



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

MISCELLANEOUS CONSTITUTIONAL APPLICATION NO. 103 OF 2018

**IN THE MATTER OF ARTICLES 2, 6, 10, 22 AND 58 AND THE
FOURTH SCHEDULE THEREOF 165(3)(B), (D) 2, 19, 20, (1), (2),
(3), (4) AND 22 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE
PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS
PROTECTED BY ARTICLES 27, 28, 29, 40, AND 50**

AND

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

DIANA MUTHONI T/A

DND GAMING MACHINES LIMITED.....APPLICANT

-VERSUS-

JOSHUA NKANATHA, THE COUNTY COMM. NAKURU.....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERNAL SECURITY

AND COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The applicant Diana Muthoni t/a DND Gaming Machines Limited moved the court by an **application dated the 16th April 2018** under Article 3, 6, 10, 22 and 258 of the Fourth Schedule of the Constitution 2010, and under the contempt of Court Act No. 46 of 2016. Seeking for an order directed to the Nakuru County Commissioner the 1st Respondent to render a proper inventory of confiscated 33 Betting and Gaming Machines, property of the applicant by his agents and/or officers, and order immediate release of the said machines pending hearing of the application, as they feared imminent destruction of the machines.

2. An order of interim injunction directed to the 1st, 2nd Respondents through their employees where granted by the court (Odero J) on the 16th April 2018.

3. The Respondents represented by the Hon. Attorney General filed a Replying Affidavit on the 27th April 2018 and on the 30th April 2018 filed a notice of preliminary objection to the application.

4. The Preliminary objection is the subject of this ruling. It is based on only one ground that the application as drafted and filed contravenes **Section 6 of the Civil Procedure Act**.

Section 6 states:

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 proceedings between the same parties or between parties under whom they or any of them claim, or between parties under whom they or any of them litigating under the same title where such suit or proceeding is pending the same or any other than court having jurisdiction in any to grant the relief claimed.

5. I have considered both parties submissions as well as the pleadings.

In the applicants supporting affidavit sworn on the 16th April 2018 at paragraph 9, it is averred that there is a conservatory court injunction issued in **Nairobi Constitutional Petition No.449 of 2016 (consolidated with Petition No. 428 of 2016) at the High Court of Kenya at Nairobi from conducting a crackdown on the petitioners premises by confiscating betting machines.**

The applicant herein is listed as No. 18 in the Petition No. 482/2016, among 345 others. I have also seen the conservatory order dated 19th December 2016. It is in force.

6. It is therefore evident that this petition as filed contravenes the clear provisions of **Section 6 of Civil Procedure Act**.

The two mentioned petitions are pending for hearing and determination. The matters at issue in this petition are directly and substantially in issue in the petitions at the High court at Nairobi.

7. This court has not been told that the conservatory order issued by E.M. Muriithi J on the 19th December 2016 have been discharged or that the two petitions have been heard and determined.

8. For those reasons, I find merit in the preliminary objection. To that extent and by a further order of Odera J issued on the 30th April 2018 coupled with the conservatory order (Muriithi J), the applicant's betting machines are safe from destruction by the 1st and 2nd Respondents by their agents or employees pending hearing and determination of the application inter parties, and the petitions stated above.

9. The applicant shall bear costs of the application to the Respondents.

Dated, signed and delivered this 31st Day of January 2019.

J.N. MULWA

JUDGE