



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.295 OF 2014**  
**AS CONSOLIDATED WITH PETITION NO.1 OF 2015 AND PETITION NO.315 OF 2014**

**BETWEEN**

**AFRICA RAFIKI LTD.....1<sup>ST</sup> PETITIONER**

**ASSOCIATION OF GAMING OPERATORS IN KENYA....2<sup>ND</sup> PETITIONER**

**WYCLIFFE INDALU ADIENO.....3<sup>RD</sup> PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**AND**

**TRANSITIONAL AUTHORITY.....INTERESTED PARTY**

**FINAL JUDGMENT**

**Introduction**

1. On 13<sup>th</sup> November 2015, I delivered an Interim Judgment in this matter and at the end of it, I stated thus:

*(i) Let this dispute be referred to the Transition Authority to clarify and delineate the licensing for betting, lotteries and gaming activities as between the National and County Governments.*

*(ii) The Transition Authority shall conclude the resolution of the dispute within days with the participation of all affected parties and subjected to the Sectoral Intergovernmental forum for adoption and formalization of any agreement reached. In doing so, the findings made in this judgment shall be taken into account.*

*(iii) Should the Sectoral Intergovernmental Forum have concluded its work as at the date of this judgment, its report shall be circulated to all affected parties and the Transition Authority shall in any event file a report on all resolutions reached including on any amendments to existing relevant legislation (National and County) within 90 days of this judgment.*

*(iv) In the meantime, the operation of the Nairobi City County, Betting, 2014 shall be suspended until further orders of this Court.*

*(v) This matter shall be mentioned after 90 days for final orders and judgment of this Court including on the matters of costs.*

*(vi) Any Party is at liberty to apply.*

2. Subsequent to that decision, I received a letter dated 16<sup>th</sup> November 2015 from M/s. Muthomi & Karanja Advocates seeking a mention for the Court to consider the contents of paragraphs 65 and 73 of the Interim Judgment against the following issues:

*a. The United Nations Central Product classification (“the CPC”) classifies betting and lotteries as recreational services;*

*b. Whether, in view of (a) above, the license fee or license tax imposed under the Nairobi City County betting, Lotteries and Gaming Act, 2014 is an entertainment tax within the meaning of Article 209(3)(b) of the Constitution; and*

*c. Whether, in view of (a) and (2) above, the Constitution allows County Governments to levy or impose taxes on betting, lotteries and gaming notwithstanding the absence of an Act of Parliament authorizing such taxes.*

3. By another letter dated 3<sup>rd</sup> February 2016, M/s. L. M. Kambuni & Associates Advocates submitted the Transition Authority’s Report on the Implementation on Betting, Casinos and other Forms of Gambling Function dated 18<sup>th</sup> January 2016. The Report is dated 18<sup>th</sup> January 2016 and was filed pursuant to Order No. (ii) of the Interim Judgment and so this Final Judgment is pursuant to Order No.(v) of the said Interim Judgment.

### **Analysis and Findings**

4. In the Interim Judgment, I made certain findings which require no repeating but of importance are the fact that I referred the question of the licensing of betting, lotteries and gaming activities to the Transitional Authority to resolve. Once that issue was addressed, I would then be required to determine whether the **Nairobi City County Betting, Lotteries and Gaming Act** was constitutional or not and therefore whether the orders sought in Petition No.295 of 2014 and Petition No.1 of 2015 as consolidated ought to be granted or not.

5. In that context, what did the Transitional Authority do after receiving the Interim Judgment? From the Report aforesaid, it called a meeting on 18<sup>th</sup> January 2016 with the following stakeholders in the betting, lotteries and gaming industry:

i. Ministry of Interior and Co-ordination,

ii. Betting Control Licensing Board,

iii. Commission on Revenue Allocation,

iv. Council of Governors,

v. Commission for the implementation of the Constitution,

vi. National Treasury,

vii. Counties with common activities on betting (Nairobi, Mombasa, Kiambu, Nakuru, Kisumu, Uasin Gishu and Kilifi)

viii. Kenya Revenue Authority,

ix. Association of Gaming Operators, Kenya.

6. Despite protestations by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners as to the legitimacy of the stakeholders' meeting and resolutions, I see no reason to ignore them and will proceed to conclude the Judgment as herebelow;

Firstly, I should dispose of the issues raised in the letter by M/s. Muthomi & Karanja under order (vi) of the Interim Judgment. In that letter, the issue of classification of betting and lotteries as recreational services was raised. In the Interim Judgment, I addressed the issue as follows;

***“In the above context, it is undisputed by all the Parties that the 1<sup>st</sup> Respondent is not levying property or entertainment tax under the impugned County Legislation. It is also clear that an Act of Parliament authorizing the 1<sup>st</sup> Respondent to impose a tax in the betting, lotteries and gambling business does not exist. If I understood the Petitioners' complaint, it is their case that the 1<sup>st</sup> Respondent is imposing a tax/fee that is beyond its mandate as the 3<sup>rd</sup> Respondent ought not to have enacted the Nairobi City County Betting, Lotteries and Gaming Act 2014 since there is a national legislation regulating the betting, lotteries and gambling business.”***

7. It would seem that the issue being raised now is that the license fee or license tax imposed under the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** is an entertainment tax. For my part, I do not understand the controversy at all because with or without the United Nations Central Product Classification, **Clause 4** of the **Fourth Schedule** to the **Constitution** provides that County Governments have functions and powers over **“cultural activities, public entertainment and public amenities including – (a) betting, casinos and other forms of gambling”**. To that extent therefore, betting and lotteries are part of public entertainment and any license or tax imposed thereby would logically qualify as entertainment license or tax. Whether however the Nairobi County Government has the constitutional mandate to levy such a tax or issue licenses in that regard is a wholly different controversy which is at the heart of the present Petition.

8. Turning back to the Report submitted by the Transitional Authority therefore, I must first of all state that the said Authority is no longer operative after its mandate came to an end sometime in 2016, a matter of public notoriety. Its inability to convene a Sectoral Inter-governmental forum which was raised by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners is no longer an issue and so long as its Report is before me, I will proceed and interrogate it as filed.

9. In that regard and of relevance to this matter, in the Report aforesaid the function of **“licensing of public gaming (casino)”** was agreed to be a function of the National Government while the licensing of public gaming (casino) premises was assigned to the County Government. Similarly, licensing of national lotteries, of on-the course totali-sators, of off the course totali-sators, licensing of bookmakers and online gambling were functions assigned to the National Government while licensing and supervisions of prize competitions for promotions confined to a County, licensing of amusement machines, licensing and supervision of County lotteries confined within a County, licensing of premises for totali-sators, licensing and issuance of pool table permits within a County and licensing of betting premises were assigned to the County Governments. Both National and County Governments were assigned the function of handling complaints and conduct arbitrations arising from the matters that are within their assigned jurisdictions.

10. The above position is now challenged by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners who have argued that at Paragraph 99 of the Interim Judgment, I indicated that the conflict between the National and County legislations is the basis for the present dispute and that the Transitional Authority had failed in its mandate to deal with it hence my interim orders directed at it. The said Petitioners have also now implored this Court to ignore the Report and allow both Petitions with the result that the National Government should retain control of the betting, lotteries and gaming industry wholly to the exclusion of the County Governments.

11. In that regard, in the Interim Judgment, I left two fundamental questions unanswered; whether there is any conflict between the National and County Legislations and whether therefore there is double licensing imposed on betting, lotteries and gaming service providers. I should reiterate in that regard that under the **Fourth Schedule** to the **Constitution** the said services and functions are concurrent as between the two levels of Government. What is the criteria for resolving a conflict of laws as would seem to be now apparent?

**Article 191** of the **Constitution** provides as follows;

*(1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.*

*(2) National legislation prevails over county legislation if—*

*(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or*

*(b) the national legislation is aimed at preventing unreasonable action by a county that—*

*(i) is prejudicial to the economic, health or security interests of Kenya or another county; or*

*(ii) impedes the implementation of national economic policy.*

*(3) The following are the conditions referred to in clause (2)*

*(a) —*

*(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;*

*(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—*

*i. norms and standards; or*

*ii. national policies; or*

*(c) the national legislation is necessary for—*

*(i) the maintenance of national security;*

*(ii) the maintenance of economic unity;*

*(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;*

*(iv) the promotion of economic activities across county boundaries;*

*(v) the promotion of equal opportunity or equal access to government services; or*

*(vi) the protection of the environment.*

*(4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.*

*(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.*

*(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.*

12. Applying the above provisions of the Constitution to the present situation, I have no doubt in my mind that the Transitional Authority's Report as filed in this Court has taken into account the above criteria hence the division of functions in the manner that I have set out above. It is also clear to me that looking at the County Legislation *vis-à-vis* the criteria, in terms of the contested question of licensing, the County legislation provided as follows in the preamble:

*“An Act of the Nairobi City County to provide for the licensing and regulation of betting and gaming activities and premises; for authorizing of public lotteries in the County; and for connected purposes”.*

13. **Section 5** then provides as follows:

*“The objects of this Act are to–*

*a. give further effect to paragraph 4 of the Fourth Schedule to the Constitution which mandates the county Government with the function of betting, lotteries and gaming regulation and licensing;*

*b. to ensure that the national government policy on the regulation of betting, lotteries and gaming as set out in the national legislation is implemented at the county level in accordance with the requirements of the Constitution to the effect that Government at either level shall among other things, as appropriate, implement the legislation of the other level of government; and*

*c. to provide for the county institutions and for procedures applicable to the regulation and licensing of betting, lotteries and gaming within the County.*

14. **Section 4** acknowledges that the national legislation **“shall apply to any matter relating to betting, lotteries and gaming to the extent that this Act (the County Legislation) does not make provision for any such particular matter”** At paragraph 79 of the Interim Judgment, I indicated that the above provision purported to subordinate the national legislation to the county legislation which is a matter that is what **Article 191(6)** seemed to have envisaged; that there are instances where the legislation of one level of Government may actually prevail over the legislation of another level if the criteria elsewhere set above is applied. The protestations by the Petitioners specifically about Section 4 above and the import of the whole county legislation can therefore only have merit if subjected to that criteria.

15. Having so said, I am satisfied that the division of functions by the Transitional Authority is properly within the law and my findings would therefore be that in licensing operators in the betting, lotteries and gaming industry, the division by the said Authority ought to be followed and I will make necessary orders at the end of this judgment.

16. Having so held, the question of double licensing would not be an issue because the division of functions would necessitate that where for example an operator is seeking a national lottery license, that is a matter for the National Government but where the same operator is only seeking a license for a lottery confined to a County, the licensing is within the purview of the County Government. The national license would therefore not be replicated in county licensing because one national license is sufficient.

### **Conclusion**

17. In the three Petitions placed before me i.e. Petitions No.295 of 2014, No.1 of 2015 and No.315 of 2014, the orders sought can be summarised as follows:

i. whether the provisions of the **Betting, Lotteries and Gaming Act Cap.131** prevail over those of the **Nairobi City County, Betting and Lotteries and Gaming Act 2014**.

ii. whether **Section 4** of the **County Legislation** is unconstitutional, null and void in purporting to provide that the County Legislation shall prevail over the National Legislation.

iii. whether in implementing the **Nairobi County Betting, Lotteries and Gaming Act**, the County Government of Nairobi is subjecting operations of the above industry to double taxation or licensing.

iv. whether the County Legislation is unconstitutional, null and void in that it was passed without regard to the criteria developed by the Transition Authority under **Section 15(2)(b)** of the **Sixth Schedule** to the **Constitution**.

v. whether anything done pursuant to the County Legislation prior to its publication in the Gazette is unconstitutional, null and void as it contravenes **Article 199(1)** of the **Constitution**.

vi. costs.

18. In that regard, on issue No.(i) I have held that the functions relating to betting, lotteries and gaming are concurrent to both County and National Governments and where there is a conflict, the same is to be resolved in terms of **Article 191** of the **Constitution**.

19. On issue No.(ii), I have already dealt with **Section 4** of the **County Legislation** in the Interim Judgment where I merely stated at paragraphs 79 and 80 that its language creates confusion by purporting to create unclear circumstances where it applies in prevalence to the national legislation. I am however unable to go so far as to declare it unconstitutional because the mere fact that it is ambiguous does not make it unconstitutional. Instead, that is a provision for the County Assembly to consider deleting as it adds no value to the legislation at hand.

20. On issue No.(iii) there is no doubt that because of the confusion created in the implementation of the County Legislation and the fact that there was no clear demarcation of functions between the two levels of Government, there may have been double licensing of operators. The way to resolve the matter is not however by this Court making a blanket order in that regard or ordering a refund of monies already paid but by making specific orders for resolution of that question post this Judgment.

21. Regarding the question in issue No. (iv) whether the criteria developed by the Transition Authority was ignored, pursuant to the directions in the Interim Judgment, that issue is no longer live for determination as it forms part of the final decision in this Judgment.

22. On issue No.(v) while I partly addressed the issue of gazettelement of the County legislation at paragraph 94 of the Interim Judgment, I did not address the matter in depth. Subsequently, in **H. C. Petition No.52 of 2016 James Gacheru Kariuki & Others v AG & Others** I addressed the import of **Article 199** of the **Constitution** and stated thus:

23. I shall begin my analysis on this issue by making reference to **Article 199(1)** of the **Constitution** which provides as follows;

***“County legislation does not take effect unless published in the Gazette.”***

24. **Article 260** goes ahead to define a ‘Gazette’ as;

***“the Kenya Gazette published by authority of the National Government or a supplement to the Kenya Gazette.”***

25. Thus, **Article 199(1)** may equally be read as, *“County legislation does not take effect unless published in the Kenya Gazette or a supplement to the Kenya Gazette.”*

26. It is also not in doubt that **Article 199(1)** of the **Constitution** imposes a mandatory obligation for publication of all County legislations in the *Kenya Gazette* or a supplement to the *Kenya Gazette* and it is only through such publication that a county legislation can gain legitimacy. *What therefore is a County Gazette, if at all and is there any relationship between a County Gazette and the Kenya Gazette?*

27. The term ‘County Gazette’ is not defined nor provided for in the **Constitution** which only provides for a *Gazette*, which has been defined as the *Kenya Gazette* published by the authority of the National Government or a supplement to the *Kenya Gazette*. However, the **County Governments Act** defines a ‘County Gazette’ as a *Gazette* published by the authority of the County Government or a supplement of such a *Gazette*. This shows that there is a clear distinction between a ‘County Gazette’ and a ‘Kenya Gazette’ and the difference as can be seen above is; whereas the ‘Kenya Gazette’ is published under the authority of the National Government, the ‘County Gazette’ is published under the authority of a County Government.

28. In essence, while the concept of a ‘County Gazette’ was introduced by the **County Governments Act**, the **Constitution** explicitly requires County legislation to be published in the *Kenya Gazette* for them to take effect. I so find.

29. Looking at the present County Legislation, in the above context, gazettelement in the County Gazette as a Supplement without gazettelement in the *Kenya Gazette* was not enough. Having allowed parties to apply with regard to any aspect of the Interim Judgment, I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners’ strong argument on non-compliance with **Article 199** is in tandem with my very elaborate findings in **James Gacheru Kariuki (supra)** and I will therefore make a finding that to the extent that the county Legislation was not gazetted in line with **Article 199** of the **Constitution** then it was invalid. However as I also stated in the same decision, invalidity commences from the date of this Judgment and this Court like in that case should allow compliance before invalidity can be declared taking into account the fact that certain processes have been undertaken pursuant to the said gazette notices. In that regard, the retrospectivity of the present decision must bear that reality in mind. I am also persuaded by the decision of the Supreme Court of the United States in **Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)**, where the Court was of the view that:

***“The past cannot always be erased by a new judicial declaration. The effect of the subsequent Ruling as to invalidity may have to be considered in various aspects<sup>3/4</sup>with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination...[;] it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.”***

In the present case, I am satisfied that an all inclusive statement of absolute retroactive invalidity cannot be justified hence my decision that the County Government ought to regularize the non-gazettment of the County Legislation within a set timeframe in the wider interests of justice. I see nothing unlawful or unprocedural about such a decision and I have given reasons why so.

30. On costs, although they would normally be the event, it is obvious that no party consciously decided to misapply the law and so each party shall bear its own costs.

31. Before I conclude this judgment, I should state that it was necessary to deliver an interim judgment to enable the Transition Authority complete the work it had started in separating the concurrent functions of the National and County Governments and I am satisfied that its Report has done so. I reiterate that upon its mandate coming to an end, it could not, be able within the timeframe it had, to subject its report to the Sectoral Intergovernmental forum and therefore Orders Nos.(ii) and (iii) of the Interim Judgment are hereby set aside *suo motu* as they are now superfluous and have been overtaken by events.

32. I note further that no party has challenged those orders under order (vi) of the Interim Judgment nor indeed did they challenge the said judgment save on the grounds set out elsewhere above and which I have substantively addressed.

33. I should also state that as correctly pointed out by the Petitioners, security, moral and ethical issues arise in the lotteries, betting and gaming business and there is therefore a clear need for the two levels of government to co-ordinate their oversight roles to ensure that any loopholes created in the licensing processes are quickly sealed while each is staying within its demarcated lane. Any disputes arising should thereafter be settled as much possible through arbitration and/or mediation.

### **Disposition and Final Orders**

34. Having held as above, the proper orders to make are that the Petitions as consolidated are determined in the following terms only:

i. Because betting, lotteries and gaming are concurrent functions of both the National and County Governments, those functions should be delineated in terms of the Transition Authority Report as follows:

	<b>National Government</b>		<b>County Government</b>
1.	<ul style="list-style-type: none"> <li>i. Policy formulation, Legislation, standards and norms</li> <li>ii. Development of standards and norms</li> <li>iii. Regulation of the gaming industry</li> <li>iv. Capacity building and technical assistance</li> </ul>	1.	<ul style="list-style-type: none"> <li>i. Implementation of Policy, standards and norms</li> <li>ii. Periodic Monitoring and evaluation of betting, lotteries and gaming</li> <li>iii. Development and Implementation of county Legislation on betting and other forms of gambling</li> </ul>
2.	Licensing of Public gaming (casino)	2.	<ul style="list-style-type: none"> <li>i. Licensing of Public gaming (Casino) premises</li> <li>ii. Enforcement and compliance-spot checks, Daily supervisions of casinos</li> </ul>
3.	Vetting, security checks and due diligence	3.	N/A
4.	Licensing of Prize competitions cross cutting several Counties (on promotion of product and services)	4.	Licensing and supervision of prize competitions for promotions confined to a County.
5.	N/A	5.	Licensing of Amusement machines

6.	Licensing of National lotteries	6.	Licensing and supervision of county lotteries (Lotteries confined within a County)
7.	i. Licensing of on-the course totali-sators ii. Licensing of off-the course totali-sators	7.	Licensing of Premises for totali-sators
8.	N/A	8.	Licensing and issuance of Pool table permits within the Counties
9.	Licensing of bookmakers	9.	Licensing of Betting premises
10.	Online gaming	10.	N/A
11.	Handling of complaints and arbitration	11.	Handling of complaints and arbitration

ii. Both the **Betting, Lotteries and Gaming Act** and the **Nairobi City County, Betting, Lotteries and Gaming Act** should only be implemented in the above terms.

iii. The orders suspending the operation of the **Nairobi City County, Betting, Lotteries and Gaming Act** shall remain in operation for a further 60 days to enable compliance with the requirement for its gazettment in the Kenya Gazette. If the County Government fails to do so within that period, the said Act shall be deemed to be unlawful and invalid following the decision in **H. C. Petition No.52 of 2016 James Gacheru Kariuki & Others vs AG & Others**.

35. Let each Party bear its own costs.

36. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MAY, 2017**

**E. CHACHA MWITA**

**JUDGE**