



**REPUBLIC OF KENYA**

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

**MISC. CR. APPLICATION NO. 33 OF 2018**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE**

**165 (3), 2, 10, 19, 20 (1), (2), (3), (4), 21 AND 22 OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF THE PROTECTION OF THE CONSTITUTIONAL RIGHTS ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION IN SO FAR AS THE APPLICANT'S CONSTITUTIONAL RIGHTS UNDER ARTICLES 27, 28, 29, 31, 40 & 47 HAVE BEEN VIOLATED**

**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 OF KENYA), NATIONAL POLICE SERVICE ACT**

**(ACT NO. 11A OF 2011)**

**AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013)**

**AND**

**IN THE MATTER OF SECTIONS 118 AND 121 OF THE CRIMINAL PROCEDURE ACT (CHAPTER 75 LAWS OF KENYA)**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**TIMOTHY MAUNDA MBITI.....1<sup>ST</sup> APPLICANT**

**VERSUS**

**1. THE REGIONAL COMMISSIONER NYANZA..... 1<sup>ST</sup> RESPONDENT**

**2. THE COUNTY COMMISSIONER KISUMU.....2<sup>ND</sup> RESPONDENT**

**3. THE REGIONAL POLICE CO-ORDINATOR NYANZA.....3<sup>RD</sup> RESPONDENT**

**4. THE REGIONAL A.P. COMMANDER NYANZA.....4<sup>TH</sup> RESPONDENT**

**5. THE COUNTY POLICE COMMANDER KISUMU.....5<sup>TH</sup> RESPONDENT**

6. THE COUNTY AP COMMANDANT KISUMU..... 6<sup>TH</sup> RESPONDENT
7. THE KISUMU EAST SUB-COUNTY AP COMMANDANT.....7<sup>TH</sup> RESPONDENT
8. THE O.C.P.D. KISUMU TOWN POLICE DIVISION.....8<sup>TH</sup> RESPONDENT
9. THE CABINET SECRETARY FOR INTERNAL SECURITY AND CORDINATION OF NATIONAL GOVERNMENT.....9<sup>TH</sup> RESPONDENT
10. THE DIRECTOR OF PUBLIC PROSECUTIONS.....10<sup>TH</sup> RESPONDENT
11. THE ATTORNEY GENERAL.....11<sup>TH</sup> RESPONDENT

#### RULING

This Ruling is in respect to two applications, which are dated 4<sup>th</sup> June 2018 and 17<sup>th</sup> August 2018, respectively.

1. By the application dated 4<sup>th</sup> June 2018 the Applicant, **TIMOTHY MAUNDA MBITHI**, sought the following substantive orders;

*(a) A Temporary Injunction to restrain the 1<sup>st</sup> to 8<sup>th</sup> Respondents from conducting a crackdown on Business Premises, specifically to raid, forcibly confiscate betting and gaming machines; disrupt business or in any way suspend or close operations of the Applicant's Business pursuant to the illegal directive of the 9<sup>th</sup> Respondent.*

*(b) The 1<sup>st</sup> to 8<sup>th</sup> Respondents be required to give or render a Proper Inventory of the confiscated Betting and Gaming machines belonging to the Applicant.*

*(c) Order the 1<sup>st</sup> to 8<sup>th</sup> Respondents or their subordinate officers or any officers or any other person acting under or through them, to immediately release the Betting and Gaming machines belonging to the Applicant, as the said confiscation is illegal and unlawful.*

2. It was the Applicant's case that on 31<sup>st</sup> May 2018, the 7<sup>th</sup> Respondent, acting under the illegal and unlawful directions of the 9<sup>th</sup> Respondent, through the 1<sup>st</sup> to 8<sup>th</sup> Respondents, forcibly raided the Applicant's business premises at **KASAGAM**.

3. At that place, the Respondents are said to have confiscated 5 betting and gaming machines.

4. When the Applicant visited the offices of the "relevant respondents", to demand the release of the machines, they declined to release them.

5. As the Applicant believed the actions of the Respondents to be draconian, unjustifiable, arbitrary, unlawful and illegal; and because the continued detention of the machines were causing the Applicant to suffer economic loss, the Applicant sought the intervention by the court.

6. On 13<sup>th</sup> June 2018, the Applicant sought interim orders, so that the equipment which had been seized would not be destroyed.

7. The Applicant also sought an order requiring the Respondents to file in court, an inventory of the machines which had been confiscated.

8. Mr. Qeu, learned State Counsel, who was representing all the Respondents, (except the 10<sup>th</sup> Respondent) conceded to an interim injunction against the destruction of the machines.

9. He also conceded to the order requiring the Respondents to produce the inventory of the confiscated machines.

10. In the circumstances, the court granted those 2 interim reliefs.

11. However, the Applicant was directed to provide the Respondents with specific particulars of the business outlets where the Applicant's licensed businesses were located.

12. On 23<sup>rd</sup> August 2018 the Applicant filed the application dated 17<sup>th</sup> August 2018.

13. The said application sought Summons to issue against the 1<sup>st</sup> to 6<sup>th</sup> Respondents to appear before the court, to Show Cause why contempt proceedings should not be commenced against them.

14. The new application was prompted by what took place on 10<sup>th</sup> August 2018.
15. According to the Applicant, the police descended on his business premises in **KISUMU**, where they confiscated 26 Slot Machines belonging to the Applicant.
16. Following the seizure of the machines, they were stored at the offices of the **ASSISTANT COUNTY COMMISSIONER, WINAM DIVISION**.
17. The Applicant's case was that the 1<sup>st</sup> to 6<sup>th</sup> Respondents refused to release the slot machines to him. As a result, the Applicant continued to suffer economic losses, as he had been run out of business.
18. On 23<sup>rd</sup> August 2018 the court heard the application dated 17<sup>th</sup> August 2018 ex-parte, in the first instance. Being satisfied that there was a real danger that the 26 machines, which had been confiscated on 10<sup>th</sup> August 2018, could be destroyed, the court issued an order barring the Respondents from destroying the machines.
19. The court further directed that the said machines be stored in good condition, in a place that was secure.
20. On 7<sup>th</sup> November 2018, the Respondents filed a Notice of Preliminary Objection, Grounds of Opposition and a Replying Affidavit. The said affidavit was sworn by **DR. (ENG.) KARANJA KIBICHO**, the Principal Secretary heading the Administration of the State Department of Interior, in the Ministry of Interior & Co-ordination of National Government.
21. As is the norm, the Preliminary Objection was canvassed first, because if it were to be upheld, there would be no need to delve into the substantive application.
22. On 28<sup>th</sup> March 2019, the court delivered its Ruling, rejecting the Preliminary Objection. Primarily, I held that the issues being raised as the basis for the Preliminary Objection, constituted the answers which the Respondents had to the applications. At that stage, I declined to make a legal determination based on matters of fact about which there was no consensus.
23. Thereafter, the parties canvassed the applications by way of written submissions.
24. First, it is noted that the Respondents did file one replying affidavit in answer to the application dated 17<sup>th</sup> August 2018. The said affidavit did not rebut the matters asserted by the Applicant, as regards the fact that on 31<sup>st</sup> May 2018 and again on 10<sup>th</sup> August 2018, the police raided the Applicant's business premises, and they carted away a total of 31 betting and gaming machines.
25. The said actions were undertaken under the auspices of the Ministry of Interior and Co-ordination of National Government, with a view to

*“ridding the Nation of this vice”,*

of the proliferation of illegal and unlicensed gaming machines.

26. Dr. Karanja Kibicho informed the court that several machines and contraptions had been impounded and initially booked in various police stations country-wide.
27. He went on to say that the machines were subsequently destroyed by burning, because they had no serial numbers nor evidence of importation or licences to trade issued by the Betting Control and Licensing Board.
28. Dr. Kibicho told the court that some Chinese nationals were arrested in Kericho County, where they were assembling gambling machines for distribution to the western region.
29. Arising from the raid in Kericho, the Chinese nationals were arraigned in court. However, they were later deported back to China.
30. All the aforesaid information was in relation to gaming machines generally. There was no information provided about the specific machines belonging to the Applicant.
31. As the Respondents have stated in their submissions, under **Section 24** of the **National Police Service Act**, the functions of the police include, the maintenance of law and order, investigation of crimes, prevention and detection of crimes, as well as the enforcement of the law as provided for by law.
32. Therefore, the police had the requisite authority to carry out investigations into the issue of illegal and unlicensed gaming machines.
33. At paragraph 9 of their submissions, the Respondents said;

*“My Lord, as part of ensuring that law and order is maintained, the Respondents proceeded and confiscated all the illegal gaming and gambling machines and were booked in various police*

***stations country- wide.”***

34. In carrying out their mandate, the police and all the Respondents have an obligation to respect the law at all times.
35. Pursuant to **Article 40 (1)** of the **Constitution of Kenya**, every person has the right to acquire and to own property of any description, in any part of Kenya.
36. The said right was only subject to **Article 65** of the **Constitution**, which limits the rights of non-citizens to hold land in Kenya.
37. If the purposes of the raid into the Applicant’s premises, and the carting away of the machines was intended to attain any of the purposes set out in **Section 24** of the **National Police Service Act**, it would appear that the destruction of the machines constituted the destruction of such evidence as the state may have required to prosecute the Applicant.
38. The police are not a law unto themselves. It is their mandate to investigate crime; prevent and detect crime and to enforce the law.
39. The police do not have the mandate to determine the guilt or innocence of a person suspected to have committed an offence.
40. I believe that the Respondents are well aware of that legal position, as demonstrated by the steps they took after they had arrested some Chinese nationals in Kericho County.
41. In that instance, the confiscated machines were held at a police station, whilst the Chinese nationals were arraigned in court.
42. In the case of **COMMISSIONER OF POLICE & THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT & ANOTHER Vs KENYA COMMERCIAL BANK LIMITED & 4 OTHERS [2013] eKLR** the Court held as follows;
- “..... we now turn to the crux of this appeal –whether or not the court can prohibit the police from conducting investigation into an alleged crime. From the provisions of the Constitution and the National Police Service Act, as a key agency of the criminal justice Administration, the police are responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, and conduct of crime.”***
43. As that is the mandate of the police, the court herein did not give orders to stop the police or any of the Respondents from carrying out their duties.
44. The court only ordered that an Inventory be maintained, to show the particulars of the machines which were confiscated; and, secondly, the Respondents were ordered to refrain from destroying the machines.
45. In my considered view, neither of those interim orders, which were issued with the concurrence of the Respondents, had the effect of interfering with the manner or scope of the Respondents’ mandate.
46. As soon as the interim orders were made, all the Respondents were obliged to respect them, through obedience. By proceeding to destroy the Applicant’s machines, (whether the number of machines destroyed was 5 or 31), the Respondents acted in violation of a court order.
47. If the Respondents were of the view that the orders, or any of them, were an impediment to the work they were carrying out, the Respondents ought to have asked the court to discharge the orders.
48. It was definitely an unacceptable affront to the dignity of the Justice System, that the very persons who profess their understanding of their role in the maintenance of law and order, and also in the enforcement of the law, should choose to destroy the machines which they were ordered to refrain from destroying.
49. However, in the light of the revelation that the machines had been destroyed, by burning, this Court cannot now order the Respondents to release the machines, as the Applicants have asked for.
50. Those who destroyed the machines have no regard for the rule of law. They have demonstrated their utter contempt to the letter and spirit of the law.
51. Appropriate action ought to be taken against them.
52. Ordinarily, when it is proved that a person had wilfully and deliberately disobeyed an order of the court, that person is held to be in contempt of court. Therefore, he may be sent to prison.
53. As was pointed out by **Lord Denning M.R.** in the case of

***“A contempt of court is an offence of a criminal character.”***

54. Therefore, before the court can punish a person for contempt of court, it must be satisfied that the person concerned had been incriminated.
55. The Applicant has cited six Respondents as the persons who were in contempt of court, for destroying the machines.
56. It is the obligation of the court to take decisive action against any person proved to have been in contempt of the court.
57. Dr. Karanja Kibicho appears to suggest that he and the Ministry of Interior & Co-ordination of National Government have some explanation for having destroyed the machines.
58. In answer to that notion, I wish to quote the following words from the decision in **WILDLIFE LODGES LIMITED Vs COUNTY COUNCIL OF NAROK & ANOTHER [2005] 2 E.A. 344;**

***“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and the disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment .....*”**

59. Whether or not it is for the good of the people of Kenya, that unlicensed betting and gaming machines be removed from our cities, is not the issue.
60. As soon as the court ordered that the machines be kept securely, and that they should not be destroyed, the Respondents had an unqualified obligation to obey the law.
61. I reiterate that the destruction of the machines was therefore an act of contempt of the court. The person who did so must be punished.
62. The next question is about the identity of the person who destroyed the machines. That question is important because, as already indicated, contempt of court is an offence of a criminal character. The punishment must be directed at the specific person or persons who committed the offence.
63. I find, regrettably, that the Applicant has not provided proof that any specific Respondent was responsible for the destruction of the machines.
64. Although Dr. Kibicho appears to say that those officers who worked under him had destroyed the machines, the Applicant did not prove the specific person or persons who destroyed the machines. In the circumstances, this court declines to collectively punish the Respondents for contempt of court.
65. Finally, the 1<sup>st</sup> to 9<sup>th</sup> Respondents shall pay to the Applicant, the costs of the applications dated 4<sup>th</sup> June 2018 and 17<sup>th</sup> August 2018.

**DATED, SIGNED and DELIVERED at KISUMU**

**This 11<sup>th</sup> day of February 2020**

**FRED A. OCHIENG**

**JUDGE**