



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 15 OF 2019**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3), 2,10,19,20(1) (2) (3) (4) 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 KENYA IN 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 ON 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 SECTIONS 118 AND 121 OF THE CRIMINAL PROCEDURE ACT (CHAPTER 75 LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**KIPKEMBOI BOIT KETER & 3 OTHERS..... APPLICANTS**

**VERSUS**

**DCC KIMININI SUB-COUNTY.....1<sup>ST</sup> RESPONDENT**

**ACC-1 KIMININI SUB-COUNTY.....2<sup>ND</sup> RESPONDENT**

**ACC KIMININI SUB-COUNTY.....3<sup>RD</sup> RESPONDENT**

**AP KIMININI SUB-COUNTY.....4<sup>TH</sup> RESPONDENT**

**CHIEF KIMININI SUB-COUNTY.....6<sup>TH</sup> RESPONDENT**

**ASSISTANT CHIEF NABISWA SUB-LOCATION.....7<sup>TH</sup> RESPONDENT**

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTION.....8<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL.....9<sup>TH</sup> RESPONDENT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Introduction

1. What is before me is a Notice of Preliminary Objection dated 12/2/2019. The same is brought on behalf of the 9<sup>th</sup> Respondent, the ODPP. The grounds of opposition are:-

*1. THAT the application as filed is fatally defective, an abuse of court process and ought to be dismissed with costs.*

*2. THAT the applicant being a party in Nairobi High Court Constitutional Petition No. 447 of 2016 ought to have filed this application there and not file a fresh constitutional application.*

*3. THAT the Honourable Court do oversee this petition to be transferred to Nairobi High Court and merged with Constitutional Petition No. 447 of 2016.*

*4. THAT the applicant has not annexed any document to show he had license to operate aforementioned business the preliminary objection is against.*

2. The Preliminary Objection is against the applicants' Amended Notice of Motion dated 23/1/2019 by which the applicants seek temporary orders of injunction against the respondents from burning and/or in any way destroying the applicants 27 gaming and gambling machines confiscated from their business premises in KIMININI TOWN Trans Nzoia County and from further conducting a crackdown on the applicants business premises situated in Trans Nzoia County containing 20 gaming and gambling machines, specifically to raid forcefully confiscate betting and gambling machines burn, disrupt businesses or in any way suspend or close operations of the applicants pursuant to the illegal directive of the 1<sup>st</sup> Respondent.

3. The applicants also seek the issuance of court summons to the Respondents requiring the Respondents to give or render a proper inventory of the confiscated betting and gaming machines.

4. The application is supported by the affidavit of Kipkemoi Boit Keter sworn on 23/1/2019 and his Further Affidavit dated 7/2/2019. At paragraph 3 of his Further Affidavit, Kipkemoi Keter Boit depones that he is petitioner in Nairobi High Court Constitutional Petition Number 447 of 2016, in which he appears as 17<sup>th</sup> of the 393 Petitioners. In that Petition, the Hon. Attorney General is the 4<sup>th</sup> Respondent while the Director of Public Prosecutions is the 5<sup>th</sup> Respondent. The Inspector General of Police is the 3<sup>rd</sup> Respondent. The other respondents are the Betting Control and Licencing Board (1<sup>st</sup> Respondent), the Minister for Interior and Coordination of National Government (2<sup>nd</sup> Respondent) Council of Governors (6<sup>th</sup> Respondent) and, Inter-governmental Relations Technical Committee (7<sup>th</sup> Respondent).

Submissions

5. All the parties made their oral submissions when the Preliminary Objection came up for hearing before me on 19/2/2019. Both Mr. Omooria and Mr. Odongo, counsel for the 9<sup>th</sup> and 1<sup>st</sup> and 8<sup>th</sup> Respondents respectively submitted that the only option open to the applicants was to file the instant application in Constitutional Petition No. 447 of 2016 which is still pending before the High Court in Nairobi and that the decision to mount this application outside that petition is an abuse of court process. Secondly, counsel submitted that the prayer for an injunction cannot stand because there is no suit (Petition) on which the instant application is anchored, and accordingly the application is fatally defective and cannot succeed as it does not meet the threshold for the granting of interlocutory injunctions.

6. Mr. Bitok counsel for the applicants opposed the Preliminary Objection on grounds that the subject matter of Nairobi High Court Petition Number 447 of 2016 is different from that of the instant application which is a Miscellaneous Criminal Application concerning destruction of betting and gaming machines. Counsel thus submitted that it would not be prudent to transfer this matter to Nairobi for consolidation with Constitutional Petition No. 447 of 2016.

7. Counsel also submitted that the parties in the two matters are different. Counsel however conceded that the substantive issue in these two matters is as raised in Nairobi High Court Petition Number 447 of 2016.

Analysis and Determination

8. I have now carefully considered the Preliminary Objection, the submissions and the law. The conclusion I have reached is that the Preliminary Objection has merit. First and foremost, the applicants concede that there is pending before the High Court in Nairobi Constitutional Petition Number 447 of 2016 in which the 1<sup>st</sup> Applicant herein is the 17<sup>th</sup> Petitioner. The 1<sup>st</sup> Applicant concedes that the issues raised in the instant application form the substratum of Nairobi High Court Petition Number 447 of 2016. Admittedly also the Hon. The Attorney General and the Director of Public Prosecutions who are Respondents in the instant application are Respondents in the Nairobi

Petition. Admittedly also conservatory orders in the Nairobi petition 447 of 2016 are still in force against the Respondents herein. I therefore agree with counsel for the 1<sup>st</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents that the instant application is an abuse of the court process and should not be allowed.

9. Secondly the applicants' prayer for injunction is ill-fated because of the fact that it does not meet the threshold for the granting of injunctions as set out in **Giella -vs- Cassman Brown & Co. Ltd [1973] EA**. There is no suit in this case upon which the application for injunction would rest. Should the instant application be transferred to Nairobi for consolidation with Nairobi High Court Petition No. 447 of 2016. In my humble view such an order is unnecessary. There are live orders in the Nairobi Petition from which the applicants are benefitting. If there is any breach of those orders, the applicants should move the court therein appropriately.

### **Conclusion**

10. In light of the above findings the preliminary objection dated 12/2/2019 be and is hereby upheld. The application dated 23/1/2019 is struck out but with no order as to costs.

It is so ordered.

**Ruling written, delivered, dated and signed in open court here at Kapenguria on this 14<sup>th</sup> Day of March, 2019.**

**RUTH N. SITATI**

**JUDGE**

### **In the Presence of:-**

Mr. Bitok (absent) for Applicants

Miss Kiptoo for Odongo for 1<sup>st</sup> and 8<sup>th</sup> Respondents

Miss Kiptoo for Omooria for 9<sup>th</sup> Respondent

Mr. Juma - Court Assistant