



REPUBLIC OF KENYA



Namiyok & 56 others v Betting & Control Lincensing Board & 8 others (Civil Application 313 of 2019) [2021] KECA 39 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 39 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 313 OF 2019
MK KOOME, MSA MAKHANDIA & F SICHALE, JJA
SEPTEMBER 23, 2021**

BETWEEN

SAMUEL KAHIU NAMİYOK 1ST APPLICANT
JAPHET NKUNJA 2ND APPLICANT
PETER MWANGI 3RD APPLICANT
DANIEL WAMUGUNDA 4TH APPLICANT
PETER MAINA 5TH APPLICANT
MAXWELL ONGURA 6TH APPLICANT
AUGUSTINE MACHARIA MURIITHI 7TH APPLICANT
SUSAN WAIRIMU NYAGAH 8TH APPLICANT
SAMUEL WANYOIKE WANGUI 9TH APPLICANT
EVANS MUREITHI 10TH APPLICANT
PATRICK MUKARIA MUTHOI 11TH APPLICANT
ISAAC MUTI MUGATHIA 12TH APPLICANT
ZAKAYO HINGA 13TH APPLICANT
EDWARD NDWIGA 14TH APPLICANT
ANTONY MUTHOMI 15TH APPLICANT
MILLICENT WAHIRA 16TH APPLICANT
JOHN WAICUA KUNG’U 17TH APPLICANT
JOYCE WANGARI KIONGO 18TH APPLICANT
SAMUEL NDIRITU GATHUGU 19TH APPLICANT



DAVID MWANGI	20 TH APPLICANT
JAMES MUGAMBI NDIRANGU	21 ST APPLICANT
PETER NDEKE MBORE	22 ND APPLICANT
FRANCIS MURIITHI JOHN	23 RD APPLICANT
PATRICK KINYUA NDEKE	24 TH APPLICANT
BENARD ONGORO	25 TH APPLICANT
NOAH TUWEI	26 TH APPLICANT
PETER WANGOMBE NJUGUNA	27 TH APPLICANT
EMMANUEL OKELLO AWITI	28 TH APPLICANT
JAMES NJAGI MBUGUA	29 TH APPLICANT
DANIEL KINYUA GATUNGU	30 TH APPLICANT
PATRICK MUGO	31 ST APPLICANT
EASTACE NGIGI	32 ND APPLICANT
CHARLES MUNENE NJIRU	33 RD APPLICANT
SAMUEL WANGAI KARUGA	34 TH APPLICANT
ANTHONY WAMBUGU	35 TH APPLICANT
BENSON GITONGA NJAGI	36 TH APPLICANT
STEPHEN NGUGI NDUNGU	37 TH APPLICANT
TANGUS RICHARD	38 TH APPLICANT
NANCY WANJIRA	39 TH APPLICANT
JAMES NDUNGU MUTHONI	40 TH APPLICANT
PAUL NYAGA MWANIKI	41 ST APPLICANT
WILSON WAWERU WILLIAM	42 ND APPLICANT
PETER NJAU	43 RD APPLICANT
FRANCIS NJAGI	44 TH APPLICANT
MARTHA WAMBUI NGATIA	45 TH APPLICANT
JAMES MWANGI	46 TH APPLICANT
JOEL MUTHAURA MBURUGU	47 TH APPLICANT
MARY WANJIRU	48 TH APPLICANT
LUCY WANJIKU GATHUA	49 TH APPLICANT
PHINEAS MBURUGU MURIITHI	50 TH APPLICANT
SIMON KITOTI KUMWAKA	51 ST APPLICANT



DIANA MUTHONI	52 ND APPLICANT
AKUMA JARED OGETO	53 RD APPLICANT
SAMMY MBURU WAMBUI	54 TH APPLICANT
PENINA WANJIKU GACHAU	55 TH APPLICANT
MOSES KINYUA	56 TH APPLICANT
SAMUEL KABII KAMAU	57 TH APPLICANT

AND

BETTING & CONTROL LICENSING BOARD	1 ST RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT	2 ND RESPONDENT
INSPECTOR GENERAL OF POLICE	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	5 TH RESPONDENT
COUNCIL OF GOVERNORS	6 TH RESPONDENT
INTER-GOVERNMENTAL RELATIONS TECHNICAL COMMITTEE	7 TH RESPONDENT
ASSOCIATION OF GAMING OPERATORS - KENYA	8 TH RESPONDENT
HULPENG TRADING COMPANY	9 TH RESPONDENT

(An Application for stay of the judgment & orders of the High Court of Kenya at Nairobi pending the hearing & determination of an intended appeal against the Judgment of (Okwany,J) dated 25th June 2019 in Petition No. 447 of 2016)

RULING

1. By a Notice of Motion dated 25th September 2019, the applicants, through their advocates, Messrs, Kinoti and Kibe Company Advocates have brought under Rule 5 (2) (b) and 42 of the *Court of Appeal Rules*, 2010, an application for stay of the judgment and/or decree of the High Court pending the lodging, hearing and determination of an intended appeal from the judgment and/or decree given on 25th June 2019 in Nairobi Petition No. 447 of 2016. The following orders are sought: -

“1. THAT pending lodging, hearing and determination of Application/ Intended Appeal an Order of injunction be issued to restrain the Respondents by themselves, official agents and representatives from conducting a crackdown on the Applicants premises and businesses specifically to raid, forcibly enter, confiscate betting and gaming machines, disrupt businesses pursuant to directive / order of the 1st Respondent contained in its letter dated 19th September 2016.



2. THAT pending the lodging, hearing and determination of the intended Appeal, an order of injunction be issued to restrain the Respondents from arresting and prosecution the Applicants, their agents and servants pursuant to the directive/ order contained in the 1st Respondent's letter dated 19th September 2016.
 3. THAT pending the; lodging, hearing and determination of the intended Appeal, an order of injunction be issued to restrain the Respondents from destroying or burning the gaming machines belonging to the Applicants pursuant to the 1st Respondent's letter dated 19th September 2019 and the 2nd Respondent's letter dated 11th January 2018.
 4. THAT pending the lodging, hearing and determination of the intended Appeal, an Order of injunction be issued to restrain the National Assembly and the President from enacting the Gaming Bill, 2019.
 5. THAT the costs of this Application abide the result of the Applicants' intended Appeal"
2. The motion is supported by the grounds on the face of it and an annexed affidavit of Samuel Kahi, the 1st applicant herein, sworn on 25th September, 2019. The reasons for the application are that firstly, the Chairman of the Betting Control and Licensing Board vide a letter dated 19th September, 2016 addressed to all County Commissioners directed them, in conjunction with the police to "sensitize members of the public about these illegal Gaming Machines and assist in mounting a major crack down, confiscate them and arraign the operators and owners in a court of law". That this led to a major crackdown and the applicants were subjected to intimidation and harassment by police and administrative officers on the allegations that their operations were illegal or provided sanctuary for criminals to plan their activities; that the applicants filed Nairobi Constitutional Petition No. 447 of 2016, challenging the directive/order; that in a judgment dated and delivered on 25th June 2019, Okwany, J declared the actions of the 1st, 2nd and 3rd Respondents to be in violation of the applicants' rights; that the applicants were aggrieved by the decision because it failed and or neglected to issue the effective remedies in order to give effect to the declaratory orders granted, thus the applicants continue to be subjected to unwarranted harassment; that they have an arguable case with high chances of success because the learned judge erred in law and fact in failing to find that the applicants were lawfully carrying out their business of betting and gaming in accordance with the Constitution; that the judge failed to find that the letter dated 19th September 2019 was illegal, null and void ab initio despite finding that the actions of the respondents violated the applicants' rights; that she failed to issue an order of certiorari quashing the letter dated 19th September 2019; she failed to permanently restrain the respondents from enforcing the orders and/or directives; failed to make an order of prohibition prohibiting all County Commissioners, Director of Public Prosecution, the Inspector General of Police and Police Officers from enforcing the orders and/or directives contained in the letter of 19th September, 2016; failed to issue an order of mandatory injunction compelling the 1st to 5th Respondents to release the gaming machines belonging to the applicants and failing to award damages for violation of the applicants' rights. Finally, that the intended appeal will be rendered nugatory absent stay. There was no replying affidavit in opposition to the motion.
3. On 17th March, 2021, the motion came before us for consideration "on written submissions and no appearance of counsel".
 4. Needless to state, the orders of Okwany, J (save the order on costs) were in favour of the applicants.



5. In an application premised under Rule 5(2)(b) of this Court's Rules, an applicant has to demonstrate that he/she has an arguable appeal that will be rendered nugatory, absent stay. In the case of *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others*, it was held as follows:

i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & Another* .

ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd.*.

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd.*

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*

viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.*

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim". *International Laboratory for Research on Animal Diseases v. Kinyua.*

Okwany, J's findings were that:

(a)A declaration that the actions of the 1st, 2nd and 3rd respondents violated the petitioners' rights and freedoms were (sic) under Articles 40, 47 and 50 of the Constitution.

(b)There shall be no order as to costs".



6. Clearly, the declaration was in favour of the applicants and in our view, the applicants cannot injunct a decision that is in their favour. We therefore find that the applicants have not shown that the intended appeal is arguable and that it will be rendered nugatory if the orders sought are not granted.
7. The upshot of the above is that the Notice of Motion dated 25th September 2019 is hereby dismissed with costs.

Dated and delivered at Nairobi this 23rd day of September, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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

