



**Okwama v Milestone Gaming Limited & 3 others; Association of Gaming Operations in Kenya (Intended Interested Party) (Constitutional Petition E016 of 2023) [2024] KEHC 14661 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14661 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E016 OF 2023  
S MBUNGI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**EDWARD OKWAMA ..... PETITIONER**

**AND**

**MILESTONE GAMING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STANDARD GLOBAL EAST AFRICA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ASSOCIATION OF GAMING OPERATIONS IN KENYA .... INTENDED  
INTERESTED PARTY**

**RULING**

**Background**

1. The Petitioner filed a Petition dated 21<sup>st</sup> August, 2023 challenging paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015, which imposes a 12.5% excise duty on players for placing a bet, regardless of whether the player wins or loses. The Petitioner contended that the impugned provision contravenes public finance principles as outlined in Article 201 of *the Constitution* of Kenya, 2010 (*the Constitution*).
2. The Petitioner further contended that the impugned provision contravenes the prescription of taxes under Articles 209 and 210 of *the Constitution* violates various constitutional provisions, including



Articles 2 (1) (2) (4), 6 (2), 10, 26, 27, 28, 40, 41 (1) (2) (b) and 4 (a), 43, 46 (1) (c), 110, 186, 189, 201, and 210, as well as established international principles of taxation.

3. The Petitioner sought the following prayers inter alia that the Court declares that the imposition of 12.5% excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 is discriminatory and violates the Petitioner's right to property hence unconstitutional. The Petitioner further sought to bar the Kenya Revenue Authority from collecting the impugned tax.
4. The court also gave interim conservatory orders on the 21.08.2023.

### **Application.**

5. The applicant filed an application dated 29.11.2023 under Certificate of Urgency seeking the following orders:
  - a. That this Application be certified as urgent.
  - b. That this Honorable court be pleased to issue orders directing that the conservatory orders issued on 21<sup>st</sup> August, 2021 and modified on 21<sup>st</sup> September, 2023 be extended to all other gaming companies.
  - c. Costs be in the cause.
6. The application was premised on the following grounds: -
  - a. The Petitioner has instituted this Petition on his own behalf and on behalf of other players/punters in the betting industry challenging the constitutionality of paragraph 4A part 2 of the First Schedule of the *Excise Duty Act*, 2015 which levies 12.5% on the amount placed on a bet. The Petition was instituted together with an application for Conservatory Orders.
  - b. That conservatory orders were issued by the court restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from deducting the 12.5% excise duty from the petitioner and other players as provided under paragraph 4A part 2 of the First Schedule of the *Excise Duty Act*, 2015.
  - c. That the conservatory orders issued on 21<sup>st</sup> August 2023 were modified on 21<sup>st</sup> September 2023 by Court and by a ruling of 24<sup>th</sup> November 2023, the said orders were extended.
  - d. The conservatory orders are only applicable to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who are gaming companies, thus giving them a competitive advantage over other similarly situated gaming companies, causing loss of business to its competitors as the other gaming companies are still deducting the 12.5% excise as per the *Excise Duty Act*. It is therefore only fair that the conservatory orders be extended to other gaming companies as well.
  - e. The Intended Interested party had since filed its application for joinder on 19<sup>th</sup> September 2023 but is yet to be enjoined as the court directed that it will first hear the Preliminary Objection (P.O) challenging its jurisdiction, after which parties will respond to our joinder application. This means that it would have taken a while before the intended interested party is enjoined. It is therefore in the interest of justice that the conservatory orders be extended to the other similarly situated players even as the application for joinder is pending.
7. The application was supported by an affidavit sworn by one Judith Karigu Kiragu.
8. Parties filed responses to the application.



### **1st Respondent's Case**

9. The 1<sup>st</sup> respondent filed grounds of opposition dated 18.01.2024, stating that the application is misconceived and bad in law as the proposed interested party does not meet the threshold required for one to be joined as an Interested party as provided for Under Order 1 Rule 10(2) of the Civil Procedure Rules.
10. The 1<sup>st</sup> respondent further stated that the Proposed Interested Party had not demonstrated any justifiable grounds for being admitted as an interested party and had no interest to be prejudiced in the matter, further stating that an interested party must demonstrate that he has an interest not just in the proceedings but in the would be orders of the court.
11. In its further averments, the 1<sup>st</sup> respondent stated that there was no substantial evidence to support the allegation by the applicant that the Conservatory Orders of 21.08.2023 had given the 1<sup>st</sup> Respondent an adverse advantage to the detriment of the Intended Interested Party.
12. Lastly, the 1<sup>st</sup> respondent stated that the proposed Interested party had not demonstrated an identifiable stake or a legal interest or duty in the proceedings as required by law urging that the application ought to be dismissed.

### **2<sup>nd</sup> Respondent's Case.**

13. Vide grounds of opposition dated 19.01.2024, the 2<sup>nd</sup> respondent stated that the applicant has no locus before the court to seek the Orders sought and that the applicant has failed to demonstrate their interest and stake in the matter.
14. The 2<sup>nd</sup> respondent further stated that the applicant's Application to be enjoined is still pending before the honorable court and the application to benefit from any orders, if any, cannot supersede the Application to be enjoined and it is for good order that the Application to be enjoined be heard first.
15. Moreover, the 2<sup>nd</sup> respondent stated that the Applicant had not demonstrated the prejudice it stands to suffer hence the application is frivolous and vexatious and should be dismissed with costs.

### **3<sup>rd</sup> Respondent's Case.**

16. The 3<sup>rd</sup> respondent filed two replying affidavits dated 08.01.2024 and 19.01.2024 sworn by Tobias Oula and Weldon Ng'eno respectively who stated that they were officers of the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent further stated that the application herein to extend the conservatory orders issued on 21.08.2023 to all gaming companies was premature as the interested party has not been joined to the proceedings
17. 3<sup>rd</sup> respondent further averred that the Applicant admits to be an Association of Gaming Operators, what is before the Court relates to betting and not gaming, the two are distinct and are governed by different legal and also sporting regimes.
18. Further 3<sup>rd</sup> respondent stated that the Applicant has not indicated the list of its members so as to the Court to be able to evaluate the effect of the extending the orders as this will adversely affect the national revenue kitty which is currently being adversely affected by the orders of the Court.
19. Also, the 3<sup>rd</sup> Respondent was apprehensive that the Applicant's intention to have the orders extended to unknown entities is not only dangerous but will lead to great loss of revenue stating that a tax relationship is a personal relationship between a taxpayer and the Revenue Authority and therefore the Applicant is neither the taxpayer nor the agent of the 3<sup>rd</sup> Respondent for the taxes in dispute.



20. Lastly, 3<sup>rd</sup> respondent stated that while the motive to seek to have the orders which are affecting national revenue collection extended to it are clear, there is no constitutional basis for the same to be extended to the members of the Applicant as they mainly deal in gaming and not betting, highlighting that it would be unprocedural for this Honorable Court to extend Orders to cover a party who has not been admitted to the Proceedings.

**Analysis.**

21. I have looked at the application, the replying affidavits, the grounds of opposition filed by the respondents and the petition.
22. The issue for determination is whether the applicant has made out a case to warrant this court to grant prayer (2) in its application.

**Determination.**

23. As correctly submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, this application is premature. At the time it was made the applicant was not a party to the proceedings.
24. Secondly, the conservatory orders were specifically meant for the parties to the petition.
25. If the court was to grant the prayer, it would amount to the court reviewing/amending/varying its orders in favor of the applicant without the applicant invoking the correct applicable procedure.
26. Therefore, I find that the application has no merit. The same is dismissed.
27. No orders as to costs for the petition is a public interest litigation.
28. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Edward Okwama the petitioner present online

Mr. Limiso and Judith Kithinji for the 3<sup>rd</sup> respondent present

Mr. John Ochieng for the two alleged contemnors present

Mr. Mureithi for Level X Ltd present online

Mr. Mola holding brief for Mr. Ndolo for the 1<sup>st</sup> Respondent and also appearing for the 2<sup>nd</sup> Respondent present online.

Mr. Kiilu for the proposed 5<sup>th</sup> Respondent present online.

Mr. Kang'ethe holding brief for Mr. Simiyu for the 4<sup>th</sup> Respondent present online

No appearance for the Intended Interested Party/Applicant

Court Assistant – Fred Owegi

