



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 23 OF 2018

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3), 2, 10, 10,
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 IN SO FAR**

**AS THE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER
ARTICLES 27, 28, 29, 31, 40 & 47 HAVE BEEN VIOLATED**

AND

**IN THE MATTER OF PROTECTION TO PROPERTY UNDER
ARTICLE 40 OF THE CONSTITUTION OF KENYA (2010) AND**

**IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT
(ACT No. 1 of 2013), PUBLIC OFFICERS ETHICS ACT (CHAPTER 182
LAWS OF KENYA, NATIONAL POLICE SERVICE ACT (ACT NO. 11A OF 2011)**

AND

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

IN THE MATTER OF AN APPLICATION

BETWEEN

DANIEL WAMUGUNDA.....1ST APPLICANT

KEVIN MWANGI.....2ND APPLICANT

VERSUS

1. LIMO KIPCHIRCHIR

2. THE ASSISTANT COUNTY COMMISSIONER

BARICHO WARD/ DIVISION & 6 OTHERS.....RESPONDENTS

RULING:

1. The application pending before court is dated 25/09/2018 seeking the following orders, that the honourable court do issue:

- a. Summons to the 1st to 6th respondents to give proper inventory of confiscated twelve slot machines belonging to the applicants and any planned destruction be stayed.
- b. Order directed to the 1st to 6th respondents to immediately release Betting and Gaming machines belonging the applicants.
- c. Order directed to the 1st to 6th respondents to immediately release twelve slot machines belonging to the applicants as the said confiscation is illegal and unlawful.

2. On 27/03/ 2019, this file was consolidated with **Misc. Criminal Application Nos 14 and 15 of 2018.**

Applicant's case.

On diverse dates between 19/08/2018 and 19/09/2018 the 1st to 6th respondents illegally raided their premises in Miringa -ini, Baricho, Kagio and Kario shopping Centre and confiscated their twelve slot machines. The machines are held up in Kerugoya Police Station and other government installation offices which are non –gazetted premises where confiscated property should be held pending production in court.

3. No criminal charges have been preferred against the applicants in relation to any of the confiscated property to warrant detention as exhibits. There is imminent danger of destruction of the machines with an aim of concealing evidence of 1st to 6th respondents unconstitutional and unlawful activities.

4. The 1st to 6th respondents' actions amount to gross violation of constitution, gross misconduct and contrary to Section 4 of the National Government Co-ordination Act (No. 1 of 2013), Sections 25, 118 and 121 of the Criminal Procedure Act Cap. 75 Sections 3, 49, 55, 60, 92 and Fifth Schedule of National Police Service Act (Act. No. 11A of 2011) and upfront of values and principles of public service.

1st -5th and 7th Respondents' case

They filed ground of opposition stating that the application is defective and incurably defective for reasons that;

- i. There is no authority to institute suit issued to the 1st applicant by the 2nd Applicant.
- ii. Failing to issue requisite notice of intention to sue the respondents as provided under the Government Proceedings Act Cap 40 Laws of Kenya.

5. In addition, they have not met the set criteria for grant of the orders, which are inter alia,

- i. Not established prima facie case
- ii. Not demonstrated nature of public interest
- iii. Not disclosed existence of other cases touching on same subject matter, that is;

- **Nairobi HC Petition No. 447 of 2016**
- **Kerugoya HC Misc. Constitutional Application No. 22 of 2018**
- **Kerugoya HC Misc. Constitutional Application No. 16 of 2018**
- **Kerugoya HC Misc. Constitutional Application No. 4 of 2018**
- **Nairobi HC Petition No. 227 of 2018**

- iv. Not demonstrated they own any gaming and/or gambling machines.
- v. Have not discharged the evidential burden to prove that the respondents Confiscated any of the gaming slot machines.

6. That the roles of the respondents touching on alleged confiscation of any gaming machines are pending hearing and determination in above cases which offends doctrine of sub –judice. To the extent that the applicant seeks rendering of proper inventory is couched as contempt of court. The application suffers from glaring inconsistencies as to who confiscated the

alleged gaming machines and how machines were confiscated. They have not demonstrated they are lawfully engaged in registered and licensed betting and gaming business under Betting, Lotteries and Gaming Act, Cap 131.

6th Respondent's case

They also filed grounds of opposition on ground that the matter is res judicata whereby the 2nd applicant has filed similar matter. No evidence to demonstrate who and when the alleged machines were confiscated. Failed to demonstrate how their rights were violated. The application is fatally defective for non-disclosure of identity of the people who allegedly confiscated their slot machines.

7. In reply to the grounds of opposition, the applicants filed a Supplementary affidavit sworn by Daniel Wamugunda on 26/3/2019.

8. He depones that he has authority to swear the supplementary affidavit, where he depones that he has consent and authority of the 2nd applicant to swear this affidavit and in response to the grounds of opposition by the 6th respondent who avers that no credible evidence with any probative value to buttress or support his allegations of the said **petition No. 447 of 2016** and **Petition 227 of 2018** filed in Nairobi and the matters filed in this court to show how similar they are with the present application.

9. That the 6th respondent has relied without any prove that he has attached photographic evidence marked DWG 1 and 2 in his application proving the said confiscation, that is his contention that grounds of opposition addresses only issues of law and no more and failure to file a replying affidavit by each of the respondents in reply or in contention admits to the admission of the facts admitted in the application.

10. He contends that it is only fair and just for the respondents or their subordinate officers or any other officers acting under them to immediately or forthwith release their slot machines as the said confiscation is illegal and unlawful.

11. He further depones that the ground of opposition by the 6th respondent is an abuse of court process meant to cause unnecessary anxiety and expense, hence wastage of this honorable courts time and resource and it should be dismissed with costs.

12. The parties agreed to proceed by way of written submissions. The applicants submits that the action by the 1st and 2nd respondents amounts to gross violation of the Constitution, gross misconduct, misbehavior incompetence and contrary to the guiding principles stipulated in **Section 4 of the National Government Co-ordination Act (Act. No. 1 of 2013) Sections 25, 118 and 121 of The Criminal Procedure code (Cap 75) of The laws of Kenya Section 3, 49, 45, 60, 92 and the 5th Schedule of National Police Service Act No. (11A of 2011)** and afloat to the values and principles of the public service as expounded in the Constitution and **Public Officer's Ethics Act**.

That the applicants have suffered economic loss, irreparable loss, damage and prejudice. That the court has jurisdiction.

13. The 6th respondent submits that the applicant's application is misconceived, vexatious and lacks any legal basis or facts.

14. He submits that function by the respondent was unconstitutional, illegal, unlawful, unjustified and forcible confiscation of the applicants betting, gaming and machines. That they were required to prove or demonstrate that they were required to carry the gaming activities and that the alleged premises where the gaming machines were confiscated were licensed and that the application is res-judicata.

That the applicants had filed similar applications which are pending before courts.

15. That the applicants are allowed to litigate in every court, there is a possibility that various courts will arrive at different findings with similar issues, this will not only embarrass the respondent but also the court. He urges the court to dismiss the application.

16. The 1st, 2nd 3rd 4th 5th and 7th respondents did not file any submissions.

17. I have considered the application, the submissions and the grounds of opposition. I find that the grounds of opposition filed by the 1st to 5th and 7th respondents have raised preliminary issues which need to be determined as they have challenged the competency of the application before this court.

18. I will 1st deal with the issues before I go to the merits of the a application.

The respondents have raised the following issues:

1. Authority to institute suit.

There are two applicants' Daniel Wamugunda and Kevin Mwangi. The 1st applicant swore an affidavit in support of the Notice of Motion and states that he has the consent and authority of the 2nd applicant herein to swear this affidavit.

19. He has however not annexed any authority from the 2nd applicant Kevin Mwangi.

Order 4 Rule 1(1) (3) of the Civil Procedure Rules provides that;

“ where there are several plaintiffs’ one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others”.

20. The rule requires that the applicant files together with the pleadings authority to swear verifying affidavits on behalf of the others. Any pleading filed on behalf of another party without proof that he has authority to swear on behalf of the other parties, is incompetent. See In case of; **Sheikh Mohamed Nunow -versus- Ali Ibrahim Hassan (2019) eKLR.**

The court held;

See also the case of: **Kenya Agricultural Research Institute (K.A.R.I.) -vs- Farah Ali, Chairman Ishahakia Self Help Group & Another (2011)eKLR** Wendo J (as she then was) held thus;

“ In my view, the appellant has to demonstrate that this suit is properly filed and not just brought by a busy body or an officer who has no authority. Such authority should be exhibited.

Failure to annex a list of names of officials and their signatures duly filed with the verifying affidavit is a serious mistake that goes into the very substance of this suit. Such a mistake in my view is not of a technical nature that can be cured by the provisions of Article 159 of the Constitution of Kenya 2010. A suit that is filed without authority becomes incompetent and ought to be struck out....”

21. Further in the case of; **Linnet Wairimu Mukuha & Another -versus – County Government of Nakuru & 3 others (2019) eKLR**

Where the court held;

There is sound wisdom in the requirement that a plaintiff signifies her intention to sue by signing the verifying affidavit or by giving a written authority which is annexed to the verifying affidavit. Litigation can be rewarding but it is also a perilous affair. There is always the risk that judgment on the main claim, on a counterclaim or on costs can be imposed against a plaintiff.

This decision properly addresses the requirement under **Order 4 Rule (1) (3) of the Civil Procedure Rules.** The applicant did not file any written authority given by the 2nd applicant, he therefore this court cannot verify or confirm whether or not the 2nd applicant is aware and has consented to the suit.

22. The applicants’ suit and claim is incompetent for want of authority from the 2nd applicant consenting to be a party in the proceedings, and giving authority to the 1st applicant to swear verifying affidavits on his behalf.

2. Notice of Intention to sue the Government.

The respondents’ contend that the applicants’ application is not properly before the court for failure to comply with mandatory provisions of the Government Proceedings Act Cap 40 of the Laws of Kenya by failing to issue the requisite notice of intention to sue to the respondents.

Section 13A of The Government Proceedings Act Cap 40 provides:

i. “No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”

ii. The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars –

a. the full names, description and place of residence of the proposed plaintiff,

b. the date upon which the cause of action is alleged to have accrued;

c. the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant.

d. a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

e. the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim”.

23. The issue of the Notice under **Section 13 A** (Supra) was addressed by the Court of appeal in the case of; **David Njenga Ngugi –versus- Hon. Attorney General (2016) ekr**

Where the court held;

“The genesis of the section was clearly grounded in policy considerations geared at ensuring that suits are not instituted against the government without notice. The Attorney general sues and defends suits on behalf of the State. As there are many departments of government, it is in public interest that the Attorney General knows in advance of claims being made against the Government so as to take instructions necessary to facilitate proper legal representation. It would be virtually impossible for the Government department, hence the need for the requirement that an intending claimant must give notice pursuant to Section 13 A (supra). At the end of the day, it is the public who must underwrite the successful claims through their taxes where monetary relief is given. It is obvious that the mischief intended to be eradicated is simply prevention of suits against the State where the Attorney General has not had notice under Section 13 A (supra). Nowhere does the Act expressly or by implication state that a suit filed where the notice is not in full compliance with Section 13 A is incompetent...”

24. In the instance case, the use of the word **“shall”** in section 13A (supra) is clearly directory. It requires that no suit shall be instituted where a notice has not been given in compliance with the section. The right and power to sue does not spring from compliance with the section and, failure to fully comply with the section cannot hamper the right of a claimant to sue. As indicated above, the foundation of a tortious action against Government is in common law. It is clear that a suit that has been filed without full compliance with Section 13A cannot be said to be incompetent nor can it be rightly struck out.

25. The applicants’ have not proved that they served the Government with the requisite notice of intention to sue.

26. The applicant bears the burden to prove that such notice was served, in who alleges must prove.

27. The respondents have said that no notice was served, the burden of prove was shifted to the applicant to prove that indeed the notice was served. This burden was not discharged and therefore the suit is not properly before this court due to failure by the applicants to comply with the mandatory provisions of Section 13 A (supra).

3. Res-judicata/ Sub-judice.

The respondent have stated that the suit is res-judicata. However, in their grounds of objection in support of that ground they have stated that the 2nd applicant have filed similar matters in H.C Nairobi and Kerugoya against similar parties and raising similar issues.

The cases are listed in the grounds of opposition. My view is that this relates to sub-judice not re-judicata. **Section 6 of Civil Procedure Act** Provides;

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.”

28. The word used under this Section

state and this can be demonstrated by proving that he/she has title to the property said to be arbitrary taken away.

d. Since the applicants are alleging that the properties were confiscated they ought to have served a notice on the respondents to produce and listing the confiscated items.

e. The respondents have raised the issue that the applicants have not demonstrated by way of empirical evidence that they are lawfully engaging in a legally registered and gaming, betting and lottery business under the Betting, lotteries and Gaming Act cap 131 Laws of Kenya.

f. Despite these matters having been raised by the respondents they have not elicited any response from the applicants.

g. I find that the applicant has not demonstrated a prima facie case and has not demonstrated the nature of the public interest that will be served by allowing the application.

h. In conclusion I find that the application lacks merits as the suit is incompetent, violates mandatory provisions of the Government Proceeding Act Cap 40 of the Laws of Kenya and is grossly sub-judice.

i. In the circumstances I order that the application be dismissed with costs.

Dated, signed at Kerugoya this 29th day of May 2020

L. W. GITARI

JUDGE