



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

PETITION NO 9 OF 2018

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3) (B), (D), 2,
10, 19, 20(1) (2) (3), (4) 21 AND 22 OF THE CONSTITUTION OF KENYA (2010)**

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), THE CHIEFS' ACT (CHAPTER 128 LAWS
(ACT NO 11A OF 2011).**

AND

IN THE MATTER OF VINDICATION OF THE RIGHTS OF

MICHEAL KITHUKA KASINA, SAMUEL MWATELA

BERNAND AND MICHEAL MUTHINI ITUMO

IN THEMATTER OF AN APPLICATION

BETWEEN:

MICHEAL KITHUKA KASINA.....1ST PETITIONER/APPLICANT

SAMUEL MWATELA BERNAND.....2ND PETITIONER/APPLICANT

MICHEAL MUTHINI ITUMO.....3RD PETITIONER/APPLICANT

-VERSUS-

STANLEY KAMANDE, THE DEPUTY COUNTY COMMISSIONER

TAVETA SUB COUNTY.....1ST RESPONDENT

SHARIF SALAR THE ASSISTANT COUNTY COMMISSIONER

TAVETA WARD/DIVISION.....2ND RESPONDENT
 SHARON MUNOKO THE ASSISTANT COUNTY COMMISSIONER

CHALLA/NJUKINI WARD/DIVISION.....3RD RESPONDENT
 WILSON ZANGURANI, THE CHIEF

BOMBENI LOCATION.....4TH RESPONDENT
 CATHERINE KIDONDI THE

CHIEF CHALLA LOCATION.....5TH RESPONDENT
 JUSTIN KIMIRI MISHILI THE

ASSISTANT CHIEF CHALLA SUB LOCATION.....6TH RESPONDENT
 THE DEPUTY O.C.P.D. TAVETA POLICE
 DIVISION JOHANA T. LEDAMAKO, ADMINISTRATION POLICE

TAVETA SUB-COUNTY.....8TH RESPONDENT
 CABINET SECRETARY FOR THE INTERNAL
 SECURITY AND CO-ORDINATION OF
 NATIONAL GOVERNMENT.....9TH RESPONDENT
 ATTORNEY GENERAL FOR THE
 REPUBLIC OF KENYA.....10th RESPONDENT

R U L I N G

1. The Court has before it an application for interim orders and a constitutional and human rights petition. There are three Petitioners, Michael Kithuka Kasina, Samuel Mwatella Bernand and Michael Muthini Itumo. They describe themselves as businessmen and inhabitants of Taita Taveta County.

2. The Application and Petition were filed together under a Certificate of Urgency filed late on 21st May 2018. In the circumstances it did not come before the Court until 22nd May 2018, when this Court made the following Orders:

"1. The Petitioners to serve all and each one of the Respondents forthwith (emphasis added)

2. The Petitioners to file and serve a supplemental affidavit setting out:

(1) The Addresses of the premises from which the betting and gaming machines are alleged to have been removed

(2) The serial number of each machine said to be removed

(3) The total number of machines removed and in relation to each machine the premises from which it was removed

3. Such Supplemental Affidavit to be filed and served within 7 days

4. Respondents to file and serve their Responses within 7 days of service

5. *Costs Reserved*

6. Mention on 8th June 2018"

3. On 8th June 2018, the Applicants through their Advocate took a different date for the mention. For various reasons the Matter did not

come before the Court until 19th June 2018. The Applicants had filed their Supplemental Affidavits but on 6th June 2018 instead of 29th May 2018. On 19th June 2018 the Petitioners were represented but the Respondents were not.

4. On 28th June 2018 the Petitioners were represented by Mr Karanja, Advocate and the Respondents by Mr Mwandanje State Counsel.

5. The Parties are described in the Petition. The following is the description used.

(a) The First Petitioner Kevin Michael Kithula Kasina is a businessman. He is resident in Calla, Taveta Sub-County, Taita Taveta County.

(b) The Second Petitioner Samuel Mwatela Bernard is a businessman. He is resident in Taveta Town, Taveta Sub-County, Taita Taveta County.

(c) The Third Petitioner, Michael Ithini Itumo is a businessman. He resides in Taveta Town, Taveta Sub-County. In fact from a subsequent application the Court is also aware he is a serving police officer.

(d) The First Respondent is an Administrative Officer. He is said to be in charge of Taveta Sub-County, Taita Taveta County. He is also said to be an agent of the Ministry of Interior and Coordination of the National Government co-ordinating the functions of the National Government within the said Sub-County.

(e) The Second and Third Respondents are Administrative Officers. They are said to be in Charge of Taveta and Challa Wards/Divisions respectively. They are also said to be agents of the National Government co-ordinating the functions of the National Government within the said Wards/Divisions

(f) The Fourth, Fifth and Sixth Respondents are Administrative Officers in charge of Bombeni, Challa Location and Challa Sub Location, respectively. They are also said to be agents of the National Government co-ordinating the functions of the National Government within the said Locations and Sub-Locations.

(g) The Seventh and Eighth Respondents are agents of the National Police Service (Kenya Police Service and Administrative Police Service respectively) and the Inspector General being the officers in charge of, stationed at and/or operating within Taveta Sub-County, Taita Taveta County, pursuant to the **National Police Service Act (No 11A of 2011)**

(h) The Ninth Respondent is a State Officer constitutionally and statutorily charged with co-ordination of the functions of the National Government at both the national and county levels of governance giving effect to **Articles 131(1)(b) and 132(3)(b) of the Constitution of Kenya 2010.**

(i) The Tenth Respondent is a constitutionally and statutorily mandated office that is the principal legal adviser to the Government and represents the National Government in court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings.

6. As stated above, the Application is brought under a certificate of urgency. The Reasons given for the Urgency are that:

(1) On diverse dates between 30th April 2018 and 10th May 2018 the 2nd and 8th Respondents herein acting under the illegal and unlawful directions of a directive issued by the 9th Respondent sometime in January 2018 forcibly raided the Petitioners' Business Premises in Taveta Town and Challa Shopping Centre in Taveta Sub County, Taita Taveta County, within the Republic of Kenya disrupting their business and confiscated their Betting and Gaming Machines totaling to about TWENTY (20) MACHINES and took them to the 1st Respondent's Offices at Taveta town where they are still kept to date.

(2) There are no Criminal Charge(s) preferred against the Applicants herein and/or any of their 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, the said confiscation and detention in a non gazetted premises is unlawful, arbitrary, inhuman, degrading and draconian without any legal justification whatsoever.

(3) There is **AN IMMINENT DANGER OF DESTRUCTION** of the said machines by 1st and 9th Respondents herein 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.

(4) The said Betting and Gaming Machines are stored in an unsatisfactory, unsafe, insecure and inhabitable condition thereby exposing them to damage, decay and/or depreciation.

(5) Despite the Applicant's numerous visits to the relevant Respondents' offices requesting the release of their property, the said Respondents have blatantly rejected to listen to the Applicants pleas and release them.

(6) The continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the Applicants as they use them as their main source of livelihood whereof if the Application herein is not heard expeditiously and Orders herein granted, the Applicant will suffer irreparable loss and damage.

(7) 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.

(8) The 1st and 9th 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 whereof they should be held personally liable for their actions.(emphasis added)

(9) The 1st and 9th Respondents' actions amounts to GROSS VIOLATION OF THE CONSTITUTION, GROSS MISCONDUCT, MISBEHAVIOUR, INCOMPETENCE and contrary to the Guiding Principles stipulated in **Section 4 of the National Government Co-ordination 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.**

(10) The 1st and 9th Respondents' endeavours amount to trespass into the Applicant's 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 my Right to Privacy held by **Article 31 of the Constitution**. The Honourable Court has inherent and unfettered jurisdiction to grant the Orders sought herein.

7. The Application is brought by Notice of Motion. It is brought "Under Article 10, 25, 27, 28, 40, 47, 257, 232, 238 and 244 of the Constitution of Kenya 2010, Rule 3, 5, 18 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 1A, 1B and 3A of the Civil Procedure Act (Chapter 21 Laws of Kenya), & Order 51 of the Civil Procedure Rules, Section 4 and 15 of the National Government Co-ordination Act (Act No. 1 of 2013), Sections 3, 49 and 55 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 all other enabling provisions of law)" It seeks the following Orders:

1. THAT this matter be certified as urgent and the same be heard ex-parte in the first instance and service thereof be dispensed with. I(spent)

2. THAT the Honourable Court do issue a SUMMONS to the **1st and 8th Respondents** requiring the said officers to GIVE OR RENDER A PROPER INVENTORY of the confiscated Betting and Gaming Machines belonging to the Applicants herein.

3. THAT this Honourable Court be pleased to issue an order directed at **1st and 8th Respondents** herein and/or their subordinate officers and/or any other person acting under or through them to immediately and forthwith release Betting and Gaming Machines belonging to the Applicants pending hearing and determination of this Application.

4. THAT this Honourable Court be pleased to issue an order directed at **1st and 8th Respondents** herein and/or their subordinate officers and/or any other person acting under or through them to immediately and forthwith release Betting and Gaming Machines belonging to the Applicants pending hearing and determination of this Petition.

5. THAT all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.

6. THAT costs of this Application be borne by the Respondents.

8. The Application is Supported by the Affidavit of Michael Kithuka Kasina, the First Petitioner. The Application relies on the Grounds that:

(1) On diverse dates between **30th April 2018 and 10th May 2018** the 2nd and 8th Respondents herein acting under the illegal and unlawful directions of a directive issued by the 9th Respondent sometime in January 2018 forcibly raided the Petitioner's Business Premises in **Taveta Town and Challa Shopping Centre** in Taveta Sub County, Taita Taveta County within the Republic of Kenya disrupting their business and confiscated their Betting and Gaming Machines totaling to about **TWENTY (20) MACHINES** and took them to the **1st Respondent's** Offices at Taveta town where they are still kept to date.

(2) There are no Criminal Charge(s) preferred against the Applicants herein and/or any of their servants, agents and/or employees in relation to all and/or any of the said confiscation and detention in a non gazetted premises in unlawful, arbitrary, inhuman, degrading and draconian without any legal justification whatsoever.

(3) There is **AN IMMINENT DANGER OF DESTRUCTION** of the said machines by 1st and 9th Respondents herein with an aim obliterating and/or extinguishing the evidence of their constitutional, unlawful and illegal activities thereby rendering the Applicant's pursuit of justice to be an exercise in futility.

(4) The said Betting and Gaming Machines are stored in an unsatisfactory, unsafe, insecure and inhabitable condition thereby exposing them to damage, decay and/or depreciation.

(5) Despite the Applicant's numerous visits to the relevant Respondent's offices requesting the release of their property, the said Respondents have blatantly rejected to listen to the Applicants pleas and release them.

(6) The continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the applicants as they used them as 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.

(7) 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.

(8) The 1st and 9th 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 (emphasis added).

(9) The 1st and 9th Respondents' actions amounts to **GROSS VIOLATION OF THE CONSTITUTION, GROSS MISCONDUCT, MISBEHAVIOUR, INCOMPETENCE** and contrary to the **Guiding Principles** stipulated in **Section 4** of the **National Government Co-ordination Act (Act No. 1 of 2013)**, **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) The **1st and 9th Respondents'** endeavors amount to trespass into the Applicant's 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 my Right to Privacy held by **Article 31 of the Constitution**.

(11) The Honourable Court has inherent and unfettered jurisdiction to grant the Orders sought herein.

9. The Supporting Affidavit sets out that all three Petitioner/Applicants are Businessmen. They are involved in the "Operation of Gaming and Machines within Taita Taveta County. They have shops some which are run by them (directly) and others which are operated by agents who work for a commission and/or salary. The addresses of the shops are not provided, nor are the names of the agents. The Deponent asserts that all three petitioners are legal and bona fide owners of betting and gaming machines (said to be about 20) which were confiscated by the 2nd to 8th Respondents from their business premises. The business premises are not identified in the Supporting Affidavit and nor are the Machines. At paragraph 6 the Supporting Affidavit states, "**THAT** on diverse dates between **30th April 2018** and **10th May 2018** the **2nd to 8th Respondents** herein acting under the illegal and unlawful directions of a directive issued by the **9th Respondent** sometime in January 2018 forcibly raided the Petitioner's Business Premises in **Taveta Town and Challa Shopping Centre** in Taveta Sub County, Taita Taveta County within the Republic of Kenya disrupting their business and confiscated their Betting and Gaming Machines totaling to about **TWENTY (20) MACHINES** and took them to the **1st Respondent's** offices at Taveta town where they are still kept to date. (Attached hereto and Marked "MK1" are true copies of Our Written Statements detailing how our property was unlawfully impounded)". The Petitioner/Applicants have not been charged with any criminal offence relating to the machines nor the premises.

10. The Supporting Affidavit then goes on to assert that, "... where the said Betting and Gaming Machines are kept is unlawful since it is not a gazetted custody where seized and/or confiscated property should be held pending their production in a court of law". The Affidavit does not explain how the deponent knows where the machines are stored and that the Offices of the Deputy County Commissioner for Taveta Sub-County are not gazetted as a place of custody for confiscated property. The Deponent then asserts that; "**THAT** the 1st to 9th 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.". and "**THAT** I am advised by my advocate which advice I verily believe to be true that the 1st to 9th Respondents' actions amounts to **GROSS VIOLATION OF THE CONSTITUTION, GROSS MISCONDUCT, MISBEHAVIOUR, INCOMPETENCE** and contrary the **Guiding Principles** stipulated in **Section 4** of the **National Government Co-ordination 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**".

11. The Supporting Affidavit states at paragraphs 11 and 12 that;

11. THAT the 1st to 9th Respondents' endeavors amount to trespass into our premises wherefore, an infringement of my Right to Property enshrined in the **Bill of Rights** under **Article 40** of the **Constitution** and a violation of our right to Privacy as held by **Article 31** of the **Constitution**.

12. THAT the continued detention of the said Betting and Gaming Machines has and will continue to cause economic loss to the us as we uses them as our main source of livelihood and that our family who entirely rely on us for upkeep and any continued unlawful withholding of my property will cause me and my family undue hardship.

12. In light of the omissions set out above, the Court did on 22nd May 2018 direct the Petitioners to file a supplemental affidavit setting out (1) the Address of the Premises from which the Betting and Gaming Machines are alleged to have been removed, (2) the Serial Number of each machine said to have been removed, and (3) the Total number of machines removed and in relation to each machine the premises from which it was removed." demonstrating a prima facie case for the allegation of confiscation.

13. The Supplemental Affidavit was directed to be filed and served within 7 days and the Respondents were directed to file their responses within 7 days of service. On 19th June 2018, the Court was told that the Applications had been served but the Supplemental Affidavits had not been filed until 6th June 2018. The Petitioner's Advocate submitted that the confiscated machines were being held in the 1st Respondent's Offices. The Respondents were given another 7 days to respond to the Application within 7 days. It was clearly and categorically ordered that the Application would be heard on 28th June 2018.

14. In the event the Respondents would have had 34 days or so to respond to the complete application. They did not. That omission had the effect that when the matter came before the Court FOR HEARING as Ordered, the Application was not opposed. State Counsel Appearing for the Respondents informed the Court that the Respondents were served on 20th June 2018 meaning they would have had 7 days to respond. However, perusal of the Affidavit of Service informs the Court that the of service was 21st June 2018 and not what State Counsel thought. Either way, that meant they had time some time (6 not 7 days) to comply with the Court Order, even though not as ordered. State

Counsel also said he did not realise that the matter was scheduled for a Hearing. After being given yet more time to take instructions. The Court was then informed that the Deputy County Commissioner stated (in effect from the Bar) that he had not confiscated any machines and there were no machines in his Office. In the circumstances the question the Court must address is whether in light of the applicants failure to serve their Application (a) as directed and (b) is order to allow the Respondents sufficient time to comply.

15. Despite their non-compliance with the Court order, the Respondents neither effectively sought, nor put forward any viable grounds, for seeking an adjournment and the matter was heard. The Court heard oral submissions from the Parties' Advocates.

16. Mr. Karanja for the Petitioners argued that the Application should be allowed as prayed because all the Respondents have put forward are mere denials. Mr Karanja does not provide any explanation for failing to comply with the directions order by serving the Application nearly 30 days after it was filed. He submits that the Application is premised on the grounds that the 2nd to 8th Respondents were acting on "illegal instructions" when they seized the machines. In support of the submission that the instruction given were illegal he points to his Annexure SNB-1. The facts and arguments relied upon by the Petitioner/Applicants are:

- (1) 20 machines were confiscated;
- (2) They were confiscated forcibly and illegally from the premises of the Petitioner/Applicants (Supporting Affidavit paras 4-6);
- (3) The Machines were all owed by the Petitioner/Applicants
- (4) The evidence produced is uncontroverted.
- (5) The seizure of the Machines was contrary to **Sections 118 to 121 of the Criminal Procedure Code.**
- (6) Such wrongful seizure when read with **Article 40 of CoK 2010** amount to an infringement on the fundamental right to property.
- (7) The actions of the Second to 8th Respondents contravene **Section 3, 49 and 55 and 60 and 92 and the 5th Schedule of the National Police Service Act.** The confiscation does not comply with any those requirements and is therefore illegal.
- (8) The seizure is an infringement on the Petitioner's right to privacy.
- (9) The 1st, 2nd, 3rd, 4th and 5th Respondents are Officers of the National Government. Their Positions are created by Statute, namely **Section 15 of the National Government and Co-ordination Act.**
- (10) In the exercise of their executive authority the said officer is are called in the course of their duty to uphold the constitution in particular **Article 120, Article 32, Article 289 and Article 201.**
- (11) They are required to act ethically in the course of their duties and they have not done so.
- (12) The Respondent's conduct in holding the machines is illegal, illegitimate, unlawful and draconian ;
- (13) The Applicants are being caused irreparable loss;
- (14) The Applicants are being prevented from earning a living
- (15) It is only fair and just that the machines are returned while the matter goes to hearing for an assessment of damages.
- (16) Return of the machines will reduce the damages payable and save taxes
- (17) **Article 48** grants all citizens access to justice.

17. As the Respondents have not filed any response to the Application, Mr Mwadaje, State Counsel was able to submit only on the law and not the facts. He directed to Court to **Article 24(a)-(e)** of the **CoK**- the Limitation of Rights, submitting that the Court should hold in high regard that the actions of the Respondents are in all manner in accordance with the law, In addition he relies on **Article 55(d) and 46(c)**. It is submitted on behalf of the Respondents that these Machines are stripping people of their enjoyment of economic rights that the little they have to spend is spent in these machine. The Respondents have moved to help stop this and also to help stop annoying members of the public. Article 55(d) requires the Court to take affirmative action. The Respondents' position is that the gaming machines are out to exploit the young people and therefore the Respondents are moving to protect them in the best interests of society. State Counsel concluded that the Respondent's acted within the ambit of the law. Therefore the Applicants must prove their case.

18. The Applicant's reply was to submit that **Article 24** must be within the law. Article 40 and 31 are not absolute but the conduct complained of is not within **Article 25**. The Respondent's did not follow the law. The Applicant's also rely on **Article 46** - consumer protection, but did not identify the consumers whose rights they are protecting. They reiterated that there has been no breach of the Betting Act and not a single charge has been laid against any of the Petitioner/Applicants. Counsel for the Petitioners also relies on the Authority of

19. The Applicant/Petitioners' Supplementary Affidavit list the affected premises as Juma Kiema Kithekilo Building, DJ Smith Computer Shop and igwe Pub at Challa Trading centre (First Petitioner/Applicant's Machines), total of 5 machines taken and Biashara Street near the main Mosque within Taveta Town 15 Machines belonging to the Second Petitioner/Applicant. In the circumstances, the Petition by the Third Petitioner seems to have no grounds for his Application, although his written statement suggests that 9 of the machines now said to belong to the Second Petitioner were stated to be the property of the Third Petitioner. The "illegal directive" complained of was issued in January 2018, however the invoices demonstrate that the machines were purchased after the instructions said to be issued. The Third Petitioner is a policeman and therefore must be taken to have knowledge of the same instructions as the Petitioner's attribute to his colleagues. The Respondents have not applied to cross-examine any of the Applicants. It seems that only the Applicants can identify the machines and there is no way of verifying ownership.

20. The Applicants' case rests squarely on the allegation that the seizure of the Betting Machines was (a) illegal and unlawful and (b) the consequence of an illegal and/or unlawful direction by someone higher up the hierarchy (c) conducted in an illegal manner, and (d) for the personal benefit of the officers involved. The law relating to search warrants relied upon as not being complied with is set out in the **Civil Procedure Code** which provides; "118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law. [Act No. 22 of 1959, s. 12, Act No. 10 of 1983, Sch.] 118A. Ex-parte application for search warrant An application for a search warrant under section 118 shall be made ex-parte to a magistrate. 119. Execution of search warrants A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may, by the warrant authorize the police officer or other person to whom it is addressed to execute it at any hour. [Act No. 10 of 1983, Sch.] 120. Persons in charge of closed place to allow ingress and egress (1) Whenever a building or other place liable to search is closed, a person residing in or being in charge of the building or place shall, on demand of the police officer or other person executing the search warrant and on production of the warrant, allow him free ingress thereto and egress therefrom and afford all reasonable facilities for a search therein. (2) If ingress into or egress from the building or other place cannot be so obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by section 22 or section 23. (3) Where a person in or about the building or place is reasonably suspected of concealing about his person an article for which search should be made, that person may be searched. (4) If that person is a woman the provisions of section 27 shall be observed. 121. Detention of property seized (1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation. (2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial. (3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise. CAP. 75 Criminal Procedure Code [Rev. 2017] C44 - 47 122. Provisions applicable to search warrants The provisions of subsections (1) and (3) of section 102, and sections 104, 106, 109, 110 and 111, shall, so far as may be, apply to search warrants issued under section 118. That sets out the law in relation to search warrants. Neither Party made any submissions on arrest etc without a warrant with sufficient cause.

21. The first issue for determination is the circumstances under which the Court grants conservatory orders.

14. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

15. In the Privy Council Case of Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions" of the Constitution... In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have... the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too... The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

The Learned Judge also referred to Musinga, J (as he then was) in Petition No. 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the

Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

22. Applicants rely on the absence of search warrants to demonstrate that there was an illegal search. That assertion is supported by the fact that there are no criminal charges against the Petitioners. However, the burden on the petitioners is to satisfy the court that they were carrying on a legitimate business and were duly licenced to do so in each of the premises affected. They have not done so. Even their Supplemental Affidavit is vague and general. There are no specific nor adequate particulars set out. Legal advice is not fact and not appropriate for an affidavit. It is an expression of opinion. As to the “illegality of the search” the application does not set out clearly whether the officers who raided the premises, were officers of the National Police or the Administrative Police. If the allegation is that the Respondents attended personally, that is not substantiated by first hand evidence. Further were they uniformed? There is no evidence. Did they make any statements regarding the commission of any offences. Again, there is no evidence before the court. This court is entitled to and does take judicial notice of the fact that there is an ongoing debate on the issue of gambling and its regulation. There is one view that it is a legitimate business subject to proper regulation. The contrary view is that it is a scourge on society exploitative of the more vulnerable members of society in particular those who can ill afford the loss and children using their dominant market position to do so. A case in point is the Sports Pesa vis-a-vis the link between sponsorship and taxation debate.

23. In addition the court takes judicial notice of the fact that there are ongoing concerns in certain sections of society relating to the positioning of betting machines case to schools and places of worship. Such concerns directive of the previous CS Nkaisery in December 2017. The Applicant/Petitioners were in fact operating betting premises within the meaning of **Section 2 of the Betting, Lotteries & Gaming Act Cap 131**. None of the Petitioners have demonstrated that the premises where they kept the “nearly 20” machines were licenced by the Betting Control and Licencing Board. **The Betting, Lotteries and Gaming Act** sets out the offences relating to unlicenced premises. Within the definition set out in **Section 14(4) of the Act, Section 14 and 28** set out what amounts to an offence. **Section 29(2) and (3)** empower a police officer to arrest without warrant anyone committing an offence under that section. Does that extend to search and confiscation? there were no submissions before the Court. The Applicants state categorically that they have not been charged with any offence. The Respondents have not responded to that, largely because the Applicants failed to serve the Application in adequate time.

The description of the machines set out in the supporting and Supplemental Affidavits suggest they may be Amusement machines within **Section 58 of the Act**. That Section also sets out the requirement for a permit and the prohibition against use by persons under the age of 18. The prescribed penalty is expressed in terms of a fine or imprisonment. Therefore there are Gaming machines requiring a licence or amusement machines requiring a permit in the affected premises. The penalty for infringement is not expressed as seizure of the offending machines. Further the Applicants have not been charged albeit that one of them is going through disciplinary proceedings. When the Applicants visited the Offices of the First Respondent, they say the machines were not returned. They do not tell the court what reason was given for that refusal, if any. The Court also takes Judicial Notice of the existence of other constitutional Petition concerning the confiscation of gaming machines. It seems that there was an order obtained in September 2016. At that time was the Ninth Respondent the current office holder or his predecessor?

24. In addition Judge Mativo is said to have issued conservatory orders restraining the police from conducting the crackdown. The Applicants have not produced a copy of that order. In addition the Government issued a Gazette Notice in May (2018), again neither Party has brought that before the Court. The Applicants state that the confiscation of the machines will prevent them from earning a living. As a consequence they will suffer irreparable harm. Irreparable harm is harm for which liquidated damages are not an adequate remedy (**Ghiella v Cassman Brown**) loss of income does not fall within that category. Therefore any loss the Applicant/Petitioner are found to have suffered in the final analysis can be compensated. The exact scope of their business and/or employment has not been disclosed. In order for the Applicants’ to succeed at this stage they must demonstrate a prima facie case that their rights have been or are being infringed. On the evidence presently before the court they have failed to do so. The facts they have satisfied the court of all that they individually or collectively purchased some machines. Those maybe gaming machines or fruit machines. There was more than one directive aimed at rooting out the use and/or misuse of those types of machines, which is being challenged? The exact directive relied on is said to have been issued in January 2018. However there were various directives dating back to 2016 issued by the current CS Interior and his predecessor, therefore to whom is personal liability to attach? The Applicants had purchased the aforesaid machines. Those machines were operated from various premises in Taveta Sub County. The Applicants say they were confiscated. In so far as the Respondents have responded they deny possession of the machines but not confiscation. Therefore the Applicants are in the invidious position of being frustrated from seeking a remedy from the Appropriate agency. The Application seeks all orders against 8 Respondents. A court will not act in vain. Dealing with each of the complaints and/or prayers.

1. As to whether the Directive from the CS was illegal and/or unlawful has not been prima facie demonstrated, that is a matter for the 8th Respondent at the hearing of the Petition.

2. The Legitimacy of the consequential actions of the 1st to 8th Defendants will flow from the legality of that first decision.

3. As to the personal interest of the Respondents in the machines or the outcome of confiscation, the Applicants have not presented any evidence whatsoever.

4. On the question of inappropriate storage, that allegation is unconvincing against a allegation that the whereabouts are not known

5. Should the court then order return of the machines? If the court was minded to do so, to whom would the order be directed? The answer is unknown. Although it is correct that the court’s inquiry has been frustrated by the Respondents failure to respond, the principal cause is the Applicant’s failure to serve the Respondents as directed notwithstanding their assertion that the application is urgent.

25. In the circumstances, the only order the court can make at this juncture is for the disclosure of the whereabouts of the machines. Therefore it is ordered that.

(1) The Ninth and Tenth Respondent shall within 30 days cause the appropriate officer of each of the law enforcement agencies in Taveta Sub-County to file an affidavit setting out each and every gaming and/or fruit machine seized and/or confiscated anywhere in Taveta Sub-County between the dates of 15th April 2018 and 20th May 2018. In relation to each machine on the list, the deponent shall specify the Area, Town and Building from which the machine was confiscated. Further the Affidavit shall also inform the Court of the current whereabouts of each machine.

(2) The 1st to 8th Respondents shall each within 30 days personally file an affidavit setting out all operations within Taveta Sub-County relating to the seizure and/or confiscation of gaming machines and/or fruit machines between 15th April 2018 and 20th May 2018 and set out the source of their instructions;

(3) In relation to each machine on the list the deponent shall specify the area, town and building from which the machine was confiscated. Further they shall set out the current whereabouts of each machine so seized and/or confiscated.

(4) Failure to comply with this Order shall be deemed to be contempt of the High Court and all its processes.

(5) The Applicants be at liberty to renew their Application following compliance with the above orders.

(6) Costs in the Petition.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 13th day of August 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Applicant/Petitioners: Mr Karanja

All 10 Respondents: Mr Mwandanje