



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 330 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(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 CONSTITUTIONAL 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 2020

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORINATION ACT (ACT NO. 1 OF 2013), PUBLIC OFFICERS ETHICS ACT (CHAPTER 183 LAWS OF KENYA), THE CHIEFS’ ACT (CHAPTER 128 LAWS OF KENYA), NATIONAL POLICE SERVICE ACT (ACT NO. 11A OF 2011)

AND

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

AND

IN THE MATTER OF SECTIONS 118 AND 121 OF THE CRIMINAL PROCEDURE ACT (CHAPTER 75 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

GETRUDE WACHUKA KAMAU.....APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER

WESTLANDS SUB-COUNTY.....1ST RESPONDENT

THE ADMINISTRATION POLICE

INSPECTOR WESTLANDS.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC

RULING

1. The Applicant approached this court by way of an amended Notice of Motion dated 28th October, 2019. The main prayers sought are:

- a) That the court do issue summons to the 1st and 2nd Respondents requiring the said officers to give, file or render inventory of the sixteen slot machines belonging to the Applicant herein confiscated from her premises in Kangemi Shopping Centre of Westlands sub-County within Nairobi County.
- b) That the court be pleased to issue an injunction restraining the 1st and 2nd Respondents herein, their employees, servants or agents and any one duly authorized by them or any one claiming under them in any manner or otherwise howsoever from proceeding with the planned illegal destruction of the sixteen slot machines that were confiscated from the Applicant's store pending hearing and determination of the application.
- c) That the court do issue an order directing the 3rd Respondent to take charge, collect and/or gather the sixteen slot machines from the 1st and 2nd Respondents and record them in the occurrence book at Kabete Police Station pending the hearing and determination of the application.
- d) That the court do issue an order directing the 1st and 2nd Respondents or their subordinate officers and/or any other person acting under/or through them or to immediately and forthwith release sixteen slot machines belonging to the Applicant as the said confiscation was illegal and unlawful.
- e) That the court be pleased to give further orders/directions as it may deem fit and just to grant.
- f) That the cost of the application be borne by the Respondents.

2. The application was premised on several grounds which, for reason of the decision I shall render, I need not emulate them all. In summary, it is stated that police officers without a search warrant raided and broke into the Applicant's business premises in Kangemi Shopping Center in Nairobi, disrupted her business and confiscated 16 slot machines and took them to the 1st Respondent's offices along Waiyaki Way. It is alluded that the Applicant's premises are non-gazetted for storage of seized and confiscated properties reasons where for they ought to be produced in court. Furthermore, at the time of seizure of the machines, no proper inventory was recorded in breach of Sections 25, 118 and 121 of the Criminal Procedure Code. It is added that the machines are at the risk of destruction against any orders of court and in breach of the Applicant's constitutional right of ownership of property. Further, it is averred that the 1st and 2nd Respondents' action of confiscating the machines was draconian, unjustifiable, arbitrary, unlawful, illegal and not done in good faith for purposes of executing the functions of the office of the two Respondents but were a wrongful conduct in furtherance of personal benefit for which the two Respondents ought to be personally held liable.

3. Before the application was canvassed on 14th July, 2020, several mentions were made before this court for purposes of confirming the status of the slot machines. Needless to state therefore, is that on the part of the Respondents, it was conceded that the machines had been confiscated. At the time of hearing the application, parties made brief submissions in which there was concession by the office of the DPP that the machines had been destroyed by the Westlands, Sub-county Commander following an order by the Cabinet Secretary, Interior and Government Coordination. Hence, the court was informed that the orders sought, if granted, would be in *rem*. It was argued and advised therefore that the Applicant seeks redress in another forum.

4. Earlier, learned counsel, Mr. Karanja appearing for the Applicant who seemed aware of the destruction of the machines informed the court that the destruction was done against an order issued by a constitutional court (Okwany J.) in which the court ruled that the confiscation of slot machines that was ongoing country wide was illegal. He however emphasized that the Applicant herein was not a party to the constitutional Petition that was heard and determined by the constitutional Court, being **Nairobi Constitutional Petition No. 447 of 2016 consolidated with Petition No. 482 of 2016 between Samuel Kahiu & 373 others and the Betting Control and Licensing Board and 6 others and Association of Gambling Operators – Kenya and Another**. Counsel informed the court that the judge had directed the parties to file compensatory suit in respect of where the machines had been destroyed.

5. I have considered the respective brief submissions by both counsel for the Applicant and counsel for Respondent.

6. The main order sought is for release of slot machines owned by the Applicant that were confiscated by the 1st and 2nd Respondents. It is conceded by both parties that the 1st and 2nd Respondents did indeed confiscate the machines. At the same time, learned State Counsel for the Respondents conceded that the two Respondents, pursuant to an executive order destroyed the machines. What this implies is that if the court were to allow the application, it would issue orders that are incapable of being executed. No court will issue an order or orders in vain as the same would render the court toothless; without powers to enforce the order(s).

7. It is my view therefore, that redress lies elsewhere for other reliefs sought in the instant application and not in this court.

8. I accordingly rule that the application dated 28th October, 2019 has been overtaken by events, and, since it has been argued, unfortunately I have no choice but to dismiss it which I hereby do. The Applicant is at liberty to pursue any other form of redress.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2020.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Karanja for the Applicant.
2. Mr. Momanyi for the Respondents.