



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLANEOUS CONSTITUTIONAL APPLICATION NO. 2 OF 2018

IN THE MATTER OF CONSTITUTIONAL PETITION, NO 447 OF 2016

(Consolidated with Petition No 482 OF 2016)

IN THE HIGH COURT AT NAIROBI

**IN THE MATTER OF ARTICLES 3, 6, 10, 22 AND 258 AND THE FOURTH SCHEDULE THEREOF 165(3)(b), (d)2, 19, 20(1)(2)
(3)(4), 21 AND 22 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONERS FUNDAMENTAL RIGHTS AND FREEDOMS
PROTECTED BY ARTICLES 27, 28, 29, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER SECTIONS 3, 4(1)(A) AND 30 OF THE CONTEMPT OF COURT ACT, 2016 (ACT NO 46 OF 2016)

SAMUEL KAHIU.....PETITIONER

VERSUS

JECINTA AKINYI SOSO THE ASSISTANT COUNTY COMMISSIONER

ILOODOKILANI WARD/DIVISION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

BACKGROUND OF THE CASE

[1] On 14th January, 2017 the 1st Respondent raided the Petitioner's Business Premises and arrested his agent, one Esther Wangui where she was locked up and the following day was arraigned in Court and was charged, a charge which was rejected under section 89(5) of the Criminal Procedure Act (cap 75) when the Magistrate found that the accused person had valid license as was produced in court.

[2] On 7th February, 2017 the 1st Respondent raided the Petitioner's premises at Elangata-Uwas shopping center within Kajiado County disrupting his business and confiscated his Betting and Gaming Machines. The said machines are still stored in the 1st Respondents offices.

[3] The above series of events led to filing of an Application vide a Notice of Motion dated and filed on 22nd January, 2018.

[4] In the Application, the Petitioner is seeking the following orders;

a) Immediate release of alleged illegally confiscated Petitioner's Betting and Gaming Machines

b) Issuance of a Notice to the 1st Respondent to show cause why contempt of court proceedings should not be commenced against her.

c) Committal of the 1st Respondent to civil jail.

B. THE PETITIONER'S CASE

[5] The Application is anchored on articles 19, 20, 22, 23, 40 and 50 of the Constitution of Kenya, 2010, rules 3 and 23 of the Constitution of Kenya, 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, sections 4 and 15 of the National Government Co-ordination Act, 2013 (Act No 1 of 2013), sections 3, 4(1)(a) and 30 of the Contempt of Court Act, 2016 (Act No 46 of 2016) and all other enabling provisions of the law.

[6] The Application is premised on the following grounds;

a) That the 1st Respondent unlawfully and forcibly raided the Petitioner's Business premises at Elangata-Uwas Shopping Center within Kajiado County disrupting his business and confiscated his Betting and Gaming Machines despite there being a valid License and a Conservatory Order /Injunction displayed on the said premises.

b) There is a Conservatory Order issued by Hon. Justice E. Muriithi on 19th December, 2016 as extended by Hon. Justice JM Mativo on 24th January 2018 against the Respondents restraining them as official, agents and representatives of the Ministry of Interior and Co-ordination and others listed in the Constitutional Petition No 447 of 2016 (Consolidated with Petition No 482 of 2016) in the High Court at Nairobi from conducting a crackdown on the Petitioners/Applicants premises and businesses specifically to raid, forcibly confiscate betting and Gaming machines, disrupt businesses or in any way suspend or close operations of the said businesses.

c) That the 1st Respondent is acting vengefully after the Magistrate Court in Kajiado rejected a charge against one of the Petitioner's agents for operating illegal Gaming and Betting Machines business.

d) There are no criminal charges preferred against the Petitioner herein and/any of its agents for offences related to the said Betting and Gaming Machines.

e) That the said machines are still in stores of the 1st Respondent offices which is unlawful since it is not a gazzetted premises where seized and/or confiscated property should be held pending their production in a court of law.

f) That the said machines are stored in an unsatisfactory, unsafe, insecure and inhabitable condition thereby exposing them to damage, decay and/or depreciation.

g) Despite the Petitioner's numerous visits to the 1st Respondents offices requesting the release of his property, the said respondents have been arrogant and blatantly rejected to heed to the Applicant's pleas and respect the Conservatory Orders in place.

h) That the continued detention of the said machines has and will continue to cause economic loss to the Petitioner as he uses them as the main source of livelihood wherefore if the Application herein is not heard and orders herein granted, the Petitioner will suffer irreparable loss and damage.

i) 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.

C. THE RESPONDENTS' CASE

[7] To respond to the Application, the Respondent filed the following grounds of Opposition on 12th April, 2018.

To determine the matters raised by the Petitioner, the Respondent invited the court to deal with the following main issues that stem from the Application;

- a) Whether the Application complied with the provisions of the law
- b) Whether the Application was filed before a proper court
- c) Whether the 2nd Respondents' reliance on the Grounds of Opposition was fatal; and
- d) Whether the confiscation of the Gaming and Betting machines was unconstitutional

The following are Grounds of Opposition as raised by the Respondents

a) The instant Application is fatally defective and the same is not properly before this Honourable Court; the impugned allegations of contempt of court by the Respondents herein can only be lawfully dealt with in Nairobi's High Court Constitutional Petition No 447 of 2016 that issued the orders that were/ have been allegedly disobeyed by the Respondents herein.

b) The Application is an abuse of courts process of this honorable court as it only meant to delay the hearing and determination of

Nairobi High Court Constitutional Petition No 447 of 2016 that is pending before Hon Justice JM Mativo as the Applicant herein filed an Application for contempt in the High Court at Nairobi on 15th February, 2017 which Application was withdrawn by consent on or about 15th June, 2017 to allow the Petition to proceed for expeditious determination.

- c) The Application is incompetent for want of compliance with section 30 of the Contempt of Court Act, 2016 (Act No 46 of 2016).
- d) The instant Application for contempt proceedings has been prematurely instituted as no Notice to Show Cause has been issued to the Respondents as required by the law.
- e) The Application as drawn is vague, incompetent and bad law, as it does not bear the names of the specific officers being cited for contempt.
- f) The petitioner has misconstrued and misplaced the law relating to contempt of court proceedings.

Submissions by counsel for the Petitioner Mr. Karanja learned counsel for the petitioner submitted on the substratum on allay of issues raised in the petition and grounds of opposition by the respondents. Mr. Karanja advanced the arguments that the petitioner is concerned about the constitutional infringements of their right to private property by the respondents with impunity calling for this court call for sanctions and punishment. According to Mr. Karanja the directive by the respondents to confiscate and order for seizure of the gaming machines violates Article 40 of the constitution. Further Mr. Karanja contended that the confiscation of the gaming machines was done without any due regard to the constitutional rights of the petitioner and the provisions of the criminal procedure code. Mr. Karanja further submitted and argued that the court must protect the rights of the petitioner who have been affected by the directive on gaming machines to be randomly confiscated and stored by the respondents without following the due process of the law. It was learned counsel contention that the respondents should also be guided by all aspects of the constitution including statutory law in their action. Learned counsel walked the court through the provisions of Articles 10,27,28,29,31,40,47, of the constitution to underscore the importance and deliberate recognition of these rights as fundamental to the citizens of this country. In whole Mr. Karanja invited this court to exercise its constitutional jurisdiction to ensure that the respondents in their application of the law does not infringe and threaten the basic and fundamental rights of the petitioners. In support of all facets of the petition learned counsel placed reliance on the following cases; [**Charles Munyeki Wachira V Kenya Pipeline Company Limited [2006] eKLR, Uganda Commercial Bank V Kigozi [2002] 1EA 305, Patrick Musimba V National Land Commission & 4 Others [2015] eKLR, Standard Newspapers Limited & Another V Attorney General & 4 Others [2013] eKLR, Keroche Breweries Limited & 6 Others V Attorney General & 10 Others [2016] eKLR, Mereka & Co. Advocates V Invesco Assurance Company Limited [2015] eKLR, Wilfred Nyaundi Konosi T/A Konosi & Advocates V John Lokorio [2015] eKLR, Jubilee Insurance Company Limited V Daniel Maingi Muchiri [2015] eKLR.**]

The Respondents' Submissions

Ms. Ndirangu for the respondents dwelt in her brief summation on the following issues.

Whether the petitioner complied with the law on gaming and lotteries Act

Whether the petitioner filed the claim in a proper court

Whether the confiscation of the gaming machines was unconstitutional or illegal

Whether the grounds of opposition are fatal to this petition.

Learned counsel relied on the following constitutional, statutory provisions and already decided cases to support the submissions. Contempt of court ACT 2016, (**Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 Others [2014], Giella V Cassman Brown [1973] EA 358, Kenya Planters Co-operative Union V Kenya Co-operative Coffee Millers & Another [2016] eKLR.**)

D. ISSUES FOR DETERMINATION

[8] Having evaluated the Petitioner's Application, the Respondents' Grounds of Opposition and the evidence produced in court, i will summarize the issues for determination as follows;

- i) Whether the Application is vexatious, frivolous and an abuse of courts processes
- ii) The jurisdiction of this Court in Contempt of Court
- iii) Whether the Constitutional rights of the Petitioner have been violated
- iv) Orders of the Court

D. ANALYSIS

i) Whether the Application is vexatious, frivolous and an abuse of courts processes

To begin with, I will look at what amounts to a vexatious litigation in the following words.

“It is a legal action, which is brought regardless of its merits, solely to harass or subdue an adversary. It may take the form of primary frivolous lawsuit or may be repetitive, burdensome and unwarranted filing of meritless motions in a matter which is otherwise a meritorious cause of action”. (Emphasis supplied)

The Vexatious Proceedings Act, 2012 is an Act of parliament, which was enacted to prevent abuse of the process of the High Court and other courts by the institution of vexatious legal proceedings. Section 2(1) of the said Act provides as follows;

(1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant.

Section 3 states that; *“No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any court, and any suit instituted by him in any court before the making of an order under section 2(1) of this Act shall not be continued by him without such leave; and such leave shall not be given unless the Court or the judge is satisfied that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit.”*

(See the cases of **Gerald Munene Mugo v Muriithi Maganjo & 2 others ELC Case No 285 of 2014; James Mwashori Mwakio v Kenya Commercial Bank Ltd Civil Application No. Nai 59 of 1998**).

Under order 13(1) (d) of the civil procedure rules it provides interalia: *“at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: it discloses no cause of action or defence or its scandalous, frivolous or vexatious or it may prejudice, embarrass or delay the fair trial of the action or its otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgement to enter accordingly as the case may be.*

A vexatious suit is a type of prosecution in an action based on a prior claim. Its settled that equity may enjoin vexatious litigation. This power of equity exists independently of its power to prevent multiplicity of actions. It’s based on the fact that its inequitable to harass an opponent not for attainment of justice but out of malice (see Bridgeport Hydraulic co v Pearson 139 conn 186.)”

In **Clark v R 2016 VSCA** The court held that: *“the concept of abuse of the process to the use of the courts process in a way that is inconsistent with two fundamental requirements. These are; First that the court protects its ability to function as a court of law ensuring that its processes are used p fairly by the state and citizens alike without bad faith or ill will. The second is that unless the court protects its stability to function in that way, its failure will lead to an erosion of public confidence. The court processes will be seen as heading themselves to oppression and injustice.”*

Looking at this, the purpose of the whole object of the applications of these doctrines is that due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in administration of justice is not eroded by permitting litigants to initiate suits on the same subject matter at various forums. It must be clear that the courts will run into a risk of inconsistent verdicts that does bring the administration of justice into disrepute.

This is more so, when a claimant is seeking to enforce his constitutional rights guaranteed under Chapter 4 of the constitution on the Bill of Rights. He/she must demonstrate that there a justiciable infringement or violation which has been contravened worth of redress.

There is a Constitutional Petition No 447 of 2016 (Consolidated with Petition No 482 of 2016) at Nairobi High Court before Hon. Justice JM Mativo. It is the Applicant’s submission that at the core of the said Petition is the distribution of functions between the National Government and the County Government as stipulated under the fourth schedule of the Constitution of Kenya, 2010. That the main issue is that whether the control, licensing and/or regulation of the Betting and Gaming industry in the Republic of Kenya is devolved or it is a function of the National government.

Further, the Petitioner submits that there was a Conservatory Order issued by the same court against the Ministry of Interior and Coordination of National Government, Inspector General of Police and the Director of Public Prosecutions, the 2nd, 3rd, and the 5th Respondents in that Petition, restraining them as officials, agents from conducting a crackdown on the Petitioners/ Applicants premises and businesses specifically to raid, forcibly confiscate betting and gaming Machines, disrupt businesses or in any way suspend or close operations of the said businesses.

The Respondents through its Counsel Lydia Ndirangu stated through her submissions, that the Petitioner was is trying to raise issues before this Court in the instant Application, which are yet to be determined in another suit filed by him in another court. That by addressing the issue would therefore force the Respondents to rely on the Replying Affidavit filed in response to the Constitutional Petition No 447 of 2016, which is the main Petition, which this Application arises from. The Affidavit referred to by the Litigation Counsel was the one sworn by Antony Kimani, the Chairman of the Betting Control and Licensing Board.

The counsel for the Respondents further submitted that, it is very difficult to argue the issues raised in the Application herein without delving into the issues that were raised in the Nairobi Constitutional Petition No 447 of 2016. That it will be impossible for this Court to entertain the instant Application without getting into the merits of the case before the Constitutional Court in Nairobi and doing so will amount to *sub judice*.

This Court will therefore seek to answer the question, whether the Petitioner is being vexatious, frivolous or abusing the courts processes by presenting an Application in this court when there is another Petition pending in Nairobi’s Constitutional Court. The main concern in the instant Application is failure of the Respondents to honour a court order issued by the Honorable Court in Nairobi. The Petitioner wants the Respondents punished for contempt of court. It is the Honorable Court in Nairobi and not in Kajiado which issued the Conservatory Orders,

which were apparently violated by the Respondents.

Multiplicity of suits is a term to describe when more than one [lawsuit](#) exists regarding the same transaction or occurrence. The law generally attempts to avoid this situation and there are several rules which have been put in place to control such situations from occurring. The main risk with several lawsuits over the same subject matter is that the different lawsuits may result in clearly contradictory results

In the case of **Yat Tung Investments co ltd v Dao Heng Bank ltd 1975 AC 581**. *“It’s an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings.”*

It is also within the courts knowledge that the Applicant herein has filed another Constitutional Petition No 59 of 2018 as **Samuel Kahi v Silas Zablon Miriti, the Chief Savannah Location & 3 others** while Petition No 447 of 2016 is still pending hearing and determination before the same court. I agree with Respondents that this Application amounts to a multiplicity of suits which is a strategy by the Applicant to attain judgments from various Courts which is an abuse of courts process and a waste of time and resources. Courts have inherent equity power to vacate or stay or dismiss proceedings obtained through an abuse of the court processes. On consideration of matters before me I have anxiously pondered as to the appropriate remedy in exercise of judicial discretion to this petition. However, for reasons given above this petition is fatally defective on the firm ground that there is a pending proceedings at the constitutional Division at Milimani commercial court on the same cause of action with similar plaintiffs and co defendants yet to be adjudicated on the merits.

In the foregoing therefore, I find that the Applicant is being vexatious and frivolous by virtue of seeking the declaration of the same characteristics as those pleaded in the Nairobi petition number 447 of 2016.

ii) The jurisdiction of this Court in Contempt of Court

Contempt of court, often referred to simply as "contempt", is the offense of being [disobedient](#) to or [discourteous](#) toward a [court](#) of law and its officers in the form of behavior that opposes or defies the authority, justice and dignity of the court. It manifests itself in willful disregard of or disrespect for the authority of a court of law, which is often behavior that is illegal because it does not obey or respect the rules of a law court

Contempt of Court Act, 2016 section 3 provides as follows;

“(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt. (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.”

Further, the court in various instances has emphasized on the importance of Notice to show Cause as was well observed in the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2017] eKLR**.

It is true that the Hon. Justice JM Mativo in 2017 allowed the Petitioners to place an advertisement on the local dailies to invite any person who had been aggrieved by the alleged illegal confiscation of the Gaming and Betting Machines to be enjoined in the Petition. The Hon. Judge went ahead and allowed numerous parties to be enjoined in the Petition whose number of Petitioners stands at 374. On 15th June 2017, Hon Justice Mativo noted that there was a growth in the number of Applications filed which was delaying the hearing and determination of the main suit, to this end the Petitioners were asked to withdraw the Applications and cease filing of any further Applications to allow the Petition to be dispensed with urgently. There was consent to withdraw all Applications with the Applicant leading the consent to pave way for the hearing of the main suit.

The Petitioner contends that the Respondents have failed to honour the Conservatory Order/Injunction, which was issued by the High Court in Nairobi, and he wants the Court to hold them in Contempt of Court.

I agree with the Respondents submission; the law provides that Contempt of Court proceedings should be instituted in the same Court that issued the orders. In the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. The learned Justices observed as follows;

“An Application under Rule 81.4 now referred to as ‘Application Notice’ (as opposed to a notice of motion) is the relevant one for the Application before us. It is made in the proceedings in which the judgment or order was made, or the undertaking given. The Application Notice must set out fully the grounds on which the committal application is made and must identify separately and numerically each alleged act and supported by affidavits containing all evidence relied upon.”

The Court of Appeal in the above case affirmed Section 5 of the Judicature Act and Section 63(c) of the Civil Procedure Act (cap 21) as the statutory basis of contempt of Court in so far as the Court of Appeal and the High Courts are concerned. The Court interpreted Section 5 to hold that applicable law in Contempt of Court proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the Application for Contempt is made.

Despite the Constitutional underpinning of the power to punish for contempt of court deriving from the elevation of the rule of law to a national value and principle of governance as well as the recognition of judicial authority as the expression of the sovereign power of the people of Kenya, contempt of court in Kenya largely retains its common law ancestry. Before the promulgation of the Constitution in 2010 and the Contempt of Court Act 2016, section 5(1) (now repealed by the Contempt Act, 2016) of the Judicature Act, Cap 8 was mainly the substantive law on Contempt of Court which was only conclusive to the power of the High Court and Court of Appeal to punish for contempt of Court. Other courts, including the Supreme Court, the specialist courts and subordinate courts exercising civil jurisdiction, can punish for contempt of court as well. Section 63 of the Civil Procedure Act (cap 21) provides that the Legislative prescription foreseen in the

interlocutory phrase to section 63 has been made through order 40 Rule 3 of the Civil Procedure Rules, 2010. The Rule provides that in cases of disobedience, or breach of any such terms, the court granting the Injunction may order the property of the person guilty of disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. All Applications under the order 40 of Rule 3 are to be made by a Notice of Motion within the Suit. (Emphasis mine)

Order 40 Rule 3(1) states as follows;

In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. (Emphasis)

In view of the above, it is proper to hold that Contempt of Court proceedings allows an applicant to institute an application in the Court that issued the orders alleged to have been disobeyed.

(See the case of case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & another Civil Case No 242 of 2013.**)

Further, **Lord Donaldson MR said in Johnson v Walton (1990) 1 FLR 350 at 352** stated: -

“It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.” (Emphasis mine)

The case of **Ramadhan Salim v Evans M Maabi t/a Murhy Auctioneers and another Civil Appeal No 69 of 2015**, the Court observed as part of the ruling in dispute as follows;

“Applicant seeks by that Notice of Motion a finding that the respondents have failed to obey an order of injunction made by Magistrate’s Court in Mombasa SRMCC No. 1198 of 2014. The order of injunction, as can be seen from applicant’s exhibit “RSK2”, was made under Order 40 of the Civil Procedure Rules. When an injunction is issued under Order 40 it is the court that issues that order that is competent to hear an application of contempt when there is a disobedience of the order”. (Emphasis supplied)

The judge appreciated the true nature and import of the orders sought by the Applicant.

I therefore agree with the Respondents and find favor with their submissions that the Applicant should have filed this Application in the High Court, Milimani Law Courts, Nairobi which gave the orders that, the Applicant alleges to have been disobeyed by the Respondents.

The Applicant should respect Hon Justice JM Mativo’s concerns when he directed that the Petitioners cease to present various Applications in court to allow the hearing and determination of the main suit. These Applications clearly are an impediment to the determination of the main suit.

iii) Whether the Constitutional rights of the Applicant have been violated

It is the Applicant’s case that, the 1st Respondent accompanied by unidentified police officers unlawfully and forcibly raided the Applicants Business premises at Elanga-Uwas Shopping Centre within Kajiado County disrupting it and confiscated his Betting and Gaming Machines despite there being a valid license and a conspicuous Conservatory order/injunction displayed on the said business premises. Article 40(1) of the Constitution of Kenya, 2010 states as follows;

Subject to Article 65 every person has a right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya.

Article 40(2) states that;

Parliament shall not enact a law that permits the state or in arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in Article 27(4) or non discrimination.

On this premise, the Applicant claims that his rights to acquire and own property in Kenya as per the above provisions of the Constitution of Kenya.

It is also the Applicant’s case that, the illegal confiscation of the Betting and Gaming Machines, the vandalism of some of them and continued detention has and will cause him economic loss as he uses them as his main source of livelihood and that of his family who entirely rely on him for upkeep thereby causing undue hardship to him and his family.

Before I continue it is important to note at this stage that, through fulfilling its duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights, the State has the opportunity to ensure that every Kenyan feels equally protected by the Constitution, which is necessary to facilitate meaningful movement towards a just and equal society.

Article 24 of the Constitution of Kenya provides as follows;

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom --

- (a) the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

Article 40(6) of the Constitution provides that, the rights under this Article do not extend to any property that has been found to be unlawfully acquired. (Emphasis)

Section 8(2) of the County Governments Act, 2012 (Act N0 17 of 2012) provides that in instances where the County Government has not passed a legislation for regulating a matter within its jurisdiction then the Act enjoins that County Government to corresponding National Government Legislation until such a time that County enacts such legislation to regulate the matter in issue

What process is due to encompass the asserted and infringement of rights against the petitioners to me must first be looked at from the lens and provisions of the Betting Lotteries and Gaming Act. The petitioners complain that they have been victims of state actors who relentlessly and unceasing series of confiscation and seizure of their slot machines has deprived them of the source of income and livelihood.

In order to invoke Article 27 of the constitution on ground of unequal treatment and discrimination on a violation of rights arising out of the provisions of the Betting, lotteries and Gaming Act, the petitioners must show that they have been treated differently from other persons in similar circumstances. The rights and obligations of the petitioners here first fall to be determined by the statutory scheme and legal regime of the Act dealing with gaming, lotteries and Betting. As the principal question of law is whether which Act the county government relied upon in issuing licenses to the petitioner to operate slot machines. That indeed is a moot question in this petition. In accordance with the law the special provisions on gaming, licenses and obligations are clearly set out in the Act. Whether or not the grievance is founded upon the respondents having breached the provisions of the Act in force at the time of seizure can only be left for consideration by the constitutional Division at Milimani court. To my mind the contention as to the termination of the licenses by the government in the public interest for writs under the constitution to issue should also be a matter within the purview of that court which had the advantage of an earlier petition instituted before it. I say so because the petitioners by and large are contesting the action on infringement and whether the respondents acted in the context of the law.

It's important to hold that constitutional guarantees of fundamental rights under chapter 4 in our bill of rights are directed against the state, agents, employees and organs. Any evidence of a wrongful act of an individual supported by the state authority is actionable as such. It is also not lost that the provisions of the law show that the county government as an entity was charged and entrusted with functions on cultural activities including betting, lotteries and gaming. These functions were specifically performed by the central government. There is doubt that the county government does so on behalf of the government. In absence of a county government Legislation on this function it seems to me the exercise of statutory power under this delegated authority is conferred on the Betting, Lotteries and Gaming Act.

Fortunately for me having ruled on efficacy nature of the petition I save myself the energy of interpreting the various violations and infringement alleged by the petitioner's rest I render petition 447 as consolidated with 482 of 2016 nugatory.

The more I appraise the facts of this petition the more I am persuaded the Petitioner's challenge as framed must fail from proceeding further to interrogate the existence of a violation or infringement under the constitution. there is some scanty evidence to indicate a sting operation by the state actors but it fell short of the content to declare a breach of the constitution.

It is not in dispute that the High Court has the power and jurisdiction to decide what is worthy of constitutional protection. In this respect, the very profound statement by **Lord Diplock in the case of Kemrajn Harrikisson V Attorney General (1979) 31 WIR 348**, sets the tone on justiciability constitutional violations where he held:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right of fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or it is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the

purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

Thus, I take the position that pursuant to the provisions of Article 22 as read with Article 23 the above principles hinge on the facts of this case.

In the light of the above analysis the notice of motion before this court dated 22nd February 2018 fails with no orders as to cost on the following reasons:

That the contempt proceedings were instituted before a wrong court with no history of the circumstances which gave rise to the disobedience of the court order. Secondly, the Petitioner’s re-litigation before this court on the same set of facts as those pending in Petition No. 447 of 2016 as consolidated with 482 of 2016 pending before the Constitutional Division of the High Court at Milimani is frivolous, scandalous, vexatious and an abuse of the court process. Thirdly, the merits and demerits of the constitutionality of the main petition be a matter undoubtedly for consideration by the constitutional court at Nairobi in which the petitioner and others filed the petition preceding the one before this court against the respondents.

Dated, Delivered and Signed in open court at Kajiado this 28th day of September 2018.

.....

R. NYAKUNDI

JUDGE

Representation

Ms. Ndirangu for the Respondents

Mr. Karanja for the Petitioner