



Okwama v Milestone Gaming Limited & 3 others; Association of Gaming Operations in Kenya (Intended Interested Party) (Constitutional Petition E016 of 2023) [2024] KEHC 14772 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14772 (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 1ST RESPONDENT
STANDARD GLOBAL EAST AFRICA LIMITED 2ND RESPONDENT
KENYA REVENUE AUTHORITY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

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

RULING

1. The Petitioner filed a Petition dated 21st 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 a motion dated 19.09.2023 in this court seeking the following orders:
 - a. That the Association of Gaming Operators - Kenya ("AGOK") be joined as an Interested Party in these proceedings.
 - b. That directions be given for the filing by the Association of Gaming Operators, - Kenya of its responses and all other allied documents within such time as may be stipulated.
 - c. That the costs of and occasioned by this Application be provided for.
6. The application was premised on the following grounds:
 - i. The Association of Gaming Operators- Kenya, ("AGOK", was registered under section 10 of the Societies Act, as a society on 1st March 2005.
 - ii. As of 30th August 2023, AGOK had 156 members comprising 105 betting companies and 54 casinos.
 - iii. The Petition before this Honourable Court is on the grounds more particularly out therein challenging the constitutionality of the imposition of 12.5% excise duty on the amount placed on a bet under paragraph 4A of the First Schedule of the Excise Duty 2015 ("the EDA")
 - iv. With more than three quarters of its membership comprising betting companies, AGOK has an identifiable stake in these proceeding. Those members are in the same industry/ carry out the same business as the 1 and 2 Respondents. They equally affected by the impugned provision as are, just like the Petitioner, their clients/customers.
 - v. As a trade association with 105 betting companies, AGOK is well placed to provide further information as well guidance as to the current state of taxation within the gaming industry in particular betting sector confirming and amplifying history of taxation of the industry as well as their effects on consumers as well as the industry.
 - vi. The determination on the constitutionality and legality of the impugned provision shall have an effect of the members of AGOR, which should thus be given an opportunity to make such representations to this Honourable Court as may advance and/or protect their interests.
 - vii. It is just and equitable that AGOK be joined as Interested Party to these proceedings as sought.
7. The application was supported by an affidavit sworn by one Judith Karigu Kiragu who stated that she was the chairperson of the Association of Gaming Operators – Kenya.
8. The application was opposed by both the 1st and 2nd respondents vide grounds of opposition dated 18.01.2024 and 19.01.2024 respectively.



1st Respondent's Case.

9. The 1st respondent stated that the application is bad in law, misconceived, incompetent and incurably defective 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 I Rule 10 (2) of the Civil Procedure Rules.
10. Further, the 1st respondent stated that the Proposed Interested Party had not demonstrated any justifiable grounds for being admitted as an interested party.
11. It was its submission that the Proposed Interested has not demonstrated an identifiable stake or a legal interest or duty in the proceedings as required by law urging that the application be dismissed.

2nd Respondent's Case.

12. In its grounds of opposition, the 2nd Respondent stated that as far as paragraph 4A of Part II of the second schedule of Excise Duty is concerned, the Applicant's constituent companies are either agents of the 3rd Respondent or its subscribers and with no authority from the principals, the Applicant cannot legally seek the orders it is seeking.
13. Moreover, the 2nd respondent stated that the instant proceedings do not affect the Applicant in any manner and the Applicant has no stake in the proceedings because the Applicant's companies are only but agents.
14. Further, it stated that the Applicant had not demonstrated the prejudice it stands to suffer if they are not joined as interested Parties urging that just like any other citizen, the Applicant can await the outcome of the Petition and comply accordingly without necessarily being made a party to the matter.
15. Lastly, the 2nd Respondent stated that no orders had been sought against the Applicant and its presence in the matter will be an academic exercise as it is trite law that no party can be a respondent in a matter where no Orders are being sought against them urging that the application be dismissed with costs.

Analysis.

16. I have looked at the application, the grounds of opposition filed by the 1st and 2nd respondents and the petition.
17. The issue for determination is whether the applicant has met the threshold required for a party to be enjoined as an interested party in ongoing proceedings.

The Law.

18. The law on joining parties is entrenched under Order 1 Rule 10 (2) of the Civil Procedure Rules and Rules 7 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
19. Order 1 Rule 10(2) of the Civil Procedure Rules provides 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 to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,



or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

20. The applicant invoked the provisions of Rules 7 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states: “Interested party.

7. A person, with leave of the Court, may make an oral or written application to
(1) be joined as an interested party. (2) A court may on its own motion join any interested party to the proceedings before it.”

21. The said provisions empower the court to join a party on the application by a party or Suo Moto to participate in proceedings where they have an identifiable stake in the proceedings.

22. This Honorable Court is required to evaluate the importance of joining a party to a suit and the relevance of the joinder in the just determination of the suit.

Case Law.

23. The supreme court in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR set out the elements to be established by a party in order to be successful in an application for joinder. At paragraph 37 the court said;

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- 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.
- 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.”

24. The Court of Appeal in Mombasa COA App No. 15 Of 2015 JMK V MWM & another [2015] eKLR quoted with approval the Court of Appeal of Tanzania in the case of Tang Gas Distributors Ltd -v-



Said & Others [2014] EA 448 which echoed the Order 1 Rule 10 (2) of the Civil Procedure Rules stated that:

“...the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage ...”

25. In the case of Civicon Limited -v-Kivuwatt Limited and 2 Others [2015] eKLR it was held as follows:

“...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial...”

26. In the case of Julius Meme -v- Republic & another [2004] eKLR (Supra) the court in establishing that it was empowered to direct joinder of parties in such a way as to “enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit” it was held as follows:

“... So important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under the restrictions of any technical rules. As constitutional interpretations and litigations are important matters embraced by the High Court’s jurisdiction, we hold that this Court must retain a broad discretion for entertaining applications such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of chamber summons...”

Determination.

27. In paragraph (1) the applicant The Association of Gaming Operators in Kenya says it was registered with the following objectives: to promote common interest of casino operators, to assist members and other persons engaged in gaming business and professionals involved therein, to promote the image and the understanding of the gaming industry and to liaise with the relevant Government Authorities on any issue pertaining to the gaming industry.

28. From the above, it is clear that it was not registered to cater for the interest of betting people but for gamers whose petition herein relates. Furthermore, the applicant has not attached a list of its membership and their respective constitutions for this court’s perusal and ascertainment.

29. Therefore, I find that the application has no merit. The same is dismissed.

30. No orders as to costs for the petition is a public interest litigation.

31. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST 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 3rd 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 1st Respondent and also appearing for the 2nd Respondent present online.

Mr. Kiilu for the proposed 5th Respondent present online.

Mr. Kang'ethe holding brief for Mr. Simiyu for the 4th Respondent present online

No appearance for the Intended Interested Party/Applicant

Court Assistant – Fred Owegi

