



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 315 OF 2014

IN THE MATTER OF ARTICLES 165(3) (D) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLE 191(2) (A) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 15(2) (B) OF THE SIXTH SCHEDULE TO THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTERPRETATION OF ARTICLES 185(2), 186(2), 187 AND THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE BETTING CONTROL AND GAMING ACT, CHAPTER 131 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT, CHAPTER 265A OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE NAIROBI CITY COUNTY BETTING, LOTTERIES AND GAMING ACT, 2014 CHAPTER 131 OF THE LAWS OF KENYA

BETWEEN

WYCLIFF INDALU ADIENOPETITIONER/APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

R U L I N G

Introduction

1. By a Motion dated 9th July, 2014, the Petitioner herein, **Wycliff Indalu Adieno**, seeks the following orders:

1. **THAT this honourable court be pleased to certify this matter as urgent and it be heard *ex parte* in the first instance.**

2. **THAT pending the hearing *inter partes* and subsequent final determination of this application, this honourable court be pleased to grant a temporary injunction prohibiting the application, implementation and/or enforcement, in any way whatsoever, of the Nairobi City County Betting, Lotteries, Gaming Act, 2014 by the Respondents, the Nairobi City County Betting, Lotteries and Gaming Board or any other person in any way whatsoever**

3. **THAT pending the hearing *inter partes* and subsequent final determination of the Petition filed herein, this Honourable court be pleased to grant a temporary injunction prohibiting the application, implementation and/or enforcement, in any way whatsoever, of the Nairobi City County Betting, Lotteries, Gaming Act 2014 by the Respondents, the Nairobi City County Betting Control and Licensing Board or any other person in any way whatsoever.**

4. **THAT costs of this application.**

Applicant/Petitioner's Case

2. The application was supported by a verifying affidavit sworn by the Petitioner on 9th July, 2014.
3. According to the applicant, on or about January, 2014 the Chairperson of the Culture and Community Services Committee of the 3rd Respondent published the Nairobi City County ***Betting, Lotteries, Gaming Bill, 2014*** (the county bill) pursuant to Article 185 (1) and the Fourth Schedule of the Constitution which Bill threatened to contravene the Constitution by providing that it would prevail over the national ***Betting, Lotteries and Gaming Act***, Chapter 131 of the Laws of Kenya (the National legislation) contrary to the provision of Article 191(2)(a) of the Constitution.
4. According to the Petitioner, Section 4 of the county bill provided *inter alia* that the national legislation will apply only to the extent that the county legislation does not make provision for any particular matter.
5. The Petitioner accordingly, instructed his advocates on record, Messrs Lumumba & Lumumba Advocates, to give notice to both the 2nd and 3rd Respondents pointing out the said inconsistency with the Constitution and further instructed the advocates aforesaid to file this Petition in the event the bill is passed without the necessary amendments thereof.
6. However, the 3rd Respondent proceeded to pass the county bill without the necessary

amendment aforesaid and the Governor of Nairobi City County subsequently assented to the Nairobi City **County Betting, Lotteries, Gaming Act, 2014** (the county legislation) despite its latent inconsistency with the Constitution.

7. In the Petitioner's view, that Section 4 of the county legislation contravenes Article 191(2)(a) of the Constitution for the following reason:

(a) Article 185(2) of the Constitution *inter alia* mandates the County Assembly to make any laws necessary for the effective performance of the functions of the County Government under the Forth Schedule.

(b) The said Fourth Schedule of the Constitution grants both the national government and the county government concurrent jurisdiction over betting, casinos and other forms of gambling in accordance with Article 186(2) of the Constitution. The said Article 186(2) of the Constitution provides as follows:

“A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.”

(c) However, the provision of Article 186(2) of the Constitution notwithstanding, Article 191(2) (A) of the Constitution expressly provides *inter alia* that national legislation prevails in all respects over county legislation if the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) thereof is satisfied.

(d) Section 4 of the county legislation purports to ensure that the county legislation prevails over the national legislation on any matter it makes provision relating to betting, lotteries and gaming.

(e) The said Section 4 of the county legislation is inconsistent with Article 191(2) (a) of the Constitution as it purports to render the national legislation subordinate to the county legislation despite the national legislation applying uniformly throughout Kenya and being necessary for the maintenance of national security. The said Article 191(2)(a) of the Constitution provides as follows:

(f) In accordance with the said Article 191(2)(a) of the Constitution, the two conditions precedent for a national legislation to prevail over county legislation are:

- i. The national legislation must apply uniformly throughout Kenya
- ii. Any of the conditions specified under Article 191(3) of the Constitution must be satisfied.

(g) The **Betting, Lotteries and Gaming Act**, Chapter 131 of the Laws of Kenya is a national legislation that applies uniformly throughout the Republic of Kenya.

(h) The second condition referred to under Article 191(2) of the Constitution aforesaid and specified under Article 191(3) (c) (i) of the Constitution is that the national legislation must be necessary for the maintenance of national security.

8. According to information received by the Petitioner from his advocates on record (a) Presently, and in light of the strategic position the betting, lotteries and gaming industry occupies in Kenya in regards to national security, the National Police Service has co-opted as ex-officio member to the Betting Control and Licensing Board. This is particularly in view of the tendency of criminal and/or terrorists to use the said industry as a conduit for money laundering and financing terrorists' activities. (b) Stakeholders in the betting control and licensing sector have variously

and unanimously appreciated the central role of the industry in and its impact on national security.

10. To the petitioner, it is evident that the interplay between national security and the betting control and licensing is widely acknowledged across the board and needless to say the national legislation is necessary for the maintenance of national security.

11. It was further contended that the county legislation is unconstitutional and at best premature for the following reasons:

a. The Transition Authority has not finalized established a criteria that must be met in devolving the function of betting, control and licensing in accordance with Section 15 (2)(b) of the Sixth Schedule to the Constitution

b. The national Betting Control and licensing Board has not finalized the national policy and legal framework to ensure effective management and control of gambling activities in the Country and also to provide a model law to the County Governments as mandated by the Transition Authority

12. Being premature, the Petitioner's position was that the County legislation serves to effectively undermine the Transition Authority as the said Authority is yet to finalize establishing a criteria that must be met before the 2nd Respondent can purport to undertake the devolved function of betting, casinos and other forms of gambling.

13. The Petitioner's case was that that the passing of the county legislation and subsequent assenting of the same by the Governor was *ultra vires* the **Transition Act** and the Transition Authority thereof and thus unconstitutional to the extent that they were passed and assented to without following the criteria being developed by the Transition Authority pursuant to the provision of the **Transition Act** and Section 15(2)(b) of the Sixth Schedule to the Constitution.

2nd Respondent's Case

14. In response to the application, the 2nd Respondent filed a replying affidavit sworn by **Lilian W Ndegwa**, the 2nd Respondent's County Secretary and the Head of County Service Board on 4th September, 2014.

15. According to her, prior to the enactment of the Constitution of Kenya, Betting, Lotteries, Gaming and other forms of gambling, both at the national and local levels were **exclusively** governed by the **Betting, Lotteries and Gaming Act** (Cap 131) Laws of Kenya under the stewardship of the Betting Control and Licensing Board established pursuant to Section 3 of the national legislation. However with the enactment of the Constitution of Kenya, 2010, the primary legal framework for regulating Betting, Lotteries, Gaming and other forms of gambling exclusively confined to Nairobi City Count fundamentally changed in view of:

(i) The creation of the 2nd Respondent's as a distinct and interdependent level of Government from that of the national government as set out in Articles 6(1) and 6(2) of the Constitution of Kenya as read together with the provisions of the first schedule thereof;

(ii) The conferment of the 2nd Respondent exclusive functions under part 2 of the fourth schedule of the Constitution of Kenya;

(iii) The Provisions of Article 260 of the Constitution of Kenya which defines "legislation" to include "a law made by an assembly of a county government or under authority conferred by such a law" and

(iv) The provisions of Articles 185(1) and 185(2) of the Constitution of Kenya which vests legislative authority of the 2nd Respondent in the 2nd Respondent's County Assembly and mandate the 2nd Respondent's County Assembly to make laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the 2nd Respondent under the Fourth Schedule of the Constitution of Kenya.

16. In her view, pursuant to Section 7 of the Transitional and Consequential Provisions of the Constitution of Kenya, the provisions of the **Betting, Lotteries and Gaming Act** (Cap 131) Laws of Kenya are only relevant in relation to regulation of betting, lotteries, gaming and other forms of gambling to the extent that the provisions of the legislations conform to the Constitution of Kenya, 2010. She further contended that at part 2 of the Fourth Schedule to the Constitution of Kenya, at paragraph 4(a) and (b) thereof, the Constitution of Kenya mandates the 2nd Respondent to regulate cultural activities, public entertainment and public amenities,, including- (a) betting, casinos and other forms of gambling; and (b) racing hence the regulation of Betting, Lotteries and Gaming that are exclusive to Nairobi City County is therefore a Constitutional function of the 2nd Respondent that the Constitution mandated the 2nd Respondent to perform vide Legislation passed by the 3rd Respondent in exercise of legislative authority expressly conferred by Article 185(1) and 185(2) of the Constitution of Kenya.
17. Further, part 1 of the Fourth Schedule to the Constitution of Kenya, at paragraph 34 mandates national government to regulate Betting, lotteries and Gaming activities conducted nationally, not exclusive to a County and the 2nd Respondent's mandate to regulate Betting, Lotteries, Gaming and other forms of gambling exclusively conducted within Nairobi City County, the 3rd Respondent, in exercise of its Constitutional mandate under Articles 185(1) and 185(2) of the Constitution of Kenya enacted the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** and contrary to the allegation of the petitioner that the county legislation ousts national legislation from applying to Nairobi City County, Section 4 of the **Nairobi City County Betting, Lotteries and Gaming Act 2014** imports national legislation to apply and regulate Betting, Lotteries, Gaming and other forms of gambling exclusively conducted within Nairobi City County on any matter that the County legislation has not provided for. Thus, the institutions of the 2nd Respondent are enjoined to enforce offences and prohibitions created by the **Betting, Lotteries and Gaming Act (Cap 131) Laws of Kenya**.
18. To the deponent, the provision of Section 4 of the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** is consistent with the provisions of Section 8(2) of **the County Governments Act** No. 17 of 2012 which, in instances where a County legislation does not provide a criteria for regulating a matter within the jurisdiction of a County Government, enjoins the County Government to import provisions of the corresponding national legislation to, "**with necessary modifications apply to the matter in question,**" until the County Assembly enacts legislation to regulate the matter in issue. As the **Nairobi City County Betting, Lotteries and Gaming Act, 2014**, at Section 5 (b) thereof, in fact enjoins the 2nd Respondent and its relevant institutions **to enforce national government policy on the regulation of betting, lotteries and gaming**, it is a gross misapprehension of law for the Petitioner to contend, generally as it did, that the county legislation ousts the application of the national legislation in regulation of Betting, Lotteries, Gaming and other forms of gambling within Nairobi City County.
19. To her nothing is unconstitutional or untoward in the **Nairobi City County Betting, Lotteries and Gaming Act, 2014** regulating Betting, Lotteries, Gaming and other forms of gambling exclusively conducted within Nairobi City County as intended by the drafters of the legislation as by dint of the provisions part 2 of the Fourth Schedule to the Constitution of Kenya, at paragraph 4(a) and (b) thereof as read together with the provisions of Articles 185(1) and 185(2) of the Constitution of Kenya, the county legislation is the primary legislation in regulating Betting, Lotteries, Gaming and other forms of gambling exclusively conducted within Nairobi City County.

20. It was averred that the mandate to pass legislation, the provisions of Article 174(c) of the Constitution of Kenya enjoins the Respondents *“To give powers of self-governance to the people and enhance the participation of the people in the participation of the people in the exercise of the powers of the state and in making decisions affecting them”*
21. In compliance with the demands of public participation, the 2nd and 3rd Respondents facilitated public participation in the enactment of the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** through public notice carried in the Daily Nation Newspaper dated Month February 3, 2014 inviting Memoranda from the Members of Public, a letter dated 10th February 2014 addressed to the Betting Control and Licensing Board and received Memoranda from the public that were duly considered in enacting the County legislation hence the Respondents followed the due process in enacting the ***Nairobi City Count Betting, Lotteries and Gaming Act, 2014***. To her, the Petitioner’s contention that the Criminals allegedly tend to use betting, lotteries and gaming industry as a conduit for money laundering and financing of terrorist activities thus the industry allegedly pose national security is a bare averment and speculative at best with not even a remote evidence placed before this honourable court of instances when money has been laundered or terrorists financed through betting, lotteries and gaming industry as to enable the court conclude that the Petitioner has established even a prima facie case to warrant granting of the interim application. She asserted based on the case of ***John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR*** that “...court should not deal with hypothetical and academic issues. “ and that this court has in the cease of ***Johnson N. Muthama v Director of Public Prosecutions & 3 Others [2014] eKLR and V/D Berg Roses Kenya Limited & Anor v Attorney General & 2 Others [2012] eKLR*** declined to issue conservatory orders where there is no imminent threat of violation of the Petitioners constitutional rights.
22. It was therefore the her case that the Petitioner does not establish any interests in the Betting, Lotteries and Gaming industry that enforcement of the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** threatens and the alleged hypothetical “threat to national security” is a

bare averment not backed up by a single cogent evidence as to warrant granting of the interim orders sought. Further, the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** does not oust the enforcement of the ***Prevention of Terrorism Act No. 30 of 2012***; the ***Prevention of Organised Crimes Act No. 6 of 2010***; and ***The proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009*** in Nairobi City County, which are the relevant national laws regulating terrorism financing and money laundering. Further, there is nothing unconstitutional in the 2nd Respondent enforcing a law that the 2nd Respondent’s County Assembly enacts pursuant to the provisions of Article 185(1) and 185(2) of the Constitution, as enforcement of the County Assembly laws is the very Constitutional mandate of the 2nd Respondent.

23. In her view, the contention that the Respondents did not publish the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** is laughable as a cursory perusal of the Title page of the legislation reveals that the Respondents published the legislation in Nairobi City County gazette Supplement No. 10 of 2014. It was further added that it is neither here nor there for the Petitioner to contend that the Transition Authority has not devolved Betting, Lotteries and Gaming functions to counties as the Petitioner ought to be aware that vide a Legal Notice No. 137 of 2013 of 9th August 2013, the Transition Authority devolved Betting, Lotteries and Gaming functions to Counties and the 2nd Respondent is already enforcing the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** necessary for the 2nd Respondent to collect revenue that it needs undertake its mandatory essential constitutional functions set out in part 2 of the Fourth Schedule of the Constitution of Kenya.
24. The deponent’s position was that on a balance of convenience, it is prudent, fair just and in the public interest that the 2nd Respondent continues to enforce the impugned County legislation to

enable the 2nd Respondent function effectively rather than protecting at this interim stage the obscure and unexplained interest of the Petitioner in the Betting, Lotteries and Gaming industry pending the determination of the Constitutionality of the County legislation. To her, both the Petition and Application are grossly incompetent and ought to be dismissed with costs to the 2nd Respondent.

3rd Respondent's Case

25. On behalf of the 3rd Respondent, a replying affidavit was filed sworn by **Muvengei Jacob Ngwele**, the Clerk of the Nairobi City County Assembly on 21st July 2014.

26. Apart from challenging the petition itself, it was contended that the Petition herein is not justiciable because the Petitioner has not disclosed or demonstrated:

(a) *any or any sufficient stake or interest* in the regulation or licensing of betting, lotteries and gaming activities

(b) *any or any compelling public interest* that would give him the *locus standi* to institute the proceedings herein;

(c) *that he (or the wider public) will suffer any or any appreciable injury* that is directly or fairly traceable to the alleged conflict between national and county legislation;

and

(d) *that the apprehended injury or risk of injury, whether to himself or the wider public, will be remedied by the reliefs sought in these proceedings.*

27. To the deponent, the allegations to the effect that the Transition Authority has not transferred or established the criteria for the transfer of the betting function from the national government to county governments are untenable because:

(a) the Transition Authority actually transferred the Betting function to county governments vide Legal Notice No. 16 of 1st February 2013;

(b) the Petitioners own documents expressly provide that *"the Betting services was transferred vide Legal Notice No. 16 of 1st February 2013 ..."* ; and

(c) the minutes attached as Exhibit WIA-3 are no evidential value to the extent that they have not been signed or otherwise authenticated or validated by the relevant signatories

28. Since the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** was published in the Kenya Gazette of 19th May 2014 *vide the Nairobi City County Gazette Supplement No. 10 (Acts No. 5)*, the allegations at paragraph 33 of the Petition are ill-founded in law and in fact.

Determination

29. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

30. The first issue for determination is the circumstances under which the Court grants conservatory orders.

31. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. The applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission**, Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR**.
32. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.
33. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the relief for conservatory order thereunder is, *prima facie*, only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. From the petition, the Petitioner's locus is derived from the provisions of Article 258 of the Constitution which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with contravention. A reading of the petition as a whole seems to indicate that the Petitioner's grievances stem from the allegation that the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** is unconstitutional and is premature. There is no express allegation that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
34. Therefore an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
35. As was held in **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63**:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. There [is a] right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms [are threatened or violated] , but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

36. In the circumstances of this case, whereas the Petitioner may well prove at the hearing of the petition that the ***Nairobi City County Betting, Lotteries and Gaming Act, 2014*** is unconstitutional and is premature, the Petitioner has not satisfied me that in the circumstances of this case, he is within the provisions of Article 22 of the Constitution.
37. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory

orders under Article 23(3)(c) of the Constitution. What I am saying is that the applicant must go further and show that his or her allegations bring him or her within the provisions of Article 22 as well.

38. It follows that the application dated 9th July, 2014 is incompetent. Having so held, it is inappropriate for me to delve into the merits of the application.

39. Accordingly, the application is struck out with costs.

Dated at Nairobi this 15th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthomi Gitonga for the applicant

Mr Okoth for the 2nd Respondent

Mr Muthomi Thianklu for the 3rd Respondent



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