IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, OKWENGU & SICHALE, JJA]

CIVIL APPEAL NO. 471 OF 2019

BETWEEN

PEVANS EAST AFRICA LIMITED...APPELLANT

AND

BETTING CONTROL & LICENSING BOARD...............................1ST RESPONDENT

CYRUS MAINA..2ND RESPONDENT

LITI WAMBUA...3RD RESPONDENT

AND

SAFARICOM LIMITED..1ST INTRESTED PARTY

AIRTEL NETWORKS KENYA LIMITED..................................2ND INTRESTED PARTY

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Mativo, J) dated 30th August 2019.)

IN

(Nairobi Petition No. 252 of 2019)

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JUDGMENT OF THE COURT

On **2nd September 2019, Pevans East Africa Limited** filed an appeal against the judgment of **Mativo**, **J** dated **30th August 2019.**

The appeal stems from an Amended Petition that had been filled in the High Court at Nairobi by the appellant against the respondents, in which the appellant was aggrieved by the respondents refusal to consider and process its application for renewal of its licence and to grant the same, and therefore sought *inter alia,* a declaration that failure and/or refusal by the respondents to consider and process the appellant's application for renewal of its licence infringed on the appellant's rights under Articles **10, 27**, **40,47** and **48** of the Constitution. The matter was heard by **Mativo, J** who in a judgment delivered on **30th August 2019** by **Makau J** dismissed the petition in its entirety with no order as to costs.

The appellant was aggrieved with the findings of the learned judge and in a memorandum of appeal dated **25th September 2019**, listed 24 grounds of appeal which were later condensed into four namely: whether the appellant demonstrated compliance with the legal requirements for the renewal of its licence; whether there was breach of Article 47 of the Constitution; whether Section 5 (3) of the Betting Lotteries Gaming Act shielded the 1st respondent from complying with its obligations under Article 47 of the Constitution and finally, whether the respondents' actions violated the appellant's rights under Article 27 of the Constitution.

The brief facts in this appeal are as follows: the appellant was engaged in the business of bookmaking which entailed receiving money in the form of bets from players and paying the winnings to the players. The said business was conducted through the mobile transfer platforms

provided by the interested parties who are licensed mobile network operators. The appellant was duly licensed by the 1st respondent to carry out the betting business. By a letter dated **18th March 2019**, the 1st respondent wrote to the appellant and reminded it that its 2018/2019 licence would expire on **30th June 2019**. The 1st respondent further set out in its said letter the requirements for renewal of the licence for the year 2019/2020 and advised the appellant to lodge its application for renewal on or before **12th April 2019**. On **5th April 2019**, the appellant lodged its application for renewal and provided the documents and information requested by the 1st respondent. The parties thereafter exchanged several letters where the 1st respondent requested for additional documents including evidence of payment of betting tax and withholding tax on winnings. The appellant contended that it provided evidence of payment of gaming and betting tax and as regards withholding tax on winnings, it notified the 1st respondent that the demands by Kenya Revenue Authority for payment of withholding tax on winnings were disputed and that despite the appellant providing the information and documents requested, the 1st respondent unreasonably and inexplicably refused to consider or process the appellant's application for renewal of its licence.

Being aggrieved by the 1st respondent's action, the appellant filled Petition No. 252 of 2019 challenging the refusal to renew the licence which was subsequently dismissed by **Mativo, J** on **30th August 2019**, thus provoking the present appeal.

With regard to the first ground and as to whether the appellant had demonstrated compliance with the legal requirements for the renewal of its licence, it was submitted that the learned judge erred by proceeding on the erroneous basis that there was a dispute as to whether payment of gaming and betting tax was a relevant consideration in the processing of a licence by the 1st respondent, which was not a contested matter, and the parties did not require a determination on this question. It was further submitted that the learned judge made a further error when he found that the appellant had not provided evidence of payment of gaming or betting tax. The appellant further submitted that the 1st respondent's demand for evidence of payment of withholding tax as a condition for renewal of the appellant's licence was not based on statute and was therefore not available for the 1st respondent to refuse to renew the appellant's licence on the basis that the appellant had not provided evidence of payment of withholding tax on winnings.

With regard to the second ground namely: whether there was breach of Article 47 of the Constitution, it was submitted for the appellant that from the pleadings and material presented before the judge, it was clear that by the time the appellant filed the petition, the 1st respondent was in possession of all the documents and information it had called for and had simply refused to comment on the fate of the appellant's application for renewal of its licence and as such the appellant was justified in filing the petition and for faulting the failure by the 1st respondent to act on its application for renewal of the licence and/or to be given reasons for the refusal to renew the licence.

It was further submitted that the 1st respondent had a statutory obligation to communicate its decision to the appellant in a timely manner and in any event before expiry of the 2018/2019 licence and that the 1st respondent's refusal to communicate its decision before **30th June 2019**, amounted to constructive refusal which entitled the appellant to move the court for redress. It was further submitted that the 1st respondent was under a clear duty to provide proper and clear reasons prior to making an adverse administrative action, in this case, the decision declining to renew the appellant's licence and that in issuing the letter dated **1st July 2019**, after expiry of the licence, the 1st respondent breached the appellant's fundamental rights enshrined in Article 47 of the Constitution as read together with Section 4 of the Fair Administrative Action Act.

With regard to whether Section 5 (3) of the Betting Lotteries and Gaming Act shielded the 1st respondent from complying with its obligations under Article 47 of the Constitution it was submitted for the appellant that the learned judge made a finding that Section 5 (3) of the Betting Lotteries and Gaming Act permitted the 1st respondent to decline granting a licence without giving reasons for the refusal and that by basing his judgment on a statutory provision that was in stark conflict with the provisions of Article 47 of the Constitution, the learned judge improperly elevated a provision of statute above the Constitution, which finding further undermined the rule of law by sanctioning the failure or refusal to give reasons and as such the decision by the learned judge was bad in law.

Finally, with regard to whether the respondents' actions violated the appellant's rights under Article 27 of the Constitution, it was submitted that the decision by the 1st respondent to unfairly treat the appellant's application differently from that of other industry players amounted to a clear case of discrimination contrary to Articles **10, 27** (4) and **47** of the Constitution.

The appeal came up for hearing on **19th November 2020** via the virtual platform. **Mr. Otieno** learned counsel appeared for the appellant whilst **Mr. Ogosso,** learned counsel appeared for the respondents whereas learned counsel **Mr. Kiarie** held brief for **Mr. Ohaga** for the 1st interested party. **Mr. Otieno** while urging the appeal, relied on the appellant's written submissions as well as its list of authorities filed on 1**3th March, 2020**. Counsel reiterated, *inter alia*, that the learned judge misdirected himself in finding that the 1st respondent's consideration as to whether the appellant had paid gaming and betting tax was merited as this was not the issue. Rather, the issue was whether the appellant had paid withholding tax, a tax payable by the players and the appellant. It was counsel's further contentions that the appellant had a legitimate expectation that it would get the licence. Finally, the learned Judge was faulted in failing to find that the 1st respondent never gave reasons for refusal of the renewal of the licence and this refusal ran against the provisions of Article 47 of the Constitution.

Mr. Ogosso for the respondents pointed out that the licence in issue was for the year 2019/2020 and that the appellant's filing of the petition was premature as the 1st respondent had not made a decision one way or the other. He contended that a decision was made by the Board vide a letter dated **1st July 2019**, which decision was never challenged by the appellant; that no evidence of payment of tax was availed and this was a relevant and material consideration and finally, that since we were already in the financial year 2020/2021 the appeal is spent.

Mr. Kiarie for the 1st interested party opted to make no submissions as the grounds of appeal did not make reference in respect of the 1st interested party.

We have anxiously considered the record, the rival oral and written submissions by the parties, the authorities relied upon and the law.

The appeal before us is a first appeal. Our mandate as a first appellate court is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> ***"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.***
>
> ***An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***
>
> ***In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270".***

With regard to the first ground of appeal and as to whether the appellant had demonstrated compliance with the legal requirements for the renewal of its licence, it was submitted that the learned judge erred by proceeding on the erroneous basis that there was a dispute as to whether payment of gaming and betting tax was a relevant consideration in the processing of a licence by the 1st respondent which was not a contested matter and the parties did not require a determination on this question. A cursory perusal of paragraph 10 of the amended petition reads:

> "***By a letter dated 8th May2019, the 1st respondent asked the petitioner to submit duly endorsed bank slip evidence of tax payment at the current applicable rates….for the period up to April 2019. On 10th May 2019 the petitioner submitted to the 1st respondent the requested information relating to gaming and withholding tax payments for the requested period." (Emphasis supplied)***

Again, at paragraph *"**d**"* the appellant sought the following relief:

> "***This honourable court be pleased to issue an order restraining the respondents from demanding from the petitioner evidence of payment of withholding tax or any other condition not contained in the Betting, Lotteries and Gaming Act as a precondition for processing the application for renewal or renewing the petitioners licence." (Emphasis supplied)***

From the above two passages, it is clear, that contrary to the appellant's assertion, this was a contested matter requiring a determination by the Judge. As a matter of fact, and in our considered opinion it was at the heart of the petition. In his judgment, the learned judge while extensively addressing this issue and in our view, rightly so, stated:

> "***The question is whether the cited reasons in this case are defendable in a court of law. The question is, whether the cited reasons in this case are defendable under the enabling statute. The converse is whether tax payment is not a relevant consideration while considering an application for the licence. To address these questions, it is imperative to examine the relevant provisions. As discussed above, a reading of the preamble leaves no doubt that the purpose and scope of the Act includes imposition and recovery of a tax on betting and gaming. Thus when an application for a licence under the Act is declined, the reasons for declining the licence must be defendable in a court of law. The question is whether the cited reasons are defendable under the enabling statute. The converse is whether that tax payment is not a relevant consideration in determining the success or otherwise of the licence, and whether the decision is defendable in law. To address these questions, it is imperative to examine the relevant provisions. As discussed above, a reading of the preamble leaves no doubt that the purpose and the scope of the Act includes imposition and recovery of a tax on betting and gaming. Section 5 of the Act provides as follows: -***
>
> > ***1) A person who desires to obtain, renew or vary a licence or permit under this Act shall make application to the Board in the form and manner prescribed.***
> >
> > ***2) On receipt of an application under subsection 1, the Board may make such investigations or require the submissions of such declaration or further information as it may deem necessary in order to enable it to examine the application. (Emphasis supplied)***
> >
> > ***3) After making investigations and considering any information or declaration as may have been required in terms of subsection (2), the Board may either grant, renew or vary a licence or permit or renewal or variation thereof without reason given provided that-……"***

The learned judge further went to state as follows:

> "***The above section provides inter alia that the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it to examine the application. The scope of this provision has not been challenged. I find no serious argument before me to suggest that proof of tax payment is not a relevant consideration within the ambit of the above provision, and bearing in mind the preamble statement discussed above."***

The learned judge at para 86 further went on to state as follows:

"A reading of the above sections leaves me with no doubt that proof payment of gaming and betting tax is a relevant consideration while considering whether to grant the licence in question. It is therefore my finding that any argument suggesting that proof of tax payment is not a legal requirement for the grant of the licence is legally frail. Such an argument flies on the face of the preamble to the Act and the purposive interpretation of the enabling statute. In addition, from the annexures to the petitioner's affidavit, it is evident that from the outset, the petitioner was fully aware that proof of tax payment was among the requirement. The petitioner states that it provided a tax compliance certificate. That may be so. However, proof that it had paid gaming and betting tax was not provided. Notable is the clear admission by the petitioner that it has tax disputes with Kenya Revenue Authority pending in courts. This admission, candid as it is, casts doubts on the petitioner's tax compliance status. It also complicates the petitioner's alleged compliance status considering the provisions of sections 29A and 55A of the Act and the preamble to the Act. Put differently, the pendency of the said cases are clear indications that its tax compliance is questionable until and unless the cases are resolved in its favour."

At para 90 the learned judge further stated:

"In conclusion, proof of payment of taxes in not only a relevant consideration, but also a requirement under the Act; hence, the assault on this impugned decision on this ground fails."

We fully associate ourselves with the sentiments expressed by the learned judge in the above quoted passages and we see no reason to interfere with the learned judge's findings on this issue. Be that as it may and in light of the provisions of Section 5 (2) of the Betting Lotteries and Gaming Act which provides that on receipt of an application under subsection (1) the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it examine the application in light of the reading of the preamble to the Act we are fully in agreement with the finding by the learned judge that proof of payment of tax was a relevant material consideration and a prerequisite prior to the grant or renewal of a licence, notwithstanding the fact that the Act does not explicitly state nor define what sort of investigations or information are deemed necessary in order to enable the Board examine the application.

The other issue raised by the appellant was that the respondents breached Article 47 of the Constitution by falling to give reasons for refusal of renewal of the licence. In a rejoinder **Mr. Ogosso** for the respondents contended that the petition as filed was premature as the appellant moved the court before it could be supplied with the reasons for the refusal. It is indeed not in dispute that the petition herein was filed on **27th June 2019** whereas the appellant was served with a letter giving reasons for refusal of renewal of the licence on **1st July 2019**. This was four days after the petition had been filed. The learned judge while addressing this issue stated thus:

"***There is evidence of correspondence between the parties after this petition was filed. Ideally, a person affected by an administrative decision is entitled to reasons in order to challenge the decision in court. The petitioner is already in court. It moved to court three days before the decision was made. It has not demonstrated that absence of reasons prejudiced its right to exercise its right to file this petition. For a court to uphold a plea for refusal to be provided with reasons, the nature of the impugned decision and the peculiar circumstances of the case are relevant."***

The learned judge at para 96 of the judgment further went to state as follows:

"***From the correspondences annexed to the affidavits, it is clear that the petitioner was at all material times aware of all the requirement, including the requirements stated in the letter dated 19th March 2018. These were the requirements upon which the application was to stand or fall. In its letter dated 10th April 2019, the respondent informed the petitioner to inter alia provide evidence of tax payment at the applicable rates".***

From the circumstances of this case, were are unable to agree with the appellant that it was not provided with reasons for refusal to renew the licence. By its letter dated **1st July 2019**, the 1st respondent informed the appellant that its application lacked merit on account of ***pending investigations into your compliance or otherwise with set licensing conditions…" (Emphasis supplied)***

Indeed, section 5 (2) of the Betting Lotteries and Gaming Act provides that on receipt of an application under subsection (1) the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it examine the application. We are of course mindful that the reasons were provided after the instant petition was filled. As alluded to by the learned judge, at para 96 of the judgment, the appellant was the author of its own misfortunes as it delayed in providing the required information to the 1st respondent. Be that as it may as rightly held by the learned judge, no evidence was provided to show that the absence of reasons prejudiced the appellant in filing the instant petition. Consequently, nothing turns on this point.

With regard to the issue as to whether Section 5 (3) of the Betting Lotteries and Gaming Act shielded the 1st respondent from complying with its obligations under Article 47 of the Constitution, the learned judge was faulted for holding inter alia that Section 5 (3) of the Betting Lotteries and Gaming Act "***permits the 1st respondent to decline granting a license without giving reasons for the refusal. This section extinguishes the petitioner's argument that the first respondent violated Article 47 of the Constitution by failing to provide it with reasons for its decisions".***

From the circumstances of this case and having found that the appellant was indeed provided with reasons for refusal to renew the licence namely: "***that its application lacked merit on account of pending investigations into your compliance or otherwise with set licensing conditions…***" we see no reason or basis to interfere with the learned judge's finding on this issue.

Indeed, the learned judge while considering this issue at para 162 stated thus:

> “*Under section 6 of the Act, that there are-reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.”*

The learned judge further went to state at para 164

> “***Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption and whether the reasons cited fall within the ambit of section 6 of the Act. The reasons cited are intelligence reports and security investigations. A reading of section 6 leaves me with no doubt that the information in question fall within the permitted exceptions.”***

Consequently, nothing turns on this point.

Finally, it was contended that the respondents’ actions violated the appellant’s rights under Article 27 of the Constitution and the learned judge was faulted for finding that the unequal treatment of various parties by the 1st respondent in its capacity as the sector regulator did not amount to discrimination within the contemplation of Articles 27 and 47 of the Constitution.

In the case of **Peter K. Waweru vs. Republic [2006] eKLR** discrimination was defined in the following terms:

> “…***Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to…restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex…a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured***.”

Further in the case of **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J** (as he then was) held:

> ***“The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification…The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally, it is recognized that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following: - (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”***

“The Black’s Law Dictionary defines discrimination as follows:

> *“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” Wikipedia, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants*

From the circumstances of this case, the appellant sought to rely on the 1st respondent’s letter dated **10th July 2019**, where the 1st respondent confirmed having renewed the operating licences for some companies but not others. We certainly do not agree that the appellant was in anyway discriminated against by the 1st respondent as no evidence was tendered to support these allegations. The mere fact that the 1st respondent confirmed having renewed the operating licences for some companies but not others *perse* does not amount to discrimination within the definition alluded to in the ***Peter K. Waweru case*** *(supra).* As a matter of fact, the 1st respondent companies were renewed while others were not as the 1st respondent was merely discharging its statutory mandate and the mere fact that some licences for some companies were renewed while others were not cannot be said to amount to discrimination. No evidence was tendered whatsoever that the appellant was treated unfairly/ differently from the other industry players and the same remained a mere allegation. Consequently, this ground must fail as well.

Accordingly, and in light of the above conclusions, we think we have stated enough reasons as to why this appeal is for dismissal. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 19th Day of March, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR