



**Odungo - Chairman & 2 others (Suing on Behalf of Hola Bar
Owners Association) v County Government of Tana River (Petition
E003 of 2024) [2024] KEHC 13287 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
PETITION E003 OF 2024**

SM GITHINJI, J

OCTOBER 29, 2024

**IN THE MATTER OF: ARTICLE 22, 23 (1) (2) (3) (B) OF THE CONSTITUTION OF
KENYA 2010 TOGETHER WITH ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF: DEPARTMENT OF PUBLIC SERVICE MANAGEMENT,
ADMINISTRATION, ICT, ROTOCOL, CUSTOMER CARE & PUBLIC
COMMUNICATION OF COUNTY GOVERNMENT OF TANA RIVER**

AND

**IN THE MATTER OF: INCREASED LIQUOR LICENCE AND
SINGLE BUSINESS PERMIT THROUGH INVOICES ISSUED ON
14TH MARCH, 2024 BY HOLA SUB-COUNTY ADMINISTRATOR**

AND

**IN THE MATTER OF: SECTION 87 (B) OF PART VIII OF
THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**IN THE MATTER OF: ADMINISTRATION ACT NO. 4 OF 2015
AND ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

LEONARD OTIENO ODUNGO - CHAIRMAN 1ST PETITIONER

MAURICE OTIENO NGERE - TREASURER 2ND PETITIONER

JEMIMAH KASEME - SECRETARY 3RD PETITIONER

SUING ON BEHALF OF HOLA BAR OWNERS ASSOCIATION

AND

COUNTY GOVERNMENT OF TANA RIVER RESPONDENT



RULING

1. The Petitioners vide a Notice of Motion dated 15th May of 2024 sought from this court the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. That upon inter-partes hearing, this honourable court be pleased to issue an order of temporary injunction restraining the Respondent by itself, its employees, servants, agents, representatives or any other person or entity from issuing invoices for payment and forcing payment of liquor licenses and Single business permits with exaggerated and increased payments from Kshs 30,000 to Kshs 50,000 for liquor license and from Kshs 6,100 to Kshs 18,100 which is contrary to the approved fees or figures by the Tana River County Assembly in the Tana River County Finance Act Bill, 2023 pending the hearing, determination and final disposal of the Petition.
 5. That upon inter-partes hearing, this honourable court be pleased to issue an order of temporary injunction restraining the Respondent by itself, its employees, servants, agents, representatives or any other person or entity from forcibly demanding for Liquor licenses and Single Business Permits of the exaggerated and increased fees and from closing, locking and shutting down the Petitioner's business premises within Hola Town and its environs pending the hearing, determination and final disposal of the Petition.
 6. That the costs of the application be provided for by the Respondent.
 7. That this honourable court be further pleased to make such other interlocutory orders as may appear for the court to be just and convenient.
2. The Application is founded on the grounds set out on its face and on the supporting affidavit of Leonard Otieno Odundo the 1st Petitioner who stated that the Petitioners together with several members have been operating their bars and Restaurants for a long time in Hola which businesses are well recognized by the Respondent and the said businesses have been operated within the provisions of Laws of Kenya and the Laws and By-laws of the Respondent and in particular, in accordance with any financial bill approved by the County Assembly. Further, that the Petitioners have been complying in terms of payment of liquor licenses and Single Business Permits as approved by the County Assembly over the years.
3. It was also averred that the payment for Liquor Licenses for the year 2023 was Kshs 30,000 and that of Single Business Permit was Kshs 6,100. Further, that the Tana River County Government Finance Bill 2024 has not yet been tabled in the County Assembly for approval and passage thus no basis for the Respondent to increase or exaggerate the fees for Liquor Licenses and of the Single Business Permits.
4. It was additionally averred that on 13th March 2024, the Sub County administrator Hola Sub-County through the instructions and directions of the Respondent, issued invoices to all Hola bar Owners which invoices had increased rates on Liquor licenses and Single Business permits without inviting the Petitioners for public participation as required by the law under Section 87 (b) of the County



Government Act No 17 of 2012 and in extension without approval of the rates by the County Assembly of Tana River County.

5. Mr. Leonard further stated that on 16th march 2024, the Tana River Bar Owners Association members held a special meeting concerning the increased rates and inadequate public participation which meeting resulted to a letter of even date addressed to the Chairperson Liquor Licensing Committee seeking audience and of which elicited no response. In addition, on 18th March 2024 the Respondent represented by the Department of Revenue changed the demand from Liquor Licensing to Single Business Permit in which the said department demanded for payment of Kshs 18,100 for a Single Business Permit far from the payment of Kshs 6,100 which was enforced by the police and officers of the said department. Following this development, the petitioners under Tana River Bars association issued a complaint letter dated 20th march 2024. That despite the public participation where the petitioners suggested that the Single Business permit be reduced from Kshs 6,100 to Kshs 5,000, restaurants are forced to pay Kshs 18,100 while bars and liquor outlets are forced to pay Kshs 50,000.
6. In response to the Application, the Respondent filed a replying affidavit sworn by Kase Ddaiddo the Respondent's director of revenue. He averred that the application and petition are frivolous, vexatious, bad in law and devoid of merit as they raise no triable and/or constitutional issues. It was further averred that the County assembly of Tana River enacted the Tana River County liquor Licensing Act 2016 which is the guideline for assessing the liquor license fees payable by the petitioners. Further, that the license fees that ought to be paid by the Petitioners shall be in strict adherence to schedule four of the liquor Act which schedule provides that the annual general retail alcoholic drink license fee is Kshs 50,000 in respect of premises situate within a city or a municipality. Additionally, that on 12th June 2018, Hola Municipality was granted a municipal charter by the County governor effectively putting the Petitioners' members under a municipality.
7. It was stated that on 13th March 2024 and in accordance to the aforementioned legislation, the Petitioners' members were issued with the license invoices for payment of license fee of Kshs 50,000 which they have declined to pay resulting to the Respondent closing down the Petitioners' members' businesses. Moreover, the last finance Act to be passed was in 2000 which is still in operation.
8. In regard to Single business permit, it was averred that the petitioners' members are issued with business permit depending on the size of the business. Further, that the orders sought by the petitioners are conservatory in nature and the petitioners have not established a *prima facie* case nor any violation and/or breach of the law in respect of the levied fees.

Disposition

9. The Application was canvassed by way of written submissions. I have taken into consideration the submissions by the parties as well as the authorities relied upon. The issue arising for determination is whether the Petitioners have met the threshold for grant of the interlocutory orders sought.
10. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;



(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

11. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [*supra*] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

12. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”

13. The Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a *prima facie* case as follows;

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

14. From the above definition, it is clear that a *prima facie* case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant’s case at the trial. Have the Petitioners therefore demonstrated this?

15. The Petitioners’ case is anchored on there being no public participation in the increase of the levies for both the Liquor license and the Single Business permit. It is averred that in the year 2023, they paid Kshs 30,000 for liquor licenses and Kshs 6,100 for Single business permits. Whereas the Petitioners provided evidence for payment of Kshs 6,100, they did not provide any receipts that they paid Kshs 30,000 for liquor license in the previous years. The Respondent on its part maintained that the fourth schedule



of the Tana River County Liquor Licensing Act 2016 provided liquor licenses for premises within the Municipality and is stipulated at Kshs 50,000 while single business permits are issued according to the size of the business. I have perused the fourth schedule attached by the Respondent. It is clear on paragraph 7 that hotel alcoholic drink license in respect of premises situate within a city or municipality is Kshs 50,000 for 12 months and in the alternative Kshs 30,000 for 6 months. There is no evidence by the petitioners to controvert this position. In the circumstance, I am not convinced that the petitioners have made out a *prima facie* case.

16. Having established that the Petitioners have not established a *prima facie* case, I need not delve into the two other pillars. This was well settled in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b). demonstrate irreparable injury if a temporary injunction is not granted, and
- (c). all any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. ... If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.” (emphasis mine)

17. Flowing from the foregoing, the Application dated 15th May 2024 lacks merit and is hereby dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF OCTOBER, 2024.

S.M. GITHINJI

JUDGE

In the presence of; -

Mr Omwancha for the Petitioners

Mr Oyugi for the Respondents

