



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 7 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI TO REMOVE INTO THIS HONOURABLE COURT AND QUASH THE ORDER/DIRECTIVE OF 19/9/2016 BY THE CHAIRMAN OF THE BETTING CONTROL AND LICENSING BOARD AND WHICH WAS DIRECTED TO ALL COUNTY COMMISSIONERS**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF THE BETTING , LOTTERIES AND GAMBLING ACT CAP 131 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

**BETWEEN**

**SAMUEL NJUGUNA NJOKI }**

**WELLINGTON MURUNGA }**

**DANIEL GITHU GWANDARU & 22 OTHERS}.....APPLICANTS**

**AND**

**THE BETTING CONTROL AND LICENSING BOARD .....1ST RESPONDENT**

**THE MINISTER FOR INTERIOR AND COORDINATION.....2ND RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE .....3RD RESPONDENT**

THE ATORENY GENERAL .....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

### JUDGMENT

The Judicial review application herein dated 22/11/2016 pray that this court do issue an order of certiorari to remove into this court and quash the order/directive of 19<sup>th</sup> September 2016 by the Chairman of the Betting Control and Licensing Board and which was directed to all the County commissioners. The application is supported by the affidavit of Samuel Njuguna Njoki, and the attached statements on his own behalf and those of his co-applicants.

The issues pertaining to this application are clear and straightforward. The chairman of the first respondent issued a letter dated 19/9/2016 to all the County Commissioners I believe round the Country explaining the purposes and mandate of his office and calling for their assistance in conjunction with the police.

**“to sensitize members of the public about these alleged Gambling machines and assist in mounting a major crackdown, confiscate them and arraign the operators and owners in a court of law. Our officers will be at hand to provide necessary assistance when required.”**

He concluded by providing them with a list of Casinos which have been licensed.

Against the above letter, the applicants contented that the police swung into action and have harassed, intimidated and carried away their gambling machines. They attached several official receipts from the County Governments which Licensed them to operate the machines. They argued that some of them have already been charged in court while others are being searched. They content that their businesses have greatly suffered and their source of livelihood hampered. That they were not issued with any such adequate notices and that the respondents have breached the Constitutional rights of natural justice.

They further content that the respondents action are in breach of Articles 28, 29, 31, 40, 47 and 50 of the Constitution and further that they are in breach of Section 4 of the Fair Administrative Actions Act 2015.

The 1st, 2nd, 3rd and 4th respondents have filed grounds of opposition arguing that the said directive did not breach any of the fundamental rights envisaged in the Constitution . That the impugned letter is not a decision but mere communication and not a decision capable of being quashed. That the said letter is directed against those operating illegal and unlicensed gambling machines which is within the mandate of the 1<sup>st</sup> respondent.

One Erick Basuna has sworn a replying affidavit on behalf of the 5<sup>th</sup> respondents. According to him they received various complaints from the members of public concerning mushrooming of gambling machines which are unlicensed and which have greatly attracted young people including school going children. That the security committee within the County did meet and decided to take action pursuant to the provisions of Section 53 and 55 of the Betting , Lotteries and Gambling Act Cap 131 Laws of Kenya. He averred that the Licenses issued to the applicants by the County Governments are for amusement machines and not gambling machines. He stated that all the machines that were impounded are gambling machines and not amusement machines which were contrary to the permits.

At the close of their pleadings the parties did file lengthy submissions which I have had the privilege of perusing together with attendant attached authorities.

### **Analysis and Determination**

The issues which are germane to this application is whether or not

**a) the letter strictly speaking is an order or directive capable of being quashed.**

**b) Whether the 1<sup>st</sup> respondent acted ultra vires.**

**c) Whether the fundamental rights of the applicant have been breached.**

It is now established that the judicial review proceedings concerns itself with not the merits of the decision but the decision making process and that the ultimate goal is to ensure that the applicant is given a fair treatment by the relevant authorities he complains of. The court should not at all times venture into the roles and duties of the said body nor usurp its powers.

Does the letter dated 19/9/16 fall with what Order 53 of the Civil Procedure Rules anticipates and therefore capable of being quashed. The applicants complaint is that the police have since acted on the said letter and have confiscated their machines and arrested some of them despite having legal licenses from the county governments. They argued that the action by the police and by extension all the respondents is illegal, irrational and unprocedural.

To answer this first issue, it would be worthwhile to reproduce the provisions of Order 53(2) which states

**53(2) “ Leave shall not be granted to apply for an order of Certiorari to remove any judgement, order, decree, conviction, or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings at such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”** *(underlining mine)*

Clearly the letter here cant not be termed to be

“ a judgment, order, directive, conviction or proceeding” as envisaged by the above order.” A closer reading of the letter in my view is a mere general directives and request to assist the 1<sup>st</sup> respondent achieve a desired end, namely, weed out illegal gambling machines.”

Infact the County Government can choose to ignore the same except that they seemed from the letter to have a mandate in ensuring that they assist the 1<sup>st</sup> respondent. Further the letter does not refer to those who have legal licences.

In my view therefore the said letter does not fall within the purview of the provisions of Order 53(2) aforesated. The same does not constitute any such proceedings capable of being quashed. If the legislature anticipated that the court could quash such a letter then it would have clearly said so. I do not find any proceedings, order, decree or conviction to quash. The letter is a mere communication and a directive.

The above findings would easily conclude this matter but there are other issues raised by the applicants

which merit consideration. One of this is whether the 1<sup>st</sup> respondent in directing the County Commissioners acted ultra vires. The mandate of the 1<sup>st</sup> respondent is spelt out in Section 4 of the Betting, Lotteries and Gambling Act Cap 131 which states as follows:-

**4(1) “ The Board shall have power:-**

**a) to issue licenses and permits in accordance with this Act and any regulations made thereunder.**

**b) during the subsistence of a license or permit, to vary or for good cause to suspend or cancel it, but the Board shall not suspend a license or permit for more than fourteen days and shall not vary or cancel a license or permit without giving the license or permit holder opportunity to show cause against the variation or cancellation; and**

**c) to inquire into complaints against licenses or permit holders.”**

The permits issued to the applicants were those from the County Government of Trans Nzoia and Bungoma. They were not issued by the 1<sup>st</sup> respondent. For reason best known to the applicants those County Governments were not made parties in this application. This court did not therefore have the opportunity to hear their part and why they decided to issue the same.

In fact the 1<sup>st</sup> respondent have argued that the permit issued are for

**' Amusement machines,' not ' Gambling machines.’** Again this court will not inquire into the details as that would be expanding the scope of judicial review law. Suffice to say that it would have been appropriate to enjoin the County Governments which issued the licenses.

The inclusion of the County Government would have been necessary so as to ascertain whether they have complied with the provisions of the 4<sup>th</sup> schedule of the constitution, namely the distribution of duties between the national Government and the County Government. In the absence of their inclusion this court would not venture into the territory of supposition and speculation.

Did the 1<sup>st</sup> respondent breach the applicants fundamental Right and Freedom as envisaged in the Constitution " I respectively do not think so. The action by the 1<sup>st</sup> respondent is within its statutory mandate of regulating gaming, gambling and lotteries. The said letter is a mere communication and directive to other arms of the law to assist in meeting the 1<sup>st</sup> respondent's mandate. Above all the letter talks of those operating illegal gambling businesses. If the applicants were or are operating legal businesses they have nothing to fear. Secondly and more importantly apart from the Judicial review process

Equally, what the police are doing is simply enforcing the law. There is nothing to show that the police have acted capriciously, illegally or outside the mandate provided to them. If the parties have breached the law then they ought to face the consequences. But as averred by the 4<sup>th</sup> respondent all they are doing is ensuring that illegal gambling is eradicated. Nonetheless their action must be within the law. Any suspects ought to have his day in a court of law. In any case, there are sanctions which could be imposed if indeed the police acted outside their mandate.

The applicants have anchored their application on the provisions of Section 4(3) of the Fair Administrative Action Act 2015 where it states that:

**“where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected the decisions**

**a) prior and adequate notice of the nature and reasons for the proposed administrative action**

**b) an opportunity to be heard and to make representation in that regard;”**

I do not think the impugned letter targeted the applicants as in my view they did not hold **“illegal Gambling machines.”** If for any reason they did so, then this court would not acquiesce to such action. As earlier indicated the court cannot be used to foster any illegal activity by any body or person. At the same breath it cannot be used by any law enforcement agencies or body to breach the fundamental rights of the individuals.

Weighing against the provided documentary evidence on record I do not find that the applicants herein have brought themselves within the province of Judicial review. Their remedy could be elsewhere. The impugned letter in my view is not a decision properly so called as provided under order 53(2) of the Civil Procedure Rules. The letter is a mere communication to other state actors. Further it is only directed to those holding illegal gambling machines. If the applicants are not falling within such category then they have nothing to fear.

Fundamentally, the county Government which issued them with the licenses have not been enjoined in the case. This would have added further details as to whether they have complied with the Transition clauses of the Constitution. For now I find that the application is not merited and there are no rights breached by the said letter which is not a decision as envisaged by the Fair Administrative Act.

In fact if the applicant felt aggrieved, I do not find any evidence to suggest that they sought audience with the respondent or for that matter the County Governments.

In the premises the application is hereby dismissed with costs to the respondents.

Delivered this 5<sup>th</sup> day of December 2016

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of**

**Kiarie for the 1<sup>st</sup> – 4<sup>th</sup> Applicants**

**Kakoi for the 5<sup>th</sup> Applicant**

**Kirong – Court Assistant**



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