Nyabayo v Shop and Deliver t/a Betika (Civil Appeal E191 of 2023)
[2024] KEHC 10597 (KLR) (Commercial and Tax) (10 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E191 OF 2023

A MABEYA, J

SEPTEMBER 10, 2024

BETWEEN

CLAIRE NYABAYO ..... APPELLANT

AND

SHOP AND DELIVER T/A BETIKA ..... RESPONDENT

JUDGMENT

1. This is an appeal arising from the Betting Control & Licensing board delivered on 31/7/2023. The appellant made a complaint to the Betting Control and Licensing Board ("the Board") against the respondent ("Betika Company") for failing to award her the winnings made from the magic numbers game.

2. On 31/7/2023, the Board rendered its decision whereby it held that the Betika Company should pay the appellant a maximum of Kshs. 1,000,000/-. This amount was stipulated in the Terms and Conditions as the maximum payout for the Magic Numbers game.

3. Aggrieved by the said decision, the appellant preferred this appeal vide a memorandum of appeal dated 21/8/2023. The appeal was founded on 9 grounds which can be summarized as follows: -

    a. That the Board erred by not directing Betika Company to pay the full amount of Kshs. 99,976,365/-, which represented the appellant's total winnings.

    b. That the Board made an error by capping the interest at Kshs. 1,000,000/- an amount not mentioned by any of the parties.

    c. That the Board erred in taking the manufacturers position that the game identified and confirmed a system problem referred to as an internal bug.

d. That the Board erred in law and fact in failing to find the Betika Company accountable for withholding the appellant's winnings for almost two years.

4. The appellant therefore prayed for the appeal to be allowed and the Betika Company to be found liable to pay Kshs 99,979,365.61 together with interest at prevailing commercial and bank rates.

5. The appeal was canvassed by way of written submissions. The appellant submitted that while the respondent accused her of exploiting the game, it did not specify how her actions were exploitative or how they affected the game or website. Additionally, the appellant submitted that the respondent failed to identify the relevant terms and conditions applicable at the time of the appellant's winnings.

6. It was the appellant further submissions that the in its letter dated 23/2/2023, the Board found no fault with her winnings and did not support the respondent's claims. That freezing the appellant's account and withholding her winnings violated her right to fair administrative action under Article 47 of *the Constitution*. She also challenged the impartiality of the game developers, Split the Pot AB, regarding their claim of a critical bug, citing lack of evidence on when the bug occurred.

7. In conclusion, the appellant submitted that the Board incorrectly relied on terms and conditions about maximum winnings that were not in effect during the appellant's game on January 2nd and 3rd, 2022, suggesting these terms were introduced during the dispute.

8. On its part, the respondent submitted that the Board did not err in failing to direct the payment of Kshs. 99,979,365.61, as the decision was consistent with the terms and conditions of the game which capped the maximum payout at Kshs. 1,000,000/-. That according to those terms, if the system generated winnings exceeding the maximum amount, any excess is considered void and not payable.

9. The respondent further submitted that a report from the manufacturer of the game "Magic Numbers" revealed that the multiplier was incorrectly calculated due to a flaw in the game logic, leading to an unusually high multiplier. That the bets followed similar patterns and settings, with betting amounts increasing significantly in a short period, despite the initial account balances being relatively low.

10. That the appellant used the same device and browser, placing bets within a 9-hour window. That in the premises, to pay the appellant Kshs 99,979,365.61 would result in unjust enrichment, as the excessive winnings stemmed from a critical system bug. It was emphasized that there was a valid contract between the appellant and the respondent, governed by terms and conditions that the appellant had accepted, and that the game manufacturer had the best understanding of the game's internal mechanics. That in the premises, the appeal should be dismissed.

11. The Court has considered the record and the submissions of the parties. This an appeal from the decision of the Board dated 31/7/2023. In its decision, the Board acknowledged that the appellant had accumulated winnings totaling Kshs 99,976,365.61. It that the respondent had unfairly frozen the appellant's gaming account. Additionally, the Board acknowledged the Terms and Conditions for the group games, which specified a maximum payout of Kshs. 1,000,000/-. Consequently, the Board awarded the appellant this maximum amount as stipulated in the terms and conditions.

12. In arguing her case, the appellant argued that the board had relied on terms and conditions that were not in effect at the time she accrued her winnings. She contended that these terms and conditions had been unfairly introduced by the respondent and that she was not given an opportunity to respond to this new evidence. In response, the respondent maintained that any winnings exceeding the maximum limit of Kshs. 1,000,000/- were null and void and that the respondent was not obligated to pay any amount beyond this allowable limit.

13. In view of the facts laid out by the parties in this appeal and the grounds of appeal set out above, the main issue for determination is whether there was an error on the part of the Board in relying on the terms and conditions which gave out the maximum limit of Kshs 1,000,000/-.

14. In terms of Selle v Associates Motor Boat & Co [1968] EA 123), this Court has a duty to re-examine and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that it did not have an opportunity to see the witnesses testify.

15. In this case, the relationship between the parties is contractual in that the betting company has an obligation of honoring the terms of the contract by paying out winnings as specified as well as maintaining the integrity of the whole process and laying out the rules of the game. The client/ customer on the other hand, is obligated to comply with the terms and conditions and ensuring timely deposits. For this process to run smoothly, there the rules are set up in the terms and conditions of the game.

16. The appellant submitted that the terms and conditions relied on were not present at the time she played the game. It is imperative to note that, the decision of the Board was wholly based on the said terms and conditions. They seem to have been submitted twice by the respondent to the Board in the respondent's letters dated 2/3/2023 and 14/7/2023, respectively. They appeared as ANNEXTURE 5 in the letter dated 14/7/2023.

17. In its letter to the appellant's advocate dated 26/9/2023, the Board supplied the said advocates with all the documents relied on by the Board. The said 2 letters and their enclosures were also included. The letter set out in detail what each document was and the Board disclosed that the subject letters and the annextures thereto which included the terms and conditions of the game.

18. However, upon perusal of the entire Record and the supplementary records of appeal, neither the appellant nor the respondent supplied that vital document. The appellant very well knew that her appeal was as against the relienace by the Board on those terms and conditions. Why did she leave that crucial document out in her Record of Appeal? That is a document which the Board specifically referred to and stated that it relied on PART D thereof to cap the winnings at a maximum of Kshs.1,000,000/-.

19. The question that arises is, can this Court interfere with a finding of fact based on a document that was before the Board which the Board specifically referred to, supplied the same to the appellant but the appellant conveniently shielded this Court from seeing? I do not think so. In the view of this Court, by failing to produce the said crucial document in the appeal before this Court, the appellant denied this Court the chance of testing the veracity of the Board's decision. Submitting that the terms and conditions were not there at the time of playing is not enough.

20. The burden of proof is on the person who alleges the existence of the set of circumstances he wishes the Court to believe. In the present case, the appellant's case is that the Board was wrong in relying on terms and conditions that were not in existence at the time she placed her wager. She failed to produce those terms and conditions so that the Court can test them and the veracity of her claim. See sections 107, 108 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya.

21. To the extent that those terms and conditions were produced before the Board and the Board not only referred to them but relied on them in arriving at its decision, but they were conveniently left out of this appeal, this Court cannot pronounce itself on them and neither can it disturb the Board's decision on them.

22. On the third ground of appeal as outlined by the court, the appellant contested the Board's finding that the game's manufacturer identified and confirmed a system issue referred to as an internal bug. The Contingencies Functionality report for Split the Pot AB indicated that the system met the relevant requirements according to the test plan. The incident report dated 3/1/2022 mentioned irregularities in the system, which led the respondent to deactivate the affected accounts.

23. This evidence remains uncontested, as the appellant merely questioned the objectivity of the respondent's manufacturer without providing contrary evidence. As a result, the burden shifted to the appellant to present opposing evidence. In failing to do so, the Court is inclined to believe that an error did occur and agrees with the Board's findings.

24. The outcome of this is that, while there is no evidence showing that the terms and conditions were in place to bind the appellant to the Kshs. 1,000,000/- maximum payout, the evidence on record suggests that a system issue may have led to unusually high payments. Therefore, while the court recognizes the appellant's right to compensation, it would constitute unjust enrichment for her to benefit from winnings generated by a faulty system.

25. The upshot of this is that the appeal has no merit and is hereby dismissed with costs.

    It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE