



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(CORAM: ODUNGA, J)**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 102 OF 2018**

**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 (2010)**

**AND**

**IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT (ACT NO. 1 OF 2013), PUBLIC OFFICERS ETHICS ACT (CHAPTER 183 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**

**SAMUEL KAHIU.....APPLICANT**

**-VERSUS-**

**1. MUKTAR MAHAT, DEPUTY ADMINSTRATION POLICE COMMANDER (D.A.P.C)**

**ATHI RIVER.....1<sup>ST</sup> RESPONDENT**

**2. MATU WILLIAMS THE O.C.S ATHI RIVER POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**3. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**4. DIRECTOR OF PUBLIC PROSECUTIONS.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 16<sup>th</sup> July, 2018, the applicant herein, **Samuel Kahiu**, substantially seeks the following orders:

1. THAT the Honourable Court do issue a SUMMONS to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents requiring the said officers to GIVE, FILE OR RENDER a PROPER INVENTORY of the SIXTY EIGHT (68) SLOT MACHINES belonging to the Applicant herein confiscated from his Store in Syokimau Mavoko Sub-County of Machakos County.

2. THAT *this Honourable Court be pleased to issue an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, their employees, servants and/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 SIXTY EIGHT (68) SLOT MACHINES that were confiscated from the Applicant's Store pending hearing and determination of this Application.*

3. THAT this Honourable Court be pleased to issue an order directed at 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and/or their subordinate officers and/or any other person acting under or through them to immediately and forthwith release the SIXTY EIGHT (68) SLOT MACHINES belonging to the Applicant herein as the said confiscation is illegal and unlawful.

4. THAT this Honourable court is pleased to give further Orders and/or directions as it may deem fit and just to grant.

2. The said application was grounded upon Article 10, 25, 27, 28, 40, 47,48, 49, 50(1), 157(11) & 159(1)(b), 232, 238 and 244, of the Constitution of Kenya 2010, Sections 118, 118A, 119, 120 and 121 of the *Criminal Procedure Act* (Chapter 75 Laws of Kenya), Sections 4 and 15 of the *National Government Co-ordination Act (Act No. 1 of 2013)*, Sections 3, 49, 55, 60, 92 and Fifth Schedule of the *National Police Service Act (Act No. 11A of 2011)*, Sections 4 and 5 of the *Office of The Attorney-General Act (Act No. 49 of 2012)* and Section 4 of the *Office of Public Prosecutions Act, (Act No. 2 of 2013)* and all other enabling provisions of law.

#### **Ex Parte Applicant's Case**

3. According to the applicant, on 25<sup>th</sup> June, 2018, the 1<sup>st</sup> Respondent in company of a group of police officers illegally and without any court order or warrant raided his private store in Syokimau Estate, broke into and unlawfully impounded his 68 slot machines which they took to Athi River Police Station superintended by the 2<sup>nd</sup> Respondent where they were kept without a proper inventory.

4. The applicant was apprehensive that the said slots were in danger of being destroyed in order to conceal, obliterate or extinguish the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's unconstitutional, unlawful and illegal activities rendering the pursuit of justice futile.

5. The applicant deposed that there are no criminal charges preferred against him in relation to said slots to warrant their detention. It was therefore contended that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were draconian, unjustifiable, arbitrary, unlawful, illegal and in bad faith for the purposes of furthering personal benefit and they should be held personally liable. It was further contended that the said actions are unconstitutional and unlawful and that the continued detention of the said machines has and will continue to cause economic loss to the applicant as they are his main source of livelihood.

6. To the applicant the Respondent's actions amounted to trespass and an infringement of his right to property as enshrined in Article 40 of the Constitution as well as a violation of his right to privacy under Article 31 thereof.

7. It was submitted by the applicant that the said Replying Affidavit has failed to respond adequately, traverse and/or give any proper defence to facts and allegations raised by the Applicant in his Notice of Motion Application as reinforced by his Supporting Affidavit. According to the applicant, the said replying affidavit clearly supports his assertion that the raid conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the Applicant's Private Premises on 25<sup>th</sup> June, 2018 is illegal and unlawful wherefore, draconian, unjustifiable, arbitrary as the same was not done in good faith for the purpose of executing the functions of the office but wrongful conduct in furtherance of personal benefit therefore, hence they should be held personally liable for their actions. According to the applicant, that position is informed by the fact the 4<sup>th</sup> Respondent who is constitutionally in charge of undertaking and instituting Criminal Charge(s) against Kenyan citizen(s) other in any court of law except Court Martial has admitted and confirmed to this Court through a sworn Affidavit that there are no criminal charge(s) against the Applicant over the confiscated property to warrant their detention.

8. It was therefore submitted that the raid and the confiscation thereof conducted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the applicant's private premises on 25<sup>th</sup> June, 2018 amount to trespass into the Applicant's premises wherefore, an infringement of his Right to Property enshrined in the Bill of Rights under Article 40 of the Constitution and a violation of his Right to Privacy as held by Article 31 of the Constitution.

9. It was further submitted that the seizure of the Applicant's sixty eight (68) slot machines is clearly contrary to the legal provisions of the constitution, Sections 25 118, 118A, 119, 120 and 121 of the *Criminal Procedure Act* (Chapter 75 Laws of Kenya), Sections 3, 49, 55, 60, 92 and the Fifth Schedule of the *National Police Service Act* (Act No. 11A of 2011) and an upfront (sic) to the values and principles of public service as expounded in the Constitution, and *Public Officers Ethics Act*.

10. In support of his case the applicant relied on the decision of **Mumbi Ngugi, J** in **Standard Newspapers Limited & Another vs. Attorney General & 4 Others [2013] eKLR.**

11. It was submitted that the 1<sup>st</sup> Respondent while conducting the forcible raids into the Applicant's Private Store in Syokimau Estate Off Kiungani Road Mavoko Sub-County of Machakos County where they broke into and unlawfully impounded a total of sixty eight (68) slot machines which they took to Athi River Police Station superintended by the 2<sup>nd</sup> Respondent did so in a blatant, complete and utter disregard of the aforementioned constitutional and statutory provisions.

12. According to the applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents being agents of the National Police Service established under Article 244 of the

Constitution in confiscating the Applicant's sixty eight (68) slot machines completely disregarded by the above constitutional provision which they are bound to obey. To the applicant, section 49 of the **National Police Service Act** (Act No. 11A of 2011) provides *inter alia* that subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer. Section 49 also provide Police officers shall make a report of all daily occurrences and incidents encountered and make it available to their superior and a police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful. However, the conduct of the two Respondents betrays this provision and the National Values and Principles of Governance.

13. According to the applicant, the power of the Police to enter a privately owned premises without a Search Warrant provided in Section 57 of the **National Police Service Act** (Act No. 11A of 2011) is subject to the Constitution and the due process of the law established in sections 25 118, 118a, 119, 120 and 121 of the **Criminal Procedure Act** (Chapter 75 Laws of Kenya), Sections 3, 49, 55, 60, 92 and the Fifth Schedule of the **National Police Service Act** (Act No. 11A of 2011). It was submitted that section 57(5) of the **National Police Service Act** (Act No. 11A of 2011) provides that a police officer who exercises the powers conferred under this section shall— **(a) identify himself beforehand; (b) record the action; (c) record the items taken; (d) make a report regarding such exercise and make it available for the superior** and such process was not followed as it is clear that the Respondents did in failing to file a response did not attach any record proving any inventory and/or documents for this Honourable Court to see. In support of his case the applicant referred to **Keroche Breweries Limited & 6 Others vs. Attorney General & 10 Others [2016] eKLR.**

14. It was submitted that though Article 232 of the Constitution provides for the Values and Principles of Public Service including accountability for administrative acts and transparency and provision to the public of timely, accurate information, the said Respondents did not conform to those principles. It was therefore submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's actions amounts to gross violation of the constitution, gross misconduct, misbehaviour, incompetence and an upfront (sic) to the values and principles of Public Service as expounded in the Constitution, and **Public Officers Ethics Act** and reliance was placed on **Republic vs. Cabinet Secretary-Ministry of Education Science and Technology & 2 Others Ex Parte Musau Ndunda & 2 Others [2016] eKLR.**

15. According to the applicant, the foregoing duties are anchored in Article 21 (1) of the Constitution which provides that: "*it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the right and fundamental freedoms in the Bill of Rights*". To the applicant, the confiscation of the Petitioners' property in the manner in which it was carried is an infringement of their right to privacy contrary to Article 31 of the Constitution and their right to fair administrative action as stipulated Article 47 of the Constitution and section 4 of the **Fair Administrative Action Act** (Act No. 4 of 2015) that states for every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. In this regard reference was made to **Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR.**

16. In the applicant's view, all the outlined contravention of the constitution of Kenya and the various statutes as highlighted means that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the Applicants fundamental right to equal protection and benefit of the law and inherent human dignity guaranteed by Articles 27(1), and 28, of the Constitution of Kenya, 2010 which is a clear punishment in a cruel, inhuman or degrading manner contrary to Article 29 of the Constitution therefore, this Court should intervene. To the applicant, the Courts have held that this right goes hand in hand with enjoyment of the other rights and in this regard he referred to **Ahmed Issack Hassan vs. Auditor General [2015] eKLR** and **Standard Newspapers Limited & Another vs. Attorney General & 4 Others [2013] eKLR.**

17. Attendant to the right to property, it was submitted, is the 'ultimate' right to dignity as enshrined in Article 28 of the Constitution. The Applicant his right to have his dignity respected was infringed upon by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the whole experience violated his sense of self-respect, self-worth, physical and psychological integrity hence causing him loss of goods worth millions. According to the applicant, the illegal and unlawful confiscation of the Applicant's Slot Machines and the continued detention in the Athi River Police Station will cause economic loss to the Applicant's as he uses them as his main source of livelihood and that of his family who entirely rely on him for upkeep thereby causing undue hardship to him and the said family.

18. As regards jurisdiction, the applicant relied on Article 165 (3) of the Constitution of Kenya 2010 which provides that subject to clause (5), the High Court shall have—unlimited original jurisdiction in criminal and civil matters hence this Honourable Court has an unfettered jurisdiction to appropriate orders sought and/or give any direction it considers appropriate to ensure the Fair Administration of Justice. In this regard, the applicant relied on **Patrick Musimba vs. National Land Commission & 4 Others [2015] eKLR** and **Charles Munyeki Wachira vs. Kenya Pipeline Company Limited [2006] eKLR** where Azangalala, J while referring to the case of **Muthaiga Road Trust Company Limited – vs – Five Continents Stationers Limited & 2 Others CA. No.298 of 2001**

19. The applicant submitted that the unlawful and illegal seizure of the Applicant's sixty eight (68) slot machines took place within the territorial and/or geographical dominion of this Honourable Court wherefore the court is empowered to act and that it is the responsibility and duty of courts of law to check such excesses by the state and its agents and to grant remedial action to protect the aggrieved parties. According to the applicant, Article 165 of the Constitution has also granted this Honourable Court authority to ascertain the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened by the Respondents. The applicant therefore prayed that this Court orders the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents to release the property of the Applicant since their raid to his premises are ridiculous and unreasonable in the context of a modern democratic society. The Court was urged to exercise its jurisdiction judiciously in accordance with sound legal principles and within the constitutional desire to serve substantive justice by acting fairly and justly; paying attention to the specific circumstances of this case, its factual context and the demands. In this regard the applicant relied on the Ugandan case of **Uganda Commercial Bank vs. Kigozi [2002] 1 EA. 305.**

20. The applicant therefore urged the court to allow the Notice of Motion Application dated 16<sup>th</sup> July, 2018 as prayed.

#### **Respondents' Case**

21. Only the 4<sup>th</sup> Respondent opposed this application by way of replying affidavit sworn by **Mogoi Lilian**, a Prosecution Counsel in the 4<sup>th</sup> Respondent's office, Machakos.

22. According to the 4<sup>th</sup> Respondent, under Article 157 of the Constitution and the Office of the Director of Public Prosecution Act No. 2 of 2013, he has the powers to direct the Inspector General of the National Police Service to investigate any information or allegations of criminal conduct and that his mandate includes instituting and undertaking criminal proceedings and discontinuing any criminal proceedings at any stage before judgement; save that in so doing he is obliged to have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

23. While stating that he was a stranger to the allegations made in the application, he however contended that no criminal charges have been instituted against the applicant to warrant his being brought into these proceedings. It was contended that no directive has been issued pursuant to Article 157(4) of the Constitution against the applicant to confiscate, destroy or otherwise deal with the applicant's property.

24. The 4<sup>th</sup> Respondent therefore prayed that the suit against him be dismissed with costs.

### **Determinations**

25. I have considered this application. As the title of these proceedings indicate, the proceedings were instituted by way of Miscellaneous Criminal Application. At the hearing I asked learned counsel for the applicant whether it was proper for the same to be brought by way of miscellaneous criminal application taking into consideration the orders sought and whether such a procedure is contemplated in the proceedings of this nature. Learned Counsel insisted that there were authorities to the effect that such a procedure is permissible.

26. It is now clear beyond peradventure that the applicant's complaints were that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions were unconstitutional and unlawful. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, provides for the procedure for moving the court and in rule 4 thereof, it provides that:

**Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.**

27. Rule 10 thereof provides as follows:

**(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.**

**(2) The petition shall disclose the following—**

**(a) the petitioner's name and address;**

**(b) the facts relied upon;**

**(c) the constitutional provision violated;**

**(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;**

**(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;**

**(f) the petition shall be signed by the petitioner or the advocate of the petitioner;**

**and**

**(g) the relief sought by the petitioner.**

**(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.**

28. It is clear that the applicant herein fell foul of the prescribed procedure and instead of taking a remedial action, his learned counsel maintained and insisted, quite improperly in my view, that he was entitled to move the Court in the manner he did. While this court appreciates that rule 10(3) and (4) confers upon this Court *epistolary jurisdiction*, that jurisdiction ought not to be abused. Where the Court finds that the said jurisdiction is being abused, the Court may well decline to issue the orders sought.

29. It has been held time and again that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. See **Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**. Accordingly in **Ngare vs. Attorney General and Another [2004] 2 EA 217**, it was held that:

**“Once the Chief Justice enacted the rules a party cannot now ignore these rules as if they did not exist since procedural rules**

are not made for fun.”

30. The rationale for following a prescribed procedure was restated in Chelashaw vs. Attorney General & Another [2005] 1 EA 33, where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. In Jaldesa Tuke Dabelo vs. Independent Electoral & Boundaries Commission & Another [2015] eKLR, the Court of Appeal held that:

**“It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. Article 159 of the Constitution or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action.”**

31. In Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651, the Court of Appeal held that:

**“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.”**

32. It is therefore clear that these proceedings were not procedurally commenced. It must be noted that the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* are made pursuant to Article 22(3) of the Constitution. In Chelashaw vs. Attorney General & Another [2005] 1 EA 33, it was appreciated that Rules made under Constitutional powers are superior and stand above those made under say a statute and they should be given more regard and force since they reflect the sovereign will of the people expressed in the spirit of the Constitution. While I agree with the decisions cited by the applicants on this point, it is my view that prescribed procedures ought not to be ignored ignobly or with impunity. It would seem that the applicant was avoiding the payment of fees prescribed for filing petitions. However as was held in James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch.

33. However as the Respondents apart from the 4<sup>th</sup> Respondent did not oppose the application, I will proceed to deal with the merits of this application.

34. In this case the applicant contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have unconstitutionally and unlawfully confiscated his slot machines, which allegation as I have stated has not been seriously opposed. The 4<sup>th</sup> Respondent has simply contended that he ought not to have been brought into these proceedings. On my part I associate myself fully with the views of Mumbi Ngugi, J in Standard Newspapers Limited & Another vs. Attorney General & 4 Others [2013] eKLR that:

**“It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary state actions could severely affect the personal freedoms and associated fundamental rights that are intended to be a predominant feature of democratic society. While I agree that the right to privacy is not absolute and must be balanced against the intended purpose for intrusion, such limitation should not be one that will risk stripping off the very core of the right or freedom. The manner in which the search and seizure is carried out must not expose persons to further violation of other rights. I am persuaded in this regard by a consideration of the provisions of international conventions to which Kenya is a party, as well as judicial precedents on this issue from other jurisdictions.**

39. Article 17 of the International Convention on Civil and Political Rights (ICCPR) seeks to guard against arbitrary search or other infringement on the right to privacy by providing as follows:-

**“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.**

**2. Everyone has the right to the protection of the law against such interference or attacks.”**

40. In South Africa, the Constitutional Court, while dealing with the question of search and seizure in the case of *The Investigating Directorate: Serious Economic offences and others vs. Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (CCT1/00) [2000] ZACC 12*, observed as follows:

[54] ...There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.” (Emphasis added)

41. Section 8 of the Canadian Charter of Rights and Freedoms stipulates that: "Everyone has the right to be secure against unreasonable search or seizure". In the case of *Hunter v Southam (1984) 41 CR (3d) 97 (SCC)* and *R v Collins (1987) 56 CR (3d) 193 (SCC)*, it was held that the purpose behind Section 8 is to protect the privacy of individuals from unjustified state intrusions and that this interest in privacy was however limited to a "reasonable expectation of privacy".

The Fourth Amendment of the United States Constitution provides that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

43. In the case of *Bivens v Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)* the Supreme Court of the United States noted as follows with regard to the protection;

“An agent acting –albeit unconstitutionally–in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own....Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”

44. I wholly agree with the sentiments expressed in the decisions from various jurisdictions set out above.

45. While it is true that police have a duty to prevent commission of crimes, they must, just like everyone else, abide by the law, and there must be due process in everything that they do in exercise of their mandate to prevent the commission of crime. To hold otherwise would be to say that the rules and dictates of democracy are too tedious to observe and an unnecessary inconvenience; and this would result in anarchy and negate the very core principles of our Constitution.”

35. I also agree with the decision in Ugandan case of *Uganda Commercial Bank vs. Kigozi [2002] 1 EA. 305* that:-

“where there is no justifiable cause for impounding or seizing and detaining the property; and where there is no logical explanation as to why police would, given the entire set of circumstances, take action to seize and detain the property such seizure and detention was not only wrongful but also unlawful; and calls for atonement in damages”.

36. Article 47(2) of the Constitution provides 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 the right to be given written reasons for the action. That the Applicant's rights have been adversely affected by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' action cannot be doubted. The Applicant is no doubt entitled to use its machines pursuant to Article 40 of the Constitution unless in so doing the law has been violated and if his interest therein is to be restricted, he is entitled to written reasons for the said denial. The said Article imposes a duty on the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents to furnish the Applicant with written reasons why the subject machines are still being impounded.

37. In my view to impound or confiscate a citizen's property without affording reasons therefor constitute an abuse of power. As was stated by Nyamu, J (as he then was) in *Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:*

“The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.”

38. In *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240* the learned Judge expressed himself as follows:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land .....regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning

**and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. “**

39. As stated hereinabove the Respondents, apart from the 4<sup>th</sup> Respondent, have not sworn any affidavit to controvert the averments made by the applicant. The said Respondents have therefore not factually defended their decision to continue impounding the applicant's said machines. The law is that where an authority entrusted with the decision making power does not give reasons as enjoined by Article 47 of the Constitution, the Court may well assume that there were none or that the reasons were irrational.

40. In the premises I find merit in this application. The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein and/or their subordinate officers and/or any other person acting under or through them are hereby directed to immediately and forthwith release the sixty eight (68) slot machines belonging to the applicant herein.

42. As the prescribed procedure was not adhered to and as the parties herein did not wholly comply with the directions to furnish the court with soft copies of their pleadings and submissions in word format, there will be no order as to costs.

43. Since these proceedings have been dealt with as if it was a petition, before the formal order is extracted, the Deputy Registrar is hereby directed to assess the filing fees as if this was a petition and collect the unpaid fees from the applicant and/or his counsel.

44. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 28<sup>th</sup> day of January, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Mogoi for the 4<sup>th</sup> Respondent**

**CA Geoffrey**