



**Okwama v Milestone Gaming Limited & 4 others (Constitutional Petition E016 of 2023) [2024] KEHC 14712 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14712 (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**

**THE NATIONAL ASSEMBLY ..... PROPOSED RESPONDENT**

**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 25.10.2023 seeking the following orders: -
  - a. The Honorable court be pleased to join the applicant as the 5<sup>th</sup> respondent in the petition.
  - b. Upon grant of the aforesaid prayer, the applicant be granted leave to respond to the petition and all applications.
  - c. Costs of this application be provided for.
6. The application was rooted on the following grounds:
  - I. The Petitioner filed the Petition dated 21<sup>st</sup> August 2023. The Petitioner is challenging paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 which provides that levies 12.5% excise duty on a player or for placing a bet notwithstanding whether the player wins or loses.
  - II. The Petitioner contends that the impugned provision is in contravention of Articles 201 & 209 of the Constitution on the principles of public finance and taxation.
  - III. The National Assembly legally debated and passed the impugned legislation in the discharge of its legislative mandate under Articles 94 & 95 of the Constitution. Therefore, the Petitioner questions the legitimacy of the legislative process carried out by the Applicant in enacting the impugned legislation.
  - IV. The National Assembly intends to adduce evidence to the effect that the impugned law was passed after due consideration hence it passes the constitutionality validity test.
  - V. Based on the above, the Applicant seeks leave of the Court to be joined in these proceedings as a Respondent in the Petition herein to assist the Court in rendering an informed decision.
  - VI. The National Assembly is therefore a proper and necessary Respondent in the Petition herein. The principles of natural justice deem all parties directly affected by a matter to be allowed to participate.
  - VII. No prejudice shall be occasioned to the other Parties herein if the orders sought in this Application are granted. However, the Applicant stands to be condemned unheard if it does not participate in these proceedings.
7. The application was supported by an affidavit sworn by one Samuel Njoroge who stated that he was a clerk of the National Assembly, duly authorized by the Rt. Hon. Speaker of the National Assembly to make the affidavit on behalf of the applicant.
8. Parties filed responses to the application.



### **1<sup>st</sup> Respondent's Case.**

9. The 1<sup>st</sup> respondent filed grounds of opposition dated 18.01.2024 citing that the application is in bad in law, misconceived, incompetent and incurably defective.
10. The 1<sup>st</sup> respondent further stated that the proposed 5<sup>th</sup> Respondent is not a necessary party in the proceedings of this matter and that the petition herein challenges "the constitutional and legal validity of Paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015", therefore this does not require the participation of the Proposed 5<sup>th</sup> Respondent.
11. Further, it submitted that the proposed 5<sup>th</sup> Respondent's presence is not necessary for the Court to adjudicate on the Constitutional Claims as between the Petitioner and the Respondents.
12. It was the 1<sup>st</sup> respondent's submission that it is not in dispute that Articles 94 and 95 of the Constitution is about the legislative authority of Parliament and the present Petition does not seek the court's intervention on the said Articles. This petition is a public interest suit, filed in defence of the Constitution pursuant to by Articles 3(1), 22(2)(c) and 258(2)(c) of the Constitution, 2010, as such, it touches on violation of constitutional rights of the public at large.
13. Moreover, the 1<sup>st</sup> respondent faulted the applicant for citing the case of the Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR, Petition 454 of 2012, and submitted that the decision in that matter was misquoted by the applicant.
14. Lastly, the 1<sup>st</sup> respondent submitted that the Applicant herein is unnecessary and superfluous since Article 156 read together with section 7 (1) (b) of the Office of the Attorney General Act, the Attorney General who is already a respondent in this petition, has a right of audience where matters before the Court involve the Legislature, Executive and Judiciary, hence there is no way the Applicant will be prejudiced at all.

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

15. Vide grounds of opposition dated 19.01.2024, the 2<sup>nd</sup> respondent opposed the application stating that the application is frivolous and vexatious and without any limbs to stand on citing the case Marigat Group Ranch & 3 Others Vs. Wesley Chepkoiement & 19 Others (2014) eKLR where it was held that "...where the Plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him."
16. The 2<sup>nd</sup> respondent stated that the applicant having enacted the law and the same having been put into effect, the applicant became functus officio as far as the Finance Act, 2023 is concerned.
17. Also, it submitted that the Applicant stands to suffer no prejudice since it already completed its legislative duties.
18. Further, the 2<sup>nd</sup> respondent stated that no orders have 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. Further, the 2<sup>nd</sup> respondent submitted that the 4<sup>th</sup> Respondent in the matter is capable of advising the applicant of any outcome of this matter without necessarily the applicant being joined.
19. It was the 2<sup>nd</sup> respondent's submission that the Application offends Rule 5(d) of the Mutunga Rules as read together with Order 1 Rule 22 of the Civil Procedure Rules and in the interest of justice and fairness that the Application be dismissed with costs.



### **Applicant's Case.**

20. The applicant filed submissions dated 21.12.2023. On whether the applicant should be joined as a respondent in the proceedings, it submitted in the affirmative, and referred the court to the case of Mombasa COA Appeal No. 15 of 2025 JMK V MWM & Another (2015) eKLR. I have read it.
21. The applicant submitted that Article 95 of *the Constitution* provides for the roles of the National Assembly as representation, deliberation and resolving issues of concern to the people, oversight of state organs and legislation. The National Assembly exercised its legislative power to consider and pass legislation and properly enacted the impugned *Excise Duty Act* of 2015.
22. Further the applicant submitted that it serves as a custodian and pivotal participant in matters related to legislation and therefore hold a substantial interest in the matter concerning the petitioner's objections to paragraph 4A part 2 of the first schedule of the *Excise Duty Act* of 2015.
23. The applicant further submitted that the present petition concerns the legislation enactment process touching on the applicant's core mandate, stating that no prejudice shall be occasioned to the parties if the orders sought were granted.

### **Analysis.**

24. I have looked at the application, the supporting affidavit, the grounds of opposition filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the petition itself and submissions by the applicant.
25. The issue for determination is whether the applicant has met the threshold required for a party to be enjoined as a party in ongoing proceedings.

### **The Law.**

26. 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.
27. 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.”
28. 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.”
29. 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.



30. 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.

31. 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."

32. 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 ..."

33. 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..."



34. 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**

35. The applicant under article 95 of *the Constitution*, is the third arm of the government whose mandate among others include legislation.

36. It is not in dispute that it is the body which enacted the *Excise Duty Act* of 2015 and also the Finance Act of 2023.

37. The applicant being a legislative body, any matter touching on any of its legislation, it becomes automatically a necessary party for it has substantial interest in the outcome of any process challenging the enactment. It is a party which cannot be wished away.

38. It is a proper and necessary party. It is the only party which can explain to the court the processes involved in enactment of a challenged legislation, therefore, enabling the court to effectively and completely adjudicate upon and settle all questions raised by the parties to the petition. Thus I have no any difficulty in finding that the applicant has met the threshold required to be enjoined as a party and I consequently allow the application in terms of prayers (a) and (b).

39. To expedite the disposal of the petition, the applicant is given 14 days to reply to the petition and serve all the parties. Any party who wishes to respond shall also have 14 days to respond after service.

40. This being a public litigation petition, no orders as to costs.

41. 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  
Court Assistant – Fred Owegi

