



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CORAM: D.S. MAJANJA J.**

**PETITION NO. 522 OF 2016**

**BETWEEN**

**LUCKY BET LIMITED .....PETITIONER**

**AND**

**THE MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**AND**

**BETTING CONTROL AND LICENSING BOARD..INTERESTED PARTY**

**JUDGMENT**

1. The petitioner’s case is set out in the petition dated 9<sup>th</sup> December 2016. It is that in 2016 it was duly licenced and authorised to operate gaming halls with slot machines in Kenya by the Betting Control and Licensing Board (“the BCLB”). By a letter dated 24<sup>th</sup> October 2016 (Ref: BCLB 8/55 VOL II/(38), the BCLB instructed all County Commissioners to assist with eradication of illegal gaming machines in Kenya. The letter also indicated that the petitioner and two other companies were licenced to operate gaming machines.

2. The petitioner’s complaint is that following the request by the BCLB, the Deputy County Commissioner of Dagoretti raided the petitioner’s premises in Kawangware and confiscated its gaming machines. The petitioner complained to the Nairobi County Commissioner about the raid and requested for the gaming machines to be released but they were not released. The petitioner states that by the letter dated 22<sup>nd</sup> November 2016, the Nairobi County Commissioner admitted that the petitioner’s gaming machines had been confiscated during its operations and requested guidance from BCLB on what should be done with those machines. The BCLB responded by the letter dated 25<sup>th</sup> November 2016 directing the County Commissioner to surrender the machines to the petitioner as it was duly licenced.

3. Based on the facts pleaded, the petitioner’s claimed that its right to protection of its property and the right to fair administrative action under **Articles 40** and **47** of the Constitution respectively have been violated by the arbitrary confiscation of its gaming machines and failure to afford it opportunity to be heard before the machines were confiscated. The petitioner therefore seeks the following reliefs:

*a) A declaration that Article 10 of the Constitution and section 5 of the Fair Administrative Actions Act, 2015 have been abridged and that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 40 and 47 of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondent;*

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the Respondent herein as provided for under Articles 40 and 37 of the Constitution of Kenya, 2010 as well as the provision of section 5 of the Fair Administrative Actions Act;

c) The court to assess the quantum of damages and compensation to be paid by the Respondent;

d) A compulsory order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to release the Petitioner in a perfectly working condition, the gaming machines presently in their custody.

e) An order of prohibition be and is hereby issued directing the Respondent(s) herein and his agents, servant and/or representatives from interfering with the property of the Petitioner.

f) An order that the Respondents be permanently restrained from unlawfully interfering with the operations of the Petitioner and from arbitrarily cancelling its license and depriving it of its property.

g) An order of compensation for loss of business for the period that the operations of the Petitioner have stalled.

h) An order compelling the 3<sup>rd</sup> respondent to personally or through its agents, servants or representatives to effectively implement prayer (d) and (e).

i) No costs of this petition.

4. The facts set out in the petition are verified and reiterated in the supporting affidavit by Zipporah Kemunto, the petitioners Finance and Corporate Affairs manager, sworn on 9<sup>th</sup> December 2016. Although the respondents were served with the petition and affidavit, they have not filed any response opposing the petition though the matter has come up for directions several times culminating in an order made on 5<sup>th</sup> November 2018 fixing the matter for hearing and directing the parties to file written submissions. Since the respondents did not file any replying affidavit in opposition to the petition and deposition, the facts as pleaded must be taken as true and correct. The only issue then is whether the petitioner had made out a case to warrant the grant of relief.

5. The facts as I have set out show that the petitioner was duly licenced by the BCLB and its gaming machines were confiscated by agents of the 1<sup>st</sup> and 3<sup>rd</sup> respondents. This is admitted in the letter dated 22<sup>nd</sup> November 2016 by the Nairobi County Commissioner seeking directions on what should be done with the petitioner's gaming machines. The respondents have not denied that the gaming machines have not been released. Since the petitioner was duly licenced to operate gaming machines, I find and hold that the 1<sup>st</sup> and 3<sup>rd</sup> respondent's violated the petitioners right to protection of property protected under **Article 40** by arbitrarily taking and retaining its property.

6. I now turn to the reliefs. Under **Article 23** of the Constitution this court has broad authority to frame appropriate relief after finding a violation. Since the gaming machines are admittedly in possession of the 1<sup>st</sup> respondent, I shall order release of the machines forthwith.

7. The substantial claim in prayers (b), (c) and (g) is for damages. It is trite law that special damages must be pleaded and proved. The Court of Appeal in **Hahn v Singh [1985] KLR 716** observed that:

*[S]pecial damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.*

8. Loss of business is in the nature of special damages which must be pleaded and proved. The petitioner has not done so. I therefore dismiss that claim. I am however cognizant that this court may grant the petitioners general damages to recognise and vindicate the its rights which have been violated. I note that the confiscation was not deliberate and may have been by mistake as evidenced by the County Commissioner's admission in his letter dated 25<sup>th</sup> November 2018. However, it is apparent that the petitioner's machines have been released two years after filing the suit and no justification has been given for holding the machines. I therefore award the petitioner Kshs. 500,000/- as general damages for the violation I have found.

9. Having found that the petitioner's fundamental rights and freedoms were violated, I now grant the following relief:

(a) A declaration be and is hereby issued declaring that the petitioner's right to property under **Article 40** of the Constitution was violated by the arbitrary seizure and withholding of it property namely gaming machines.

(b) The 1<sup>st</sup> and 3<sup>rd</sup> respondents are directed to release the petitioner's gaming machines in its possession forthwith.

(c) The petitioner is awarded Kshs. 500,000/- as general damages as against the 1<sup>st</sup> respondent.

(d) The 1<sup>st</sup> respondent shall pay costs of Kshs. 50,000/- all-inclusive for the petition.

**SIGNED AT KISII**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of November, 2018.**

**E. C. MWITA**

**JUDGE**