



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO.3 OF 2018**

**JAMES KIPKORIR KEME.....1<sup>ST</sup> APPLICANT**

**NOAH TUWEL.....2<sup>ND</sup> APPLICANT**

**DIANA MUTHONI.....3<sup>RD</sup> APPLICANT**

**SAMSON KIBET YEGON.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**JOHN KARUGU KIMANI**

**THE ASSISTANT COUNTY COMMISSIONER**

**RORET WARD DIVISION.....1<sup>ST</sup> RESPONDENT**

**RICHARD BET**

**THE CHIEF AINAMOI LOCATION.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF KERICHO**

**TOWNSHIP LOCATION.....3<sup>RD</sup> RESPONDENT**

**NANCY CHEPKORIR RUTOH**

**THE CHIEF KAPSOIT LOCATION.....4<sup>TH</sup> RESPONDENT**

**JOSEPH CHELOGOI**

**THE CHIEF KAONYO LOCATION.....5<sup>TH</sup> RESPONDENT**

**SAMUEL CHEBOCHOK**

**THE CHIEF KAPSOOS LOCATION.....6<sup>TH</sup> RESPONDENT**

**MATHEW KISUI**

**KAPSOIT SUB LOCATION.....7<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY FOR**

**INTERNAL SECURITY**

AND COORDINATION OF

NATIONAL GOVERNMENT.....9<sup>TH</sup> RESPONDENT

REGIONAL COMMISSIONER,

RIFT VALLEY.....10<sup>TH</sup> RESPONDENT

COUNTY COMMISSIONER,

KERICHO.....11<sup>TH</sup> RESPONDENT

**RULING**

1. The applicants/petitioners (hereafter ‘the petitioners’) have two applications pending before this court, dated 19<sup>th</sup> April and 2<sup>nd</sup> May 2018 respectively. In the application dated 19<sup>th</sup> April 2018, the petitioners seek orders as follows:

*a) That this matter may be certified urgent and disposed expeditiously owing to reasons of urgency.*

*b) That pending the hearing and determination of this application and/or petition, an order of stay of execution of the enforcement of the directive of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and such other officer and/or persons acting however under his authority or otherwise to impound all coin slit machines in Kericho County and transport them to the office of the Regional Commissioner, Rift Valley for destruction.*

*c) That pending the hearing and determination of the substantive petition, a mandatory injunction be issued directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents and any such officers and/or persons acting whatsoever under their authority or otherwise to render and/or provide a detailed inventory stating the physical state, content and the whereabouts of all 43 coin slot machines confiscated and/or seized from the petitioner’s premises in Kericho County and in custody of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein, and to forthwith file the same in court.*

2. The application dated 2<sup>nd</sup> May 2018 seeks orders to include other parties as petitioners in this petition.

3. The petitioners seek in the substantive petition to challenge the decision of the 1<sup>st</sup> respondent to seize their coin slot machines and transfer them to Nakuru, an action they term malicious and an abuse of power. They further argue that the actions of the 1<sup>st</sup> respondent infringe on the powers of the Director of Public Prosecutions, are arbitrary and are in violation of their constitutional rights.

4. In response to the application and the entire petition, the office of the Attorney General filed a Notice of Preliminary Objection dated 30<sup>th</sup> May 2018 in which it raises the following grounds:

*1. That this Honourable Court lacks jurisdiction to hear and determine this application.*

*2. That the application herein is sub-judice in view of the petitioner’s averments in grounds 6 and 7 of their application and the supporting affidavit of James Kipkorir Kemei.*

*3. That the applications herein is an abuse of the court process.*

5. When the parties appeared before me on 4<sup>th</sup> June 2018 they agreed to canvas the preliminary objection by way of written submissions which they duly filed, and which I have read and considered.

6. It is correct, as submitted by the petitioners, that a preliminary objection should be based on a pure point of law. I think the definition of a preliminary objection as set out in the case of Mukisa **Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** is too well known to require much discussion. However, in this case, I understand the Attorney General’s preliminary objection to be based primarily on section 6 of the Civil Procedure Act which provides as follows:

***“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*** (Emphasis added)

7. The basis of this objection by the Attorney General is grounds 6 and 7 of the applicant’s application dated 19<sup>th</sup> April 2018, and the averments in paragraphs 12 and 13 of the supporting affidavit of James Kipkorir Kemei sworn on 2<sup>nd</sup> May 2018.

8. At ground 6 and 7 in support of the application dated 2<sup>nd</sup> May 2018, the applicants state as follows:

**6. That the applicants herein are the PETITIONERS No. 197, 38, 18 respectively in the CONSTITUTIONAL PETITION No.v447 of 2016 (consolidated with petition No. 482 of 2016) IN THE HIGH COURT OF KENYA AT NAIROBI.**

**7. There is a valid and pending a conservators' Court Injunction/Order issued by Hon. Justice Mureithi on 19<sup>th</sup> December 2016 against the 1<sup>st</sup> to 6<sup>th</sup> respondents restraining them as officials, agents and representatives of the MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT, THE 2<sup>ND</sup> 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 send, forcibly confiscate betting gaming and machines, disrupt business or in any way suspend or close operations of the said businesses.**

9. Paragraphs 12 and 13 of the affidavit of Mr. Kemei rehash the above grounds.

10. I fully agree with the submissions of the petitioners in their written submissions, in response to the ground that the court lacks jurisdiction to hear this petition, that Article 165 of the Constitution grants this court jurisdiction to deal with alleged violation of their constitutional rights.

11. However, I cannot agree, as the applicants seem to suggest at page 8 of their submissions, that they can be parties to a petition before the High Court in Nairobi, then file another petition dealing with the self-same issues before this court, ostensibly to deal with alleged unlawful action taken in respect of their property which is situate in Kericho County within the territorial jurisdiction of this court. To hold otherwise would be to defeat the purpose of the limitation imposed by section 6 of the Civil Procedure Act. It would lead to countless suits all over the county on the same issue. This would not be a useful way of expending precious and limited judicial time, and would more likely than not lead to conflicting decisions and chaos in the administration of justice.

12. In the circumstances, I find the present petition and the various applications therein an abuse of the court process. The preliminary objection by the Attorney General therefore succeeds. The petitioners and their co-petitioners in other parts of the country have a consolidated petition which, from the case number, has been pending in the system for the last three or so years. Let them pursue their claim in that petition, and should there be a violation of the conservatory orders as they allege, they are no doubt aware of the process for dealing with such violations.

13. In the circumstances, the present petition is hereby struck out but with no order as to costs.

**Dated Delivered and Signed at Kericho this 27<sup>th</sup> day of February 2019.**

**MUMBI NGUGI**

**JUDGE**