



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCALLENEOUS CRIMINAL APPLICATION NO. 9 OF 2018

TIMOTHY MAUNDA MBITI.....APPLICANT

VERSUS

FREDRICK KABAIKU KAGAI(OCPD)

BUNYALA/PORT VICTORIA POLICE DIVISION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. **Timothy Maunda Mbiti**, the applicant herein, has moved the court by way of Notice of Motion dated 14th June 2018 under Articles 10, 25, 27, 28, 40, 47, 157, 232, 238 and 244 of the Constitution of Kenya, 2010 and Rules 3, 5, 18 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Sections 4 and 15 of the National Government Co-ordination Act, sections 3, 49 and 55 of the National Police Act, section 4 of the office of the Public Prosecutions Act, sections 4 and 5 of the Office of the Attorney-General Act and all other enabling provisions of the law.

2. He is seeking orders as follows:

- a) That this court do issue summons to the 1st respondent requiring him to render a proper inventory of the confiscated six Betting and Gaming Machines belonging to the applicant.
- b) That this court do issue an order to the 1st respondent and or his subordinates to release the betting and gaming machines of the applicant.
- c) That the cost of this application be borne by the respondents.

3. The application was supported by a sworn affidavit of the applicant and was premised on the following grounds:

- a) That the applicant herein is a businessman involved in operation of licensed gaming machines within Busia County and other counties within the Republic of Kenya.
- b) That on 9th June 2018, the 1st respondent forcibly raided the applicant's business at Port Victoria and confiscated six Betting and Gaming machines which were taken to Port Victoria police station.
- c) That on 13th June 2018 the 1st respondent removed the said six Betting and Gaming machines to unknown destination.
- d) That there were no criminal charges preferred against the applicant.

4. Section 54 of the Betting, Lotteries and Gaming Act requires an person who involves himself with betting, lotteries and gaming activities to obtain a license from the Board established under the Act. It states:

(1) The Board may, subject to any regulations made under this Act, issue a permit authorizing the use of a gaming machine on premises approved by it.

(2) A permit issued under this section shall be subject to such conditions as the Board may impose and to the following conditions—

(a) not more than two gaming machines are made available for play in any one building or, where different parts of a building are occupied by two or more different persons, in the part or parts of the building occupied by any one of those persons; and

(b) the stake hazarded in order to play the game once does not exceed one shilling; and

(c) all stakes hazarded are applied either in the payment of winnings to a player of the game or for purposes other than private gain; and

(d) the premises on which the gaming machine is used are not wholly or mainly used by persons under the age of eighteen years.

(3) A person who contravenes any conditions provided for in subsection (2) or imposed by the Board shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both.

(4) In this section—

(a) in construing subsection (2)(c), stakes hazarded shall not be held to be applied for purposes of private gain by reason only that their application for purposes other than private gain resulted in benefit to any person as an individual:

Provided that, where a payment falls to be made by way of hiring, maintenance or other charge in respect of a gaming machine and the amount of that charge falls to be determined wholly or partly by reference to the extent to which that gaming machine is used for the purposes of gaming, then that payment shall be held to be an application of the stakes hazarded for purposes of private gain;

(b) “building” includes the curtilage of the building.

For the applicant to claim that he was operating a bona fide business, he must show the court that he had a license issued by the Betting Control and Licensing Board, established under section 3 of the Betting, Lotteries and Gaming Act. He has not exhibited such a licence. This court cannot be called to aid a person who has deliberately breached section 54 of the Betting, Lotteries and Gaming Act.

5. The applicant has displayed a single permit issued by the County Government of Busia. The permit was issued in respect of a gaming business. A permit by the County Government cannot replace a license by a statutory Board as envisaged in the Betting, Lotteries and Gaming Act.

6. Part VII of The National Police Service Act lays down the duties of the police to include investigations, prevention and detection of crime. The applicant has not established a prima facie case to warrant the issuance of the orders sought. To do so, would be tantamount to curtailing the operations of the police to maintain law and order and aiding the breach of the law.

7. In order for the law to come to aid any person, he must demonstrate that he has complied with the law. The applicant did not have the requisite license to operate the lotteries and the gaming machines from the Betting Control and Licensing Board. His business was therefore illegal.

8. The consequences of operating an illegal business is what befell him. His application is in want of merits and is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 29th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE.