REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NUMBER HCJRMISC/E138/2022

IN THE MATTER OF AN APPLICATION BY ASENATH WACHERA MAINA FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE BETTING CONTROL AND LICENING BOARD

AND

IN THE MATTER OF ARTICLES THE BETTING AND GAMING ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

BETTING CONTROL AND LICENSING BOARD ..... RESPONDENT

(EX PARTE ASENATH WACHERA MAINA)
AND
MILESTONE GAMES LIMITED.....INTERESTED PARTY
AND

REPLYING AFFIDAVIT

I, SABRINA KANINI, of P.O Box 43977-00100 Nairobi being an adult of sound mind and a resident of Nairobi city do hereby solemnly swear and state as follows;

1. **THAT** I am a serving Board member of the Betting Control and Licencing Board (herein after referred as the "BCLB") the Respondent herein.

2. **THAT** that I have read and understood the contents of the Application dated 12th October, 2022 by the Exparte Applicant Asenath Wachera Maina together with the Supporting Affidavit. I am aware that the Application is seeking for summons to issue to individual members of the board including me to show cause why they not be punished by committal to jail and/or fined for contempt of Court for disobedience of orders issued by this Honourable Court on the 19th of September, 2022.

3. **THAT** that the Application has caught me by surprise as I have not personally caused the flagrant disobedience of the court order, nor participated in any board meeting where a decision has be made that is contrary to the orders issued by the court.

4. **THAT** I have also had an opportunity to peruse the main Application by the Ex-Parte Applicant Asenath Wacera Maina, the Verifying Affidavit and the Annextures thereof.

5. **THAT** I have noted that the crux of the Ex-Parte's Applicant is challenging the Bookmakers Licence **No. 000448 for** the year 2022/2023 issued to the Interested Party Milestones Games Limited by the Respondent on 5th August, 2022.

6. **THAT** I have also read the contents of the Interested Party Replying Affidavit sworn by Benard Chauro on behalf of the Interested Party on 28th September, 2022 and I have noted that at paragraph 21, the Interested Party averred that that the basis of the Respondent issuing a licence to the Interested Party was pursuant to a consent recorded between the Respondent and the Interested Party and filed in Judicial Review Application **E061 of 2020 Republic vs Betting Control and Licencing Board Ex-Parte Milestones Games Limited.** (Attached is a copy of the Replying Affidavit and Consent marked as "SK-1 & SK-2").

7. **THAT** I filed an application dated 5th August, 2022 in my personal capacity and I categorically distance myself from the Consent filed in Judicial Review Application **E061 of 2020** as it had not been sanctioned by the Board. I had asked the court to strike out the consent.

8. **THAT** it is instructive to note that the Court in a ruling delivered on 22nd September, 2022 declined to adopt the consent as drawn and filed and stated that the contents of the consent went beyond the purview of the Application filed by the interested party.

9. **THAT** this is the second time I being sued for contempt of Court in relation to the operations of the licences and operations of the Interested Party. In Judicial Review **E061 of 2020**, Honourable Lady Justice Nyamweya in a ruling dated 17th February, 2022 and delivered on 22nd February, 2022 found five out of eleven members of the board guilty of contempt of court for disobedience of orders issued on 3rd December, 2022. I have asked the Court to review and/or set aside. The Application is pending hearing and determination. (Attached herewith in a bundle are copies of the Application marked as "JM-3").

10. **THAT** I am not aware of any application by the Interested Party for the licence for year 2022/2023 and I was not invited to a Board meeting where the issue was deliberated and approval given.

11. **THAT** I have attended every single Board meeting called by the Chairman and I do not recall a meeting where the issue of the licence to the Interested Party was tabled as an Agenda and an approval given. It follows that the current licence being number **000448** impugned in the proceedings herein was not issued after consideration by the board in a duly constituted meeting. I am not privy to the details of how and when the consideration was done and I cannot take ownership of the decision leading to the issuance to the licence to the interested party.

12. **THAT** just like the Consent, the I was not as a member of the Board involved at all in the process leading to of issuance of a licence number **000448** to the Interested Party. The Board last held a meeting in April, 2022 and I do not recall sitting in a duly convened meeting to evaluate and approve any licence including licence number **000448**.

13. **THAT** the board has not met from the time the orders of the Court were issued on 19th September, 2022 to date. We have been kept in the dark in regard to the operations of the Respondent herein and presently I cannot answer for any of the actions or inactions of the by Respondent. I have never been invited to a meeting to deliberate on the way forward in regard to the orders issued by the Court and the status of the licence number **000448** issued to the Ex-parte applicant in view of the orders of the Court.

14. **THAT** my attempts to get details and information regarding the issuance of licence number **000448** from the Chairman of the Board have not been successful.

15. **THAT** the Respondent is represented by the state law office in the proceedings and by extension the state law office should be representing me in the proceedings herein. However I have opted to seek independent legal representation as I did in Judicial Review **E061 of 2020**.

16. **THAT** my decision to seek alternate representation in Judicial Review Number E61 of 2020 was informed by the failure of the state law office to consult entire membership of the board and for conspiring and conniving with a few members to clandestinely record consent. The effect of which would have been to entrench and sanitize illegalities as well as deprive the Board the powers given to it by the Gaming Betting Control Act in evaluating applications for licences and to sanction violations of the terms and conditions of the licences issued.

17. **THAT** the state law office did not at all challenge the Ruling issued by the Hon. Justice Nyamweya finding me and other members of the Board guilty of contempt of court. Despite the fact that the said ruling had obvious and glaringly errors the state law office did not take steps to appeal against the ruling. Instead they entered into a consent which did not exonerate the contemnors myself included.

18. **THAT** I have not failed to obey or implement the order of this Honourable Court. If at all the Interested Party is still operating despite being served with a Court order, it is not doing so my blessings or involvement as an individual member of the board. The Interested party ought to be answer for the disobedience of the Court orders.

19. **THAT** given what I have stated above and in my application in Judicial Review Application Number E061 of 2020, the impugned licence is tainted with procedural flaws in the manner in which the Respondent has conducted itself where far reaching actions have been taken without the involvement of the members of the Board.

20. **THAT** I urge the Court to exonerate me from any culpability complained of by the Ex-parte applicant in the present application.

21. **THAT** what is deponed to herein is true to the best of my knowledge information and belief.

SWORN by SABRINA KANINI

At Nairobi on this ....19th..... day of October, 2022,

Before Me) HARRISON N. GITHINJI) .....
COMMISSIONER FOR OATHS)
P. O. Box 38551 - 00100,)
NAIROBI.)
COMMISSIONER FOR OATHS.)

DRAWN & FILED BY:

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This is the Exhibit "Marked" SK - 1
Referred to in the annexed Affidavit / Declaration
of: Sabina Icanini
Sworn / Declared before me this: 19th
day of: October 20 22 at Nairobi

Commissioner for Oaths

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JR NOE138 OF 2022

ASENATH WACHERA MAINA.....APPLICANT

VERSUS

BETTING CONTROL & LICENCING BOARD.....RESPONDENT
MILESTONE GAMES LIMITED .....INTERESTED PARTY

REPLYING AFFIDAVIT

I, BERNARD CHAURO, a resident of Nairobi in the Republic of Kenya and of P.O Box 49207-00100, Nairobi within the aforementioned Republic do make oath and swear as follows:

1. THAT I am a Kenyan Male adult of sound mind and the Operations Manager of the Interested Party/Applicant herein and duly authorised and therefore competent to swear and depone to this Affidavit.

2. THAT I swear this affidavit conscientiously believing the same to be true and in accordance with the Oaths and Statutory Declarations Act and I swear this Affidavit in support to the Application herein.

3. THAT I have read the Chamber Summons application, statutory statement, verifying affidavit and the Notice of Motion herein and the annexed documents and the same have further been explained to me by our Counsels on record and I swear this affidavit in response thereto.

4. THAT at the on sent I wish to state that the proceedings herein have been commenced in a manner that offends the provisions of Section 62 Betting Lotteries and Gaming Act which requires that any appeal against a decision of the Respondent has to be lodged within 21 days of the decision. The impugned decision was made on 4th August 2022 and the present proceedings filed on the 8th September 2022. The Honourable Court

therefore lacks jurisdiction to entertain the suit the same having been filed outside the statutory period when such action are to be instituted. The suit is therefore time barred and the Honourable Court has no alternative but to down its tools and strike out the motion and chamber summons.

5. THAT I am advised by our Counsel on record which advise I believe to be correct that judicial review proceedings concerns itself with administrative propriety and the process which a public body has adopted in arriving at its decision. The present proceedings do not fall within the ambit of judicial review proceedings, they do not seek to question the decision making process but are based on commercial claims over the use of the trademark 'Sportpesa' which the Ex Parte Applicant purports to have an interest in.

6. THAT the Interested party followed due process and lawfully obtained the bookmakers licence number 0000448.

7. THAT the Respondent carried out due diligence before issuance of the Interested party's bookmakers licence number 0000448.

8. THAT the bookmakers licence number 0000448 is the property of the Interested party herein, thus issuance of an order prohibiting the Interested party from using the said licence without first hearing the interested party amounts to an arbitrary deprivation of property contrary to the provisions of Article 40 of the Constitution of Kenya 2010.

9. THAT in the statutory statement and the verifying affidavit, the Ex Parte Applicant asserts that the Interested Party should not be licensed to trade under the trade mark 'Sportpesa' but 'Milestone Bet' and that the Ex Parte Applicant has a claim over the trademark Sportpesa.

10. **THAT** it is not the duty of the Respondent to arbitrate over ownership of trademarks and that in any event the Ex Parte Applicant has filed Civil Suit No. 162 of 2022 before the High Court of Kenya in Nairobi in which the subject matter involves the ownership and use of the trademark 'Sportpesa'. The Ex Parte Applicant in the High Court commercial proceedings made an application seeking to injunct the Interested Party from using the trademark 'Sportpesa'. The Honourable Court has not granted orders barring the Interested Party from using the said trademark.

11. **THAT** the upshot of the above is that the question of ownership and use of the trademark 'Sportpesa' is issue sub judice the proceedings in HCCC No. 162 of 2022 and to bring it for further litigation in the present proceedings amounts to an abuse of the processes of the Honourable Court. To the extent that the matter is sub judice, it offends the provisions of Sections 6 and 7 of the Civil Procedure Act and the same should be dismissed.

12. **THAT** to the extent that the application seeks to invite the Honourable Court to make a determination on the use of the trademark 'Sportpesa' the same is not within the purview of judicial review proceedings and the Honourable Court should not accept the invitation.

13. **THAT** for the avoidance of doubt the trademark 'Sportpesa' belongs to Sportpesa Global Holdings Limited which as the lawfully registered owner of the trademark has assigned it to the Interested Party to use in the course of its business and operations. The Interested Party is therefore lawfully using and operating under the said trademark 'Sportpesa' with lawful authority from the registered holder of the trademark.

14. **THAT** in any event pursuant to section 46 of the Trademark Act (Cap 506) the issuance of the certificate of renewal to Sportpesa Global Holdings limited is prima facie evidence of the ownership of the Trademark "Sportpesa" by Sportpesa Global Holdings limited.

15. **THAT** to the extent that the proceedings are based on the question of ownership and use of the trademark 'Sportpesa' the same issue is equally being litigated in HCCC No. 162 of 2022. In the present circumstances the question of the Ex Parte Applicant's claim to the trademark 'Sportpesa' can only be made and determined in a civil suit through a factual exposition, witness testimony and a full trial process. This issue cannot be determined though a claim in judicial review proceedings.

16. **THAT** if this Honourable Court were to allow the application and the commercial court were to dismiss the ownership claims over the trademark 'Sportpesa' by the Ex Parte Applicant, the decision herein will have been arrived at without the benefit of a full trial process and hearing and there would be no legal foundation.

17. **THAT** in any event if the Ex Parte Applicant desired to base her application on the ground of use and ownership of the trademark 'Sportpesa' she should have waited the outcome of the commercial case before challenging the use of the trade mark 'Sportpesa' in an appropriate forum.

18. **THAT** it is not unreasonable of the Respondent to fail to consider the on going litigation between the Ex Parte Applicant and the Interested Party on the ownership claims over use of the trademark 'Sportpesa' unless there were orders emanating from any such litigation that would affect the said trademark. As it is there are no orders from the court inhibiting the Interested Party from using the said trademark lawfully registered in its name.

19. **THAT** on the claim that the Interested Party conducted its business without a license for two years and thereby was not qualified to be issued with a license, I wish to state that the Interested Party had in its favour orders issued by this Honourable Court in JR No. E061 of 2022 on the 3rd December 2022 permitting it to continue operating and carrying

out its business until the hearing and determination of the main motion. The Interested Party has therefore been operating under the authority of a court order competently issued which has not been challenged or appealed against.

20. **THAT** the Ex Parte Applicant in setting out averments in the affidavit of Mr. Cyrus Maina in support of her application herein and the proceedings that took place in JR No. E061 of 2020, I urge the Honourable Court to ignore the same since it amounts to an invitation to sit on appeal against the decision and orders issued in the same file. This Honourable Court cannot sit on appeal against orders issued by a judge of concurrent jurisdiction and further there is no application before the Honourable Court to review the said orders. the issues raised are grounds of appeal if the Ex Parte Applicant is dissatisfied by the orders issued on the 3rd December 2020 and do not constitute grounds for judicial review as presented.

21. **THAT** it should be pointed out further that the parties in JR No. E061 of 2022 have in settlement of the matter entered a consent agreement which stipulates out the responsibilities which all parties are to undertake culminating in the issuance of the impugned license. To the extent that the parties have acted in compliance with their consent agreement it creates a legitimate expectation on the part of each party that the other would fulfil and honour their obligations.

22. **THAT** there was no bad faith at all on the part of the parties in JR No. E061 of 2020 in entering and signing the consent agreement and in any event the Respondent willing entered into the said consent agreement and has never challenged or appealed against the same.

23. **THAT** it is not irrational of parties in resolving a dispute between them to proceed to act in fulfilment of their agreed responsibilities under the agreement and any act done in

fulfilment of the agreement cannot be irrational just because the agreement between the parties is yet to be adopted and recorded by the Honourable Court.

24. THAT the Ex Parte Applicant is not a member of the Respondent and does not speak for and on behalf of the members of the Respondent that would warrant her to comment about the inner functioning and workings of the Respondent and any statements to that effect should be dismissed as hearsay.

25. THAT a pending litigation between parties or against a party cannot be a bar to the issuance of a license under the Betting Lotteries and Gaming Act and it would actually be irrational and unreasonable for the Respondent to fail to consider an application for a license on the basis of other on going litigations against an applicant.

26. THAT the Ex Parte Applicant has not expressly pointed out any act of illegality committed by the Respondent or the Interested Party in the processing and issuance of the impugned license and there is therefore no proof of any illegal act on the part of the said parties that would warrant the intervention of the Honourable Court through the grant of the prerogative orders.

27. THAT the Ex Parte Applicant has not disclosed any grounds that would warrant the Respondent not issuing the Interested Party with a license and the purported grounds are subject to on going litigations in other suits and are therefore res sub judice and in any event do not constitute recognised grounds under the Betting Lotteries and Gaming Act that would militate against issuance of a license under the Act. I therefore pray that the motion herein be dismissed with costs to the interested party.

28. THAT I am advised by our counsel which advise I believe to be correct that the orders given by this Honourable court on the 19th September 2022 amount to issuance of final orders at the interlocutory stage, a position which is untenable in law.

29. THAT I am advised by our counsel which advise I believe to be correct that orders given by this Honourable court on the 19th September 2022 were issued without first hearing the Interested Party thus amount to a violation of the Interested Party's non derogable right to a fair trial which is guaranteed under article 25(c) as read with article 50 (1) of the Constitution of Kenya 2010.

30. THAT I am advised by our counsel which advise I believe to be correct that Section 5A of the Betting, Lotteries and Gaming Act (CAP 131) applies to the Casinos and is therefore not applicable to the Interested Party herein.

31. THAT I am advised by our counsel which advise I believe to be correct that one Paul Wanderi Ndungu has filed an application dated 21st June 2022 in Judicial Review No. E061 of 2020 in which he, while acting as a shareholder of Pevans East Africa Limited, is seeking several orders inter alia: **"Any off-the-course betting and or gaming licence that have been issued to the ex parte applicant Milestone Games Limited in the intervening duration be declared as illegal and held to be null and void ab initio and the same be cancelled unconditionally forthwith"** which order is the same subject and has the same effect as the prayers sought by the Ex parte Applicant herein.

32. THAT I am advised by our counsel which advise I believe to be correct that the present application is therefore sub judice as it contravenes the provisions of section 6 of the Civil Procedure Act (CAP 21).

33. THAT I attach herewith a bundle of documents marked ***BC-1*** in support of the averments contained herein.

34. **THAT** whatever is deposed to herein is true to the best of my knowledge, information and belief save for matters of belief whose grounds have been disclosed and information whose sources have been disclosed.

SWORN at **NAIROBI** by the said:

BERNARD CHAURO

DEPONENT

This 22nd day of September 2022

BEFORE ME:

COMMISSIONER FOR OATHS:

DRAWN & FILED BY: -
OTIENO OGOLA & CO ADVOCATES
B11 OFFICE SUITE, 11TH FLOOR, CMS AFRICA HOUSE
CHANIA AVENUE OFF MARCUS GARVEY ROAD
P O BOX 22671-00100
NAIROBI

This is the Exhibit "Marked" SK-2
Referred to in the annexed Affidavit / Declaration
of Sabrina Icanini
Sworn / Declared before me this 19th
day of October 20 22 at Nairobi
Commissioner for Oaths

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW MISC. APPLICATION NO. E061 OF 2020
IN THE MATTER OF AN APPLICATION BY MILESTONE GAMES LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 2, 3, 10, 20, 21, 22, 23, 27, 40, 47, 50 AND 258 OF THE CONSTITUTION OF KENYA, 2010
AND
IIN THE MATTER OF THE BETTING, LOTTERIES AND GAMING ACT
AND
IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26, LAWS OF KENYA
AND
IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010
BETWEEN

REPUBLIC ..... APPLICANT

AND

BETTING CONTROL AND LICENSING BOARD ..... RESPONDENT
SAFARICOM LIMITED ..... 1ST INTERESTED PARTY
AIRTEL NETWORKS KENYA LIMITED ..... 2ND INTERESTED PARTY
COMMUNICATIONS AUTHORITY OF KENYA ..... 3RD INTERESTED PARTY
PEVANS EAST AFRICA LIMITED ..... 4TH INTERESTED PARTY
MILESTONE GAMES LIMITED ..... EX PARTE APPLICANT

CONSENT

WHEREAS the Honourable Court vide a ruling issued on the 21st February, 2022 found the Board members of the Respondent in contempt of court and directed that the act of court be purged within a period of 60 days thereof; the Parties in execution of the Orders of the Honourable Court enter into this agreement to facilitate the full implementation of the Orders of the Honourable Court and to finally settle the dispute herein.

The Parties hereby agree by Consent;

This is the Exhibit Marked "JM3" In the annexed
Affidavit of JOY MASINDE Sworn / Declared
Before me
This 8th Day of AUGUST 2022
At NAIROBI
COMMISSIONER FOR OATHS

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1. THAT the Applicant shall supply the Respondent with all the returns for the FY 2020/2021 and FY 2021/2022.

2. THAT the Applicant shall provide the Respondent with evidence of payment of relevant taxes to date.

3. THAT the Applicant shall fill all the statutory application forms for renewal of its licenses for the period the Respondent had not issued it with a license or had its license illegally revoked and in particular supply the Respondent with the following;

    - Application Form for renewal of Bookmakers License for FY 2021/2022.

    - Application Form for renewal of Bookmakers License for FY 2022/2023. This will be submitted upon the lapse/close of the FY 2021/2022.

    - A banker's cheque of Kshs. 100,000/= in the name of the State Department for Interior and Citizen Services being license renewal fees for year FY 2021/2022.

    - A banker's cheque of Kshs. 100,000/= in the name of the State Department for Interior and Citizen Services being license renewal fees for FY 2022/2023. This will be submitted upon the lapse/close of the FY 2021/2022.

    - A banker's cheque for Kshs. 200,000/= in the name of State Department for Interior and Citizen Services being investigation fee for new directors.
    - Tax Clearance Certificate of the Applicant and all natural persons who are shareholders in the company.

    - A letter for confirmation of remittance of Betting Taxes from the Petitioner's bankers.

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- Summarized monthly returns for the period up to 30th June, 2021 (for the 2021/2022 license).

- Summarized monthly returns for the period of up to 30th June, 2022 (for the 2022/23 License). This will be submitted upon the lapse/close of the FY 2021/2022.

4. THAT the Applicant shall pay all necessary administrative charges and fees to the Respondent for the FY 2020/2021 and FY 2021/2022. In respect of FY 2022/2023, this will be done at the point of making the requisite application(s).

5. THAT the Applicant shall notify the Respondent of the dates, time and venue of pending and due jackpot draws as and when due and seek approval to conduct the same.

6. THAT the Respondent shall issue and maintain on its website information indicating that the Applicant is duly licensed and authorized to carry on the business of gaming in the Republic of Kenya.

7. THAT having confirmed that the Applicant has complied with the aforestated, the Respondent shall forthwith issue the Applicant with:

   (a) the operating licenses for the FY 2021/2022;

   (b) the operating licence in respect of the FY 2022/2023 upon the commencement of the said Financial Year, which operating licence will run for a period of 12 months operative from the 1st July, 2022.

8. THAT the Respondent shall consider and duly approve and authorize the Applicant to carry out advertisements of its business in a manner prescribed by the Board's Operating Requirements. This will be done once the Applicant submits an application to that effect.

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9. THAT the Applicant undertakes not to initiate or pursue any commercial claims against the Respondent in relation to loss of revenue and its reputation that may arise as a result of the conduct or actions of the Respondent in relation to matters canvassed in these proceedings.

10. THAT the suit herein be and is hereby settled on the above terms with no order as to costs.

DATED at NAIROBI this .....26TH..... day of May, 2022.

.....
WILLIS OTIENO
OTIENO OGOLA & CO ADVOCATES
ADVOCTAES FOR THE APPLICANT

.....
MUNENE WANJOHI
SNR STATE COUNSEL
FOR: THE HON. ATTORNEY-GENERAL

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
IN THE JUDICIAL REVIEW DIVISION
CASE NUMBER HCJRMISC/E061/2020

IN THE MATTER OF AN APPLICATION BY MILESTONE GAMES LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 27, 40, 47, 50 AND 58 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES
BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

BETTING CONTROL AND LICENSING BOARD ..... RESPONDENT
(EX PARTE MILESTONE GAMES LIMITED)

AND

SAFARICOM PLC ..... 1ST INTERESTED PARTY
BHARTI AIRTEL NETWORK (KENYA) LIMITED ...2ND INTERESTED PARTY
COMMUNICATIONS AUTHORITY OF KENYA ..... 3RD INTERESTED PARTY
PEVANS EAST AFRICA LIMITED.....4TH INTERESTED PARTY

NOTICE OF MOTION

Under Rule 3 (1) of the High Court (Practice and Procedure) Rules, Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act (Cap. 21) Order 45 Rule 1 (1) (a) and Order 51 Rule 1 of the Civil Procedure Rules, the inherent jurisdiction as well as all other relevant and Applicable provisions of the Law)

TAKE NOTICE that this Honourable Court will be moved on the 19th day of October 2022 at 9.00 O'clock in the forenoon or soon thereafter on an Application by Counsel for the Applicants, **SABRINA KANINI, PETER KANAIYA and PAUL NJAGA for ORDERS THAT:**

1. This application be certified urgent and be heard and determined on priority basis during the August Recess of the High Court of Kenya.

This is the Exhibit "Marked" SK-3
Referred to in the annexed Affidavit / Declaration
of Sabrina Kanini
Sworn / Declared before me this 19th
day of October 2022 at Nairobi

Commissioner for Oaths

SK

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2. The Applicants in this Application, be granted leave as a matter of course to bring the prayers in this application before this Honourable Court.

3. There be a temporary stay of any further proceedings or substantive determination of this cause pending the *inter partes* hearing and determination of this Application. In particular, there be a stay of the Ruling scheduled to be delivered on the 22nd of September 2022.

4. This Honourable Court be pleased to review and set aside the ruling of the Honourable Lady Justice Pauline Nyamweya in this matter, dated and signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022), in its entirety.

5. This Honourable Court be pleased to hold that the Consent dated the 26th of May 2022 between the *ex parte* Applicant and the Respondent is illegal, fraudulent and an aberration of justice and therefore null and void ab initio, as it seeks to subvert justice by circumventing the express mandatory provisions of the law as laid down by the Betting Lotteries and Gaming Act (Cap. 131).

6. In furtherance of the Order in Prayer 5 hereinabove, this Honourable Court be pleased to strike out the Consent dated the 26th of May 2022 as between counsel for the *ex parte* Applicant and counsel for the Respondent herein.

7. This Honourable Court be pleased to lift and discharge unconditionally forthwith the order in the impugned Ruling dated and signed on the 17th of February 2022 holding the Applicants and other members of the Board of the Betting Control and Licensing Board are in contempt of Court.

8. Costs of this Application be provided for.

ON THE GROUNDS THAT: -

a) The ruling of the Honourable Lady Justice Pauline Nyamweya in this matter, dated and signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022) determined that the Applicants together with other Members of the Board of the Betting Control and Licensing Board were in contempt of Court for allegedly disobeying an order of the Court given on the 16th Day of November 2020.

b) The ruling of the Honourable Lady Justice Pauline Nyamweya in this matter, dated and signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022) was given pursuant to, inter alia, an application by the *ex parte* Applicant Milestone Games Limited, which was based on an alleged disobedience of the order of the Court given on the 3rd of December 2020 and not the order of the Court given on the 16th Day of November 2020.

c) The Applicants were never served personally with the Ruling and/or order of the Court given on the 16th Day of November 2020 and they were unaware of it when they

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sat in the proceedings of the Board of the Betting Control and Licensing Board on the 4th of December 2020.

d) The Applicant discharged her statutory duties as a member of the Board on the 4th of December 2020 in utmost good faith and she is therefore not personally liable for the acts done at the behest of the proceedings of the Board of the Betting Control and Licensing Board by virtue of Section 3 (12) of the Betting Lotteries and Gaming Act, (Cap 131).

e) Having found, at Paragraph 64 of the Ruling dated and signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022), that it was doubtful that the Order given on the 3rd of December 2020 was served at the time alleged by the *ex parte* Applicants in its Application dated 16th December 2020, the threshold and/or standard of proof required in applications for committal were unmet and consequently there was no basis for the Honourable Judge to find the Applicants herein and other members of the Board of the Betting Control and Licensing Board as having been in contempt of Court;

f) By finding that the Applicants and other members of the Board of the Betting Control and Licensing Board were in contempt of the order of the Court given on the 16th of November 2020, the Honourable Judge deviated from the Application dated 16th of December 2020 and dealt with matters outside the purview of the said application.

g) Neither of the formal orders extracted from two orders given on the 16th Day of November 2020 and on the 3rd of December 2020 bore a notice of penal consequences endorsed on the faces thereof and could not therefore form the basis of an application for committal for contempt of court.

h) The actions of the Honourable Judge in deviating from the substratum of the Application by the *ex parte* Applicant dated the 16th of December 2020 meant that the Honourable Judge changed the gravamen of the matter before her and dwelt on the subject of or offence of **interference with the due administration of justice**.

i) In effect, the subject handled by the Judge meant that the court would only be seized of jurisdiction to entertain the application for committal for contempt if the *ex parte* Applicant had approached the Court after obtaining leave to make the Application. Consequently, the Honourable Judge proceeded without jurisdiction in the matter.

j) The Honourable Judge found as a fact the *ex parte* Applicant's Application dated the 2nd of December 2020 had been filed on the 2nd of December 2020, yet the court record shows that: -

i. That the Judiciary issued an Official Receipt Serial Number FSCA-0030163 upon payment of the demanded Court filing fees;

ii. The official Receipt was for the sum of Kshs. 1,160/=, received from Otieno Ogola & Co. Advocates as Court fees for the Application; and

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iii. The Receipt was issued on 3rd December 2020 at the time 09:43:52, which was therefore the effective time when the Application dated 2nd of December 2020 was filed and received by the Registry of the Court.

k) Counsel for the *ex parte* Applicant and Senior State Counsel representing the Respondent have concluded, signed and filed a Consent Order dated the 26th of May, 2022, in this matter and the same is intended to be adopted as an order of the Court, settling this matter.

l) The introduction of the Consent dated the 26th of May 2022 reaffirms that the Applicants herein and other Directors of the Board of the Betting Control and Licensing Board were found to be in contempt of Court via the ruling of the Court in the Ruling Dated the 17th of February 2022 and the Consent is intended to purge the contempt of Court.

m) The preamble of the Consent dated the 26th of May, 2022 also expressly mentions at Clause 3 that the Applicant and other Directors of the Board of the Betting Control and Licensing Board had illegally revoked the licence of the

n) The Applicants have never been contacted regarding the content of the said Consent and neither have they approved and/or signified their approval of the terms thereof in any way.

o) The Applicants are aggrieved by the findings and orders of the contained in the impugned Ruling signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022)

p) The Applicants were never notified of the impugned ruling but they have taken prompt action and brought this application as soon as they became aware of the ruling.

q) There are therefore various errors apparent on the face of the record and sufficient reasons as detailed in the grounds above to warrant the review the setting aside of the ruling signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022).

AND WHICH APPLICATION is further grounded on the annexed affidavits of **SABRINA KANINI, PETER KANAIYA, PAUL NJAGA** and upon such other or further grounds that may be adduced at the hearing hereof.

DATED at NAIROBI this 5th **day of** August **2022**

M/S. MACHARIA, BURUGU & CO.,
ADVOCATE FOR THE APPLICANTS
(SABRINA KANINI, PETER KANAIYA, PAUL NJAGA)
Practice No. LSK/2022/03579 & Adm. No. P.105/8863/11

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"NB If any party served does not appear at the time and place above mentioned, such orders will be made and proceedings taken as the court may think just and expedient."

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
IN THE JUDICIAL REVIEW DIVISION
CASE NUMBER HCJRMISC/E061/2020

IN THE MATTER OF AN APPLICATION BY MILESTONE GAMES LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 27, 40, 47, 50 AND 58 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

BETTING CONTROL AND LICENSING BOARD ..... RESPONDENT
(EX PARTE MILESTONE GAMES LIMITED)

AND

SAFARICOM PLC ..... 1ST INTERESTED PARTY
BHARTI AIRTEL NETWORK (KENYA) LTD .....2ND INTERESTED PARTY
COMMUNICATIONS AUTHORITY OF KENYA ..... 3RD INTERESTED PARTY
PEVANS EAST AFRICA LIMITED ..... 4TH INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, **SABRINA KANINI** of P. O. Box 43977-00100 Nairobi, being an adult of sound mind and a resident of Mombasa City, do solemnly make oath and state as follows:

1. THAT I am one of the Applicants in the Application filed herewith, alongside Peter Kanaiya, Paul Njaga, Daniel Koech (who have authorized me to swear this affidavit) hand I am therefore competent to swear this affidavit.

2. THAT I and my co-applicants are members of the Board of the Betting Control and Licensing Board.

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3. **THAT** we are aware that the *ex parte* Applicant herein, Milestone Games Limited filed an Application in Court in this matter, dated the 16th of December 2020 seeking to cite the Directors of the Board of the Betting Control and Licensing Board, being Cyrus Maina, Peter K. Mbugi EBS, Peter Kanaiya, Paul Njaga, Joy Masinde, Daniel Koech, and I for contempt on the allegation of disobedience of the order of the court given on the 3rd of December 2020.
(Attached hereto and marked collectively as Exhibit Number "S1" are copies of the Certificate of Urgency, Notice of Motion and Supporting Affidavit dated 16th December 2020)

4. **THAT** I confirm that I swore a Replying Affidavit to the said Application on the 4th of February 2021 and I am aware that the same was filed in Court and that the other Applicants swore Replying Affidavits having substantially similar content.
(Attached hereto and marked as Exhibit Number "S2" is a Copy of my Replying Affidavit sworn on the 4th of February 2021)

5. **THAT** I and my co-Applicants were unaware that a ruling had been delivered on the ex parte Applicant's Application aforesaid, but I have become aware lately that the ruling (hereinafter called "the impugned ruling") was delivered at Nairobi on the 21st of February 2022 by the Honourable Justice A. Ndung'u. The impugned ruling is dated and signed on the 17th of February 2022 by the Honourable Lady Justice P. Nyamweya.
(Attached hereto and marked as Exhibit Number "S3" is a Copy of the Ruling delivered at Nairobi on the 21st of February 2022 by the Honourable Justice A. Ndung'u)

6. **THAT** we became aware that the ruling had been delivered when it was mentioned in a sitting of the Betting Control and Licensing Board sometimes in June 2022 that a ruling had been delivered in which the members of the Board, being Cyrus Maina, Peter K. Mbugi EBS, Peter Kanaiya, Paul Njaga, Joy Masinde, Daniel Koech, and I had been held to be in contempt of court and that we had been given an opportunity to purge the contempt before sentencing.

7. **THAT** I and my co-Applicants therefore made efforts to get a copy of the impugned ruling with the help of our advocates on record who took time to carefully study the same.

8. **THAT** I am informed by my advocates on record, which information I verily believe to be true that, based on their perusal and analysis of the impugned ruling, the following matters stand out: -

   a) The impugned ruling was made on, *inter alia*, an application by the *ex parte* Applicant Milestone Games Limited, dated the 2nd of December 2020 which was grounded on an alleged disobedience by the directors of the Respondent (being being Cyrus Maina, Peter K. Mbugi EBS, Peter Kanaiya, Paul Njaga, Joy Masinde, Daniel Koech, and I) of the order of the Court given on the 3rd of December 2020, as evinced by prayer 3 of the Notice of Motion attached as *Exhibit Number "S1"* to this Supporting Affidavit. This fact is also acknowledged at page 3 of the impugned ruling, being paragraph 4 b) thereof;

b) The other subject matter of the impugned ruling was an Application by the Betting Control and Licensing Board dated the 17th of December 2020, which sought a stay, variation and/or setting aside of the Orders of the Court given on the 3rd of December 2020, which fact also acknowledged at page 9 and 10 of the impugned ruling, being paragraph 15 thereof.

c) The Honourable Judge found at paragraph 63 of the impugned ruling that the members of the Board Betting Control and Licensing Board were in contempt of, and had deliberately intended to circumvent and render ineffectual, the orders of the Court given on the 16th Day of November 2020.

d) The Honourable Judge also found at paragraph 63 of the impugned ruling that the actions of the Respondent **after the 4th of December 2020** were an intentional disregard of the orders of the Court given on the 3rd Day of December 2020.

e) The Honourable Judge further determined at paragraph 63 of the impugned ruling that the *ex parte* Applicant's Application dated the 16th of December 2020 was **largely merited.**

f) At paragraph 64 of the impugned ruling the Honourable Judge agreed that the question of service of the order given on the 3rd of December upon the Respondent remained unsettled and therefore granted the Respondent and the alleged contemnors time to purge the alleged contempt.

9. **THAT** I wish to indicate that neither I nor my co-Applicants have ever been served personally with the of the Court given on the 16th Day of November 2020 and we were unaware of it when we participated in the sitting and proceedings of the Board of the Betting Control and Licensing Board on the 4th of December 2020.

10. **THAT** were therefore discharging our duties as members of the Board of the Betting Control and Licensing Board on the 4th of December 2020 in utmost good faith.

11. **THAT** I am informed by my advocates on record, which information I verily believe to be true that in light of the matters deposed to in paragraph 10 of this Supporting Affidavit, I and my co-Applicants cannot be held to be personally liable for the acts done in good faith for the Board of the Betting Control and Licensing Board by virtue of Section 3(12) of the Betting Lotteries and Gaming Act, (Cap 131).

12. **THAT** I am informed by my advocates on record which information I verily believe to be true, that the finding at paragraph 63 of the impugned ruling that the members of the Board of the Betting Control and Licensing Board were in contempt of the order of the Court given on the 16th of November 2020, represents a fundamental error on the face of the record as it evinces that there is a material deviation from the Application dated 16th of December 2020, and therefore dealt with matters outside the purview of the said application since the subject Application specifically sought to commit the alleged contemnors for the alleged disobedience of the orders made on the 3rd of December 2020.

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13. **THAT** I am informed by my advocates on record which information I verily believe to be true, that by deviating from the substratum of the Application by the *ex parte* Applicant dated the 16th of December 2020 which was strictly based on disobedience of the orders given on the 3rd of December 2020, the Honourable Judge effectively altered the gravamen of the matter before her from disobedience of the orders given on the 3rd of December 2020 to the subject of **interference with the due administration of justice**.

14. **THAT** I am informed by my advocates on record which information I verily believe to be true, that the where subject of an application for committal for contempt of court is the interference with the due administration of justice on the part of alleged contemnors, the *ex parte* Applicant would be required to seek leave before making the substantive Application for committal for contempt of court as required by the law for the time being in force in England and Wales as provided for by Section 5 of the Judicature Act (Cap.8).

15. **THAT** I am informed by my advocates on record which information I verily believe to be true, that in effect, the court would only be seized of jurisdiction to entertain the application for committal for contempt if the *ex parte* Applicant had approached the Court after obtaining leave to make the Application. In this case the Honourable Judge proceeded without jurisdiction in the matter.

16. **THAT** I am informed by my advocates on record which information I verily believe to be true, that having found, at Paragraph 64 of the impugned ruling, that it was doubtful that the Order given on the 3rd of December 2020 was served at the time alleged by the *ex parte* Applicant in its Application dated 16th December 2020, the threshold and/or standard of proof required in applications for committal for contempt (being higher than a balance of probability) were unmet and consequently there was no basis for the Honourable Judge to find the Applicants and other members of the Board of the Betting Control and Licensing Board in contempt of Court.

17. **THAT** we have perused the formal orders extracted from two orders given on the 16th Day of November 2020 and on the 3rd of December 2020 and I note that neither of them had a Penal Notice or Notice of Penal Consequences endorsed thereon.
Attached hereto and marked as Exhibit Number "S4" and Exhibit Number "S5" respectively, are copies of the Orders issued on 18th Day of November 2020 and on the 4th of December 2020)

18. **THAT** I am aware that in the case of the Application by the *ex parte* Applicant dated the 16th of December 2020, there is evidence that counsel for *ex parte* Applicant purported to issue and Serve a Penal Notice dated the 7th of December 2020 on Cyrus Maina, Peter K. Mbugi EBS, Peter Kanaiya, Paul Njaga, Joy Masinde, Daniel Koech, and I.
Attached hereto and collectively marked as Exhibit Number "S6" are copies of the Affidavit of Service Sworn by Felix Omondi Owino on 9th December 2020, the purported Penal Notice drawn by Otieno Ogola & Co., Advocates on the 7th of December 2020 and the Order Issued on the 4th of December 2020)

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19. **THAT** I am informed by my advocates on record which information I verily believe to be true, that it is a requirement of the law relating to the practice and procedure for committal for contempt that notices of penal consequences must be endorsed on the faces court order for that order to form the basis of an application for committal for contempt of court in the event of disobedience.

20. **THAT** I am informed by my advocates on record which information I verily believe to be true, that a Penal Notice should therefore emanate from the Court and not from counsel or any other party as was done in this case.

21. **THAT** in addition to the matters set forth in paragraph 8 of this supporting Affidavit, I note that the impugned ruling states at Paragraph 40 (being pages 24 and 25 thereof) that the *ex parte* Applicant's Application dated the 2nd of December 2020 was dated and filed on the 2nd of November 2020. This is incorrect because the court record shows that: -

a) The Application leading to the Orders given on the 3rd of December 2020 is dated the 2nd of December 2020;

b) That the Judiciary issued an Official Receipt Serial Number FSCA-0030163 upon payment of the demanded Court filing fees;

c) The official Receipt was for the sum of Kshs. 1,160/=, received from Otieno Ogola & Co. Advocates as Court fees for the Application; and

d) The Receipt was issued on 3rd December 2020 at the time 09:43:52, which was therefore the effective time when the Application dated 2nd of December 2020 was filed and received by the Registry of the Court.
Attached hereto and marked as Exhibit Number "S7" and Exhibit Number "S8" respectively, are copies of the Notice of Motion dated the 2nd of December 2020 and Official Receipt Serial Number FSCA-0030163)

22. **THAT** we have also noted that the Court Order issued on the 4th of December 2020 indicates that the *ex parte* Applicant's Application dated the 2nd of December 2020 was filed on the same day, which is incorrect in light of the matters deposed to in Paragraph 21 b) c) and d) of this Supporting Affidavit.

23. **THAT** we have become aware that Counsel for the ex parte Applicant and Senior State Counsel representing the Respondent have concluded, signed and filed a Consent dated the 26th of May, 2022, in this matter and the same is intended to be entrench many other ulterior and contested issues under the pretext that it is being adopted as an order of the Court, settling this matter.
Attached hereto and marked as Exhibit Number "S9" is a copy of the Consent Dated 26th day of May 2022)

24. **THAT** having read the wording of the consent, I note the following which are of greatest concern to me: -

a) The introductory paragraph of the Consent reaffirms that the Applicants and other Directors of the Board of the Betting Control and Licensing Board were found to

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contempt of Court via the ruling of the Court in the impugned ruling and the Consent is intended to purge the contempt of Court; and

b) Clause 3 of the Consent states that the other Directors of the Board of the Betting Control and Licensing Board and I had illegally revoked the license of the Applicant

25. **THAT** I am aware that there were concerted efforts to compromise the *ex parte* Applicant's Application dated 16th December 2020 even before the impugned ruling was delivered, but this was at an official level.
Attached hereto and marked as Exhibit Number "S10", Exhibit Number "S11" and Exhibit Number "S12" respectively, are copies of the Letter dated 17th June 2021 from Otieno Ogola & Co. Advocates, The Letter Dated 18th June 2021 from Michael Maurice Ogosso and the Letter dated 6th September 2021 from P.K. Mbugi, OGW)

26. **THAT** in spite of the matters stated in paragraph 25 above, I am unaware of the circumstances leading to the proposed compromise as I have never been contacted regarding the content of the said Consent and neither have I signified my approval of the highly contentious terms thereof in any way.

27. **THAT** I am aggrieved by the findings and orders contained in the impugned ruling because it imputes bad character on my part yet I acted in good faith in the course of my duties as a member of the Betting Control and Licensing Board on the 4th of December 2020.

28. **THAT** I have also never been formally notified of the outcome of the impugned ruling and I only became aware of it when I was informed that the Consent referred to herein was on the verge of being recorded in court and I have brought the application filed herewith as soon as I became aware of the impugned ruling.

29. **THAT** in light of the foregoing depositions it is clear that there are various errors apparent on the face of the record in the impugned ruling and that there are sufficient reasons as detailed above to warrant the review the setting aside of the ruling of the Honourable Lady Justice Nyamweya signed at Mombasa on the 17th of February 2022 (then dated and delivered at Nairobi on the 21st of February 2022) and I pray that the Application filed herewith be allowed.

30. **THAT** I have been advised by Counsel on record for me herein and verily believe this to be true that the finding of contempt and the ensuing actions of the purported purging thereof are matters touching on me and my colleagues at the Betting Control and Licensing Board in person. I therefore wish to have this Honourable Court exonerate and/or discharge me wholly in person from the irregular, illegal and unmerited findings of being in contempt of any order of the Court on this matter.

31. **THAT** I therefore pray that this Honourable Court be pleased to lift and discharge unconditionally forthwith the order in the impugned Ruling dated and signed on the 17th of February 2022 holding me and other members of the Board of the Betting Control and Licensing Board in contempt of Court

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32. **THAT** I swear this affidavit in buttress of the Notice of Motion filed herewith.

33. **THAT** I make this oath conscientiously believing the same to be true and according to the Oaths and Statutory Declaration Act.

SWORN by **SABRINA KANINI**
At Nairobi on this ……5th…….. day of August 2022,

)
)
Before me ADVOCATE, COMMISSIONER FOR OATHS & NOTARY PUBLIC P. O. Box 3891 - 00100, NAIROBI ……Wain……
)
COMMISSIONER FOR OATHS.)

Drawn & filed by: -

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