



**Okwama v Milestone Gaming Limited & 3 others; Level X Tech Ltd (Intended Interested Party)  
(Constitutional Petition E016 of 2023) [2024] KEHC 14711 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14711 (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**

**LEVEL X TECH LTD ..... 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 a notice of motion dated 14.09.2023 in this court seeking the following orders:
  - a. That the intended interested party be admitted in this petition as an interested party.
  - b. That upon its admission as a party, the court thus orders that the orders currently in favor of the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondent does extend to the interested party.
  - c. That such further directions be given regarding the filing of subsequent pleadings.
  - d. Costs be in the cause.
6. The application was premised on the grounds on the face of it and supported by an affidavit sworn by one Jimal Ibrahim Hassan, the director of the intended interested party who stated that the intended interested party is a registered gaming company in Kenya under the trade name Betgr8 with valid public gaming license from the Betting Control and Licensing Board.
7. He stated that the company is obligated to pay excise duty of 12.5% of the amount waged or staked following the introduction of the Finance Act 2023 whose legality is challenged by the petition herein.
8. He further stated that the orders in place in favor of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the petitioner, ought to extend to all gaming companies in order to prevent unfair advantage of any company that is restricted from the remittance of the 12.5% tax at the moment, urging that this would create evenness, equity and fairness.
9. The applicant stated that Level X has a valid legal stake in the issues raised in the proceedings herein, and its participation was paramount to afford it an opportunity to be heard on matters concerning its tax obligations as a service provider in the gaming industry.
10. The applicant also stated that the filing of separate proceedings would lead to conflicting decisions on the same issue which shall be avoided if the orders sought are granted, further saving precious judicial time.
11. Lastly, the applicant stated that there would be no prejudice if the orders sought were granted.
12. The application was canvassed by way of written submissions.

### **Proposed Interested Party's submissions**

13. Vide submissions dated 06.06.2024, the intended interested party submitted that it had filed a formal application as set out in law, and had an identifiable legal stake in the proceedings for the purposes of joinder as held in the Muruatetu Case.
14. The applicant averred that the increase in tax rate affected the applicant, as it will be required to pay a new rate from its own funds notwithstanding that the stake by the player might eventually be lost. Further, the applicant submitted that the impugned provisions cause a winning bet on short odds to actually lose which is impractical and uncertain.



15. Moreover, the applicant submitted that if enjoined, it would make a case not only for the unconstitutionality of the impugned new rates and provisions of law, but also the unfairness which extend to the right to property and the right to fair administrative action under Article 47 which has not been raised by the petitioner.
16. The applicant further averred that it is unreasonable and unfair to require a gaming company to remit taxes even where there has been no win following the stake placed by the player as this infringes the right to consumer protection under Article 46 and Consumer Rights as provided under the [Consumer Protection Act](#).
17. It was the applicant's submission that the petitioner herein is not a gaming company, but a player; averring that the interests of a gaming company can only be well articulated by a gaming company such as the applicant.
18. Lastly, the applicant submitted that the joinder application has been supported by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are also gaming companies.

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

19. The 2<sup>nd</sup> respondent filed grounds of opposition to the application on the grounds that the applicant is either an agent of the 3<sup>rd</sup> Respondent or its subscribers and cannot legally seek the orders sought without authority from its principals as per paragraph 4A of Part II of the first schedule of Excise Duty.
20. The 2<sup>nd</sup> respondent further averred that the instant proceedings do not affect the applicant in any manner as an agent of the 2<sup>nd</sup> respondent and that the applicant had no stake in the proceedings.
21. It was the 2<sup>nd</sup> respondent's submission that the applicant had not demonstrated the prejudice it stands to suffer if not enjoined as interested parties.
22. Lastly, the 2<sup>nd</sup> respondent submitted that no orders had been sought against the applicant and its presence in the matter would be an academic exercise.

### **Analysis.**

23. I have looked at the application, the supporting affidavit, the grounds of opposition filed by the 2<sup>nd</sup> respondent, the petition itself and submissions. 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.**

24. 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.
25. 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.”



26. 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 (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party. (2) A court may on its own motion join any interested party to the proceedings before it.”
27. 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.
28. 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.

29. 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.”
30. 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 ...”

31. 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...”

32. 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.**

33. The applicant says that he is a player in the gaming industry and is also under obligation to deduct and remit to the 3<sup>rd</sup> respondent (KRA) 12.5% excise duty and other applicable taxes from wagers as required by paragraph 4A of Part II of the first schedule of Excise Duty.

34. He further submits that the conservatory order only gives a respite to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the petition but not other players in the betting and gaming industry.

35. The applicant says that the petitioner did not include it as a respondent in the petition yet it is affected by the provisions of paragraph 4A of Part II of the first schedule of Excise Duty just like the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

36. Any person or entity affected by the implementation of paragraph 4A of Part II of the first schedule of Excise Duty is an interested / necessary party in any proceedings touching on the constitutionality of the paragraph 4A of Part II of the first schedule of *Excise Duty Act*.

37. The applicant being one of the entities, which is required to deduct 12.5% on the amount waged or staked as required by paragraph 4A of Part II of the first schedule of *Excise Duty Act* is an interested party in this petition.

38. Therefore, his prayer to be enjoined as an interested party is allowed.

39. On prayer (2), I decline to order that the conservatory orders given by the court on 21.08.2023 in favor of the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents do extend to the interested party because at the time they were issued the interested party was not a party to the proceedings. The orders were specific to



the then parties and in allowing the prayer, the court will be reviewing/varying/amending its orders unprocedurally for the applicant did not invoke the procedure applicable.

40. On prayer (3), since the applicant now is an interested party, it enjoys full rights of a party in any proceedings and therefore is given 14 days to file and serve any response it may deem fit and serve all the parties. Any party who wishes to respond shall also have 14 days to respond after service.
41. No orders as to costs. The petition is a public interest litigation.
42. 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. 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

Court Assistant – Fred Owegi

