



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 26 OF 2016

BETWEEN

JULIUS ONYANGO MUNYENDO PETITIONER

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

OFFICER COMMANDING POLICE

DIVISION (OCPD) KISUMU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

THE BETTING CONTROL & LICENSING BOARD 4TH RESPONDENT

JUDGMENT

1. The petitioner is a businessman running slot gaming machines within Kisumu County. He has brought this case seeking relief for the violation of his fundamental rights and freedoms. In his petition dated 24th November 2016 he seeks the following primary reliefs;

(a) An order of prohibition to restrain the 1st and 2nd respondent, his agents, servants, employees from interfering with the petitioner's businesses, from interfering with the petitioner's slot gaming machines within the petitioner's premises pending the full determination of the application.

(b) A declaration that [the actions of] the Officer Commanding Police Division Kisumu under the auspices of the 1st defendant is unconstitutional and a contravention of the petitioners economic and social right and therefore null and void.

2. The corpus the petitioner's complaint is that on 26th October 2016, the 2nd respondent directed that all business slot gaming machines within the petitioners gaming premises, be closed down until everyone gets authority by way of a license or permit from the 1st respondent, the Kisumu County Government ("the County").

3. The petitioner contends that he complied with the directive including paying for and obtaining a single business permit from the County for running the slot gaming machines. He contends that police officers under the auspices of Kisumu Officer Commanding Police Division ("OCPD") continue to harass, arrest and intimidate him despite compliance with the directive. The petitioner denied that his activities were

illegal and contended that he imported and paid taxes for the slot gaming machines with full knowledge of the Government.

4. The County opposed the petition through the replying affidavit of its Chief Officer in charge of Gender Culture, Sports and Social Services, Lucy Matengo. She contended that while the County was able to issue a permit to enable the petitioner operate his premises, it could not issue a gaming license as the authority to do so was vested in the 4th respondent, the Betting Control and Licensing Board (“BCLB”) under the provisions of the *National Betting, Lotteries and Gaming Act (Chapter 131 of the laws of Kenya)*.

5. In the course of dealing with his application for interim relief, the petitioner alleged that his gaming equipment had been taken by the police. I summoned the OCPD to show cause why his officer’s had taken the petitioner’s gaming equipment. Senior Superintendent Mutune Maweu told the court that the police did not have any record of having taken the petitioner’s equipment or have in their possession the petitioner’s gaming machines.

6. The petitioner also submitted that the when he went to BCLB, it referred him to the County to resolve the issue concerning his licence. Following these submissions and in order to fully deal with the matter, I directed that the Attorney General and BCLB be joined to this case as the 4th and 5th respondents.

7. The BCLB filed a replying affidavit sworn its Chairman, Anthony Kimani Ndungu, in which he set out the pertinent issues concerning the licensing of gaming. He deponed that betting control and licensing is a concurrent function of the National and County governments and that the nature and extent of the concurrent function was resolved by Lenaola J., when he adopted the report of the Transitional Authority Report on the Implementation of Betting in *Africa Rafiki Limited v Nairobi City County Government & others Nairobi Petition No. 295 of 2014 consolidated with Petition No. 1 of 2015 and Petition No. 315 of 2014 [2017]eKLR*. Following the judgment, BCLB contended that the applicable law is **section 54** of the *Betting Lotteries and Gaming Act* which provides that BCLB has the power to authorize the use of gaming machines subject to conditions in the *Act* and those it may impose.

8. BCLB therefore submitted that a person seeking to operate a gaming machine is required to obtain a permit from BCLB and thereafter apply for a business permit for the premises from which he intends to operate the gaming machines from the respective county government. Conversely, it argued, a single business permit does not authorize one to operate any gaming machine without a permit from BCLB.

9. From what has been stated by BCLB, the petitioner’s problem is where to seek the gaming license from. The issue of the concurrent jurisdiction of the National and County Governments under the **4th Schedule Part 1 section 34** and **Part 2 section 4(a)** of the Constitution was resolved in the case of the *Africa Rafiki Ltd Case (Supra)*. The position as it presently obtains is that the National Government through the BCLB is the licensing authority for public gaming while the County Government licenses premises.

10. While the petitioner had a licence for his premises issued by the County, the petitioner has not established that he had a licence for gaming issued by the BCLB. By failing to establish this fundamental fact, it cannot be said that the petitioner’s right to carry on business had been violated. Further the prayers in the petition cannot be granted in such circumstances. For the sake of completeness, I now turn to consider whether the petitioner’s fundamental rights and freedoms were violated.

11. It was established in *Anarita Karimi Njeru v Republic [1976-1980] KLR 1272* that where a person seeking redress from the High Court involving reference to the Constitution, he must set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed (see also *Mumo Matemu v Trusted Society of Human Rights NRB CA Civil Appeal No. 290 of 2012 [2013]eKLR*).

12. The petitioner has cited the violation of **Article 46(1)(c)** of the Constitution which states that, “Consumers have the right to protection of their health, safety and economic interests.” By referring to

consumer rights it is not clear what how the petitioner's right to consume a product or service is being violated by his failure to obtain a gaming licence from BCLB.

13. The petitioner's reference to **Article 6** of the *International Covenant of Economic Social and Cultural Rights* which provides that, "*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right,*" is not helpful as the Constitution contemplates the licencing of gaming business and if the factual threshold for establishing a right is not established, then the citing of an international covenant to which Kenya is a party does not take the petitioner's case any further.

14. It is abundantly clear that the petition must fail and it is dismissed. The petitioner is at liberty to apply for a gaming license from BCLB and obtain a business permit from the County.

15. I direct each party shall bear its own costs.

DATED and DELIVERED at KISUMU this 4th day of August 2017.

D.S. MAJANJA

JUDGE

Applicant in person.

Mr Amondi instructed by Amondi and Company Advocates for the 1st respondent.