



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

MISC. CRIMINAL APPLICATION ON. 33 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 OF KENYAN SO FAR AS THE PETITIONER’S CONSTITUTIONAL RIGHTS UNDER ARTICLES 27,28,29,31,40 AND 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 THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013)

AND

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

IN THE MATTER OF AN APPLICATION

BETWEEN

KIPKEMOI KETER BOIT.....APPLICANT

VERSUS.

COUNTY COMMISSIONER BUNGOMA.....1ST RESPONDENT

COUNTY POLICE COMMANDER, BUNGOMA.....2ND RESPONDENT

COUNTY A.P. COMMANDANT, BUNGOMA.....3RD RESPONDENT

WEBUYE SUB-COUNTY AP. COMMANDANT.....4TH RESPONDENT

THE OCPD WEBUYE POLICE DIVISION.....5TH RESPONDENT

THE CABINET SECRETARY FOR INTERNAL SECURITY &

COORDINATION OF NATIONAL GOVERNMENT.....	6 TH RESPONDENT
MISIKO BARASA, CHIEF WEBUYE LOCATION.....	7 TH RESPONDENT
PIUS WANYONYI, SUB-CHIEF MATULO SUB-LOCATION.....	8 TH RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTION.....	9 TH RESPONDENT
THE ATTORNEY GENERAL	10 TH RESPONDENT

R U L I N G.

The Petitioner/Kipkemoi Keter Boit filed this application dated 21.6.2018 seeking orders that;

1. *THAT the Honourable Court do issue a temporary injunction against the 1st to 8th Respondents herein from conducting a crackdown of business premises specifically to raid, forcefully confiscate betting and gaming machines, disrupt businesses or in any way suspend or close operations of the Applicant's businesses pursuant to the illegal directive of the 6th Respondent*
2. *THAT pending the hearing and determination of this Application this Honourable Court do issue a temporary injunction against the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Respondents from burning and/or in anyway destroying the Applicant's 2 Gaming and Gambling machines confiscated from his business premises in WEBUYE TOWN, Bungoma County and from conducting a crackdown on the Applicant's business premises situated in MAYANJA TOWN, Bungoma County containing 6 Gaming and Gambling machines; specifically to raid, forcefully confiscate betting gaming machines, burn, disrupt businesses or in any way suspend or close operations of the Applicant's pursuant to the illegal directive of the 6th Respondent.*
3. *THAT the Honourable court do issue a summon to 1st to 8th Respondents requiring the said officers to GIVE OR RENDER A PROPER INVENTORY of the confiscated destroyed and turned betting gaming machines belonging to the Applicants herein.*
4. *THAT all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.*

The application is premised on the grounds that;

- (a) *THAT there is an IMMINENT DANGER OF DESTRUCTION of the said machines with an aim obliterating and/or extinguishing the evidence of their unconstitutional, unlawful and illegal activities thereby rendering the Applicant's pursuit of justice to be an exercise in futility.*
- (b) *THAT the said Betting and Gaming Machines are stored in an unsatisfactory, unsafe, insecure and inhabitable condition thereby exposing them to danger, decay and/or depreciation.*
- (c) *THAT there is a reasonable apprehension based on credible and reliable information from trusted informants that a major crackdown is looming in Bungoma region where there are several machines following the illegal directive issued by the 6th Respondent on 30th May, 2018.*
- (d) *THAT there are no Criminal charge(s) preferred against the Applicant herein and/or any of his servants, agents and/or employees in relation to all and/or any of the said machines in any Court of Law within the Republic of Kenya wherefore, and said confiscation and detention in an ungazetted premises is unlawful, arbitrary, inhuman, degrading and draconian with any legal justification whatsoever.*
- (e) *THAT the continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the Applicant as they uses them to their main source of livelihood wherefore if the application herein is not heard expeditiously and orders herein granted, the Applicant will suffer irreparable loss and damage.*
- (f) *THAT it would be just and expedient if the application is heard as a matter of priority to protect the constitutional rights of the applicant from draconian, arbitrary and unjustifiable action.*
- (g) *THAT the 1st to 8th Respondents actions are draconian, unjustifiable, arbitrary, unlawful, illegal and not done in good faith for the purpose of executing the functions of the office but wrongful conduct in furtherance of personal benefit wherefore they should be held personally liable for their actions.*
- (h) *THAT the 1st to 9th Respondents actions amounts to gross violation of the constitution, gross misconduct, misbehavior, incompetence and contrary to the guiding principles stipulated in Section 4 of the National Government Coordination Act (Act No. 1 of 2013), National Police Service Act (Act No. 11A of 2011) and an upfront to the values and principles of public service as expounded in the Constitution, and Public Officers Ethics Act.*
- (i) *THAT the 1st to 8th Respondent endeavors amount to trespass into the Applicants premises wherefore, an infringement of their right to property enshrined in the bill of rights under Article 40 of the Constitution and a violation of the Applicant's*

rights to privacy is held by Article 31 of the Constitution.

The applicant is supported by the Affidavit of Kipkemoi Boit Keter the applicant in which he reiterates the grounds of the application. M/s Njeru for the DPP and the A.G. on behalf of the Respondents filed grounds of opposition. The Main grounds are;

1. **THAT** the said application is unprocedural since no suit has been filed by the applicant.
2. **THAT** the application lacks merit as it is aimed at derailing justice. The 6th Respondent is the Cabinet Secretary for Internal Security and Coordination of National Government. The Security and Welfare of each Kenyan is vested in him.
3. **THAT** the application does not put into account Public Interest and is only working towards enhancement of the economic gains of the applicant. It is selfish in nature.
4. **THAT** this application does not meet the threshold requisite for grant of the orders it seeks.
5. **THAT** the 6th Respondent is acting within the confinements of the law and is carrying out his duties and Responsibilities.

By Consent of the parties, this application was to be disposed of by way of written submissions. Both parties filed their respective submissions. Mr. Bitok for the Applicant submitted;

The Application in Court is by way of Miscellaneous Application filed in Court on 3/7/2018 seeking that the Respondents herein be restrained from destroying his Gaming and Betting machines. It is further seeking that in inventory be provided by the respondents detailing their state, whereabouts and their content of the said machines. The Applicant's case against the Respondents is that it raided his place of business situated in Webuye Trading Centre (T-Junction) and confiscated 6 machines, 4 which were destroyed by burning under the supervision of the 1st to 5th and 7th to 8th Respondents herein.

Aggrieved, the Applicant reported the matter with Webuye Police Station and obtained Ob No. 14/06/2018 which he noted that the destruction occasioned to his machines by known person(s). Based on this, the applicant has instituted this process with the aim of preserving what is in the hands of the Respondents herein from being obliterated and to preserve the ones that have not been confiscated from falling under the same fate. At the onset, our submission the 9th Respondent is properly suited.

In support of his application the applicant avers that the confiscation of the gaming machines by the respondents is a violation of his Constitutional rights, and therefore unlawful. He submits that he has been issued with a license to operate the gaming machine and the order to confiscate the same on pretext of Public interest is unlawful.

M/s Njeru for the State filed submissions in which she submitted no report of crime was reported to the Webuye Police Station, the office of the DPP is wrongly enjoined in the proceedings.

In a further affidavit sworn on 26.6.2018 the applicant depones that he was an applicant in Nairobi Constitutional Petition No. 447/2016 where conservatory orders were granted. Mr. Bitok for the applicant submitted that the confiscation of the 6 betting and gaming machines belongs to the applicant was unlawful and in blatant disregard to the Constitution in regards to personal property which should not be made unless just compensation in suit has been made. Counsel further submits that the confiscation amounted to a unfair execution of administrative action.

The applicant in this application is seeking for a temporary injunction to restrain the Respondent from confiscating the gaming machines. There is no Petition, Judicial Review application or Plain filed or intended to be filed annexed to this application. The grounds upon which a temporary injunction can be granted were well stated in ***Giella Vs. Cassman Brown (1973) EA 358 as;***

- i. *The Applicant must establish that he has a prima facie case with probability of success.*
- ii. *That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- iii. *When the Court is in doubt, to decide the case on a balance of convenience.*

Even if the application was seeking conservatory orders under the provision of the Constitution he must establish;

- i. *An arguable case sometimes called prima facie arguable case.*
- ii. *That the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible.*
- iii. *In constitutional cases, the public interest in the matter would be considered and generally upheld.*

In this application the applicant has annexed an order granted in Nairobi. From the documents annexed, these were interim orders granted in 2016. The appellant has not shown what has become of the main suit. He cannot therefore base his claim in this application on validity of those orders which in my view if they have not been extended or the suit finally concluded will be null and void.

In the premises, this is an application which is not premised on any suit or Petition filed or intended to be filed. I find that the applicant has not satisfied the court that this court should grant the prayer sought. This application is hereby dismissed. Interim orders issued on 3rd July 2018 are hereby vacated.

Dated and Signed at Bungoma this 25th day of February, 2019.

S.N. RIECHI

JUDGE.