IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU, M'INOTI & ACHODE, JJ.A.

CIVIL APPEAL (APPLICATION) NO. E671 OF 2022

BETWEEN

MILESTONE GAMES LIMITED.....APPELLANT

AND

BETTING CONTROL & LICENSING BOARD ..... 1ST RESPONDENT SAFARICOM LTD ..... 2ND RESPONDENT AIRTEL NETWORKS (K) LTD .... 3RD RESPONDENT COMMUNICATIONS AUTHORITY OF KENYA ..... 4TH RESPONDENT PAUL WANDERI NDUNGU ..... INTERESTED PARTY

(Application for joinder of an interested party and for setting aside the Consent Order dated 24th February 2023

in

Civil Appeal No. E671 of 2022)

****

RULING OF THE COURT

1. This ruling determines the Notice of Motion dated 22nd October 2024 taken out by ***the interested party, Paul Wanderi Ndung'u***. In the application, the interested party

prays for two substantive orders as follows:

i). That there be and is hereby issued an order joining Paul Wanderi Ndung'u to these proceedings as an interested party; and

ii. That there be and is hereby issued an order setting aside the consent order recorded by this Court on '24th February 2023.' "

2. The third prayer is a consequential one, which prays that upon grant of the two prayers above, the interested party be served with all the documents filed in ***Civil Appeal No. E671 of 2022***.

3. The application has a chequered background and from the record, there is a multiplicity of petitions, applications, and appeals between some of the parties, in this Court, the High Court and even the subordinate court. However, the brief background that is relevant to the application before the Court is as follows.

4. On or about 9th November 2020, ***Milestone Games Ltd (Milestone)*** took out Judicial Review Proceedings in the High Court for orders of *certiorari* to quash two decisions of the ***Betting Control and Licensing Board (the Board)*** dated 30th and 31st October 2020. The first decision prohibited Milestone from using the trade name

“Sportpesa”, which allegedly

belonged to ***Pevans East Africa Ltd (Pevans)***, together with domains associated with the name *(www.ke.sportpesa.com* and *www.sportpesa.co.ke)*, two short codes *(**29050*** and ***79079**)* and three paybill numbers *(**521521, 9555700,*** and ***95700**)* issued by ***Safaricom Ltd*** and ***Airtel Networks (K) Ltd***. The second decision suspended indefinitely Milestones Bookmaker's license. Milestone also applied for orders of *prohibition* to stop the Board from implementing the said decisions.

5. The application was based on the grounds that the impugned actions of the Board were in violation of ***Articles 10, 40,*** and ***47*** of the Constitution, tainted with illegality and in breach of due process and Milestone's right to natural justice.

6. On 18th November 2020 the High Court granted Milestone leave to apply for the orders of judicial review and directed the leave to operate as stay of implementation of the impugned decisions of the Board. The Board opposed the Judicial Review Application vide a replying affidavit sworn by its chairperson on 24th November 2020.

7. Contempt proceedings followed suit against the Board and

the High Court found its officers to be guilty of contempt of court,

but gave them sixty days to purge their contempt. On 26th May 2022 Milestone and the Board recorded a consent order in the High Court settling their entire dispute. When the consent order came up for adoption as an order of the Court, the interest party in the present application, opposed the consent order and applied to be joined as a party to the proceedings in the High Court. After hearing the parties, by a ruling dated 22nd September 2022, the High Court *(**Ndung'u, J.**)* declined to adopt the consent order on, among other grounds, the need to ascertain whether it was based on regular and procedural resolution of the Board.

8. Milestone was aggrieved and lodged ***Civil Appeal No. E671 of 2022*** within which this application is made. On 27th September 2022, Milestone applied before this Court for an order of stay of further proceedings in the High Court pending the hearing and determination of the appeal.

9. On 20th December 2022, the interested party applied to be joined in the proceedings in this Court on the basis that he held 17% shareholding in Pevans and that although he had participated in the proceedings in the High Court which led to

the intended appeal, Milestone had not made him a party to the appeal.

10. The application for joinder was opposed by both Milestone and Pevans, on the grounds that the dispute before the Court was between Milestone and the Board and that the interested party had no interest in the matter because he had been expelled from Pevans on 8th October 2022 by a resolution of the majority of the members.

11. By a ruling dated 10th February 2023, this Court ***(Musinga, Laibuta*** and ***Mativo, JJ.A)*** dismissed the application for joinder. On ***12th February 2024***, the Court adopted a consent order marking ***Civil Appeal No. E671 of 2022*** as withdrawn by consent.

12. Undeterred, on 2nd January 2025, the interested party applied for review of the ruling of 10th February 2023 on, among other grounds, that the resolution for his expulsion from Pevans was non-existent and that ***Civil Appeal No. E671 of 2022*** had been surreptitiously and illegally withdrawn.

13. By a ruling dated 11th April 2025, this Court ***(Musinga, M. Ngugi & Odunga, JJ.A)*** allowed the interested party's

application, reviewed and set aside the ruling dated 10th February 2023 and allowed the application by the interested party to be joined in the proceedings. In arriving at the decision to review its earlier ruling, the Court found that there were allegations of fraud by the interested party that required further consideration.

14. Ultimately the Court delivered itself as follows:

> ***"From the foregoing, we are satisfied that there are sufficient reasons to warrant a review of this Court's ruling dated 10th February 2023. Consequently, we hereby review and set aside the said ruling and substitute therefor an order allowing the Notice of Motion dated 20th December 2022 by Paul Wanderi Ndung'u seeking to be joined as an interested party to these proceedings. While we are aware that Civil Appeal No. E671 of 2022 has been settled by consent where Paul was not a party, it is up to Paul to determine his next steps in the quest for his property rights."***

15. Next, the interested party lodged the application now before the Court, where he seeks to be joined in the proceedings, and an order for review and setting aside of the consent order

of ***"24th February 2023"***, which marked this appeal as withdrawn.

16. In support of the application the interested party, represented by learned counsel, ***Dr. Aukot*** and ***Mr. Kosgei***, relied on his affidavit sworn on 22nd October 2024 and further affidavit sworn on 31st January 2025 and submitted that on 2nd October 2023, the High Court in ***HC Com C. No. E002 of 2023*** found the interested party's purported expulsion from Pevans to be unprocedural and unlawful. That purported expulsion was the basis of declining to join him in the proceedings in this Court. It was further contended that despite knowledge of that fact, Milestone proceeded to unlawfully withdraw the appeal so as to defeat the cause of justice and the interests of the interested party.

17. The interested party further argued that the High Court had intimated that it would discontinue the proceedings before it on account of the withdrawal of the appeal and that unless the application is granted, the applicant's rights under ***Articles 47, 48*** and ***50*** of the ***Constitution*** would be violated. He also argued that the consent order

was unlawful because it was not signed by all the parties to the appeal.

18. Milestone, represented by ***Mr. Otieno***, learned counsel, opposed the application vide a replying affidavit sworn on 27th January 2025 by Milestone's Operations Manager, ***Bernard Chauro***, and submissions of even date. It was submitted that the interested party was not a party to the proceedings in the High Court, the appeal in this Court and the consent order, and therefore, he had no basis for setting aside the consent order.

19. It was Milestone's further contention that the application for joinder was *res judicata*, the interested party having made a similar application in this Court which was dismissed on 10th February 2023. It was contended, rather erroneously in our view, that the interested party had not made any application for review of the ruling of 10th February 2023. The mistake in that submission is understandable because Mr. Chauro's affidavit was sworn on 27th January 2025, while the application for review we have adverted to above was determined on 11th April 2025.

20. Milestone further submitted that a party can only join existing proceedings and in this case there were no

pending proceedings that the interested party could validly join. In

support, it cited the decision of the High Court in_ ***Apollo***

Mboya v. The Cabinet Secretary, National Treasury & 6

Others [2019] KEHC 6435 (KLR) for the proposition that once a consent order is entered into settling a dispute, there was nothing else pending for determination and that the court becomes *functus officio*.

21. It was further contended, on the authority of the decision of the High Court in ***Trust Bank of Kenya Ltd v. Ply & Panels***

Ltd [2004] 1 EA 23, that the interested party, not being a party to the consent order, could not set it aside or derive any relief from it because it was in the nature of a contract. The same decision of the High Court in the ***Apollo Mboya*** case was cited in support of the submission that a consent order can only be set aside by the parties to it rather than by strangers.

22. ***Mr. ole Ntome***, learned counsel, held brief for ***Mr. Kiche*** for Safaricom Ltd and informed the Court that Safaricom Ltd. had not filed any response because it was discharged from the proceedings and was no longer interested in the

matter.

23. We have carefully considered this application, the submissions by the parties and the authorities they cited.

Beginning with the first prayer in the application, the same seeks joinder of the interested party in these proceedings as an interested party. We note that on 22nd December 2022 the interested party applied to this Court to be joined as a party to Civil Appeal No. ***Civil Appeal No. E671 of 2022***. Although that application was dismissed on 10th February 2023, this Court subsequently on 11th April 2025 reviewed the ruling of 10th February 2023 and specifically allowed the joinder of the interested party as follows:

> ***"Consequently, we hereby review and set aside the said ruling and substitute therefor an order allowing the Notice of Motion dated 20th December 2022 by Paul Wanderi Ndung'u seeking to be joined as an interested party to these proceedings."***
>
> **(Emphasis added).**

24. The issue of joinder of the interested party was addressed and determined by this Court in the ruling of 11th April 2025 and the Court cannot be asked to revisit and determine an issue it has already determined. The prayer for joinder is not well founded and has absolutely no merit.

25. The second prayer relates to setting aside of the consent order dated ***"24th February 2023"***. We have rummaged and

combed through the entire record presented to us and we have been unable to trace a consent order dated or adopted by this Court on ***"24th February 2023"*** as pleaded by the interested party. None of the parties has indicated, whether in their replying affidavits or submissions, that there is a mistake about the date of the consent order that the interested party seeks to set aside. Neither did the interested party apply, even informally to correct the date of the consent order.

26. By its nature, a consent order, unless proved to the satisfaction of the Court that it is tainted with fraud, illegality or any of the grounds upon which a contract may be set aside, is sacrosanct, and binding upon the parties to it. The Court cannot casually set aside a consent order that has been adopted by the parties and is said to have been fully implemented by the parties there, unless it is absolutely sure of the consent order that is impugned. The only consent order on the record before us is dated ***"12th February 2024"***, which clearly is not the consent order dated ***"24th February 2023"*** that is impugned in the application before us. It is possible that in the various

other cases between the parties

that we have adverted to and which are not before us in this application, such an order exists. The bottom line is that it is not on record before us and we cannot be sure of its terms. Therefore, we cannot set aside an order that has not been placed before the Court and whose terms we cannot tell.

27. It has been held consistently in our jurisdiction that parties are bound by their pleadings and that unless they amend the pleadings, the Court cannot deal with an issue that is not before it. Thus, for example, in **David Sironga ole Tukai v.**

Francis arap Muge & 2 Others [2014] KECA 155 (KLR), this Court held as follows:

> ***"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this***

reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way,

none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

28. To the extent that the interested party seeks to set aside a consent order dated ***24th February 2023*** which has not been presented before the Court and the fact that the only consent order on record is dated ***12th February 2024***, which clearly is not the consent order that the applicant seeks to set aside, we cannot grant the order sought by

the interested party. For the foregoing reasons, we find no merit in the interested

party's notice of motion dated 22nd October 2024 and the same is dismissed with costs to Milestone. It is so ordered.

Dated and delivered at Nairobi this 13th day of February 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

L. A. ACHODE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.