents filed grounds to the effect that the Application is incompetent, misconceived, bad in law, offends provisions of Order 53 Civil Procedure Rules and lacks merit and has no justifiable grounds to stand on.

The Applicant filed a list of authorities on 7th February 2006. I will consider some of the authorities cited, later in this judgment.

Before I go to the merits of the decision I think it proper to consider whether or not the Application conforms with the provisions of Order 53 Civil Procedure Rules. It was Mrs. Chesire's submission that the Notice of Motion is unsupported by any evidence because the Verifying Affidavit consists of only 4 paragraphs which are of no evidential value and that a Supporting Affidavit filed on 7th July 2005 which contains the annextures was filed without the leave of the court and is therefore irregularly on record and should be struck out.

In reply Dr. Khaminwa said that after they filed notice to the Registrar, they filed the Chamber Summons accompanied by an Affidavit dated 6th July 2005 sworn by Charles Shikanga and that the objection raised in respect thereof is misplaced. I have perused the court record. On 5th July, 2005, the Applicant lodged in court the notice to the Registrar, Statement and a 4 paragraphed Verifying Affidavit sworn by Charles Shikanga. Thereafter the Applicant filed the Chamber Summons dated 6th July 2005 which was accompanied by a Supporting Affidavit sworn by Charles Shikanga on the same date. The latter is is a 13 paragraphed Affidavit which contains evidence and annextures.

It is obviously different from the Verifying Affidavit lodged in court on 5th July 2007. The Applicant went ahead to file the Notice of Motion dated 7th July 2005 which is accompanied by a Supporting Affidavit of Charles Shikanga, dated 7th July 2005. The Supporting Affidavit dated 7th July 2005 is basically a reproduction of the Affidavit dated 6th July 2005 save for paragraph 11 of the affidavit dated 7th July 2005 which is not included in the affidavit of 6th July 2005.

Under Order 53 Rule 1 (3) Civil Procedure Rules, before filing of the Chamber Summons application, the Applicant is required to lodge with the Registrar a notice of the Application, the Statement and Affidavits. This means that the Affidavits and Statement filed along with the Chamber Summons should have been lodged with the Registrar the preceding day. It is noteworthy that the Verifying Affidavit dated 5th July 2005 which was lodged with the Registrar is not the same one that was lodged with the Chamber Summons Application on 6th July 2005. That is an anomaly in the Application.

The Affidavit dated 6th July 2005 contains the evidence and is the affidavit that should be relied upon in arguing the Notice of Motion. Under Order 53 R 4(1) copies of the Statement accompanying the Application for leave shall be served with the Notice of Motion and copies of any Affidavits accompanying the Application for leave shall be supplied on demand. It means that if the Applicant wanted to rely on any other Affidavit apart from the one dated 6th July 2005, they would have to seek the court's leave under Order 53 Rule 4 (2) Civil Procedure Rules. There is no evidence that such leave was ever sought from the court and the Affidavit dated 7th July 2005 is therefore irregularly on record and is hereby struck off. Is there evidence to support the Notice of Motion?

In the case of **COMMISSIONER GENERAL KENYA REVENUE AUTHORITY V SILVANO ONEMA OWAKI CA 45/00,** the Court of Appeal observed that it is the Verifying Affidavit not the Statement to be verified, which is of evidential value in an Application for Judicial Review.

I find that apart from the Verifying Affidavit lodged which the notice to the Registrar, the Applicant filed another affidavit dated 6th July 2005 upon which leave was granted which contains the evidence supporting the Application and the court can as well ignore the facts that have been erroneously placed in the Statutory Statement. That objection by the Respondent is therefore dismissed.

Is the **Notice of Motion** Application statute barred? The decision under challenge is dated 15th December 2004. The Judicial Review Application for leave was not made till 6th July 2005 which is about 20 days after the 6 months period lapsed. It is the Respondent's contention that it is statute barred and should not be entertained by this court. Order 53 Rule 2 Civil Procedure Rules provides that no leave shall be granted to apply for an order of certiorari to quash any judgment, order, decree, conviction or other proceeding unless the Application for leave is made within 6 months from the date of the order or proceeding.

The court has however held that the 6 months limitation period would not apply if the decision made was a nullity. In the case of **R V JUDICIAL COMMISSION OF ENQUIRY & OTHERS ex parte MWALULU H.MISC APPLICATION 1279/04** , where court observed as follows:-

"1) A careful scrutiny of S.9 of the Law Reform Act, pursuant to which Order 53 Rules were made and in particular rules 2 and 7 which it is contended denies this court jurisdiction to grant or give the order of certiorari outside 6 months reveals that only formal judgments, orders, decrees, conviction or other proceedings of an inferior court or tribunal fall within the 6 months period stipulated;

2) The act of publishing a rule cannot be said to be a proceeding or any of the order mentioned in Order 53 rule 2. Neither is the decision to formulate the rule a proceeding, judgment, order decree or a conviction. Order 53 rule 2 which prescribes the time limit does not also include anything covered by the principle of ultra vires or any nullities or decisions made without jurisdiction at all."

In this case, the 6 months period would not apply if the decision of the Board is found to have been made ultra vires the Board's powers or if it is a nullity. The court would therefore need to consider whether or not the decision of the Board was a nullity in the first place.

The issues that stand out for consideration are;

1) whether the Applicant Association has the locus standi to bring the Application;

2) whether the Board acted ultra vires its powers;

3) whether the rules of natural justice were breached.

Of locus standi:-

It is the Respondent's contention that the Association which has brought this Application did not exist at

the time when the decision of 15th December 2004 was made. Annexture 'CS 1' the letter dated 26th May 2005, accompanied with certificate of Registration is evidence that the Association was non existent as of 15th December 2005 and that is when it came into existence. The averments by Charles Shikanga that the Association should have been consulted for them to add their voice to the decision are untrue and unfounded. The Respondents had no legal obligation to call upon a non existent party for consultation. However as regards the three Applicants, if they are parties who are affected or inconvenienced by a decision, then they have a right to bring an Application in Judicial Review in their individual capacities. This is because the remedy of Judicial Review is discretionary and the court may refuse to grant it if it is not the most efficacious in the circumstances. **Sir William Wade and Forsyth on Administrative Law 7th Ed** state as follows (Page 701)

"the court is prepared to act at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public."

In the case of **IRC V FEDERATION OF SELF EMPLOYED (1981) 2 ALL ER 106** Lord Diplock (p 644 E)

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

In the instant case, the Applicants describe themselves as officials of the society that represents the interests of casino owners and operators. To be such officials, they must be involved or directly interested in the casino business and in my view they are proper parties to bring such an Application even in their own individual capacities and are therefore properly before this court. The court finds however that the Association had no standing in the matter as of 15th December 2004 but the court will still consider the application as if brought by the Applicants as individuals.

Of breach of Rules of Natural Justice:-

In his Affidavit, Charles Shikanga denied that they were ever consulted before the decision was taken. On the contrary, the Respondents have exhibited the letter dated 1st December 2004 addressed to all casinos inviting them to the meeting of 15th December 2004. The minutes of 15th December 2004 do show that all the Applicants who represented different casinos were present. In fact the three Applicants were present as their names appear on the list of those in attendance. One of the issues discussed at that meeting was operating hours for public gaming premises – at minute 1209/2004 and it was resolved that with effect from 1st May 2005 the operating time for gaming premises would be Nairobi and upcountry 12 noon to 4.00 a.m., Coastal Region 11.00 a.m. to 5.00 a.m.

This is the same decision that is now challenged by the same persons who took part in its making. The parties have not denied participation in the meeting of 15th December 2004. They cannot turn back to what they were party to and allege that they were denied a hearing. That exhibits lack of candour on their part. They have not come to court in good faith. Besides it is not that all the casinos do not approve of the times allowed for gaming. The 2nd Applicant Stephen Ndichu, has since withdrawn his claim in this Application by his letter of 8th July 2005 to the Respondent informing the Respondent that their two establishments are in agreement with the circular on the timings and will respect that decision and the Respondent as the legitimate regulatory body of the Government. I find that the Applicants having been party to the meeting that agreed on the timing of operations of the gaming premises, they were never denied a hearing and rules of natural justice were not flouted at all. Duty to accord one a hearing comes with the duty to give reasons. In this case, that does not arise because the Applicants were present when the issue was deliberated and agreed upon.

Of the Respondents acting ultra vires their powers;

It was submitted that S.4 of the Betting Lotteries and Gaming Act does not bestow upon the Respondents any power to regulate the timings of the gaming business.

To the contrary, the Respondents contend that S.46(3) (a) gives the Respondent the power to regulate the operations of gaming premises.

S.4 of the Betting, Lotteries and Gaming Act Cap 131 Laws of Kenya sets out the powers of the Board. It stipulates;

"**4 (1) 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 licence or permit to vary, or for good cause to suspend or cancel it;**

c) **To inquire into complaints against licenses or permit holders;**

2) …….**shall regulate its own procedure**

3) **The Board may authorize the chairman to exercise on its behalf, such powers as it may from time to time specify…."**

Under the above Section there is no power granted to the Respondent to regulate the timing of the premises. But it seems that that is not the only Section that empowers the Board to do certain acts under the Act. Under S.46 of the Act, the Board has the discretion to license public gaming premises, and Section 46 (3) stipulates;

"46 (3) the Board may, in respect of a license issued under this Section, impose conditions providing for-

(a) The manner in which a person may conduct his business and the suitability, condition and conduct of the premises and the hours during which the premises may be open for business;

(b) ……**.."**

In fact from a reading of the minutes, it is apparent that this was not the first thing the Board was dealing with the issue of regulation of the timing of operation of the gaming premises. The Board was merely changing the operation hours that had been in existence. I find and hold that the law empowers the Board to regulate the timing of gaming premises. As correctly submitted by the Respondent, the public interest would require that the timings of the casinos be regulated to protect would be weak and compulsive members of society from exploitation through addiction which may result in lots of time spent in gambling which would have negative economic, social and cultural effects in our country. It cannot be left to the whims of free enterprise. There has to be a measure of control which does not amount to total prohibition.

I do find and hold that the Respondents did not act ultra vires the powers of the Act nor did they breach rules of natural justice.

In the result, I do not find any merit in the Notice of Motion dated 8th July 2005 and it is hereby dismissed with costs to the Respondent.

Dated and delivered this 11th day of July 2007.

R.P.V. WENDOH

JUDGE

Coram: Wendoh J

Court Clerk: Daniel

Ms. Munyi – Respondent

Mr. Kuloba holding brief for Dr. Khaminwa

Court

Judgment read in open court

Mr. Kuloba

I seek leave to appeal

Court

Right of appeal is automatic.

R.P.V. Wendoh

Judge