



**Consumer Federation of Kenya v Betting Control and Licensing Board & 2 others; Cabinet Secretary Ministry of Information Communication and the Digital Economy & 4 others (Interested Parties) (Petition E307 of 2023) [2024] KEHC 11785 (KLR) (Constitutional and Human Rights) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E307 OF 2023**

**LN MUGAMBI, J**

**OCTOBER 4, 2024**

**BETWEEN**

**CONSUMER FEDERATION OF KENYA ..... PETITIONER**

**AND**

**BETTING CONTROL AND LICENSING BOARD ..... 1<sup>ST</sup> RESPONDENT**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CABINET SECRETARY MINISTRY OF INFORMATION COMMUNICATION AND THE DIGITAL ECONOMY ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**OFFICE OF THE DATA PROTECTION COMMISSIONER .... INTERESTED PARTY**

**COMPETITION AUTHORITY OF KENYA ..... INTERESTED PARTY**

**MILESTONE GAMES LIMITED ..... INTERESTED PARTY**

**RULING**

1. By way of a Notice of Motion application dated 18<sup>th</sup> January 2024, the Applicant seeks orders that:
  - i. Spent.



- ii. Pending the hearing and determination of this application this Court be pleased to order a stay of execution of the consent executed by the Petitioner, 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed in Court on 9<sup>th</sup> January 2024 and adopted as an order of the Court on 16<sup>th</sup> January 2024.
  - iii. This Court be pleased to order that the consent executed by the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be set aside together with all consequential orders.
  - iv. The Applicant be admitted to join these proceedings as the 5<sup>th</sup> Interested Party.
  - v. This Court upon grant of Prayer 4 above be pleased to grant the Applicant leave to file a Replying Affidavit and written submissions in response to the Petitioner's Notice of Motion dated 24<sup>th</sup> August 2023.
  - vi. The Petitioner's Notice of Motion dated 24<sup>th</sup> August 2023 be heard and determined on priority basis.
  - vii. The costs of this Application be provided for.
2. The application is premised on the grounds set out on the face of the application and Applicant's supporting affidavit by Robert Macharia, it's Corporation Secretary sworn on even date. Additionally, the Applicant's Supplementary affidavit dated 20<sup>th</sup> March 2024.
  3. It is imperative to highlight that the Applicant vide a Notice of Motion Application dated 19<sup>th</sup> October 2023 sought to be enjoined in this suit as an interested party. This application had not been determined when the instant application was subsequently filed. When this issue was pointed out by Counsel for the 1<sup>st</sup> Respondent, Mr. Marwa on 28<sup>th</sup> February, 2024; the proposed 5<sup>th</sup> Interested Party/Applicant hurried to indicate that it was withdrawing the application of 19<sup>th</sup> October, 2023 and pursue the instant application dated 18<sup>th</sup> January, 2024.

### **Applicant's Case**

4. The Applicant describes itself as a trader in the gaming industry licensed by the 1<sup>st</sup> Respondent.
5. The Applicant alleges that the motive behind the Petition is the advancement of its competitor's interest, not the protection of the young people as pleaded, a fact that had been conveniently and deliberately omitted by the Petitioner.
6. The Applicant avers that it pointed out this mischief in a letter dated 16<sup>th</sup> August 2023 addressed to the 1<sup>st</sup> Respondent. The Applicant asserts that if the orders sought herein are granted the same will adversely affect its constitutional rights. For this reason, it argues that it is a necessary party in this suit.
7. On 17<sup>th</sup> January 2024, it was brought to the Applicant's attention that the Petitioner together with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' had colluded and entered into consent Agreement which had been adopted by the Court to the effect that 'all gaming operators to cease the use of speed dial feature forthwith'.
8. The Applicant asserts that this Notice was issued without any reference to it yet has a direct and negative effect on its business operations and its ongoing contractual obligations. Further that this Order was not served upon it before its adoption.
9. Considering this, it is argued that the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' connived to deny it an opportunity to have its case heard on merit. This is since the consent order is final in nature and was granted at the interlocutory stage. Moreover that this was done in total disregard of its application dated 19<sup>th</sup> October 2023 that was intent of disclosing a number of hidden facts.



10. The Applicant depones that enforcement of the Consent Order will force it to breach their existing Agreement with Opera mini. Correspondingly that barring the speed dial feature will stifle innovation in the technology and betting industry.
11. The Applicant also notes that it has been adversely mentioned in the Petition at paragraphs 23, 27, 27, 29 and Prayer g. Equally that it is mentioned under paragraph x in the Petitioner's Notice of Motion dated 24<sup>th</sup> August 2023. Owing to the detrimental nature of these allegations, it is contended that it should be enjoined so as to be heard.
12. In the further affidavit, the Applicant challenged the 1<sup>st</sup> Respondent's affidavit terming it defective in view of Section 5 of the *Oaths and Statutory Declarations Act* as the said affidavit is undated. As a consequence, the 5<sup>th</sup> proposed Interested Party argues that the same should be struck out from the record.

### **Petitioner's Case**

13. In opposition to the application, the Petitioner's Secretary General, Stephen Mutoro filed a replying affidavit sworn on 19<sup>th</sup> February 2024.
14. He depones that the key contention in the Petition is protection of consumers including children from the unregulated gambling advertisements through the speed dial feature which poses a great risk. He stresses that the Petitioner's action is solely premised on public interest and has no bearing on what the Applicant is alleging in its application.
15. He avers that the law of joinder of interested parties in constitutional petitions is not a matter of right hence one must first meet the set threshold. In the same way a party's identifiable stake in the proceedings must be demonstrated and the prejudice likely to be suffered. In this matter, he argues that the Applicant does not meet this threshold and so does not qualify as an interested party.
16. The Petitioner further contends that this application is misconceived and an abuse of the court as the Applicant had filed an initial application for joinder which was not dispensed with before filing the instant application.
17. It is further averred that the Applicant has failed to adduce the Contract in view of its obligations with Opera mini as alleged. By the same token, that no grounds to support its claim have been accentuated in the application other than merely stating that it is being affected. Moreover, the Petitioner stresses that it has not sought any orders against the Applicant and Petition capable of being disposed without any reference to it.
18. He posits additionally that the request for consideration of the Consent Order was guided by the 1<sup>st</sup> Respondent's admission that the speed dial feature is problem and it required to formulate guidelines. He as well avers that the Applicant who initially utilized the speed dial feature had not used the feature since 2022. As such cannot claim to be prejudiced due to the Consent Order.
19. The Petitioner also adds that the Applicant has not met the threshold for setting aside a Consent Order. Even so it is averred that the Applicant was not a party to this suit at the time the Consent Order was issued for it to be served.
20. The Petitioner also depones that the Applicant wrote to the 1<sup>st</sup> Respondent on 16<sup>th</sup> August 2023 declaring that they would not comply with its directive in relation to the speed dial feature. In view of this, he alleges that the Applicant who was not intent on complying with the directive in the first place, only seeks joinder so as to continue in the same trajectory.



### **1<sup>st</sup> Respondent's Response**

21. The 1<sup>st</sup> Respondent's Director, P.K. Mbugi in an undated replying affidavit, avers that he is unaware of the prejudice likely to be suffered by the Applicant if the Orders sought in the Petition are granted.
22. He depones that the 1<sup>st</sup> Respondent as the regulator of the gambling industry in Kenya and exercising its mandate with reference to unregulated gambling business, issued a circular banning the use of speed dial on all internet browsers. This directive was aimed at protecting minors and vulnerable persons from its harmful effects which include addictive gambling.
23. Prior to issuing this directive, the 1<sup>st</sup> Respondent had been informed by the Petitioner of the predatory advertising that was being conducted by its licensees including the Applicant. Considering this, he asserts that the Applicant's allegations are far-fetched as its role is primarily to regulate such issues. Moreover, that the minors and vulnerable persons are granted protection by the 1<sup>st</sup> Respondent against risks of unregulated gambling.
24. The 1<sup>st</sup> Respondent further contends that the Applicant has failed to adduce the Contract that contains the alleged legal obligations at risk of breach or the loss it is likely to suffer for failure to use the speed dial feature. In the same way he makes known that the 1<sup>st</sup> Respondent even prior to filing of this Petition had issued the directive to all betting companies including the Applicant to cease using the speed dial feature.
25. He as well avers that the Applicant who initially utilized the speed dial feature had not used the feature since September 2023. Considering this, he asserts that the Applicant cannot claim to suffer prejudice owing to the Consent Order.
26. He additionally claims that the Applicant only seeks to be enjoined in this suit for commercial gain. Likewise, it is stated that the Applicant has not met the threshold for setting aside a Consent Order. Nonetheless being that the Applicant was not a party to the suit, the 1<sup>st</sup> Respondent was not bound to serve it with the Consent. For this reason, its application is adjudged to be baseless, misconceived and an abuse of the Court.

### **2<sup>nd</sup> Respondent's Response**

27. David Mugonyi, the 2<sup>nd</sup> Respondent's Director General vide a replying affidavit sworn on 7<sup>th</sup> March 2024, depones that it was not a party to the consent between the Petitioner and the 1<sup>st</sup> Respondent. As such the Applicant's allegations against it in this regard are misguided.
28. He avers that the 2<sup>nd</sup> Respondent's Counsel had alerted the Court about the Applicant's application dated 19<sup>th</sup> October 2023. Counsel further questioned whether the same could be dispensed with before the consent was adopted.
29. In its view, there is no reason to disallow the Applicant's application as the Applicant has a right to be heard by the Court.

### **3<sup>rd</sup> Respondent's Response**

30. In reply to this application the 3<sup>rd</sup> Respondent filed Grounds of Opposition dated 23<sup>rd</sup> February 2024 on the basis that:
  - i. The intended 5<sup>th</sup> Interested Party has failed to show sufficient facts to anchor its claims.



- ii. The intended 5<sup>th</sup> Interested Party is not a party to the proceedings as such he has no right oppose the consent as entered into by the Petitioner and Respondents.
- iii. The intended 5<sup>th</sup> Interested Party has no right of audience before this Court for reasons that it is yet to be admitted to the proceedings.
- iv. In Nairobi Election Petition No. 23 Of 2017 Japathet Muroko And Another – Versus Independent Electoral and Boundaries Commission & Another it was held that admission of a person as an interested party is not a matter of right and even where the law provides the basis, the court admits a party in exercise of its judicial discretion.
- v. The intended 5<sup>th</sup> Interested Party will not be affected by the determination of this Court on the Petition made either way.
- vi. The intended 5<sup>th</sup> Interested Party is a private entity that has neither disclosed nor demonstrated any direct interest in the instant Petition.
- vii. The intended 5<sup>th</sup> Interested Party has not demonstrated any prejudice that it will suffer in case of non-joinder.
- viii. The intended 5<sup>th</sup> Interested Party has not demonstrated that its purported interest will not be well articulated unless it is enjoined and appears in the proceedings to champion its cause.
- ix. The intended 5<sup>th</sup> Interested Party has failed to set out the case and/or submission it intends to make before the Court, and demonstrate the relevance of those submissions.
- x. In Francis Kariuki Muruatetu & Another v Republic & 5 Others (2016) eKLR the Supreme Court defined an interested party as one who has a stake in the proceedings and can only be enjoined in a suit where it demonstrates its personal interest or stake, prejudice to be suffered and sets out the case and submissions it intends to make before the Court.
- xi. The intended 5<sup>th</sup> Interested Party has failed to show the Court that it has a clearly identifiable personal stake in the matter.
- xii. In Joseph Njau Kingori vs. Robert Maina Chege & 3 others (2002) eKLR the Court gave the guiding principles to be followed in such an application as: one must be a necessary party; be a proper party; in the case of the defendant there must be a relief flowing from that defendant to the plaintiff; the ultimate order or decree cannot be enforced without his presence in the matter and His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

### **Interested Parties' Response**

- 31. The Interested Parties response and submissions to the application are not in the court file or Court online portal (CTS).

### **Parties Submissions**

#### **Applicant's Submissions**

- 32. On 20<sup>th</sup> March 2024, Macharia, Gakaria and Associates Advocates filed submissions in support of the application. Counsel sought to discuss a number of issues. Whether the Applicant has an identifiable stake; whether its right to be heard was violated; whether final orders were issued at the interlocutory



stage; whether the consent is illegal; whether the applicant has satisfied the threshold for setting aside the consent order and whether the 1<sup>st</sup> Respondent's affidavit is defective.

33. Counsel in the first issue submitted that the Applicant has an identifiable stake in the matter. This is because it is a licensed gaming operator and has an existing contract with Opera Software Ireland Limited. In this regard it was argued that the Consent Order is directed at all gaming operators to cease use of the speed dial feature. As such, this Order has a direct effect on the Applicant and its contractual obligations.
34. Reliance was placed in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR where it was held that:

“The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

- a. the intended interested party must have "an identifiable stake"
- b. or legal interest
- c. or duty in the proceedings

The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.”

35. On the competence of the 1<sup>st</sup> Respondent's affidavit, Counsel submitted that its lack of the date sworn was in breach of Section 5 of the *Oaths and Statutory Declarations Act*. The implication of this was argued to mean it has no evidentiary value and so should be struck out. Reliance was placed in *Nyabuto Arambe Abusa v Kenya Power & Lighting Co. Ltd* [2015] eKLR where it was held that:

“Such an affidavit must be signed by the deponent, dated and note the place where the deponent is situated stated. These are not just mere technicalities that can be omitted and left to be addressed literally. There is a law that governs the making of affidavit, the *Oaths and Statutory Declarations Act*, such a law is intended to ensure that the facts deponed in an affidavit are true and based on the personal knowledge of the maker and hence the requirement to state where the affidavit was made, the date and the name of the deponent. By signing such a statement, the deponent is in essence giving evidence under oath that the contents of such a document is correct to the best of his knowledge at the time such an affidavit was made as held in *Kenya Union of Employees of Charitable Organisations versus St. Joseph Catholic Church Parish, Cause No.745 of 2013*. Hence the failure to note the dates when such an affidavit is made becomes crucial to the facts stated as such facts may or could change based on the time the particular averments in the affidavit are made. To thus fail to state the time when the affidavit was made removes a very vital aspect of the same from the document, making it valueless and cannot be relied upon. The claim that has such an affidavit that is undated is thus left exposed and without any Verifying Affidavit.”

36. Like dependence was also placed in *Mulusiah Land Consultants & another v Industrial Development Bank Ltd & 2 others* [2005] eKLR.



37. It is submitted further that the effect of the Petitioner’s and Respondents’ action of entering into the agreement denied the Applicant an opportunity to be heard. Reliance was placed in *Olive Mwhiki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR where the Court of appeal held that:

“The right to be heard embodies the right of audience; this right is jealously guarded by this Court. In *Richard Nchapi Leiyegu -v- IEBC & 2 Others* Civil Appeal No. 18 of 2013, this Court expressed that the right to a hearing has always been a well-protected right and is the cornerstone of the rule of law. In *Rose Detbo -v- Ratilal Automobiles & 6 Others, Civil Application No. 304 of 2006* (171/2006UR), this Court in a bench majority (Githinji and Onyango-Otieno JJA; with Hon. Tunoi JA, as he then was dissenting) observed that if the actions of the alleged contemnor in failing to obey court orders cannot impede the course of justice or make it difficult to ascertain the truth in respect of the matter, then the contemnor can be heard.”

38. Counsel as well argued that the Consent Order has a final effect at an interlocutory stage yet the matter ought to be heard on merit. For this reason, the Applicant challenges summarily issuing the Consent Order at this stage. To buttress this argument reliance was placed in *East African Portland Cement Company Limited V Attorney General & Another* [2013]eKLR where it was held that:

“25. Interim orders are granted where the Court, exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits.”

39. Moving on, Counsel argued that the manner in which the Consent Order was agreed upon and made was illegal since it was geared toward excluding the Applicant while circumventing its already existing application dated 19<sup>th</sup> October 2023. According to Counsel, this is in violation of the Applicant’s right to be heard under Article 25(c) and 50(1) of *the Constitution*. Moreover it’s right to a fair administrative action under Article 47(2) of *the Constitution*. Being that the Consent was made in breach of constitutional provisions the parties actions are deemed null and void.

40. Reliance was placed in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where it was held that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law...”

41. Like dependence was also placed in *Kenya Airways Limited vs Satwant Singh Slora*(2013)eKLR.

42. From the foregoing, Counsel submitted that the Applicant has satisfied the threshold for setting aside the Consent Order. This is because the making of the Consent Order was tainted with illegality. Reliance was placed in *Purple Rose Trading Company Limited v Bhanoo Shashikant Jai* [2014]eKLR where it was held that:

“It is trite law that a contract which is tainted with illegality is unenforceable at the instance of either party. Where a contract is ex facie illegal, the Court will not enforce it whether the



illegality is pleaded or not. This is due to the fact that once illegality is brought to the court, then the court must investigate it whether it was pleaded in the statement of defence or not since the court, as the custodian of law cannot shut its eyes to an allegation of illegality simply on grounds that it was not pleaded. Once illegality is brought to the attention of the Court it overrides all questions of pleadings including admissions made therein. The Court will not condone an illegality and base a decision on it. It has been held that it is unacceptable that a Court should allow itself to be a party to unlawful act by ignoring it and make an order to the benefit of the wrong doer or those claiming through him.”

### **Petitioner’s Submissions**

43. Mutai Maina Kimeu and Associate Advocates filed submissions on behalf of the Petitioner dated 20<sup>th</sup> February 2024. Counsel declined to address the issue of joinder of the Applicant as an Interested Party. This is because the instant application was not properly placed before the Court as the first application has not yet been withdrawn.

44. Counsel submitted that the sole issue for discussion was whether the Applicant had met the required threshold for setting aside of the Consent Order dated 16<sup>th</sup> January 2024. To buttress this point, reliance was placed in Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited (2015) eKLR where the Court of Appeal held that:

“The law on variation of a consent judgement is now settled. The variation of a consent judgement can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgement at page 626 -"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983, This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held: "A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

45. Like dependence was placed in Inter Countries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others (2019) eKLR and Flora N. Wasike vs Destimo Wamboko (1988) eKLR.

46. Consequently, Counsel submitted that the Consent Order herein can only be set aside where the Applicant demonstrates that it was procured through fraud, there was non-disclosure of material facts or mistake or for a reason that would enable a court to set it aside. Similarly, these elements must be proved.

47. Counsel submitted that an examination of the Applicant’s evidence in the supporting affidavit does not show the alleged collusion that occurred between the parties before the Consent was entered. It was as well pointed out that as per the 1<sup>st</sup> Respondent, the content of the Consent was not novel. The same had already been issued through its directive to all the betting companies including the Applicant even before filing of this Petition. Subsequently, Counsel argued that the Petitioner had not met the threshold for grant of the prayers sought.



## 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Submissions

48. On 13<sup>th</sup> March 2024, State Counsel, Christopher Marwa, filed submissions dated 13<sup>th</sup> March 2024 where he noted that the key issue for discussion was whether the Applicant had met the threshold for joinder as an interested party in the suit. Relying on Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Counsel submitted that for one to qualify as an interested party, they must prove a number of elements.
49. First, prejudice. Counsel submitted that the allegation of an existing contract between the Applicant and Opera Software Ireland Ltd was not demonstrated. Correspondingly that the bar to the use of the speed dial feature was notified to all the operators on 11<sup>th</sup> August 2023. As such, the Applicant was well aware of the bar long before the Petition was filed.
50. For this reason, Counsel argued that the Applicant cannot be allowed to challenge the Consent Order until and unless he is admitted as an Interested Party in this matter. Additionally, it was asserted that the Applicant had failed to demonstrate any prejudice that it will suffer in case of a non-joinder.
51. Reliance was placed in Francis K. Muruatetu case (supra) where the Supreme Court held that an applicant seeking to be joined as an interested party must satisfy the following threshold:
- i. The personal interest or stake in that party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - ii. The prejudice to be suffered by the intended Interested Party in the case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”
52. Equal dependence was also placed in Kenya Medical Laboratory Technicians and Technologists Board & 6 others (supra).
53. Secondly, the Applicant is required to identify its interests in the matter. According to Counsel, the application is largely focused on the Consent Order and does not in any way indicate the Applicant’s interest with regard to the substantive Petition. Reliance was placed in Nairobi Election Petition No. 23 of 2017 Japathet Muroko and another v Electoral and Boundaries Commission & another where it was held that:
- “That said, should a party seeking to join proceedings as an interested party be shut out completely? The court is clothed with power to promote the interests of justice, and it is on this premise that this court gives audience to the applicant herein. However, an admission of a person as an interested party is not a matter of right. Even where the law provides the basis for such an application, the court admits a party in exercise of its judicial discretion”.
54. Analogous reliance was also placed in Attorney General v David Ndi & 73 others (Petition 12 (EO16) of 2020) [2021] KESC 17 (KLR) (9 November 2021) (Ruling).



55. From the foregoing, it is the Respondents' submission that the Applicant has failed to satisfy the legal requirements for joinder as an interested party and hence the application ought to be dismissed.

### **Analysis and Determination**

56. It is my considered view that the issues that arise for determination are:
- i. Whether the Applicant should be joined in this suit as an interested party.
  - ii. Whether the Applicant has satisfied the threshold for setting aside of a Consent Order.
  - iii. Whether the 1<sup>st</sup> Respondent's Replying Affidavit is competent.

### **Whether the Applicant should be joined as an interested party**

57. The law on joinder of interested parties in Constitutional petitions is set forth in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules). Rule 2 defines an 'interested party' as:

'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'.

58. The Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR echoed this principle by stating that:

“ 17. Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

18. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

59. The addition of an interested party is provided for under Rule 5 (d) (ii) of the Mutunga Rules as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

60. The applicable principles for joinder of an interested party were set by the Supreme Court in *Francis Kariuki Muruatetu* (Supra) where it underscored the principles as follows:

“i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.



- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iv. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

61. Furthermore at Paragraph 41 the Supreme Court noted as follows:

“(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court...”

62. Furthermore in *Jeremiah Mghanga Msafari v Millicent Zighe Mwachala & 3 others* [2021] eKLR the Court observed that:

“26. ...Who is an interested party and at what stage can joinder of an interested party be entertained? According to the Black’s Law Dictionary, 9<sup>th</sup> Edition a “Necessary Party” is defined as;

“A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings”

....

29. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo. J. explained circumstances when an interested party ought to be enjoined in a proceeding. He stated thus;

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.



30. In the case of Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR the Supreme Court of Kenya held that;

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

31. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

63. The Court went on to state as follows:

“ 33. It is trite that joinder of an interested party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party’s inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all...”

64. In present case, the Petitioner mainly sought to stop the invasive and predatory speed dial advertising feature used by betting firms through the internet so as shield the children from such exposure. In claiming that its interests would be prejudiced by the nature of the orders sought, the 5<sup>th</sup> proposed interested party indicated that it had entered into contracts one of which was with Opera Software Ireland Limited, the operator of the mobile browser that is the subject of the Petition. Nevertheless, as was clearly pointed out by the Respondents, the Applicant did not any copy of the contract to substantiate the said allegation hence it is my finding that the claim that it would be adversely affected based on existing contracts is not factual and just but a mere hypothesis meant to hoodwink the Court to grant the orders sought.



## Whether the applicant has satisfied the threshold for setting aside the Consent Order

65. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for Consent Orders under Rule 29. It states as follows:

Settlement by consent

The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.

66. In *Cheruiyot v Korir (Civil Appeal 131 of 2017)* [2021] KECA 222 (KLR) (5 November 2021) (Judgment) the Court of Appeal discussed as follows:

“29. Did the appellant’s application meet the threshold for setting aside a consent order/judgment to entitle us to interfere with the learned Judge’s orders? We revisit our earlier decisions on this point. This Court in *Kuwinda Rurinja Co. Limited vs kuwinda Holdings Limited & 13 others [2019] eKLR, Civil Appeal No. 8 of 2003*, reiterated and buttressed the law as set out earlier as follows:-

“In the seminal case of *Flora N. Wasike vs. Destino Wamboko* [1988] eKLR this Court stated:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983*.”

In *Purcell vs. F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676; can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...”

In *Kenya Commercial Bank Ltd vs. Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J correctly held, inter alia, that -

- “1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.” (Emphasis supplied)

See also *Contractors Ltd vs. Margaret Oparanya* [2004] eKLR.



30. In a more recent decision in *Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others*[2019] eKLR, this Court pronounced itself as follows:-

“ Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside...”

67. Similar sentiments were observed in *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021]eKLR where it was held that:

- “ 34. The import of the Application before me is that the Applicant sought to challenge the consent entered into on the 3/12/2013. The law on setting aside a consent entered into by parties is now not in doubt. A consent can only be set aside in clear cases of fraud, misrepresentation, coercion and the related vitiating factors of contracts. In the case of *James Muchori Maina vs. Kenya Power & Lighting Company Ltd* [2005] eKLR the court, approving the case of *Flora Wasike* observed as follows:

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd -vs- Benjob Amalgamated Ltd. - Nairobi Civil Appeal No. 276 of 1997*, wherein the Court of Appeal applied the reasoning in the case of *Flora Wasike vs- Destimo Wamboke* (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.”

35. Similarly, in *John Waruinge Kamau vs Phoenix Aviation Limited* [2015] eKLR the court considered the circumstances in which a consent order can be set aside and stated:-

“The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.



36. In *M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another* [2015] eKLR the Court of Appeal stated as follows:

“We re-affirm the dicta in the High Court case of *Kenya Commercial Bank Ltd. -v-Specialized Engineering Company Ltd.*, 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.
4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.
5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

68. The Applicant is not a party in these proceedings and has no role in the consent order. The proposed 5<sup>th</sup> interested party has not proved a legal stake to entitle it participate in the proceedings and thus lacks capacity to set aside the consent order. It is a stranger to the dispute. Its application to set aside the consent lacks merit.



69. The upshot is that the application dated 18<sup>th</sup> January, 2024 by the applicant is hereby dismissed in its entirety with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4<sup>TH</sup> OCTOBER, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

