



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.522 OF 2012**

**COTES DU THONE LTD.....PETITIONER**

**VERSUS**

**BETTING CONTROL AND LICENCING BOARD.....1ST RESPONDENT**

**AMOS ODERO KWASI.....2ND RESPONDENT**

**RULING**

1. The Application dated 13th November 2012 is premised on the provisions of Rules 20 and 21 of the Constitution of Kenya (supervisory Jurisdiction and Protection of Fundamental Freedoms of the individual) High court Practice and Procedure Rules, 2006 and Articles 22(2) and 258(1) of the Constitution, 2010. The Orders sought are that;

“1) ...

2) *That a Conservatory Order of Stay do issue against the directive by the 2nd Respondent to the petitioner to open and close business between 12 noon and 4.00 a.m. Respectively as contained in his letters to Gaming Operators dated 3rd September 2012 pending the hearing and determination of Prayer 3 of this Application.*

3) *That a Conservatory Order of Stay do issue against the directive by the 2nd Respondent to the petitioner to open and close business between 12 noon and 4.00 a.m. Respectively as contained in his letters to Gaming Operators dated 3rd September 2012 pending the hearing and determination of the petition herein.*

4) *That an interim injunction be made restraining the Respondents, their officers, servants and or agents from in any manner whatsoever interfering with the business and operations of the Petitioner pending the hearing and determination of prayer 3 of the Application.*

5) *That a temporary injunction be made restraining the Respondent, its officers, servants and or agents from in any manner whatsoever interfering with the business and operations of the Petitioner pending the hearing and determination of he Petitioner's Petition.*

6) *That the costs of this Application be in the cause.”*

2. The grounds in support are that;

- a) ***The 2nd Respondent has directed the Petitioner to open and close its business premises specifically at 12 noon and 4.00 a.m. In the morning respectively despite the fact that the chairman of the 1st Respondent had directed the Petitioner to self regulate its hours of business as long as it does not breach any Law.***
- b) ***The 2nd Respondent has no powers to overrule the Chairman of the 1st Respondent or contradict his decision.***
- c) ***The directive by the 2nd Respondent is illegal, unreasonable, impractical, punitive and arbitrary as the petitioner has in its employment, people that rely on public transport which is unavailable at 4.00 in the morning.***
- d) ***the Petitioner's operations have been put into a spin in that it shall be required to close business at about 11.00 p.m. To enable its employees get transport home safely.***
- e) ***The Petitioner does not have lodging or taxi/cab facilities to either accommodate or drop its employees home.***
- f) ***The Petitioner has been put into a position that it may close business and send its staff home in total breach of their rights to earn a living as enshrined under Article 39 of the Constitution and their right to a fair administrative action as enshrined under Article 47 of the Constitution.***
- g) ***The petitioner operates a gaming house where the duration of the games played therein are unpredictable and not under the control of the Petitioner.***
- h) ***The directive to close business at 4.00 a.m. has led to mass exodus of customers most of whom are tourists in Kenya for holiday due to interruption of their gaming.***
- i) ***No reason has been given to the Petitioner why it should open shop at 4.00 a.m. yet other operators licensed by the Respondent are operating beyond 4.00 a.m. and others 24hours a day.***
- j) ***Article 47(2) provides that where a right of fundamental freedom is likely to be adversely affected by an administrative action, written reasons must be given. The Respondent has not done so despite request in writing.***
- k) ***Unless the Orders sought herein are made the petitioner will be driven out of business and its employee's will be rendered jobless.***

3. The Supporting Affidavit sworn on 13th November 2012 by one Peter Kibogo, General Manager of the Plaintiff company is brief and points to facts deposed to in the Affidavit in support of the Petition sworn on the same day. In the latter Affidavit, he has deposed that the Petitioner runs a Casino by the name "Jokers Wild" and that since the Casino opened, it had established the hours of 7.00 a.m. to 10.00 p.m. As ideal for its business and clientele. That the directive by the Respondents to have all Casinos operate from 12.00 p.m. to 4.00 a.m. has adversely affected its business as it has inconvenienced both its clientele and staff and has caused massive losses to it.

4. Further, that the change in business hours was arbitrary, made without following the law and was also irrational and unreasonable. It is also the Applicant's case that the 2nd Respondent by purporting to overturn decisions of the Board without lawful authority and acted capriciously and without due regard to the law.

5. That the actions of the Respondent are against the Vision 2030 blueprint of a 24-hour economy and is also inconsistent with the Constitution; and that their actions are outdated and out of touch with the current reality in world business.

6. In response, the Respondents filed a Replying Affidavit sworn on 7th December 2012 by the

2nd Respondent and their case is that the regulation of business hours for Casinos was lawful and that in fact what was unlawful was a directive by the then Chairman of the 1st Respondent purporting to reverse the hours of 12.00 p.m.-4.00 a.m. to the former hours of business as pleaded by the Applicant.

7. The 2nd Respondent also takes issue with the petition against him in his personal capacity and he urged the point that at all material times he acted in his official capacity and in good faith.

8. It is also the Respondent's case that all their actions were taken pursuant to the provisions of **Section 46(3) of the Betting, Lotteries and Gaming Act, Cap(3)** which provides the mechanism for checks and balances in the Gaming Industry. That gambling is “*a vice which if left unchecked can cause huge economic, social and emotional prejudices to the members of the Public*” and due to its addictive nature, the gambling industry cannot be left to the free enterprise.

9. Lastly, that the 1st Respondent does not derive any benefit in any way by reducing, regulating or extending the hours of operation of Casinos and its main objective is to maintain clarity and sanity in the Gaming industry generally.

10. That therefore the Petition is without merit and should be dismissed with costs.

11. I have read the Submissions by advocates for the parties and I agree with Ms Kamande for the Respondents that in an Application of this nature, the approach taken by Ibrahim J. (*as he then was*) in Muslims for Human Rights vs Attorney General & 3 Others, H.C. Misc. Appl. No.7 of 2011 would be the best. The learned judge in that case opined, and I agree, that in matters where conservatory orders are sought pending the hearing and of a Petition under the Constitution, the Court seized of the matter in exercising its discretion should consider, *inter-alia*, the following issues;

i) ***Whether the Applicant has made out a prima facie case that is arguable.***

ii) ***Whether the case or petition will be rendered nugatory if the conservatory orders are not granted.***

iii) ***the balance of convenience in the circumstances.***

12. On the issue (1) above, I have perused the petition dated 13th November 2012 and the constitutional issues raised revolve around the right to equality (Article 27), social and economic rights (Article 43), freedom of movement (Article 39) and fair administrative action (Article 47). Further, declaratory orders are sought that Section 46(3) of the **Betting, Lotteries and Gaming Act, Cap.131** is inconsistent with **Articles 24(2), 39 and 47 of the Constitution.**

13. I should begin by addressing **Section 46(3) of the Act**, which provides as follows;

“(1) ...

(2) ...

(3) ***The Board may, in respect of a licence issued under this Section, impose conditions providing for-***

a) ***the manner in which a person may conduct his business and the suitability, condition and conduct of the premises and the hours during which the premises may be open for business;***

b) ***the protection of persons taking part in the gaming against fraud;***

c) ***the payment of admission fees for persons resorting to the premises.***

(4) ...”

14. Without addressing the issue whether the Section is inconsistent with the Constitution or not, when

the 1st Respondent imposes conditions on the hours during which gaming premises may be open for business, *prima facie*, it is acting withing its statutory mandate and to that extend only, this Court would not at this stage, intervene. It would have been different if for example, the Board was assuming powers it was never expressly granted by Statute. But that is not the end of the matter because I have seen conflicting directions from the 1st Respondent; in a letter dated 27th February 2012, one Lucas Maitha, writing as the Chairman of the 1st Respondent specifically directed that the Applicant should open its premises at 12.00 p.m. and close at 4.00 a.m. every day. In a subsequent letter dated 31st August 2012, he directed all gaming operators to revert back to their “*original operating schedules*”. I consider it imperative to set out the letter in full for its import to be gleaned. It reads as follows;

**“The Chairman  
August, 2012**

**31st**

**Association of Gaming Operators,  
Kenya (AGOK)  
Utalii House  
Box 53373-00200  
NAIROBI.**

**Dear Sir,**

**REF: \_ OPENING AND CLOSING HOURS**

**Please refer to my letter ref:BCLB/26/VO1111/CC112 written to all Casino operators regarding the above. Further, refer to the meeting your umbrella body had with BCLB under my chairmanship on the 14th June 2012 at 2.00 p.m in or boardroom.**

**Having listed to your complains on the impracticality of the 27th February 2012orders which would bring job losses to many Kenyans, insecurity of workers and gamblers who have to be released early, and the drive towards a 24 hour economy in which Kenya as a nation is encouraging and having further received complaints that some Casinos including Casino Malindi at the Coast have been allowed to operate out of the enforced hours unofficial due to demand by tourists I have today directed that all Casino operators should revert back to their former operating schedules. They should continue to self-regulate their business hours provided the Betting, Lotteries and Gaming Act Cap.131, Laws of Kenya is fully complied with. I have taken this action in order to rationalize and bring uniformity in the industry**

**This directive takes effect immediately all operators stand advised.**

**Yours faithfully,**

**HON. LUCAS MAITHA  
CHAIRMAN**

**CC Director BCLD”**

15. A casual reading of the above letter would bring out a number of issues, vis;

- a) That a letter reference number BCLB/26/VOL.III/CC112 had previously been authored by Lucas Maitha to all gaming operators regarding opening and closing hours for their businesses.
- b) That a meeting between the Association of Gaming Operators of Kenya and the 1st Respondent was held on 14/6/2012 and chaired by the same Lucas Maitha.
- c) For reasons set out in the letter, it was directed that the original gaming hours be reverted to.

16. In a letter dated 3rd September 2012, the 2nd Respondent writing as a Director of the 1st Respondent wrote to Association of Gaming Operators of Kenya aforesaid and stated as follows;

***“The Chairman***

***3rd September, 2012***

***Association of Gaming Operators,  
Kenya (AGOK)  
Utalii House  
Box 53373-00200  
NAIROBI.***

***Dear Sir,***

***REF: . OPENING AND CLOSING HOURS***

***We refer to the above matter and a letter to you by Chairman of 31st August, 2012.***

***We wish to inform you that the position of the Board in respect to opening and closing hours for public Gaming Premises (Casino) still remains as communicated in or three letters dated 27th February, 2012 23rd and 30th May, 2012 respectively.***

***We therefore wish to inform you to treat the letter dated 31st August, 2012 as null and void and legal action shall be taken against any of your members of any other operator not complying with the set hours.***

***This directive takes effect immediately all operators stand advised.***

***Yours faithfully,***

***A.O.KWASI  
DIRECTOR***

***cc Permanent Secretary***

***Office of the Vice-President and***

***Ministry of Home Affairs  
NAIROBI.”***

17. It is the 2nd Respondent's argument before me that the letter of 31st August 2012 was influenced by probable misconduct on the part of Lucas Maitha because upon writing it, he resigned from the Chairmanship of the 1st Respondent three days later. He provided no evidence of such influence and specifically, he never stated that the Applicant was party to any conspiracy to defeat the law.

18. Further, it is instructive that the letter dated 27th February 2012 referred to in the 2nd Respondent's letter of 3rd September 2012 was authored by Lucas Maitha and not the 2nd Respondent. I do not have on the record the letters dated 13th May 2012 and 30th May 2012 and so I have no idea what they contain.

19. The 2nd Respondent is not the chairman of the 1st Respondent and there is no evidence that when he wrote the letter dated 3rd September 2012, he had been authorized by the Chairman to do so and that a gazette notice had been published to that effect. He may well argue that Lucas Maitha had resigned on 3rd September 2012 and that effectively there was no Chairman of the 1st Respondent. The answer has in **Section 3(2)** of the **Act** which provides as follows;

***“In the event of the chairman being absent from any meeting of the Board, the members***

**present shall choose one of heir number to act as Chairman for that meeting”**

Where is the evidence that the Board met and authorized the 2nd Respondent to author the letter of 3rd September 2012 reproduced above?

20. In her Submissions, Ms. Kamande introduced Legal Notice No.81 of 15th June 2005, where one J. I. Adongo, chairman of the 1st Respondent gave such authorization to the Director of Gaming. The Notice is dated 4th July 2009 and the argument made is that it was to operate in perpetuity. It cannot be so because Section 3(10) of the Act must be read with **Section 3(1)** regarding the appointment of the Chairman. Mr. Adongo was not the Chairman when the letter of 3rd September 2012 was written and there is no law that the 2nd Respondent should enjoy powers conferred to another officer by a retired chairman. He ought to have and for avoidance of doubt, he ought now to obtain authorization from the sitting chairman appointed and gazetted under **Section 3(1)**. To say otherwise would be to create uncertainty leading to a procedural and legal quagmire.

21. It would not be the first time that the High Court is telling the 2d Respondent to act within the law and not on his won whims – see the decision of Khaminwa J. in Republic vs Betting Control and Licensing Board ex-parte Fim Loxx Ltd. H.C Misc. Appl No.288/2003 (Msa) where he was castigated for usurping the powers of the Director when he was Deputy Director of Gaming.

22. And so sadly, the overzealousness of the 2nd Respondent to pour cold water on the actions of Lucas Maitha cannot be mitigated by his own action which *prima facie* appear to be in contravention of the Act.

23. In a nutshell, what I am saying is that with the facts as placed before me and without in any way purporting to go to the merits of the Petition, the letter of 31st August 2012 at face value superseded the one dated 27th February 2012 and that the one dated 3rd September 2012 by the 2nd Respondent, even if made in good faith, cannot be taken as lawful. Incidentally **Section 3(12)** of the Act protects the 2nd Respondent and to that extend, I agree with him that he ought not to have been sued in his personal name and I will at the end of this Ruling strike his name out of the proceedings for that reason.

24. In the end, I find and hold that the Petition is neither frivolous nor vexatious but in fact raised arguable sues.

25. On **issue No.(ii)**, once I have ruled as I have done above, it is obvious that when a Respondent act is the way the present Respondents have acted, the Court must intervene not to allow a *prima facie* unlawful directive to operate to the prejudice of an entrepreneur who has shown that the consequences of abiding by such a directive would cause damage and in effect legitimate the directive thus rendering the hearing of the Petition otherwise nugatory.

26. On **issue No.(iii)**, I have been pointed to the decision of Wendoh J. in Charles Shikanga & Stephen Ndichu H.C Misc. App. No.1023 of 2005 where the issue of gaming hours was also addressed. In refusing to quash a decision of the 1st Respondent to change he said hours, she stated that the Board had jurisdiction under **Section 46(3)** to do so and held quite correctly that there is need to regulate “*timing of Casinos ... to protect would be weak and compulsive members of society from exploitation through addiction ...*” and that such a matter “cannot be left to the whims of free enterprise” That finding may apply generally but in the circumstances of this case, I have shown above that internal disagreements within the 1st Respondent have created conflicting directives to owners of Casinos. How will they know which one to follow?

27. Further, and in line with Wendho J.'s argument above, clearly the party to be prejudiced if no conservatory orders are granted would be the Applicant. The 2nd Respondent has stated on oath that by regulating gaming hours, the Board obtains no advantage or gain.

That is a correct statement because save for license fees, it has no other benefit. On a balance therefore, equity must favour the party that may suffer unless the Orders are granted. That party is the

Applicant.

28. In conclusion, I will order as follows;

i) ***The 2nd Respondent's name is struck off the proceedings. Costs therefore shall be paid by the Applicant who improperly sued him inspite of Section 3(1) of the Betting, Lotteries and Gaming Act.***

ii) ***The Application dated 13th November 2012 is allowed in terms of Prayer 3 thereof.***

iii) ***In line with Article 159(2)(c), of the Constitution, I shall order the 1st Respondent together with he Association of Gaming Operators Kenya (AGOK) to commence discussions on gaming hours across Kenya.***

iv) ***In the meantime, directions on the hearing of the petition dated 3rd November 2012 shall be given.***

v) ***Costs of the Appreciation shall abide the Petition.***

28. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – Court Clerk*

*Mr. Macharia for Petitioner*

*Ms. Kamande for Respondent*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

*Mentioned on 17/4/2013 for directions.*

**ISAAC LENAOLA**

**JUDGE**