



REPUBLIC OF KENYA



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Masinde & another v Betting Control Licensing Board & 5 others; Ndungu (Proposed Interested Party) (Civil Application E351 of 2022) [2025] KECA 685 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 685 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E351 OF 2022
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
APRIL 11, 2025**

BETWEEN

JOY MASINDE 1ST APPLICANT

SABRINA KANINI 2ND APPLICANT

AND

BETTING CONTROL LICENSING BOARD 1ST RESPONDENT

SAFARICOM LIMITED 2ND RESPONDENT

MILESTONE GAMES LIMITED 3RD RESPONDENT

AIRTEL NETWORKS KENYA LIMITED 4TH RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA 5TH RESPONDENT

PEVANS EAST AFRICA LIMITED 6TH RESPONDENT

AND

PAUL WANDERI NDUNGU PROPOSED INTERESTED PARTY

(Being an application for review of the Ruling of this Court (Musinga, (P), Laibuta & Mativo, JJ.A.) delivered on 10th February 2023 in High Court JR. Case No. E061 of 2020)

RULING

1. On 10th February 2023 this Court dismissed two applications, the first one by the 1st and 2nd applicants, and second one by 3rd respondent, who were seeking to be joined as parties to Civil Appeal No. E671 of 2022 that was pending before the Court. The 3rd applicant, Paul Wanderi Ndung'u, being dissatisfied by that ruling, brought an application dated 2nd January 2025 under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Articles 47, 48 and 50 of [the Constitution](#), seeking a review of the ruling.



2. The application is based on grounds that:
 - i. “The court dismissed the proposed interested party’s application for joinder on the ground that he had been expelled as a shareholder of the 4th respondent.
 - ii. The order relied on by the court at the time was set aside and upon further review has been found to have been non-existent.
 - iii. It has further emerged that the underlying appeal was illegally compromised and the proposed interested party only made aware of the illegal consent on 5th November 2024. In fact, the proceedings before the superior court may be wrongly terminated on account of the illegal consent where the ruling of 10th February 2023 has been cited as a fact signifying the removal of the exparte applicant and basis for justification of the continued oppression of the proposed interested party herein.
 - iv. This Court’s mandate and power under the cited provisions to correct illegalities and review its orders are wide and this is an appropriate instance where the court can rise to the occasion to prevent abuse of court and pervasion of justice.
 - v. The illegal enterprise that has been run by the appellant herein to try as much as possible to prevent the interested party from participating and assisting the court to find the truth will continue unless the court intervenes by correcting the record herein.
 - vi. Particularly, the consent to close the underlying appeal and the irregularity of the orders that this Court relied on to make its ruling of 10th February 2023 are new facts which this Court ought to reconsider in order to engender the review sought by the proposed interested party.
 - vii. If the court does not intervene urgently, its decision may be used to mislead and hoodwink the lower court into closing the file before it causing monumental prejudice and loss to the 5th respondent and the proposed interested party.
 - viii. It is in the interest of justice that the orders sought be granted.”
3. In support of the application, Paul Wanderi Ndung’u, the proposed interested party, (hereafter referred to as “Paul”), makes reference to his earlier application dated 21st December 2022, which was the subject matter of the ruling now sought to be reviewed.
4. In the earlier application, Paul had sought to be joined as an interested party to proceedings before this Court, saying that he is a shareholder of Pevans East Africa Limited, (hereafter referred to as Pevans), where he holds 170 ordinary shares which represents 17% of the issued share capital.
5. Paul had stated that he participated in the proceedings in HCJR No. E061 of 2020 that Milestone Games Limited, (hereafter referred to as Milestone), but Milestone opted to shut him out of the proceedings by failing to serve him with an application that resulted in an unfavourable ruling against him.
6. The application was opposed by Milestone and Pevans. Milestone contented that Paul had no interest in the proceedings to warrant his joinder because the dispute was primarily between Milestone and Betting Control and Licensing Board (BCLB); that Paul is not a member of Milestone; that his primary concern upon which his application was anchored was HCJR No. E091 of 2022 which he had not sought to have consolidated with HCJR E061 of 2020, and that he did not have authority to act on behalf of Pevans.



7. On its part, Pevans argued that on 8th October 2022 Paul was expelled from the membership of Pevans and therefore he had no interest in the conduct of the proceedings before the High Court and this Court to warrant his joinder as an interested party. Pevans further contended that in HCCC No. E002 of 2023 it had sought and obtained an order of injunction restraining Paul from interfering with its business operations; making any representations; correspondence; contracts or taking any action whatsoever, or dealing in any assets or property of the company. The orders were issued by Mabeya, J. on 12th January 2023.
8. In its impugned ruling, this Court dismissed the two applications for joinder, and with respect to Paul’s application stating as follows:

“32. Turning to the application by Paul Wanderi Ndungu, we note from his supporting affidavit that he describes himself as a shareholder of the 5th respondent, holding a total of 170 ordinary shares, and is therefore a beneficial owner of the 6th respondent as defined by section 93A of the Companies Act, 2015 as read with the Companies (Beneficial Ownership Information) Regulations, 2020.

33. His argument is that, since he has substantial interest in the 6th respondent, he is likely to be prejudiced if he is not joined in the proceedings before this Court and allowed to make a reply to the application for stay of further proceedings filed by Milestone.

34. The applicant, together with one Asenath Wachera Maina, were expelled from the 6th respondent through a resolution passed by members of the 6th respondent on 8th October 2022. There is no evidence placed before this Court to show that the applicant had taken legal steps to challenge his expulsion. In the circumstances, and in the absence of such evidence, his expulsion whether right or wrong still stands. In addition, the High Court on 12th January 2023 issued an order of injunction against the applicant and one Asenath Wachera Maina in an application by the 6th respondent dated 6th January 2023. The order relevant to the instant application was:

“That pending the hearing of this application inter parties, a temporary injunction shall and is hereby issued restraining the defendants, jointly and severally, either by themselves, their servants and/or agents from interfering with any business dealings of the Plaintiff company, making any representations, correspondences, contracts, or taking any action whatsoever or dealing in any assets or property of the Plaintiff Company and/or in any manner whatsoever purporting to be acting on behalf of or in the interest of the Plaintiff company.”

35. An order of injunction, like a judgement, remains in force until it is either set aside on appeal or set aside, or varied by the court issuing it. The applicant did not provide any evidence that he had made any application to discharge, vary or set aside the said order, or that the said order had since been discharged, varied or set aside by the court. The orders, although issued after the filing of the instant application, are valid orders of the court, and are in force.



36. Our interpretation of the board resolution expelling the applicant as well as the court order issued by the High Court on 12th January 2023 is that the applicant herein has no, at least presently, any locus standi or interest related to the 6th respondent which he can seek and/or purport to represent.
37. The dispute in HCJR Misc case No. E061 of 2020 is/has been primarily between Milestone and the BCLB. The interests of the applicant are, in our view, taken care of vide HCJR Misc. Case No. E091 of 2022, which the applicant brought against the BCLB, and which is pending hearing and determination. If the two matters were related in any way, the applicant would have definitely sought for an order of consolidation.
38. In the premise, we are of the view that the applicant will not be prejudiced if we decline his prayer for joinder in the proceedings before this Court. The applicant's joinder in these proceedings are likely to convolute the proceedings and hence delay the determination of the dispute between the parties herein. We accordingly decline the applicant's prayer for joinder.
9. In paragraph 2 of his affidavit in support of this review application, Paul sets out the background to the disputes which briefly stated is that: Pevan's business collapsed due to non-issuance of license by BCLB in 2019; that its attempts to compel BCLB to issue it with a license through Constitutional Petition No. E252 of 2019 and Civil Appeal E471 of 2019 was unsuccessful; the assets of Pevans were stolen and donated to Milestone, which action gave rise to Civil Application No. E351 of 2022 and Civil Appeal No. E671 of 2022; that it is his application as a proposed interested party in JR E061 that led to the ruling that informed the filing of two matters before this Court; and it is therefore strange that having participated in the High Court Judicial Review application, and the court having ordered that all parties deserve to be heard as per the provisions of Article 50 of *the Constitution* that this Court denied him a chance to participate in Civil Application No. E351 of 2022.
10. Paul advances various reasons as to why this Court ought to grant his application for review and/or setting aside of the impugned ruling. With reference to paragraph 34 of this Court's ruling, he states that he had filed a current Form CR 12 to prove his membership in Pevans; that with regard to the injunction that had been issued by Mabeya, J. on 12th January 2023, the same had lapsed by operation of law and had not been extended; with regard to paragraph 36 of this Court's ruling to the effect that he had no locus standi or interest related to Pevans as he had been removed as a member, the directors had not filed any resolution within the times lines provided for under section 27 of the Company's *Act No. 17 of 2015* and therefore this Court elevated those illegal resolutions above the Form CR 12 that had been filed to prove that he was a shareholder even at the time of the hearing of E351 of 2022; that regarding this Court's ruling in paragraphs 37 and 38 where the Court held that the dispute was primarily between BCLB and Milestone, there was clear evidence that the appeal emanated from his application as a proposed interested party in JR E061 dated 21st July 2022; and in arriving at that conclusion this Court failed to consider his constitutional right to a fair trial under Article 50 of *the Constitution*.
11. Paul further states that the consequences of this Court's ruling are grave and continue to infringe on his constitutional rights and have resulted to consequences that: he was denied the right to participate in Appeal No. E671 of 2022; the High Court has threatened to close JR E061 of 2022 stating that it is bound by this Court's decisions due to an illegal consent that was adopted in his absence in E671 of 2022; that Pevans' operations remain dormant to date, which has occasioned him loss as a shareholder as its assets continue to be used by Milestone.



12. Paul further states that Milestone filed “a fraudulent manufactured court order” that misled this Court to dismissing his application for joinder and advances various reasons why the said order was fraudulent.
13. Paul further argues that contrary to this Court’s finding on paragraph 38 of its impugned ruling that he would not be prejudiced by the dismissal of his application for joinder, the consequences of the ruling have had grave consequences on his interests and those of Pevans in that he was excluded from the proceedings in Civil Appeal No. E671 of 2022 where Milestone fraudulently entered into a consent with BCLB and JR E061 of 2020, whose ruling informed this Court’s application, and his rights to property under Article 40 of *the Constitution* had been infringed.
14. Lastly, Paul states that this application has been brought without undue delay because it is only on 5th December 2024 that he learnt that Appeal No. E471 of 2019 had been settled by an illegal consent; and that it is only upon recent examination of the sequence of events on the portal of HCOMM E002 of 2023 that he discovered that the order that this Court had relied on was actually a forgery.
15. Milestone opposed the application by way of an affidavit sworn by Benard Chauro, its Operations Manager. He states that there has been inordinate delay in filing the application for review because the orders sought to be reviewed were made on 10th February 2023, whereas the application for review was filed on 2nd January 2025, a period of more than 20 months since the orders were made. In his view, Paul has not proffered any explanation for the inordinate delay and therefore the Court should not exercise its equitable discretion in his favour.
16. The said deponent further states that the substantive appeal having been settled and the file closed, there is no legal anchor or appeal to which the applicant would be seeking an order of review to be made a party. In his view, the application is unmeritorious.
17. Paul filed a further affidavit in response to Milestones affidavit. He reiterated that there was no inordinate delay in filing the application for review; that in response to the assertion that there exists no appeal upon which he may be added as an interested part, his application clearly explains the background that led to the recording of the said consent, including submission of falsified documents by Milestone’s Directors, and that in any case there exist two conflicting orders in Civil Appeal No. E671 of 2022 where one bench comprising Mumbi Ngugi, M’Inoti and Gachoka, JJ.A. declined to adopt the consent, while another bench comprising Gatembu, Tuiyott & Ngenye, JJ.A. adopted the consent without reviewing the orders made by the earlier bench.
18. When the application came up for hearing on 3rd March 2025, Dr. Aukot, Mr. Alvin Kosgei and Ms. Diana Bosire appeared for Paul, while Mr. Willis Otieno appeared for Milestone. There was no appearance for the other respondents. Counsel highlighted their respective clients’ written submissions, which we shall not rehash.
19. We have carefully considered all the affidavits filed by the parties in this application as well as the written and oral submissions. This is an application for review of this Court’s ruling. As stated by this Court in *Benjoh Amalgamated Limited vs Kenya Commercial Bank* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection.”
20. In that matter, the Court, after reviewing decisions from various jurisdiction on the question of review delivered itself as follows:

“The jurisprudence that emerges from the case law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with jurisdiction to reopen a decided matter, it has residual



jurisdiction to do so in cases of fraud, bias or other injustice with a view to correct the same and in doing so the principles to be held regard to, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice.”

21. While it is doubtful whether this Court’s ruling of 10th February 2023 was appealable to the Supreme Court, considering the issues of fraud, injustice and contravention of various provisions of *the Constitution* and the need to boost public confidence in our judicial system that have been brought out by Paul, we are satisfied that we have jurisdiction to consider this application.
22. The first ground of objection by Milestone is that there has been inordinate delay in filing the application. The impugned ruling was delivered on 10th February 2023, but the application for review was not filed until 2nd January 2025, a period of nearly 20 months from the date of delivery of the said ruling. In our view, that delay was well explained by Paul. He stated that it was only on 5th November 2024 when he learnt that Civil Appeal No. E061 of 2022 had been “surreptitiously settled by way of an illegal consent”. From 5th November to 2nd January 2025 was a period of less than two months, which cannot amount to inordinate delay.
23. Paul also raised the issue of fraud regarding the said consent, which was signed on 1st August 2023. He stated that Milestone had in subsequent court appearance in JR No. E061 of 2020 feigned ignorance that it was not aware that BCLB had not signed the consent; that on 29th July 2024 counsel for Milestone told the High Court that the matter before this Court was still alive, and the adoption of the consent had not been concluded, only for counsel for Communications Authority of Kenya to tell the Court that they had been served with the consent order dated 1st August 2023 which was a year after the consent had been signed; that the High Court in its ruling of 22nd September 2022 declined to adopt the consent after Paul filed an application for joinder for the interest and on behalf of Pevans; and that after the High Court refused to adopt the consent, which formed the basis for Civil Application No. E351 of 2022 and Civil Appeal No. 671 of 2022, the two parties allegedly signed the consent on 1st August 2023, long before this Court started the hearing. Therefore, Paul argued, Milestone ignored the High Court ruling refusing to adopt the consent and went on to sign the consent long before Civil Appeal No. E671 pertaining to the consent was heard on merit.
24. Some of the above intricacies regarding the signing of the said consent were not brought to the attention of this Court at the time of considering the earlier application. The filing of the consent denied Paul an opportunity to participate in the appeal, thus infringing his right to a fair hearing under Article 50 of *the Constitution*. In *Mbaki & Others vs Macharia & Another* [2005] 2EA 2006, this Court held that the right to be heard is a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.
25. We turn to paragraph 34 of this Court’s ruling where we briefly dealt with the issue of expulsion of Paul from Pevans and stated that there was no evidence to show that Paul had taken any steps to challenge his expulsion. It has since been clarified to us that he had filed a current CR 12 to prove that he was still a shareholder of Pevans, and that section 27 of the *Companies Act* requires such special resolutions to be filed within 14 days, which had not been done by the other shareholders. We think that the issue of his alleged expulsion as a shareholder of Pevans is one that requires proper interrogation, and that would be impossible unless Paul is joined as a party to the appeal or other proceedings that are pending in any court.



- 26. Turning to the orders of injunction issued by the High Court of 12th January 2023, Paul stated, and rightly so, in our view, that the said orders were interim in nature and lapsed by operation of the law as they had not been extended. That averment was not challenged by Milestone.
- 27. 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.
- 28. Regarding costs, we order that each party bears its own costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

Deputy Registrar.

