



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.4 OF 2016

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 31, 40, 46, AND 47 OF THE CONSTITUTION OF KENYA
2010**

BETWEEN

- 1. ANTONY WAMBUGU GITAHI**
- 2. PETER NDERI GICHOHI**
- 3. LYDIAH NYAMBURA CHEGE**
- 4. LYDIAH GATHIGA MURIUKI**
- 5. MARTHA WAMBUI NGATIA**
- 6. DANSON MAINA NDUNG'U**
- 7. JOSHUA CHEGE GITHUI**
- 8. PHILIP KAMUNYA GATHANGA**
- 9. BENSON IREGI MUYA**
- 10. JOSEPH GICHERE MUCHANGI**
- 11. STEPHEN MWANGI NJOGU**
- 12. GEORGE KIBUE MAINA**
- 13. FRANK KAHUMBA KIGOSI**
- 14. STEPHEN THAIRU KARITI**
- 15. EVENS MURIUKI MURUNGU**
- 16. NANCY WANJIRA NYAGUTHII**
- 17. JOSEPH MIANO WARUGURU**
- 18. JAMES NJOROGE MWAURA**

19. PETERSON MWANGI WAIGWA

20. SAMSON KAILEKIA

21. CHALRES NDIGA

22. JOHNSON KIONGO NJOGU

23. NELSON KINYUA WAMBUTA

24. MOSES MUKURE MUKOMA

25. JOHN MWANGI GUTU.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

BETTING CONTROL AND LICENSING BOARD.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion was brought under a Certificate of Urgency and under Article 23 (3) (b) of the Constitution of Kenya, Section 13 of the Constitution (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act; the application is dated the 16th day of February, 2016 and is made by the Petitioners (hereinafter referred to as the applicants) who consist of a group of business persons operating slot gaming machines; their claim is that the respondents have infringed on their rights as enshrined in the Constitution of Kenya 2010 and that they shall continue to suffer loss and damage unless the orders sought are granted; the applicants are seeking the following orders;

(i) Spent

(ii) Spent

(iii) Spent

(iv) That the Honourable Court be pleased to grant temporary injunction orders restraining the 1st respondent, its agents and/or servants from interfering with the petitioners' slot gaming machines within the petitioners' gaming premises pending the full determination of this application.

(v) That the Honourable Court be pleased to grant temporary injunction orders restraining the 1st Respondent, its agents and/or servants from interfering with the Petitioners slot gaming machines within the Petitioners gaming premises pending the full determination of the Petition;

(vi) That the Honourable Court be pleased to direct that the orders issued pursuant to the application be served upon the relevant police authorities for maintenance of law and order;

(vii) The costs of the application be provided for.

2. At the hearing hereof on the 25th February, 2016 the 2nd Respondent was not present and had not filed a

Notice of Appointment nor put in any response; the applicants and the 1st respondent were ably represented by learned counsels Mr Wamahiu and Mr Ngunjiri who made oral presentations which are as set out hereunder;

PETITIONERS SUBMISSIONS

3. The application is premised on the grounds stated on the face of the application and on the supporting affidavit sworn on the 15th day of February, 2016 and a Further Affidavit dated the 23rd February and by **Antony Wambugu Gitahi**; who was duly authorised to make the affidavits for and on behalf of the other 24 applicants; the grounds set out in the application read as follows;

(a) That the petitioners are business persons working for gain in various towns and shopping centres within the County of Nyeri.

(b) That the petitioners have procured for valuable consideration slot gaming machines for carrying out gaming business for their clientele in their business premises.

(c) That the petitioners procured the slot gaming machines at a great cost solely for the purpose of engaging in the business for profit in line with the provisions of **THE BETTING, LOTTERIES AND GAMING ACT CHAPTER 131 LAWS OF KENYA**.

(d) That whereas betting, lotteries and gaming are statutorily recognized under Kenyan Law as legitimate consumer pursuits the 1st and 2nd respondent have failed and refused to issue the Petitioners with licenses and permits for their slot gaming machines and gaming premises respectively.

(e) That the 1st respondent has declared the petitioners' slot gaming machines illegal and ordered the seizure of the petitioners slot gaming machines and closure of their gaming premises to the immense prejudice of the applicants.

(f) That as a consequence of the 1st respondents order the applicants are suffering immense loss and damage on their expensive investment.

(g) That the substratum of the petition filed herewith touches on the petitioners' rights under the **CONSTITUTION OF KENYA 2010** which would be destroyed if the orders sought are not granted.

(h) That the petitioners will continue to suffer immense loss and damage unless the orders sought herein are granted.

4. The function of regulating the matters related to the issues at hand was devolved to the County Government of Nyeri vide Legal Notice 181/2013; that the 1st Respondent passed the Nyeri County Finance Act 2015 for collecting revenue but is yet to enact legislation on Betting, Gaming and Lotteries.

5. Section 8(2) of the County Governments Act No.17 of 2012 provides that in instances where the County Government has not passed legislation for regulating a matter within its jurisdiction then the Act enjoins that County Government to corresponding National Government Legislation until such time that County enacts such legislation to regulate matter in issue.

6. The applicants made applications to the 2nd Respondent; and as it had refused and or failed to issue the applicants with the relevant permits it was thus enjoined to the Petition;

7. That there are many casinos operating that are licensed everywhere in the County; therefore the denial to issue the applicants with licenses is discriminatory.

8. The machines imported with full knowledge of the Government and taxes paid; the activities are not illegal; Petitioners are consumers and their rights are recognized under the Constitution 2010; under Article 36(1) (c) the Constitution their economic right has been infringed as they have been precluded from enjoying these rights.

9. That the Order from the County Government contravenes Section 4 of the Administration Action Act; the applicants have adversely affected by the Order and decision therein; that they were not given prior notice nor given an opportunity to make presentations.

10. That the 1st respondent has thus breached the applicants right to fair administrative action; that the applicants are properly before this honourable court as provided under the provisions of Articles 22 and 23.

11. That the prayers sought are guided by the case of **Giella vs Cassman Brown** as they have demonstrated a prima facie case, That applicants have invested Kshs. 140,000/- with no returns to their investment; which demonstrates suffering and irreparable loss.

12. The applicants also rely on the case of **Stephen Murithi vs D.T.Moi Petition No. 625/2009 eKLR 2011**; that their claim has merit and filing is procedural and prayers in line with the scope and objectives provided under The Protection of Fundamental Procedure Rules.

13. The applicants prayed for conservatory orders pending hearing of the Petition; and further prayed that the Order be served on the Police for maintenance of law and order.

1st RESPONDENTS SUBMISSIONS

14. The application was opposed; the respondent relied on the Replying Affidavit made by

15. Counsel submitted that the applicants were not entitled to the orders sought;

ISSUES FOR DETERMINATION

16. After hearing the Counsels respective submissions the only issue framed by this court for determination is whether the conservatory injunctive orders sought are merited pending the hearing and determination of the Petition.

ANALYSIS

In ascertaining whether the orders sought herein are merited this court shall make reference to the celebrated case cited by the applicants of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** which sets out the guiding principles applicable for granting of injunctive orders; these principles are inter alia:

- (i) The applicant must establish a prima facie case with a probability of success;
- (ii) That the applicant must demonstrate they stand to suffer irreparable loss that cannot be compensated by way of damages;
- (iii) If in doubt, the court can then make a decision on a balance of convenience.

Whether the applicants have made out a prima facie case

17. The applicants are asking the court to look at the administrative actions of the respondents which they claim have violated and continue to infringe upon their constitutional rights.

18. Under this principle this court also makes reference to **Constitution Petition No. 16 of 2011 CREAW & 7 Others** where the Honourable Musinga J (as he then was) held that;

“...a party seeking a conservatory order only requires to demonstrate that he has a prima facie case

19. Therefore the applicants herein must first establish an arguable case to demonstrate that their fundamental rights are threatened or have been infringed upon by the administrative actions of the 1st respondent and/or the 2nd Respondent and are therefore deserving of the orders sought.

20. The applicants have annexed to the supporting affidavit the annexures marked as “AWG-3” being copies of documents for the importation of the slot gaming machines and also annexure “AGW-2” which consist of receipts for the purchase of the purchase of the automatic slot gaming machines.

21. At paragraph 8 of the supporting affidavit the applicants make the following averments;

“8. That whereas betting, lotteries and gaming are statutorily recognised under Kenyan Law as legitimate consumer pursuits the 2nd respondent has failed and refused to issue the Petitioners with licences for their slot gaming machines and their gaming premises.”

22. This court is alive to the provisions of Section 8(2) of the County Governments Act of 2012 which provides that in instances where the County Government has not passed legislation for regulating a matter within its jurisdiction then the Act enjoins that County Government to corresponding National Government Legislation until such time that County enacts such legislation.

23. The National Government has enacted legislation that provides for the regulation and licensing of the businesses in line with that being conducted by the applicants and has set up the bodies that are mandated to enforce its provisions.

24. The applicants contend that the 1st respondent has not yet formulated legislation to control this area of business therefore they approached the 2nd respondent to issue them with these licenses.

25. Their averments in paragraphs 14 and 15 of the supporting affidavit allude to the numerous applications made to the 2nd respondent which it failed, neglected or refused to respond to or issue licences.

26. The applicants would have made out their arguable case had they annexed to this instant application these numerous applications alluded to as annexures to support and demonstrate the steps taken in their attempts to pursue the licences from the 2nd Respondent for their slot gaming machines and their gaming premises; in their rush to file the application these annexures may have been inadvertently omitted.

27. In the absence of such documentation this court finds that the applicants have not made out an arguable case on discrimination nor have they established a prima facie case as against the respondents.

Whether the applicants will suffer irreparable loss that cannot be compensated by damages;

28. An irreparable injury is one whereby the injury or harm is of such a nature that monetary compensation would be inadequate; the applicants contend that the declaration that their slot machines were illegal and the seizure of the machines by the 1st respondent and closure of their gaming premises has immensely prejudiced them.

29. As a consequence of the 1st respondents’ administrative actions, which the applicants contend to be unfair, they aver that they have suffered prejudice and have been put to immense loss and continue to suffer loss and damage.

30. In this instance the applicants have annexed receipts in support of the purchase of their expensive investment in the form of gaming machines; it is this courts considered view that the value of their loss is therefore an amount that is quantifiable and any loss of business is also measurable and quantifiable in

monetary terms;

31. On this principle as well the applicants have not satisfied the court that their loss and damage is irreparable and cannot be compensated by damages if the conservatory orders are not granted.

FINDINGS AND DETERMINATION

32. For the reasons stated above this court finds that this is not a suitable case for the issuance of the conservatory orders sought.

33. The application is found to be lacking in merit and is hereby dismissed.

34. The costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 28th day of April 2016.

JUDGE

A. MSHILA