



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO.9 OF 2017

RUTO KIPNGENO KENETH & 31 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT

COUNTY COMMISISONER OF BOMET.....2ND RESPONDENT

JUDGMENT

1. The Petition dated 19th December 2017 seeks the following orders:

- i. That an order of prohibition be issued to restrain the Respondents, their agents and or servants from making orders, directives and decisions meant to interfere with the Petitioners' legitimate business of operating slot gaming machines.**
- ii. A declaration that the Petitioners' betting, lotteries and gaming business are statutorily recognized under Kenyan Law and enjoy equal protection of law.**
- iii. A declaration the Petitioners fundamental rights fair administrative action have been violated, transgressed and trampled upon by the Respondents.**
- iv. A declaration that the search of the petitioners' businesses and the seizure and confiscation of their slot machines by the agents and or servants of the 2nd Respondents without warrants or any court orders rendering the petitioners unable to carry out their businesses and to earn a livelihood are violations of the Petitioners' fundamental rights to life, to the protection and benefit of the law, human dignity and privacy as guaranteed by articles 26 (1), 27 (1), 28 and 31 of the Constitution.**
- v. A declaration that the seizure and confirmation of the Petitioners slot machines by the agents and or servants of the 2nd Respondent without warrants or any orders of a court of law are violations of the Petitioners' fundamental rights against deprivation of private property of whether description as guaranteed by article 40 (3) of the Constitution.**
- vi. A mandatory order/injunction directed against the 2nd Respondents compelling them to return to the Petitioners their slot gaming machines confiscated by the agents and or servants of the 2nd Respondents as appearing in the Petitioners' Supporting Affidavit herein.**
- vii. Contemporaneously filed with this Petition is a Notice of Motion application of even date seeking a temporary injunction against the 2nd Respondent from interfering with the Petitioners' slot gaming machines and a mandatory injunction compelling the 2nd Respondent to return the slot gaming machines to the Petitioners. Both the Petition and the Notice of Motion application were ordered to be heard together.**

2. **THE PETITIONERS CASE**

- i. It is the contention by the Petitioners that they are business people working for gain in the County of Bomet.**
- ii. That they have procured slot gaming machines for the purpose of engaging in the business for profit in line with the provisions of the Betting, Lotteries and Gaming Act cap 131 Laws of Kenya.**

iii. That betting, lotteries and gaming are statutorily recognized under the Kenyan law but the 1st and 2nd respondents have failed and or refused to issue the Petitioners with licenses and permits for their slot gaming machines and gaming premises respectively.

iv. That the 1st and 2nd Respondents have declared the Petitioners' slot gaming machines illegal and ordered the seizure of the Petitioners slot gaming machines and closure of their gaming businesses.

v. That as a consequence of the fraud and the 2nd Respondent's actions, the applicants are suffering immense loss and damage on their expensive investments.

3. The Petitioners' place reliance on **Articles 70** of the **Constitution. Article 165 (3) (B)** which is on the Jurisdiction of the High Court to determine whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed **Article 2** on the supremacy of the Constitution. **Article 10** on the national values and principles of governance. **Article 47** on the right to fair administrative action. **Article 27** on matters of discrimination. **Article 40** on the right to property and the principle of legitimate expectation.

THE 1ST RESPONDENT'S CASE

4. The 1st Respondent has filed grounds of opposition dated 4th January 2018 which are:-

1. That all the petitioners have failed to demonstrate any violation of any law by the 1st Respondent.

2. That the Petitioners have not made out an arguable case on alleged infringement of their Constitutional rights nor have they established a prima facie case against the 1st respondent for reasons that:-

a) The Petitioners have failed to specifically point out instances in which the 1st respondent violated their Constitutional rights.

b) That the Petitioners have not shown in their pleadings which rights and freedoms have been infringed by the 1st Respondent.

c) That the Petitioners have failed to bring before the court sufficient evidence in support of both the main Petition and the application.

4. That the Petition is an abuse of the court process as the Petitioners have failed to bring before the court evidence on the role carried out by the 1st respondent on the interference/confiscation of slot gaming machines.

5. That the instant petition does not satisfy the pre requisites for a Constitutional Petition for failure to set forth with a degree of precision the manner in which the constitution has been infringed and or violated.

6. That the Petitioners have made wild allegations without factual empirical date support. All averments in the Petitioners' Supporting Affidavit are factually incorrect and filed with the intention of misleading the court on the real issues.

7. That the 1st Respondent gives notice that it shall at the first hearing hereof raise a Preliminary objection regarding the jurisdiction of this court to hear and determine this matter. This Petition was by consent heard by way of written submissions.

SUBMISSIONS BY THE PETITIONERS

8. It is the Petitioners submissions that their Petition dated 19th December 2017 seeks the following reliefs:

a) A declaration that the Petitioners betting, lotteries and gaming business are statutorily recognized under Kenyan law and enjoy equal protection of law.

b) An order of prohibition to restrain the 1st and 2nd Respondents from interfering with the Petitioners businesses, from interfering with the Petitioners slot gaming machines within the Petitioners' premises.

c) A declaration that the actions of the local administrators under the auspices of the 2nd Respondent are unconstitutional and a contravention of the Petitioners economic and social rights and therefore null and void.

d) A declaration that the Petitioners fundamental rights to fair administrative action have been violated, transgressed and trampled upon by the Respondents.

e) A mandatory injunction directed against the 2nd Respondents compelling them to return to the Petitioners their slot gaming machines confiscated by the agents and or servants of the 2nd Respondent.

f) In the alternative but without prejudice, an order to issue to the Respondents to comply with orders as per the decision of

Isaac Lenaola J. dated 4th may 2017 in Petitioner no.295 of 2014.

8. The court's jurisdiction as envisaged under **Article 165 (3b)** of the Constitution is recognized together with **Article 23 (1)** of the Constitution which gives the High court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom on the bill of rights.

9. The Petitioners have singled out two other for determination.

1) *Locus standi*

2) The right to fair administrative action.

ON LOCUS STANDI

9. The Petitioner is said to have been brought under **Article 22 (1)** of the Constitution. Counsel for the Petitioner places reliance on the Case of **Mumo Matemu –v- Trusted Society of Human Rights Alliance and 2 Others** where the Court of Appeal endorsed the view held by the High court in Trusted Society case that the standard guide for *locus standi* is **Article 258** of the Constitution provides: -

“1. Every person has the right to institute court proceedings. claiming that this constitution has been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (i) may be instituted by;

(a) a person acting on behalf of another person who cannot act in their own name.

(b) a person acting as a member of, or in the interest of, a group or class of persons.

(c) a person acting in the public interest of

(d) an association acting in the interest of one or more of its members.”

10. On the right to fair administrative action, the petitioners submitted that the Respondent's purported seizure and closure of their legitimate businesses denies them their enjoyment of their right to fair administrative action as provided by **Article 47** which states that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

11. Further that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action. The petitioners further aver that they were ready and did apply for licenses however, while some were given, some were told to hold on since the County Government had not legislated on the matter and the said issue has taken too long.

12. On the issue as to whether the petitioner's betting, lotteries and gaming businesses are statutorily recognized under Kenyan Law and enjoy equal protection of the law, it was submitted by the petitioners that they procured the slot gaming machines at a great cost for the purpose of engaging in business for profit in line with the provisions of **the BETTING, LOTTERIES AND GAMING ACT CHAPTER 131 LAWS OF KENYA** and therefore the premise and business are legal.

13. Further that prior to the promulgation of the Constitution of Kenya 2010, betting, lotteries, gaming and other forms of gambling business were exclusively governed by the **BETTING CONTROL AND GAMING ACT (Cap 131)** under the stewardship of the **BETTING CONTROL AND LICENSING BOARD** established pursuant to section 3 of the said Act.

14. It was also submitted by the petitioners that section 34 of the fourth schedule (CONSTITUTION) provides that the National Government has the function of “national betting and other forms of gambling” while section 4(a) of part II of the fourth schedule provides that the County Government has the function of “cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling and therefore it falls within the concurrent jurisdiction of the two levels of government.

15. It was also submitted that the actions of the police officers under the auspices of the 2nd Respondent are unconstitutional and in contravention of the petitioner's economic and social rights and therefore null and void and further that the police seized, threatened, intimidated and arrested the employees of the petitioners and if they are not restrained, they stand to suffer imminent loss and damage which is irreparable.

16. On the issue as to whether the remedy of prohibition and mandatory injunction are available to the petitioners, it was submitted that **Article 23(3)** of the Constitution provides that in any proceedings brought for the enforcement of the bill of rights, a court may grant appropriate relief including a declaration of rights, an injunction and conservatory orders and therefore the remedies of prohibition and mandatory injunction are available to the petitioners.

THE 1ST RESPONDENT'S SUBMISSIONS

17. The 1st respondent submitted that the entire petition be dismissed with costs and further that section 34 of part 1 of the fourth schedule to

the Constitution and section 4(a) part II of the fourth schedule provide that the business of gaming, betting and lotteries is a function of both National and County Governments.

18. The 1st Respondent stated that the issues for determination are as follows:

- i) Whether the 1st Respondent has been wrongly enjoined in this petition
- ii) Whether there is anything done by the 1st Respondent which is unconstitutional, null and void against the petitioners
- iii) Whether there is double taxation by the 1st Respondent
- iv) Whether the petitioners are entitled to the prayers sought
- v) Who pays the costs of this Petition?

19. On the issue as to whether the 1st Respondent has been wrongly enjoined in this petition, the 1st petitioner submitted that there was no evidence which shows the acts and/or omissions by the 1st Respondent which have infringed the rights of the petitioners.

20. On the issue as to whether the 1st Respondent had done anything unconstitutional, null and void against the petitioners, again it was submitted that there is no iota of evidence tendered to support that allegation and on the issue of double taxation, it was submitted that the business of gaming, betting and lotteries is a function of both National and County Government and that enforcement of a single business permit does not occasion double taxation.

21. Further that under **Article 210(1)** of the Constitution, a County Government has powers to impose property and entertainment tax and any tax authorized by an Act of Parliament. Further it was submitted that **Article 209(4)** of the Constitution gives County Government discretionary powers to impose charges for services rendered as provided in legislation.

22. On the issue as to whether the petitioners are entitled to the prayers sought, it was submitted that they have failed to prove their case or to raise constitutional and legal questions to justify the court's intervention for the following reasons:

- a) That from the petitioners' averments, the activities of the petitioners were not compatible with national security.**
- b) That it is clear that there is need for coordination of the oversight roles in restoring security issues in lotteries, betting and gaming businesses and further that acts carried out by the 2nd Respondent do not amount to breach of constitutional rights.**
- c) Further that the petitioners did not plead their case with precision.**
- d) That the petitioners have failed to clearly and elaborately set out instances and particulars of actions alleged to have been carried out by the 1st Respondents employees or agents which are unconstitutional, null and void or which result in breach of the petitioner's constitutional rights.**
- e) That the orders sought are in respect of acts already carried out.**
- f) That the facts averred thereto amount to hearsay.**
- g) That the petitioners have failed to meet the threshold for grant of an injunction as set out in the case of Giella vs Cassmand Brown & Co. Ltd 1973EA 358.**

23. On the issue as to who pays the costs the 1st Respondent submitted that the court should order each party to bear its own costs since no party has consciously decided to misapply the law.

24. I have considered the petition and Application both dated 19/12/2017 filed herein together with the Affidavits in support of the same. I have also considered the 1st Respondents grounds of opposition dated 4/1/2018 filed in response to the petition and Application filed herein. The parties filed written submissions which I have duly considered.

25. I find that the issues for determination in both the Application and Petition dated 19/12/2017 are as follows:

- i) Whether the petitioners are entitled to declaratory orders they are seeking against the Respondents.**
- ii) Whether an injunction should issue against the Respondents to compel them to return the slot machines confiscated by the Agents and or Servants of the 2nd Respondent.**
- iii) Who pays the costs of this Petition and the Application both dated 19/12/2017?**

26. On the issue of the declaratory orders, the petitioners are seeking that an order of prohibition be issued to restrain the Respondents, their

agents and or servants from making orders, directives and decisions meant to interfere with the petitioner's legitimate business of operating slot machines.

27. The petitioners are also seeking declaratory orders that their betting, lotteries and gaming business are statutory recognized under Kenyan Law and they enjoy equal protection of law and other declaration.

28. In the case of **Republic Vs Cabinet Secretary for Internal Security Exparte Gragory Oriaro Nyauchi [2017]eKLR**, the Court held as follows:

“With respect to the need to establish locus the Court of Appeal in Johana Nyokwoyo Buti vs. Walter Rasugu Omariba & Others Civil Appeal No. 182 of 2006 expressed itself as hereunder:

“A declaration or declaratory judgement is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgement at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.”

29. I find that the petitioners did not adduce evidence to show how the Respondents have interfered with their businesses. I find that this kind of case required adducing of viva voce evidence to prove that the Respondents have interfered with the operations of the petitioners. I find that no witness statements were filed to explain what transpired. It is not enough for the petitioners to file pleadings; they were duty bound to adduce evidence in support of their averments in the pleadings.

30. The court further said in the case of **Republic Vs Cabinet Secretary for Internal Security Exparte Gragory Oriaro Nyauchi** (supra) as follows:

“That a declaratory order of judgement can be granted was appreciated by the Court of Appeal of Uganda in Andrew Lutakome Kayira and Paul Kawanga Semogerere vs. Edward Rugumayo, Omwony Ojok, Dr. F. E Sempebwa & 8 Others Constitutional Case No. 1 of 1979 where it expressed itself as hereunder:

“Order 2 rule 7 of the Civil Procedure Rules provides that no suit shall be open to objection on grounds merely that a declaratory judgement or order is sought or not. Under Order 2 rule 7 of the Civil Procedure Rules, the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed. This is a very wide power but it is discretionary power and one which should be exercised if at all, only with the greatest caution where the declaration sought would have the result of creating a relationship between persons, which relationship has an essential element of mutual confidence. Further the discretion to give a declaratory judgement is one, which should never be exercised where result of the declaration would be seriously to embarrass and prejudice the security of the state.”

28. This case required that the petitioners adduce evidence and therefore the petitioners have failed to prove their case to the required standard in civil matters which is on a balance of probabilities. There is no way this court can establish that the slot machines of the petitioners were confiscated by the Respondent's agents and or servants without evidence to support the assertions. Where were the machines taken from? What are the particulars of the machines, which agents of the Respondents' undertook the operations?

29. The supporting affidavits merely state as follows:

i) THAT the Applicants made applications to the 1st Respondents and were issued with permits and others were locked out and advised to wait as the issue was under deliberation

ii) THAT the 1st & 2nd Respondent have declared the petitioner's slot gaming machines illegal and ordered the seizure of the machines and closure of the petitioner's premises

iii) THAT the chiefs and other local administration officers have been literally invading, destroying and looting the properties of the petitioners, seizing the machines with unprecedented impunity and unconventionally accessing the same leading to huge financial losses to the petitioners

iv) THAT the chiefs led by Area Deputy County Commissioners of Bomet central illegally confiscated gaming machines with money inside belonging to the petitioners on 14/12/2017

30. On the issue as to whether an injunction should issue against the Respondents to compel them to return the slot machines confiscated by the Agents and or Servants of the 2nd Respondent, I find that there is no basis for giving such an order in the absence of evidence that such machines were indeed confiscated.

31. I accordingly dismiss both the Petition and Application dated 19/12/2017 for want of evidence. I direct that each party bears its own costs of both the Application and the petition dated 19/12/2017.

Delivered, dated and signed at Bomet this 3rd day of August 2020.

A. N. ONGERI

JUDGE