



**REPUBLIC OF KENYA**

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

**Petition No. 10 Of 2018**

**Between**

**In The Matter Of An Application Under Article 165 (3) (B), (D), 2,10,19,20 (1), (2), (30), (4), 21 And 32 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 Petitioner's Constitutional Rights Under Article 27,28,29, 40 And 47 Have Been Violated**

**-And-**

**In The Matter Of The Protection Of 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 Chief's Act (Chapter 128 Laws Of Kenya) National Police Service (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 Vindication of the rights of Purity Kananu, David Kamau Mbatia, Henry Mburugu, Eric Kimathi, Boniface Muchui, Peter Gitau, Lucy Wanjiku**

**-And-**

**IN THE MATTER OF AN APPLICATION BY**

**PURITY KANANU ..... 1<sup>ST</sup> PETITIONER/APPLICANT**

**DAVID KAMAU MBATIA .....2<sup>ND</sup> PETITIONER/APPLICANT**

**HENRY MBURUGU .....3<sup>RD</sup> PETITIONER/APPLICANT**

**ERIC KIMATHI.....4<sup>TH</sup> PETITIONER/APPLICANT**

**BONFACE MUCHUI .....5<sup>TH</sup> PETITIONER/APPLICANT**

**PETER GITAU ..... 6<sup>TH</sup> PETITIONER/APPLICANT**

**LUCY WANJIKU.....7<sup>TH</sup> PETITIONER/APPLICANT**

-VERSUS-

THE COUNTY COMMISSIONER & 26 OTHERS..... RESPONDENTS

**RULING**

1. By a Petition dated 26<sup>th</sup> March, 2018, the petitioners sought the following orders/declarations:-

**a. a declaration that the unilateral and arbitrary action of the 2<sup>nd</sup> to 24<sup>th</sup> respondent to confiscate and burn the petitioners' betting and gaming machines after a valid court order was issued by a court of concurrent competent jurisdiction is unconstitutional, illegal, unlawful, invalid, null and void *ab initio*.**

**b. a declaration that the petitioners' protection of right to property, fair administrative action, human dignity, right to freedom and security of the person and right of equality and freedom from discrimination were violated and/or infringed as enshrined and contemplated in Article 40, 47, 28, 29 and 27 of the Constitution have been violated and or infringed upon by the 1<sup>st</sup> respondent.**

**c. a declaration that as a result of breach of the petitioners' rights they have suffered loss and damages.**

**d. an order for compensation for the apparent breach or violation of petitioners' rights.**

**e. Costs of the suit and interest thereon.**

**f. Any of other order as the honourable court shall deem just and fit**

2. Before the petition could be heard on its merit, the respondents filed a preliminary objection to the same alleging that this court lacked jurisdiction to hear and determine the same. That the same was *sub judice* in view of a similar constitutional petition pending before the High Court in Nairobi, to wit, **Petition No. 447 of 2016 (consolidated with Petition No.482 of 2016)**, wherein the petitioners herein are petitioner numbers 14, 31, 112, 114 and 118 and that the petition was an abuse of the due process of the court.

3. When the matter came up for hearing on 3<sup>rd</sup> July 2018, the court directed that the preliminary objection be canvassed by way of written submissions.

4. Only the respondents filed their submissions within the time ordered. By the time of writing this Ruling, the petitioners had not yet filed or delivered their submissions within the time given.

5. It was submitted for the respondents that the orders that the petitioners were relying on were issued against the respondents in **Nairobi High Court Constitutional Petition No.447 of 2016 (consolidated with Petition No. 482 of 2016)** and that the petition before court was an invitation by the petitioners for this court to sit on the same bench with the judge in Nairobi who was seized of Petition No. 447 of 2016; that it would be improper and absurd for this court to be called upon to make a determination based on a matter whose facts are in a file in Nairobi which was clearly a violation of section 6 of the Civil Procedure Act.

6. The law on Preliminary Objections is well settled. It is established that the proper practice is to determine preliminary objections first, especially where such objections are likely to dispose off the suit or application entirely. The case of **Mukisa Biscuits Manufacturing Co. Ltd vs West end Distributors Ltd (1969) EA 696** is instructive in this regard.

7. In the case of **Oraro vs Mbaja (2005) eKLR**, the court held:-

**“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point”.**

8. In the present case, it is not in dispute that the orders that the petitioners contend to have been violated were issued in **Petition No. 447 of 2016 (consolidated with Petition No. 482 of 2016)**. It is also not in dispute that the petitioners in this petition are petitioner numbers 14, 31, 112, 114 and 118 in the Nairobi petition which is yet to be determined. Clearly, the issues being raised here could very well be determined in that petition. Moreso, having in mind that the cause of action herein is founded on interim orders made in that petition, the question that arises is, what if this court finds for the petitioners here yet in the final end, the court in Nairobi finds that the orders being relied on were not warranted and dismisses the petition? The reverse is also the case.

9. In **Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR**. Odunga J cited the case of **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993**:where the High Court in Uganda stated as follows:-

**“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in**

**terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”**

10. Taking into totality all the circumstances in this case and in light of the fact that the present petitioners are also petitioners in the Nairobi petition which is yet to be determined, I find the petition herein to be incompetent and a blatant abuse of the court process. They should have sought to enforce the said orders in the petition where the orders were made instead of instituting a fresh petition.

11. Accordingly, the notice of preliminary objection dated 24<sup>th</sup> May, 2018 is hereby upheld and the petition is struck out with costs to the respondents.

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 11<sup>th</sup> day of October, 2018.**

**A. ONG'INJO**

**JUDGE**