



**REPUBLIC OF KENYA**

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

**CRIMINAL MISC. APPLICATION NO. 12 OF 2016**

**JOHN MAINA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

John Maina hereinafter referred to as the applicant filed a notice of motion dated 17/11/2016 pursuant to Article 40 and 47 of the Constitution, section 49, 362, 364 and 389 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

In the application the applicant sought to invoke the revisionary powers of this court under section 362 of the Criminal Procedure Code and grant the following orders:

- (1) That the honourable court be pleased to review, set aside and quash the forfeiture order made by the trial magistrate in Kajiado Criminal Case No. 1953 of 2016.
- (2) That the honourable court be pleased to direct that the coin slot gaming machine be released to the applicant.

In his affidavit in support of the application, the applicant stated inter alia that on 7/11/2016 he learnt of his employee Irene Maina having been indicted with the offence of operating a gaming machine without a license contrary to the Betting, Lotteries and Gaming Act Cap 139 of the Laws of Kenya, that the proceedings before the trial magistrate were conducted on the 8/12/2016 where the employee pleaded guilty to the charge. Besides and order on conviction and sentence, the gaming machine was also forfeited to the state.

Following this order the applicant commenced this action on the basis that the failure not to be heard contravenes Article 47 on the right to a fair administration of justice and Article 40 right to private property as enshrined in the Constitution 2010 of Kenya. The applicant impugned the order of the trial court issued without being given an opportunity to be heard and ventilate his case.

Being aggrieved by the forfeiture order, the applicant filed these proceedings.

The factual background of the case:

The applicant operated a gambling business at Isinya Township using a token slot machine. The business was being managed by his employee namely Irene Maina. On the 6<sup>th</sup> day of November, 2016 the employee, Irene Maina was arrested by the police and charged with the offence of gambling in a public place without a permit contrary to section 53 (1) (2) of the Betting and Gambling Act Cap 131 of the

Laws of Kenya.

The accused apparently pleaded guilty to the charge. The learned trial magistrate convicted and sentenced the accused to a fine of Ksh.10,000 in default three months imprisonment at the same day an order of forfeiture of the confiscated machine to the state under section 362 of the Criminal Procedure Code. The lower court file was availed in order to satisfy to the correctness, legality or propriety of the sentence, or order passed and as to the regularity of the proceedings before the trial court.

I have perused the trial court proceedings on the matter and the following pertinent issues arise:

***Whether the impugned order on forfeiture was made in total contravention of section 389 (a) of the Criminal Procedure Code?***

***Whether the court has satisfied itself to the legality, correctness, regularity or propriety of the proceedings before the court on 8/11/2016?***

On the first issue, section 389 (a) of the Criminal Procedure Code sets out the procedure to be followed whereby the property is a subject of Criminal Proceedings or the proceeds of unlawful activities are to be forfeited to the state. The procedure set out include interalia where any goods or things maybe or are to be forfeited by a court and the law does not provide the procedure by which forfeiture is to be effected, the court shall do the following:

- (1) Cause to be served on the person believed to be the owner notice that it will at a specified time and place order the goods or things to be forfeited unless good cause is shown to the contrary.
- (2) Where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in the suitable newspaper and in such manner as the court thinks fit.
- (3) If the court finds the goods or things belong to same person who was innocent of the offence in connection with which they may or are to be forfeited and who neither know nor had reason to believe that the goods or things were being used in connection with that offence and exercised all reasonable diligence to prevent that being so used, it shall not order for their forfeiture.
- (4) If it finds that such person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.

From the record the trial magistrate did not comply with the detailed procedure provided for under section 389 (a) of the Criminal Procedure Code. The order of forfeiture was made simultaneously at the conclusion of the criminal proceedings.

My reading of section 389 gives me an impression that forfeiture proceedings should be held separately from the criminal trial. There is need for a notice to show cause why the goods or things subject matter of the crime should not be forfeited. The owners or interested parties of the goods or things in issue must be given an opportunity to ventilate arguments on whether they were aware of the offence or the criminal proceedings involving the goods to be forfeited.

In a persuasive authority by South African Court in the case of ***National Director of Public Prosecutions v Sevartz [2005] 2 SACR 186***, the court had an occasion to comment on the requirements of section 48 (1) of the Criminal Procedure Code Act on forfeiture which has similar provisions with our section 389 (a). The court stated as follows:

**“In forfeiture proceedings, sufficient evidence must be adduced on a balance of probabilities in satisfaction of the requirements of section 48 (1). Those requirements being that the property concerned must be shown to have been an instrumentality of an offence referred to in schedule 1 and or that the property was representative of the proceeds of an unlawful activity.”**

The trial magistrate erred in law when making an order on forfeiture in the following manner:

There was no issuance of notice in writing to the person from whom the property was seized or to any other person who may appear to have some interest in such property.

Secondly the trial magistrate did not afford an opportunity to the persons whom the law requires to be served with the notice to make representation within reasonable time at a place indicated by the court for such proceedings to be held. There is no evidence of a hearing date fixed for such purpose to hear the parties on forfeiture proceedings.

The order of confiscation and forfeiture issued *suo moto* by the trial court was illegal and unlawful. In the culminate analysis the learned magistrate did not apply section 389 (a) of the Criminal Procedure Code to make the orders on forfeiture. There is prima facie evidence through the annexures that the subject matter of this matter being coin slot machine belongs to the applicant. The orders therefore stands ousted.

***Dated, delivered and signed in open court at Kajiado on 9/1/2017***

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

The applicant - present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli – Court Assistant present