



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION NO. 6 OF 2019**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 153(3), 2, 10, 19, 20(1), (2), (3), (4), 21, AND 22 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE PROTECTION OF THE CONSTITUTION RIGHTS ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION OF KENYA IN AS FAR AS THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER ARTICLE 27, 28, 31,40, AND 47 HAVE BEEN VIOLATED**

**AND**

**IN THE MATTER OF THE PROTECTION OF PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONERS' FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY ARTICLES 27, 28, 40, AND 47**

**AND**

**IN THE MATTER OF NATIONAL GOVERNMENT COORDINATION ACT (ACT NO. 1 OF 2013) PUBLIC OFFICERS ETHICS ACT (CHAPTER 183 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF SECTIONS 118, 118A, 119, 120, 121 OF THE CRIMINAL PROCEDURE ACT CHAPTER 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE RULES AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF AN APPLICATION BETWEEN**

**DND GAMING MACHINES LTD..... PETITIONER**

**VERSUS**

**MANASSEH CIURI ASSISTANT COUNTY**

**COMMISSIONER BARUT DIVISION.....1<sup>ST</sup> RESPONDENT**

**PAUL KIRUI CHIEF KAPTEMBWO LOCATION.....2<sup>ND</sup> RESPONDENT**

**PAUL GIKUNGU**

**JUDGMENT**

1. The petitioner herein filed petition dated 5<sup>th</sup> February 2019 seeking the following orders: -

- a. *A declaration that the unilateral and arbitrary action by the 1<sup>st</sup> to 3<sup>rd</sup> respondents to confiscate and destroy the petitioner's thirty-four (34) betting and gaming machines and destruction of eight (8) betting and gaming machines is unconstitutional, illegal, unlawful, invalid, null void abinitia.*
- b. *A declaration that the petitioner's right to property, fair administrative action, human dignity, right to freedom and security of the person and right of equality and freedom from discrimination were violated and/or infringed as contemplated in Article 31, 40, 47, 28 and 27 of the constitution have been violated and/or infringed upon by the 1<sup>st</sup> to 3<sup>rd</sup> respondent.*
- c. *A declaration that as a result of the breach of the petitioner's right, he has suffered loss and damages.*
- d. *An order for compensation for apparent breach or violation of petitioner's rights.*
- e. *Costs of the suit and interest thereof*

**PETITIONER'S CASE**

- 2. The petitioner averred that on diverse dates between 11<sup>th</sup> September 2018 and 30<sup>th</sup> October 2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents without any warrant of the arrest broke into the petitioner's place of business and unlawfully confiscated 34 betting and gaming machines and the money in them.
- 3. That no criminal charges have been preferred against the applicant and despite numerous demands, the respondent has refused to release the betting machines.
- 4. The petitioner contend that the continued detention of the said machines continues to cause economic loss as the machines are the main source of income for the applicant.
- 5. The petitioner averred that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents are unlawful, unjustified, illegal, and were not done in good faith; that the actions amount to gross violation of the constitution, gross misconduct, misbehavior, and incompetence and should be held liable for their misconduct.
- 6. The petitioner further averred that the 34 betting machines are stored in unsatisfactorily, unsafe, insecure, and inhabitable conditions thus exposing them to damage and decay and the said actions of the respondents amount to trespass into the applicant's premises and a violation of the infringement of the right to property enshrined in the **bill of rights under article 40 of the constitution of Kenya** and a violation of the **right to privacy enshrined under article 31 of the constitution of Kenya.**
- 7. The petitioner averred that economic and irreparable loss, damages, and prejudice to the petitioners resulted in infringement of the petitioners right to have their dignity respected by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.
- 8. In response to the 1<sup>st</sup> and 2<sup>nd</sup> respondent replying affidavit, the petitioner filed a supplementary affidavit on 16<sup>th</sup> April 2019. He stated that the 1<sup>st</sup> respondent has not attached any document that he has authority to swear affidavit on behalf of the 2<sup>nd</sup> respondent and averred that the petitioner has attached documentary evidence including a photo of the 1<sup>st</sup> respondent carrying away the betting machine and loading the same into his motor vehicle.
- 9. He averred that the petitioner was licensed and has attached a copy of the 2018 license and stated that the respondents have failed to respond adequately to the averments in the petition, the notice of motion is clear, comprehensible, valid, and competent.
- 10. In respect to the 3<sup>rd</sup> respondent's replying affidavit, the petitioner averred that the affidavit contains falsehoods and misrepresentation as after the incident, the 3<sup>rd</sup> respondent accompanied by goons and *Boda Boda* operators raided the premises of the Petitioner and confiscated 8 betting machines with the monies inside and supervised as the machines were being set ablaze. He urged that the 3<sup>rd</sup> respondent be summoned in court for cross-examination on the contents of the affidavit.

**THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS CASE**

- 11. The 1<sup>st</sup> respondent who is the Assistant County Commissioner Barut Division Nakuru West Subcounty filed their replying affidavit on 19th February 2019 with the authority of the 2<sup>nd</sup> respondent to swear affidavit on his behalf. He averred that the 2<sup>nd</sup> respondent was directly under his administration.
- 12. He averred that the allegations by the petitioner are baseless as he had not conducted any such confiscation in the area. He added that the location has not licensed any gaming and betting business and there is therefore no legal gaming and betting business operating.

13. The 1<sup>st</sup> respondent further averred that the petitioner has not proved that the respondents have the said machines to warrant the orders sought.

### **3<sup>RD</sup> RESPONDENT'S CASE**

14. The 3<sup>rd</sup> respondent who is area chief, Thayu Location filed replying affidavit dated 20<sup>th</sup> February 2019. He averred that Kaptembwa Nakuru Town West Sub-County is not within his jurisdiction and that he was not involved in the said act. He stated that he was only answerable to activities within his jurisdiction which is Thayu Location and that he is not in the possession of the machines and is a stranger to the said allegations.

### **PETITIONER'S SUBMISSIONS**

15. The petitioner submitted that the respondent's replying affidavit contain mere denials and they have not controverted the issues raised and are therefore unmerited for failure to disclose an arguable case.

16. In respect to the respondent's actions being unconstitutional, illegal, unlawful, unjustified, and forcible confiscation of the applicant's betting gaming and machines, the petitioner submitted that their action was unlawful having been conducted arbitrarily without any legal justification and is in violation of **Article 40(1) of the constitution** which provides for right to acquire and own property; and is in complete disregard to **sections 25, 118, and 121 of the criminal procedure codes**.

17. The petitioner further submitted that during the confiscation, the 1<sup>st</sup> to 3<sup>rd</sup> respondents who were accompanied by agents of the National Police Service failed to obtain warrants of arrests thereby disregarded provisions of **Article 244 the constitutional** provisions; and submitted that the right to privacy was infringed as enshrined in **Article 31 of the constitution** of Kenya.

### **RESPONDENT'S SUBMISSIONS**

18. The respondents in submissions dated 18<sup>th</sup> March 2021 argued that the petitioner had failed to prove its claim against the respondents as required by sections **107 (1) and (2) of the Evidence Act**; and cited the case of **Evans Otieno Nyakwana V Cleophas Bwana Ongara (2015) eKLR** where the court held as follows: -

**“... as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and subsequently asserts the affirmative of the issue...”**

19. The respondents denied infringing on the constitutional rights of the petitioner and submitted that the petitioner has failed to adduce evidence on damage caused to her business premises as alleged, neither has she submitted evidence linking the respondents to the act.

20. The respondent submitted that the picture attached showing a man loading items in the vehicle does not show that the machine belongs to the petitioner, nor show that it was taken from the petitioner's premises.

21. Further that motor vehicle KAM 283T has a civilian number plate and the same could belong to any member of the public and the petitioner has to show how it is linked to the respondents herein and further stated that government operations are done using government vehicles with unique number plates.

22. The respondents concluded by submitting that they cannot account for something not in their possession or jurisdiction and urged the Court to dismiss the petition as the petitioner has failed to prove her case against the respondents.

### **ANALYSIS AND DETERMINATION**

23. I have considered averments and submissions by parties herein and wish to consider is whether the petitioner has proved the claim against the respondents on a balance of probabilities to warrant grant of prayers sought.

24. In support of this petition, the petitioner attached a photo of a person carrying a machine and loading the same into the motor vehicle KAM 283T. The respondent's argument is that, the vehicle's registration is private yet government operations are carried out using government vehicles. On perusal of the attachments, I do confirm that a Subaru Vehicle with the above registration is shown as the vehicle being loaded with the exhibits being carried. No document has been availed to show connection between the vehicle and the respondents. The respondents having denied the alleged operations, it was incumbent upon the petitioner to clearly demonstrate that the respondents were involved in the alleged confiscation.

25. The respondent further averred that some of the machines have been sold and some are being held in deplorable state. I note that the petitioner attached a statement by one **Mildred Kerubo** who stated that she purchased a machine from the area chief. The particulars of the machine and the alleged transaction have not been availed neither has any investigation done to establish whether it is true that a machine belonging to the petitioner was sold to the said lady. The allegation in my view is not proved.

26. In respect of a heap of items seen in the photograph attached, no sufficient evidence has been availed to show that the items belong to the petitioner. Further to that, no clear evidence has been adduced to confirm parties involved in the actions alleged.

27. I also note that besides attaching certificate of incorporation, the petitioner has not attached any document to show the company was

licensed to operate gaming and betting business.

28. From the foregoing, I do agree respondents submissions that no evidence was adduced linking the private vehicle in the picture attached to the respondents neither do the pictures show that the item being carried by the man is a machine from the petitioner's premises; further the petitioner failed to show description of the alleged machines; petitioner only indicated the number of machines without giving their description; nor ownership of the alleged machines alleged to be in the respondent's possession

29. I find that the petitioner failed to prove prayers sought on a balance of probabilities and is not therefore deserving of prayers sought. This petition therefore lacks merit and I hereby dismiss it with costs.

**30. FINAL ORDERS**

**1) This petition is hereby is dismissed.**

**2) Costs to the respondents.**

**JUDGMENT** dated, signed and delivered via zoom at **Nakuru**

**THIS 23RD DAY OF SEPTEMBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

**JENIFER - COURT ASSISTANT**

**MR. KARANJA FOR PETITIONER**

**MS. CHERUIYOT FOR RESPONDENTS**