



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS CONSTITUTIONAL APPLICATION NO. 58 OF 2017

IN THE MATTER OF CONSTITUTIONAL PETITION NO. 447 OF 2016

(Consolidated with Petition No. 482 of 2016)

IN THE HIGH COURT OF KENYA AT NAIROBI

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF THE PETITIONERS FUNDAMENTAL RIGHTS AND FREEDOM
PROTECTED BY ARTICLES 27, 28, 29, 40, 47 AND 50 OF THE CONSTITUTION**

AND

IN THE MATTER OF SECTIONS 3, 4 (1) (A) AND 30 OF THE CONTEMPT OF COURT ACT (ACT NO. 46 OF 2016)

BETWEEN.

KEVIN MWANGI.....PETITIONER/ APPLICANT

AND

CHARITY .K. GATOBU

THE ASSISTANT COUNTY COMMISSIONER

BARICHO WARD/ DIVISION.....1ST RESPONDENT

THE CHIEF KIRITINI LOCATION.....2ND RESPONDENT

THE CHIEF NDUINI LOCATION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

The Applicant filed a Notice of Motion under Article 19, 20, 22, 23, 40 and 50 of the Constitution of Kenya 2010, Rule 3 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Sections 4 and 15 of the National Government Co-ordination Act (Act No. 1 of 2013), Sections 3, 4 (1) (a) and 30 of the Contempt of Court ((Act No. 46 of 2016) and all other enabling provisions of law) seeking the following orders:

(i) Spent

(ii) That the Honourable court do issue a NOTICE to the 1st, 2nd and 3rd Respondents requiring the said officers to SHOW CAUSE why contempt of court proceedings should not be commenced against them.

(iii) That subsequently this Honourable court be pleased to issue an order of committal against 1st, 2nd and 3rd respondents hereinto prison for such a period as it may deem fit and just for having disobeyed the Conservatory court injunction/ order issued herein by this Honourable Court, under Hon. Justice J. M. Mative on 9th October, 2017.

(iv) That this Honourable Court be pleased to order the immediate release of the illegally and unconstitutionally confiscated Betting and Gaming Machines belonging to the Applicant pending hearing and determination of this application.

(v) That this Honourable court be pleased to issue an order directing the 1st, 2nd and 3rd respondents to face Criminal Charge (s) for Disobedience of Statutory duty and lawful order.

(vi) That all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.

(vii) That costs of this application be borne by the Respondents.

And which application is supported by the annexed Affidavit of **KEVIN MWANGI MUGWERU** further premised on the **GROUND**
THAT;

1. On diverse dates from 9th October, 2017 to date the 1st, 2nd and 3rd Respondents herein have forcibly raided the Applicant's Business Premises at Kagio, Kiania, Ithare and Karia Shopping Centre within Kirinyaga County disrupting his business and confiscated his Betting and Gaming Machines despite there being a conspicuous Conservatory court Injunction/ order displayed on the said Business Premises.

2. There is a Conservatory Court injunction/ order issued by HON.JUSTICE MATIVO on 9th October, 2017 against the Respondents restraining them as officials, agents and representatives of the MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT, the 2nd Respondent in the CONSTITUTIONAL PETITION NO. 447 OF 2016 (Consolidated with Petition No. 482 of 2016) IN THE HIGH COURT OF KENYA AT NAIROBI from conducting a crackdown on the Petitioners/ Applicants premises and businesses specifically to raid, forcibly confiscate betting gaming and machines, disrupt businesses or in any way suspend or close operations of the said businesses.

3. There is no Criminal Charge (s) preferred against the Applicant herein and the said Betting and Gaming Machines are still stored in the 1st, 2nd and 3rd Respondents' offices which is unlawful since it is not a gazetted premises where seized and/or confiscated property should be held pending their production in a court of law.

4. The said Betting and Gaming Machines are stored in an unsatisfactory, unsafe, insecure and inhabitable condition thereby exposing them to damage, decay and/or depreciation.

5. Despite the Applicant's numerous visits to the 1st, 2nd and 3rd Respondents offices requesting the release of his property, the three Respondents have blatantly rejected to heed to the Applicants pleas and respect the Conservatory Court injunction/ order.

6. The continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the Applicant as he uses them as his main source of livelihood wherefore if the Application herein is not heard and Orders herein granted, the Applicant will suffer irreparable loss and damage.

7. The Applicant herein is the PETITIONER No. 160 in the CONSTITUTIONAL PETITION NO. 447 of 2016 (Consolidated with Petition No. 482 of 2016) IN THE HIGH COURT OF KENYA AT NAIROBI.

8. The 1st, 2nd and 3rd Respondents has been arrogant claiming that they will not release nor honour any court order unless directed by the Principal Secretary for MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT.

9. The 1st, 2nd and 3rd Respondents' actions amounts to GROSS VIOLATION OF THE CONSTITUTION, GROSS MISCONDUCT, MISBEHAVIOUR, INCOMPETENCE and contrary the Guiding principles stipulated in SECTION 4 of

the National Government Co-ordination Act (Act No. 1 of 2013) and an upfront to the Values and Principles of Public Service as expounded in the Constitution, and Public Officers Ethics Act.

10. The 1st, 2nd, and 3rd Respondents' actions are draconian, unjustifiable, arbitrary, unlawful, illegal and not done in good faith for the purpose of executing the functions of the office but wrongful conduct in furtherance of personal benefit wherefore they should be held personally liable for their actions.

11. The 1st, 2nd and 3rd Respondents' conduct is meant to undermine the dignity and authority of the court, observance and respect of due process of the law, preservation of an effective an impartial system of justice and diminishing public confidence in the administration of justice as administered by court.

12. The continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the Applicant as he uses them as his main source of livelihood wherefore if the Application herein is not heard and Orders herein granted, the Applicant will suffer irreparable loss and damage.

13. It would be just and expedient if the Application is heard as a matter of priority to protect the constitutional rights of the Applicant from arbitrary and unjustifiable action.

14. This Honourable Court has Jurisdiction to grant the orders sought herein.

15. The Applicant has no other way of enforcing the said Order wherefore it is only fair and just that the Honourable Court grants all the Orders as prayed for herein.

The respondents filed grounds of opposition and they contend that the instant application is fatally defective, that the same is not properly before the court as the application can only be lawfully dealt with in **Nairobi High Court Constitutional Petition No. 447 of 2016** that issued the orders that were/ have been allegedly disobeyed by the respondents' herein.

The application for contempt is incompetent for want of compliance with Section 30 of the Contempt of Court Act number 46 of 2016.

That no notice to show cause has been issued to the respondent as required by law, that the application has misconstrued and misapplied the law relating to contempt of law proceeding.

That the application as drawn is vague, incompetent, bad in law as it does not bear the names specific officers been cited for contempt. Finally, that the application is an abuse of the Court process.

The respondents' filed supplementary grounds of opposition to the applicants Notice of Motion application dated 13th of April, 2018 and the respondents shall oppose the same and seek to have them struck out and dismissed and interim conservatory orders issued therein be vacated, or discharged.

Grounds of opposition are based on the ground that the instant application is incompetent as is scorched as a contempt of court application contrary to the well laid down procedure under the contempt of court Act number. 46 of 2016 which the applicant has misunderstood and misapplied.

By dint of the decision by **Justice Nyakundi in Kajiado Mis. Constitutional application no. 2. of 2018 Samuel Kahiu –versus- Jacinta Soso and Hon. Attorney General** it is Judiciary settled that contempt is not transferable. The learned judge in his decision held that; “

“The court that issues the orders is the same court that should entertain the contempt application.”

“The applicant should respect Justice Mativo’s concerns that the numerous applications will be an impediment to the hearing and determination to the main petition.”

That the instant application therefore undermines the dignity and authority of a court of concurrence jurisdiction of Nairobi Petition Number. 447 of 2016 as consolidated with Petition No. 482 of 2016 (**Samuel Kahiu & others -versus- Betting Control and Licensing board and others**) in which he is the 160th Petitioner to punish any party for contempt of its own orders.

He further submitted that the application offends the doctrine of Sub- judice. He further depones that the applicant has not met the Judiciary right criteria for the grant of conservatory orders sought and has misapplied the conservatory orders issued in Petition No. 447 of 2016.

That the applicant by filing numerous applications in the High court is abusing the court process, and the petitioner has not explained the difficulty he has in approaching the presiding Judge in the High court petition number. 447 of 2016 so as to raise the issue of disobedience in the court orders issued therein.

That the application is scandalous, frivolous and /or vexatious and is highly or meritorious.

Before the application could be heard and determined a Notice of Preliminary objection was filed by the applicants’ dated 27th May, 2019 against the respondents’ supplementary grounds of opposition dated 12th November, 2018 and filed in this court on 11th December, 2019, on the grounds that the supplementary grounds of opposition are misconceived and incurable defective and fatally incompetent for want of legal format, want or legal contempt, and the ground should be struck out as this court has not been properly moved.

That the respondent is seeking to set aside, vary or review the consent order issued in this court on 18th December, 2017 using the said the Supplementary grounds of opposition contrary to stipulated procedure enshrined in Civil Procedure Act (Cap 21 Laws of Kenya and the Rules therein).

That the respondent purports to represent 2nd and 3rd respondent in this matter, and yet the said parties were discharged from this proceeding through a withdrawal application made by the applicant when they complied with the dictates of the consent order.

It is further stated that the supplementary grounds of opposition are a diversionary tactic meant to divert the attention of this court of the respondent blatant disobedience of the consent order that necessitated the filing of the contempt application herein.

That the grounds of opposition defeat the express provisions and the spirit of Section 1 A and 1 B of the Civil Procedure Act. He prays that the supplementary grounds of opposition be dismissed.

The parties agreed to file submissions and the notice of preliminary objection.

Submissions for the applicant:

Submissions were filed by Gichuki Karuga & Company Advocates.

He submits that the legal and the procedural way of setting aside a consent judgment and the principles therein is one of the grounds for the Preliminary objection.

They submit that on 18th of September, 2017 a consent order was recorded and adopted as an order of this court, and any party who wishes to set aside the consent is set to follow the laid down rules set out under the Civil Procedure Act, Section 80 of Civil Procedure Act and Order 45 of Civil Procedure Rules provide a section of review of decree/order.

He has referred this court in the decision of: **George Ndemo Sagini -versus- Attorney General & 3 Others (2017) KLR** where it was stated

“The Law on review is clear that a party seeking review under Section 80 and Order 45 (1) must show that there is an error or mistake apparent on the face of the record to form a factual basis for review. The error or mistake must be apparent and not difficult to search from the record or there must be new and important evidence which the person applying for review could not place before court despite due diligence and therefore he could not produce it in court at the time the matter was heard and the decree or order passed, or that there is some other sufficient reason.”

They have further relied on the case of:

National Bank of Kenya Ltd -vrs- Ndung’u Njau (Civil Appeal No. 211 of 1996).

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of court. The error must be self –evident and should not require elaborate arguments to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an in correct position of the law and reached an incorrect conclusion.”

He submits that to purport to seek audience of this court by asking of a review of a consent order by means of supplementary grounds of opposition, the proper way is by having to move the court by way of review of consent orders by filing a notice of motion application as provided by Order 45 Rule 1 CPR.

The applicant has also referred this court to the decision by: Hancox J.A (as he then was) in the case of; **Flora Wasike -versus- Destimo Wamboko (1982 - 1988) 1KAR 625** where he stated at page 626

“ it is now settled law that a consent law or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out.”

See the decision of this court in J.M **Mwakio versus- Kenya Commercial Bank Ltd (Civil application 28 of 1982, and 69 of 1983)**.

It was further submitted that the grounds of opposition are defective as the 4th respondent purports to represent the 2nd and 3rd respondent who are no longer parties to this proceeding as they were discharged through an application in court when they complied with the court order and filed affidavits to that effect.

He submits that the filing of grounds of opposition by the 4th respondent is an abuse of court process meant to cause unnecessary anxiety, delay and expense hence wastage of this honorable court’s time and resources.

FOR RESPONDENTS:

Submissions were filed by Lydia Ndirangu senior state counsel for the honorable Attorney General.

The respondent submits that the supplementary ground for opposition was necessitated by the fact that a judgment was delivered by Justice Nyakundi in Kajiado In **Misc. Constitution App. No. 2 of 2018 Samuel Kahiu -versus- Jacinta Soso and Hon. Attorney General**, in which a number of issues raised by the Applicant/ petitioner herein were settled by the same court. This included the decision on the issue of Contempt.

Where the Hon. Judge held that contempt is not transferrable. The learned Judge in his decision held that **“the court that issues the orders is the same court that should entertain contempt applications.”** -

“the applicant should respect Justice Mativo’s concern that the numerous applications will be an impediment to the hearing and determination of the main petition.”

That the court further held that the instant application that was before it undermines the dignity and authority of a court of competent and concurrent jurisdiction being High Court Nairobi Petition No. 447 of 2016 as consolidated with Petition Number. 482 of 2016 (**Samuel Kahiu & Others -versus- Betting Control and Licensing Board and others**) in which he is the 160th petitioner, to punish any party for contempt of its own orders.

It is therefore clear that the petitioner applicant herein is scratching on strolls by filing the same preliminary objection in order to divert this courts attention from the decided issues. That furthermore the grounds of opposition filed by the respondent had not captured sufficient information regarding the matter before the court including;

(i) That the applicant has demonstrated by way of empirical evidence that he is lawfully engaging in legally registered and licensed betting or gaming business under the betting/ lotteries and gaming act subject to approvals from the Kirinyaga Government.

(ii) The applicant has not demonstrated by way of empirical a evidence that he lawfully owns any gaming or gambling machines the subject matter of the instant suit and there no payments and ETR receipts issued to the applicants for any alleged purchase for any gaming machines.

The respondents submits that the applicant is applying diversionary tactics as they have been unable to discharge the evidentiary burden required of them to prove that the respondent confiscated any of their gaming slot machines if at all.

The respondent submits that we are not seeking any order to set aside the consent order in this matter, and as a matter of fact the instant application touches on the alleged roles played by the respective respondents in the alleged confiscation of any gaming machines if at all. The issue has been decided in the **Constitutional petition number 482 of 2016** in a judgment which was delivered on 25th June, 2019 and as such this affects the doctrine of sub-judice.

The instant application is a re- adjitiation of the issues which have been decided on in Petition number 447 of 2016 (Consolidated with Petition Number 482 of 2016) and can only be viewed as an abuse of the Court process.

The respondents' rely on the case of; **Godfrey Paul Okotoyi –versus- Habil Olaka (2018) eKLR**, where it was held that I agree with Senior Counsel ORaro's submission that the decision to mount this petition when the same counsel is pursuing similar litigation in Commercial division is an abuse of court process as stated in the case of; “ **Kenya Planters Co-operative Union Limited –versus- Kenya co-operative Millers limited & another (2016) eKLR, the filing of a Constitutional petition during the pendency of other proceedings before the same court raising the same issue is an abuse of the court process.....**” it is further submitted that there should be an end to litigation that the petitioner is clearly abusing the court process by continuing to pursue this petition despite the fact that the issue at hand is been determined in Petition number 447 of 2016 as consolidated with Petition number 482 of 2016.

The applicant is a notorious abuser of the due process of this court and they urge the court to dismiss the preliminary objection dated 27th May, 2019.

ANALYSIS AND DETERMINATION.

I have considered the preliminary objection and the submissions.

The leading authority in this area of preliminary objection is the case of: **Mukisa Biscuits Manufacturing company limited -versus - Westend distributors limited (1969) EA 696** where it was stated that a preliminary objection must raise a pure point of law. Sir Charles New Bold in the case stated

“a preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct. It cannot be raised if any fact have to be ascertained or if what is sort is the exercise of judicial discretion. ”

The issue raised in the Preliminary objection that the appellants seeks to set aside, vary and/or review the consent order and the 4th respondent is purporting to represent 2nd and 3rd respondent yet they were discharged from the proceeding. The respondent has submitted that they are not seeking to review the consent order and they have also raised the issue that a number of issues raised by the petitioner applicant were settled by a court with concurrent jurisdiction.

Applying the principle in the case of; **Mukisa Biscuits -versus Westend company limited (supra)** the Preliminary objection does not meet the threshold and it has no possibility of determining the suit to its finality. In other words the facts raised in the supplementary grounds of opposition are in dispute.

The law is now well established that striking out of pleadings is draconian and the court should seek to hear and determine disputes other than been on determining matters based on procedural technicalities. Article 159 2 (d) of the Constitution provides that;

“ Justice shall be administered without undue regard to procedural technicalities, it is important to hear the dispute and determine it on merit.”

In the end I find that the Preliminary objection is without merit and it is dismissed with costs.

Dated, signed at Kerugoya this 29th day of MAY, 2020.

L.W. GITARI

JUDGE