



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 2 OF 2018**

**IN THE MATTER OF ARTICLES 2, 3(1), 10, 19(1)(2) & # 20,**

**22, 23, 27, 47 and 159 of THE CONSTITUTION OF KENYA 2010**

**AND IN THE MATTER OF THE CONTRAVENTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER**

**ARTICLES 10, 27 AND 47 OF THE CONSTITUTION OF KENYA**

**AND IN THE MATTER OF THE BETTING,**

**LOTTERIES AND GAMING ACT CAP 131, LAWS OF KENYA**

**B E T W E E N:**

**MURITHI ROBERT AND 23 OTHERS.....PETITIONERS**

**-VERSUS-**

**THE COUNTY COMMISSIONER TAITA TAVETA COUNTY.....1st RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2nd RESPONDENT**

**THE COUNTY COMMANDER OF POLICE TAITA TAVETA COUNTY....3rd RESPONDENT**

**THE HON ATTORNEY GENERAL.....4th RESPONDENT**

**J U D G M E N T**

1. There are 24 Applicant/Petitioners in this matter. They have filed an Application by Notice of Motion together with a Petition. Both proceedings were issued by filing on 6th February 2018. The Application is "brought under Articles 40, 47(1), (2) & (3) and 49 of the Constitution of Kenya 2010, Section 1A and 1B of the Civil Procedure Act Order 40, 4(1) of the Civil Procedure Rules, and any other enabling provisions of the laws of Kenya".

2. The Petition seeks the following orders:

*i. A declaration that the respondents' crackdown and confiscation of the petitioners' coin slot gaming machines is unlawful, unfair and/or unjust.*

*ii. An order of permanent injunction prohibiting the County Commissioner Taita Taveta County, area chiefs serving under her, the County Commander the Inspector General of Police and Police Officers serving under him from conducting the crackdown on the petitioners' business premises.*

*iii. An order of mandatory injunction be issued against the respondents herein compelling them to release the gaming machines belonging to the petitioners that have been confiscated and/or seized by the administration police officers, and chiefs pursuant to the crackdown.*

iv. A declaration that the petitioners are entitled to protection under the constitution to their right to fair administrative actions, equality and freedom from discrimination and fair treatment.

3. The Application seeks the following Orders:

"1. THAT the application be certified urgent and be heard ex-parte on the first instance.

2. THAT this honourable court be pleased to issue injunction orders suspending and or barring the Respondents whether by themselves or through the local chiefs and or police officers from confiscating the petitioners coin slot gamin machines within Taita Taveta county pending the hearing and determination of the application herein inter-partes

3. THAT this honourable court be pleased to issue injunction orders suspending and or barring the Respondents whether by themselves or through the local chiefs and or police officers from confiscating the petitioners coin slot gaming machines within Taita Taveta pending the hearing and determination of the petition herein inter-partes.

4. THAT the costs of this application be borne by the respondents."

4. The Application is supported by the Affidavit of Murithi Robert. The Grounds relied upon are:

"1. THAT the crackdown is in violation of basic constitutional rights pursuant to the provisions of the constitution of Kenya 2010.

2. THAT the crackdown offends the constituion and the norms of good governamce in a democratic state because punishment can only be subjected to a specific individual or company who/which has contravened specific law and not target a group.

3. THAT the crackdown and confiscation of the petitioners' machines are illegal as requisite notices on alleged breach of law show cause letters and right to hearing have not been grandted.

4. THAT the crackdown is a secretive operation as neither the first respondent nor any other government body and/or agency has notified the petitioners herein why and since when their duly licensed businesses have gecome illegal within Taita Taveta County.

5. THAT that the operations of the said machines are still ongoing pursuant to orders from various courts and neither the respondents herein nor any other government agency has notified the petitioners herein why the crackdown is carried out selectively affecting only Taita Taveta County.

6. THAT the manner in which the crackdown is being carried out amounts to an abuse of power by the authorities in its entirety which contravenes the tenets of good governance.

7. THAT its only fair and in interests of justice that the sought orders be granted."

5. The Application came before Hon J. Kamau J on 6th February 2018. She declined to certify the matter as urgent. The Learned Judge did not make any ex parte orders and gave directions for the proceedings to be served on the Respondents. On 12th February 2018, the Judge decided that the Application had been duly served and was not opposed and therefore she deemed that the Application was not opposed and made an order in terms of Prayer 3. The Lerved Judge also asked the Petitioner if there was duplication between the current petition and petition No 15 of 2015. The Court was informed that in Petition No 15 of 2015, the Respondents were enforcing a different directive, so the subject matter is different.

6. On 13th June 2018, the Matter came before the Court as currently constituted. The Court raised concerns as to the clarity of the Petitioner's case. The Court was informed that either the Petitioners or someone one their behalf had attacked a chief. In the circumstances made the following order:

"1. The Respondents and each of them are forbidden whether through themselves, their servants and/or agents or howsoever from destroying, attempting to destroy and/or threatening to destroy any or all of the gaming machines the subject of these proceedings until the next hearing, wherever in the County they were seized.

7. The Petitioners were also directed to file an affidavit listing the machines that were seized (identified by serial number) together with the name of the individual. The Respondents were then directed to identify which of the listed machines were in their possession. The Lists were filed and incomplete. The Petitioners also filed an application for committal for contempt for breach of the Order of 12th February 2018. The evidence of the contempt came from the Affidavit of the First Petitioner who says that on 8th February the Respondent threatened to destroy more machines and on 5th June the 1st Respondent ordered the area chiefs to break into his premises (1st Petitioner) and confiscate the coin sloth gaming machines. In addition it was alleged that the First Respondent, a Madam Rhodah had threatened to destroy all the machines on 8th June 2018. The Deponent does not explain how he came by that information.

8. The Petitioner's Notice of Motion dated 7th June 2018 was filed under a Certificate of Urgency where the Advocate for the Petitioners states that unless the Court hears the application (of committal for contempt) Madam Rodah Nyachae, the First Respondent shall continue to breach the Orders of this Court.

9. The Application is brought under CPR **Order 40 Rule 3**. The Application is brought by Notice of Motion. The Notice of Motion states that it is brought "**Under Order 40 Rule 3(1),(2) & (3) of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A and 63(c) of the Civil**

**Procedure Act Cap 21** as well as **Sections 3** and all other enabling provisions of the law”. The Application seeks the following orders

“1. THAT this application be certified urgent and be heard on a priority basis:-

2. THAT an order do issue from this court restraining the 1<sup>st</sup> Respondent, Rodah Nyachae from destroying the confiscated machines on the 5<sup>th</sup> June 2018 pending the inter parties hearing of this application

3. THAT an order of contempt of court do issue against the Respondents namely the 1<sup>st</sup> Respondent, Madam Rodah Nyachae, the District Officer, Mr George Chege and the Chiefs, Delphine Mwazo (Mwanga Sub-location), Michael Mwapea (Sagalla Location and Mwangemi (Voi Location) for contempt of court by disobeying the orders issued herein on 12<sup>th</sup> February 2018

4. THAT this Honourable court be pleased to issue an order for the arrest and detention in prison and /or payment of a fine against the Respondents namely the 1<sup>st</sup> Respondent Madam Rodah Nyachae; the District Officer, Mr Chege and the local Chiefs, Delphine Mwazo (Mwanga Sub-Location), Michael Mwapea (Sagalla location) and Mwangemi (Voi location) for contempt of court by disobeying the orer issued herein on 12<sup>th</sup> February 2018.

5. THAT this court be pleased to order the payment of costs by the respondents.”

10. The Application is supported by the affidavit of Murithi Robert and on the grounds appearing of the face of the application, as well as other grounds as may be adduced at trial. The Grounds that appear on the face of the Application are:

“1. THAT this honourable court issued injunctive orders against the Respondents on 12<sup>th</sup> February 2018 suspending and barring the respondents from confiscating the coin slot gaming machines owned by the Petitioners/Applicants until further determination of the Petition by the court

2. THAT the Respondents in utter contravention of the said court order, by themselves or their agents/servants confiscated the coin slot gaming machines on 5<sup>th</sup> June 2018 and are still holding the same against the court order issued by this court on 12/02/2018

3. THAT the 1<sup>st</sup> Respondent through her agents, the local Chiefs, contravened the said court order alleging to have been given orders from the President and as such the court order is immaterial.”.

11. As stated, the Supporting Affidavit is sworn by the First Petitioner, Mr Murithi Robert. The Affidavit is said to have been sworn on his own behalf and on behalf of all the other Petitioners. The Deponent states that he and the Co-Petitioners operate coin slot gaming machines in various locations within taita Taveta Court. The Supporting Affidavit sets out the history of the order of 12<sup>th</sup> February in paragraphs 1 to paragraph 6. At paragraph 7 it is averred “THAT on the 5<sup>th</sup> day of June 2018 the 1<sup>st</sup> Respondent ordered the local Chiefs namely Delphine Mwazo (Mwanga Sub-location), Michael Mwapea (Sagalla location) and Mwangemi (Voi location) to break into our premises and confiscate the coin slot gaming machines and sho subsequently broke into our premises thereby confiscating our coin slot mgaming machines in violation of the court order issued on 12<sup>th</sup> February 2018”. It is also deponed that the machines were at the District Officers offices, one Mr Chege where they are still being held contrary to Court orders and requests for their release was refused. It is said the machines were then taken to the 1<sup>st</sup> Respondent’s Offices in Mwatate. The Deponent then states categorically at paragraph 10 “THAT the 1<sup>st</sup> Respondent, one Madam Roda, has said she will have all machines completely destroyed come the 8<sup>th</sup> June 2018”. Paragraph 12 states that the Orders were served on the previous county commissioner who obeyed the Orders of the Court. However, the Affidavit does not explain when the new County Commissioner took over the position and if she was ever served with the Order. The Affidavit also complains that if the machines are destroyed the subject matter of the Petition will become non-existent and there will be incurable injustice against the Petitioners. At paragraph 19, the Affidavit states “THAT unless a warrant of arrest and an order for contempt of court is issued against the Respondents, they will continue to confiscate the coin slot gaming machines despite a lawful order. At paragraph 20 he states “THAT the interest of justice that an order for contempt of court and the warrant of arrest do issue against the respondents in order to protect the integrity and dignity of this Honourable court”.

12. The Affidavit of Service which appears as Exhibit MR-2 states that the Order was purportedly served on the First Respondent by serving it upon the receptionist at the County Commissioner’s Office, Mwatate (address not stated).

13. After significant delay, the Respondents filed a single Replying Affidavit on 28<sup>th</sup> June 2018. At the same time a Notice of Preliminary Objection to the Proceedings (without specifying whether it relates to the Petition or the application for committal for contempt and Grounds of Opposition to the Petition. The Replying Affidavit was sworn by Teddy Bonaya the Assistant County Commissioner of Taita Taveta County. The Affidavit states that the machines were returned and the Petitioners have been engaging in their businesses subsequent to the return.

14. The Petitioner/Applicants Filed Submissions in relation to the Contempt proceedings. The Respondents have filed written submissions dealing with the substantive Petition notwithstanding their position that it is superseded by events. It is clear that the Petitioners wish to proceed with the Application for Contempt. In Kalyosi Farmers the Court of Appeal ordered that once an application for contempt is made, the main proceedings should stop pending the outcome of the contempt proceedings.

15. In this case, the Petitioner have filed an application for contempt. The Application is flawed but its intent is clear. The Application is based solely on the Affidavit of the First Petitioner. Neither Party has asked the Court to list the matter for hearing so that the alleged contemnors can show cause why they should not be committed for contempt. The Parties filed Submissions instead. In the circumstances, the Court has not heard any uncontroverted evidence justifying a committal.

16. In order to be satisfied that any party is in contempt of Court, firstly, the Court must decide whether the Order was served personally on each of the Respondents or that its terms were brought to his/her notice. In the case of the First Respondent it was not, it was served on a secretary at an address that is not disclosed. In the case of the Chiefs, they declined to accept service – which is questionable and then they were induced into accepting service by a false statement, namely that the First Respondent had already been served. In the circumstances, that service too is questionable. If the Court were to commit them for contempt it would be tantamount to the Court punishing an agent without punishing the principal. Further, any contempt was purged by the return of the betting machines – a fact that has not been disputed.

17. For those reasons, this Court cannot come to the conclusion that the Respondents are guilty of contempt of Court. Application for Order for Contempt and/or warrant of arrest is dismissed.

18. Committal for contempt, though necessary, is a draconian remedy. Before a Court commits a person and punishes then, the Court must be satisfied that a contempt was committed. That requires the Court being satisfied that both the procedural and evidential strictures are complied with. In this case the Application fails because of the lack of service of the orders as required, namely by personal service. However, procedural technicalities should not be seen as an excuse for Public Officers to breach the law and Court Orders at will. Such an attitude has implications and at the very least could found a perception of (a) misfeasance in public office and/or (b) a challenge to the rule of law and the sovereignty of the people as enshrined in the Constitution.

19. In relation to the Petition, the Parties have filed submissions however, the Petitioners still have not identified the machines in which they claim property.. Further, they have not explained how loss of those machines cannot be compensated for with liquidated damages. Furthermore, the Petitioners have not demonstrated that they were running their businesses having obtained the requisite licences and complying therewith. In the meantime this Court has ruled on the associated *Petition No 15 of 2017* which deals with the same issue. Therefore the Petition is superseded by events and is therefore dismissed. Each Party to pay its own costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Delivered dated and signed at Voi this the 7<sup>th</sup> day of November, 2019**

In the Presence of:

Court Assistant: Josephat Mavu

Petitioner/Applicants: Mr Owino HB Ms Isika

Attorney General & Respondents: Ms Mukangu