



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 274 OF 2016**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.**

**AND**

**IN THE MATTER OF ARTICLES 259, 165 (6) & (7), 23 (3) (F),**

**47, & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 4 OF THE 4TH SCHEDULE TO THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE BETTING, LOTTERIES AND GAMING ACT CAP 131**

**AND**

**IN THE MATTER OF THE NAIROBI CITY COUNTY BETTING, LOTTERIES AND GAMING ACT, 2014**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE BETTING CONTROL & LICENCING BOARD.....1ST RESPONDENT**

**THE CABINET SECRETARY,**

**MINISTRY OF INTERIOR AND NATIONAL COORDINATION....2ND RESPONDENT**

**THE CITY COUNTY OF NAIROBI.....3RD RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

**EX-PARTE: DIANA MUTHONI T/A DND GAMING MACHINES**

**JUDGMENT**

**The Application**

1. Diana Muthoni T/A DND Gaming Machines (hereinafter the Applicant") is a business entity operating in Nairobi, and states that it is fully registered to carry out business in Kenya, and that its specialization is the supply, support and operation of gaming machines. The said Applicant has brought judicial review proceedings against the 1st to 4th Respondents herein, by way of a Notice of Motion application dated 1st July 2016.

2. The 1st Respondent is the Betting Control & Licencing Board**,** a statutory body established under Section 3 of the Betting, Licensing and Gaming Act, Cap 131 of the Laws of Kenya, with the responsibility of issuing licenses and permits in accordance with the act amongst other functions. The 2nd Respondent is the Cabinet Secretary in charge of Interior and National Coordination, under whose docket the 1st Respondent falls. The 3rd Respondent is the City County of Nairobi, a county government established under the Constitution, while the 4th Respondent is the Attorney General of the Republic of Kenya and the Chief Legal Advisor of the Government of Kenya under the Constitution.

3. The Applicant seeks the following orders in its Notice of Motion:

**a) That an order of Certiorari does issue to remove into this honourable court and quash the 1st Respondent's decision to conduct raids, close, vandalise, confiscate, impound, seize and or destroy by burning or in any other manner whatsoever, the Applicant's Limited Payout gaming machines installed at licenced premises by the Applicant, or in any way interfering with the Applicant's lawful operations of her business pursuant to the Betting, Lotteries and Gaming Act, Cap 131 of the Laws of Kenya or otherwise.**

**b) That an order of Prohibition does issues directed at the 1st Respondent, its officers and any other authority acting on its instructions from conducting raids, closing, vandalising, confiscating, impounding, seizing and or destroying by burning or in any other manner whatsoever, the Applicant's Limited Payout gaming machines installed by the Applicant at licenced premises or in any way interfering with the Applicant's lawful operations of her business pursuant to the Betting, Lotteries and Gaming Act, Cap 131 of the Laws of Kenya or otherwise.**

**c) That an order of Mandamus does issues directed at the 1st Respondent, its officers and any other authority acting on its instructions compelling them to issue a Pilot License for Limited Payout Gaming Machines to enable the Applicant operate within the 1st Respondent's Regulations**

**d) That the court be at liberty to make such further and other orders as it deems fir to meet the ends of justice.**

**e) That the cost of this application be provided for.**

4. The application is supported by a statement of facts dated 1st July 2016, and a verifying affidavit sworn on the same date by Diana Muthoni, the Applicant herein. The Applicant explained that it has applied for, and been issued with licenses by the 3rd Respondent to operate its business within the Nairobi County, and has procured gaming machines for carrying out gaming business at their business premises, which premises are also licensed for purposes of gaming.

5. However, that the 1st Respondent's officers have without any color of right, been conducting illegal raids on the various business premises where the Applicant has installed her machines, and destroying the said machines by breaking them, burning and / or destroying the said machines. Further, that the said officers of the 1st Respondent have also been taking away and / or stealing all the monies collected in the said gaming machines without any justification whatsoever.

6. The Applicant averred that the decision by the 1st Respondent to conduct raids upon licensed premises, breaking gaming machines and taking monies therein is made in bad faith, is an abuse of power and is ill intentioned. This is for the reason that the 1st Respondent has never preferred any charges against the Applicant and / or the owners of the premises where the said machines are installed, and continues with the raids without explaining the circumstances under which the raids are being conducted. In addition, that the Applicant has severally requested the 1st Respondent for information in regard to the installation of the gaming machines in licensed premises by the Applicant, but the 1st Respondent has failed, refused and / or neglected to give any information.

7. The Applicant alleged that the arbitrary destruction of it's gaming machines by the 1st Respondent without affording the Applicant an opportunity to be heard is both unfair and an affront to the principle of fair administration and natural justice, and is an infringement of it's right to own property. Further, that there are many gaming machines installed by various business entities within Nairob,i and the fact that the 1st Respondent has refused to issue licenses to the Applicant is both unfair, discriminatory and is actuated by malice.

8. Lastly, the Applicant contended that the 1st Respondent claims that it doesn't recognize licenses issued by the 3rd Respondent, yet casinos, gaming and betting activities are a shared function of both the national and county governments under the Constitution. In addition, that the Constitution provides that the Governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultations and cooperation. The Applicant asserted that the wrangles and fights between the two levels of

governments has caused it immense suffering and heavy financial losses. In support of its averments, the Applicant annexed copies of its Registration Certificate; its applications for, and single business permits issued for the year 2016 by the 3rd Respondent; photos of its destroyed machines, and of a letter dated 30th April 2016 addressed to the 1st Respondent.

**The Responses**

13. The 1st, 2nd and 4th Respondent opposed the application through a replying affidavit sworn on 13th October 2016 by Anthony Kimani Kungu, the Chairman of the 1st Respondent. The said Respondents averred that gaming machines are licensed under section 53 of the Betting, Lotteries and Gaming Act, and that any gaming machines not licensed by the 1st Respondent are unauthorized machines and therefore illegal. Further, that under 54 of the said Act, the 1st Respondent may issue a permit authorizing the use of a gaming machine on premises approved by it, and that it is a criminal offence under section 53 to operate unlicensed gaming machines in Kenya.

14. The said Respondents contended that the Applicant does not hold any permit or license to operate gaming machines in Kenya, and has been operating numerous trading entities where she is operating illegal or unauthorized machines in Nairobi as she has indicated in her pleadings, even before she acquired her single business permits which are trading but not gaming licenses, from the Nairobi County in June 2016. Further, that the Applicant has been operating illegal machines in different residential areas whose majority are low income earners, which include Kayole estate.

15. The 1st, 2nd and 4th Respondents denied that the officers of the 1st Respondent visited the Applicant's premises or confiscated any of her machines as alleged. They asserted that the function of licensing machines is a function of the National Government and for an operator to operate any gaming premises in Kenya, it must have a license from the Board and a trade license from the County. They annexed a copy of the functions agreed to by stakeholders in January 2016 on the function of gaming.

16. According to the said Respondents, the Applicant wrote to the 1st Respondent on 30th April 2016 requesting for a pilot license to operate limited payout gaming machine, which letter was responded to on 19th May 2016, when she was informed that the Board was developing a policy on gaming machines and her request would be considered upon its completion. Lastly, that the 1st Respondent in a letter dated 19th May 2016 warned the Applicant against operating any unlicensed gaming machine, but that the Applicant has continued to operate illegal gaming machines.

17. The 3rd Respondent's response was in a replying affidavit sworn on 25th July 2016 by Robert Ayisi, the 3rd Respondent's County Secretary. He deponed that the instant application raises no cause of action, reasonable or otherwise, against the 3rd Respondent, as it played no role on the claims as made against the 1st Respondent, and it is therefore wrongly joined as a party to these proceedings, and should be struck out. Further, that the dispute is primarily one between the Applicant and the 1st Respondent.

18. These averments notwithstanding, the 3rd Respondent contended that it issued the Applicant with licenses to operate the gaming machine business as it is mandated to do by the law, specifically the Constitution, which under Part 2 paragraph 4 of the Fourth Schedule devolves the regulation of betting, casinos and other forms of gambling, that does not cover the national spectrum, to counties, and pursuant to the Nairobi City County Betting, Lotteries and Gaming Act no. 5 of 2014. The 3rd Respondent annexed a copy of the said Act. Therefore, that the Betting, Lotteries and Gaming Act only regulates betting, casinos and other forms of gambling within the national spectrum, and that under the Nairobi City County Betting, Lotteries and Gaming Act, the Nairobi City County Betting Licensing and Regulations Board has the power to issue licenses and permits in accordance with the Act and any regulations made thereunder.

19. The 3rd Respondent averred that it acted with due diligence and within its scope in the discharge of its constitutional and statutory obligations to issue the Applicant with the license to operate the gaming machine business, which licenses are valid in the face of the law. Therefore, that the alleged injustices or otherwise that the Applicant may or may not have suffered in the course of her business is in no way caused by any fault or laxity on its part.

**The Determination**

9. The Application was canvassed by way of written submissions. Kabathi & Company Advocates filed submissions dated 28th August 2019 on behalf of the Applicant. The 1st, 2nd and 4th Respondent's submissions were dated 8th October 2019 and were filed by Munene E. Wanjohi, a State Counsel in the Attorney General's office. The 3rd Respondent did not file any submissions.

10. I have considered the pleadings, submissions and arguments made by the parties, and find that there is a preliminary issue that I need to summarily dispose of at the outset, arising from the 3rd Respondent's pleadings of its joinder. It is my view and finding in this regard that to the extent that the 3rd Respondent did admit that it issued permits to the Applicant in exercise of its constitutional mandate which it explained in great detail; and to the extent that the said permits were relied upon by the Applicant in this application, the 3rd Respondent was a necessary party and was therefore properly joined.

11. The main issue arising for determination is whether the Applicant is entitled to the relief sought. The questions to be answered in this respect is whether the Applicant has demonstrated that the 1st Respondent acted illegally, and that it is under a duty to issue the Applicant with the pilot license she seeks.

12. The Applicant's submissions on these questions were that it was never informed the reasons of the 1st Respondent actions, contrary to Article 47 of the Constitution and section 4 of the Fair Administrative Act 2015. In addition, that the 1st Respondent neither charged the Applicant with any criminal offence, nor heard the Applicant before they took a decision destroys her machines, and refused to give the

Applicant information required for the protection of the Applicant's rights contrary Article 35 (1) of the Constitution, 2010. The Applicant cited various judicial decisions in support, including **Republic vs County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh, [2018] eKLR** and **Onyango Oloo vs Attorney General, [1986-1989] EA 456.**

13. In addition, that by destroying the Applicant's machines, the 1st Respondent violated the Applicant's right to own property and its actions contradicted Article 40 of the Constitution and also the economic rights of the Applicant. Lastly, that the fact that the 1st Respondent has refused without any justification to issue licenses to the Applicant is both unfair, discriminatory and contrary to Article 27 of the Constitution, and its decision not to recognize the Applicant's licenses issued by the 3rd Respondent is void under Article 6(2) and Schedule 4 of the Constitution. as the regulation of casinos, gaming and betting activities are a shared function of both the national and county governments. The Applicant submitted that it is thus entitled to general and exemplary damages**.**

14. The 1st, 2nd and 4th Respondents on the other hand submitted that the application had been overtaken by time as the permits in the Applicant's annexures are for the year 2016, and the permits annexed thereto are renewable over 12 months. That the application was thus supported by expired permits and documents. The said Respondents contended that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove the settled criteria for issue, which include illegality, impropriety of procedure and irrationality, as held in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. They submitted that this is not the case in this matter.

15. The Respondents contended that they acted in accordance with the provisions of the law, and relied on the decisions in **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** ; **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR**; **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005;** and **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (1996) eKLR,** for the position that the orders sought should not issue as they acted within their jurisdiction, and in lawful exercise of power within their statutory mandates. They submitted that the 1st and 2nd Respondents are mandated with the responsibility of overseeing the management and conduct of all betting businesses in Kenya as guided by the Betting, Lotteries and Gaming Act.

16. This Court has considered the parameters of its powers in judicial review in considering the arguments made by the parties herein. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
>
> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
>
> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

**17.** It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action**, *the* **reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

18. **Lastly, the applicable law on the orders sought by the Applicant was restated by the** Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge, (1997) e KLR** *inter alia* as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person,**

**corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done… Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

19. **In the present application, the Applicant produced and relied on copies of photographs of the machines it alleges were destroyed by the Respondent, which it annexed as** Annexure "DM4" to the verifying affidavit of Diana Muthoni**. The 1st, 2nd, and 4th Respondents on their part denied destroying the Applicant's machines. It is notable that the burden of proof in this regard is upon the Applicant to prove to the required level of a balance of probabilities the claim they make.** Under Section 107(1) of the *Evidence Act*, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

20. Once such proof is provided, the onus then moves to the Respondent to show the legality of its actions. It was held as follows in this regard in the Ugandan case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

**"As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95".**

**This position was also reiterated by the Kenya Supreme Court in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017 .**

21. The Applicant herein has brought photographic evidence in support of its allegation that the 1st Respondent destroyed its machines. There are evidentiary rules that require to be observed in the production of photographs, which also apply in judicial review proceedings. In this respect the Evidence Act (Chapter 80 of the Laws of Kenya), provides for its applicability in section 2 as follows:

**"(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.**

**(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court."**

22. The provisions of the Evidence Act therefore apply to all judicial proceedings, and the only exception are proceedings in Kadhi's Court where Islamic law applies. It is notable that the Evidence Act also applies to affidavit evidence adduced in Court. Section 78 A of the Evidence Act in this respect requires that electronic messages and digital material shall be admissible as evidence in any legal proceedings. Sections 106A and B of the Evidence Act in addition provides for the conditions for admissibility of such electronic records.

23. In summary, section 106A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106B on the other hand requires any information contained in an electronic record (whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer), is deemed to be a document and is admissible in evidence without further proof of the production of the original, providing the conditions set out in section 106B (2) for the admissibility of evidence are satisfied. The process of producing an image on paper in the form of a photograph requires the same to be printed by a printer using a computer, and therefore a photograph falls within the definition of an electronic record , and the provisions of section 106B of the Evidence Act accordingly apply to its admissibility.

24. These conditions set out in section 106B(2) are as follows:

1. At the time of creation of the electronic record, the computer output containing the information was produced from a computer that was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.

2. During the period, the kind of information contained in the electronic record was regularly fed in to the computer in the ordinary

course of the activities.

3. Throughout the material part of the period, the computer was operating properly or, if not, the computer was out of operation for some period, but it was not such to affect the electronic record or the accuracy of the contents.

4. The electronic record bears the information reproduces or is derived from such information fed into the computer in the ordinary course of the regular activities.

25. Section 106B (4) further mandates the production of a certificate of authenticity of electronic evidence which is signed by a responsible person who was responsible for the computer on which the electronic was created or stored, in order to certify the qualifications set out above. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the particulars of the device that created it, and certify compliance with the conditions of sub-section (2) of section 106B.

26. Various judicial authorities have held that the conditions and safeguards set out in section 106 B of the Evidence Act are intended to ensure the reliability and authenticity of an electronically-produced document, and the procedure set out therein is aimed at preventing printed copies of the electronic records adduced as evidence in court being manipulated altered or tampered with. This was explained in **Coalition for Reform and Democracy & Another vs Republic of Kenya & Another High Court (Nairobi) , Constitutional Petition No. 628 of 2014**, and **Republic vs Mark Lloyd Steveson (2016) e KLR** and in **William Odhiambo Oduol vs Independent Electoral & Boundaries Commission & 2 Others (2013) e KLR**.

27. It is clear from the provisions of section 106B of the Evidence Act that the proponent of an electronic record has the burden of satisfying the conditions set out therein, and for establishing the electronic record's authenticity. In the present application, the proponent of the photographs is the Applicant, as it is the party seeking to rely on the said documents. It has not provided any evidence of its compliance with the provisions on production of electronic evidence.

28. It is thus the finding of this Court that since no certificate has been produced showing compliance and authentication as required by section 106B of the Evidence Act in relation to the photographs annexed as Annexure "DM4" to the affidavit of Diana Muthoni sworn on 1st July 2016 , the said photographs are inadmissible as evidence, and the Applicant has accordingly not proved that the 1st Respondent destroyed its machines.

29. **Despite this finding, the Applicant nevertheless claims that it is licensed to undertake the gaming business, and the Respondents are therefore acting illegally towards it. The Applicant claims to be licensed by the 3rd Respondent to operate gaming machines, and she provided various single business permit licenses for the year 2016 as proof. Further, the 3rd Respondent also stated that it issued the Applicant with a permit pursuant to its legal and constitutional mandate to issue licenses for gaming.** According to the Applicant and the 3rd Respondent, the said licenses were issued to the Applicant under the Nairobi City County Betting Lotteries and Gaming Act as Act No. 5 of 2014, which is a county legislation to control the business of betting, lotteries and gaming activities within the Nairobi City County, and is enacted pursuant to paragraph 4(a) of Part II of the Fourth Schedule to the Constitution.

**30. The 1st, 2nd and 4th Respondents on their part reiterated that the Applicant was operating illegally as she is not licensed under section 53 the** Betting, Lotteries and Gaming Act section which provides as follows:

**" (1) A person who—**

**(a) uses or permits the use of an unauthorized gaming machine; or**

**(b) knowingly allows premises to be used for the purpose of gaming by means of an unauthorized gaming machine; or**

**(c) knowing or having reasonable cause to suspect that premises would be used for gaming by means of an unauthorized gaming machine—**

**(i) caused or allowed the machine to be placed on the premises; or**

**(ii) let the premises, or otherwise made the premises available, to a person by whom an offence in connection with the machine was committed**

**shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both.**

**(2) In this section, "unauthorized gaming machine" means a gaming machine in respect of which a permit has not been issued under section 54."**

31. The 1st , 2nd and 3rd Respondents also produced a report by the Transition Authority dated 18th January 2016 on the *Implementation on Betting, Casinos and Other Forms of Gambling Function*, wherein resolutions was reached on the functional assignments of the betting casinos and other forms of gambling function between the National and County Governments. In particular, it was resolved that policy formulation, licencing of public gaming, and vetting security checks and due diligence, would be a National Government function. On the other hand, the Implementation of policy, development of county legislation on betting and gambling, licencing of public gaming premises and enforcement and compliance would be the County Government functions. It is notable that this consensus was reached before the

Applicant moved this Court.

32. This Court notes that it is not in dispute that the function of betting, casinos and other forms of gambling is a concurrent function between the two levels of Government. What is in dispute is the 1st Respondent's role as regards this function. Section 186 (1) of the Constitution provides that the functions and powers of the National Government and County Government are respectively set out in the Fourth Schedule to the Constitution. The Fourth Schedule under Part I, paragraph 34 of the Fourth Schedule provides that the National Government has the function of; "national betting, casinos, and other forms of gambling", while in Part II, paragraph 4, it is provided that the County Government has the function of "cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling." Article 186(2) of the Constitution further provides that "a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government."

33. It is thus the finding of this Court that since under the Constitution both the national and county governments have concurrent functions with respect to betting, casinos and other forms of gambling, and the 1st, 2nd and 4th Respondents provided evidence on consensus on the assignment of these functions, the Applicant was required to be licenced by the 1st Respondent before undertaking any gaming business. This fact is acknowledged by the Applicant as it did make an application for a licence to the 1st Respondent on 30th April 2016, a copy of which was annexed as "Annexure DM5" to its verifying affidavit. She did not provide any evidence of any such licence, and therefore, any actions undertaken by the Respondents to ensure compliance with the national law which requires licencing of gaming was not illegal.

34. It is also pertinent in this respect that the licences produced by the Applicant as evidence of her authorisation to operate gaming machines were single business premises permits, and were not specific to betting and gaming. In addition, under Part III of the Nairobi City County Betting Lotteries and Gaming Act of 2014, licences and permits under the Act are required to be issued by the Nairobi City County Betting and Licencing and Regulation Board set up under the said Act, and also required to be published in the Gazette. No such permit by the Nairobi City County Betting and Licencing and Regulation Board or Gazette Notice of its licence was produced by the Applicant.

35. **On whether the 1st, 2nd and 4th Respondents are under a duty to license the Applicant to undertake the gaming business, the said Respondents do not dispute that the Applicant did make an application for a pilot license which was not granted, and annexed copies of the correspondence between the Applicant and 1st Respondent in this regard as Annexures "AKK3 and AKK4". The circumstances when the 1st Respondent can issue a licence are provided for in section 54 (1) and (2) the** Betting, Lotteries and Gaming Act section as follows:

> **"(1) The Board may, subject to any regulations made under this Act, issue a permit authorizing the use of a gaming machine on premises approved by it.**
>
> **(2) A permit issued under this section shall be subject to such conditions as the Board may impose and to the following conditions—**
>
> > **(a) not more than two gaming machines are made available for play in any one building or, where different parts of a building are occupied by two or more different persons, in the part or parts of the building occupied by any one of those persons; and**
> >
> > **(b) the stake hazarded in order to play the game once does not exceed one shilling; and (c) all stakes hazarded are applied either in the payment of winnings to a player of the game or for purposes other than private gain; and**
> >
> > **(d) the premises on which the gaming machine is used are not wholly or mainly used by persons under the age of eighteen years. (3) A person who contravenes any conditions provided for in subsection."**

36. The 1st Respondent responded to the Applicant's application for a pilot licence in a letter dated 19th May 2016, which was annexed as Annexure "AKK4" to its replying affidavit, and stated as follows:

> **"We wish to inform you that the Board is currently developing a policy on Gaming Machines and consideration of this request will be done when the policy is in place"**

It is evident from the letter that the Applicant's application was still under consideration, and the 1st Respondent did not refuse to undertake its statutory duty. The prayer for an order for mandamus is in the circumstances therefore premature. In addition, it is also notable that contrary to the Applicant's averments, the 1st Respondent gave the reasons for deferring its request for a pilot licence.

37. In the premises this Court finds that the Applicant's Notice of Motion dated 1st July 2016 is not merited, and the said Notice of Motion is dismissed with no order as to costs.

38. Orders accordingly.

**DATED AND SIGNED THIS 18TH DAY OF NOVEMBER 2019**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI**

**THIS 20TH DAY OF NOVEMBER 2019**

**J.M. MATIVO**

**JUDGE**