



No. 30

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 4 OF 2013

BOAZ OMONDI ONGORO

PLAINTIFF

-VERSUS-

**THE CHAIRMAN LIQUOR RACHUONYO SOUTH
DISTRICT..... DEFENDANT**

RULING

1. The application before the court is the Notice of Motion dated 2nd April 2013 brought pursuant to order 40 Rule 1 and 2 of the Civil Procedure Rules, section 3A 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The application seeks orders that the defendant/respondent be compelled to issue a license over the applicant's business premises at plot no. Central Kasipul/Kamuma/4309 also known as town council of Oyugis Commercial Plot no. 173. The applicant also seeks for costs of the application.
2. The application is premised on the grounds on the face of the application and further supported by the affidavit of Boaz Omondi Ongoro sworn on 2/4/2013 who states that he is the proprietor of all the business premises at plot no. Central Kasipul/Kamuma/4309 also known as Town Council of Oyugis Commercial Plot No. 173 where he runs a business trading as Bosuana Mega Store on the 1st floor and Blazer Sports Club on the 2nd floor. He has attached copies of application for grant or renewal of an alcoholic retail drinks license, environmental impact assessment license, Ministry of Public Health building occupation certificate, clearance certificate, official receipts and rejection letter from the respondents. He further states that all the stakeholders in the alcoholic drinks i.e Ministry of lands, public health and Oyugis Town Council gave him a clear bill of health and he was issued with a license to operate within the same building by the respondent herein and he continued with his business for about three (3) months.

He complained that the respondent said they will not issue him with a licence owing to allegations of cracks on the wall in the VIP lounge and signs of seepages on the ceiling in the main drinking hall, which he says is not true. He asks the court to grant him the orders sought as he will suffer irreparable loss and further that the acts of the respondent are an afterthought, irrational and acts of impunity.

3. Counsel for the applicant made oral submissions on the 23/5/13 in the absence of the Respondent who was duly served, and ruling was served. The counsel's verbatim submissions are set out below:-

“Application dated 2/4/13. I rely on the grounds on the face of the application and the supporting affidavit of the applicant and the annexures thereto. I seek order no. 3 of the notice of motion pending the hearing of the suit. Applicant has been operating the business for 3 months with an undertaking with the Respondent. I refer to the recommendation by the inspection team of 21/12/2012. I do refer to the paragraph 3 of the supporting affidavit. All the other stakeholders have given the applicant a clear bill of health to pursue on to proceed with the bar business. It is only the Respondent who has refused to grant the same for undisclosed reasons. The applicant has invested heavily and if the Respondent is not compelled to issue the licence, the applicant will suffer irreparably. The acts of the Respondent are an after-thought because they had granted a licence for a wholesale within the same building to the applicant dated 14/11/2012. There is no reason why the applicant cannot be issued with a retail licence in the same building having met all the conditions for the issuance of the same. That is all.”

4. The power to grant licences for premises is provided for under section 12 of the Alcoholic Drinks Control Act and District Committee shall not grant a new licence for the sale of an alcoholic drink to be issued on the premises unless the District Committee is satisfied of certain criteria specified therein.

“12(1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied-

- a. ***That it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometer and the permitted maximum number of such premises as shall as prescribed by law;***

Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws;

- b. ***That the premises in respect of which the application is made are in good repair and are in a clean and wholesome condition, and are provided with adequate and proper sanitary arrangements;***
- c. ***That the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.”***

If the District Committee declines to grant the licence, the correct procedure of seeking redress is to, within 28 days of refusal, appeal to the High Court under section 15 of the Act, which was not done here.

5. However, the court will disregard this technicality of procedure as prescribed by Article 159 of the Constitution. It is noteworthy, however, that in seeking an interlocutory order for the grant of a licence to operate the liquor business the applicant prays for an order whose grant as interlocutory relief would also dispose of the entire suit. The order for the defendant to issue a liquor licence for the year 2013/2014 is the same relief sought in the Plaintiff and in the interlocutory application the subject of this ruling.
6. It is trite law that a mandatory injunction will not issue in the interlocutory stage save in exceptional and clear cases. See *Magnate Ventures Ltd v. Eng Kenya Ltd* (2009) KLR 538 where the Court of Appeal held that:-

“A mandatory injunction need not be given at an interlocutory stage. It could be granted

on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was:

- a. *Clear and one which the court thought it ought to be decided at once, or*
 - b. *If the act done was a simple and summary one which could be easily remedied.*
 - c. *Or if the defendant attempted to steal a march on the plaintiff.”*
7. The issue as to whether the District Committee was satisfied of the matters set out in section 12 of the Act, or whether the applicant had complied with all the requirements set out in the provision, are questions of fact which must be proved by the evidence to be adduced at the full hearing of the suit as filed. I have seen the reason given for the refusal of the licence and, without prejudging the merits of the suit, it would appear to be a serious safety concern which the District Committee is obligated to consider under section 12(1)(b) of the Alcoholic Drinks Control Act of 2012. For the protection of the patrons and prevention of building accidents such as collapse of buildings, the court would hesitate to conclude that a clear case exists for the grant of the liquor licence which would permit bar patrons to attend the place whose safety has not been ascertained. In these circumstances, there cannot be basis for the grant of an interlocutory mandatory injunction for the grant of the liquor licence as prayed. I do not find that there are special circumstances to warrant the grant of an interlocutory mandatory injunction in this case.
8. Accordingly, for the reasons set out above, the application dated 4/3/2013 is dismissed with costs in the cause. The matter will await determination by the court upon full trial on the merits, for which I direct that the suit be fixed for hearing on priority-basis.

Dated and delivered this 21ST day of JUNE 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Moracha for the Applicant

N/A for the Respondent

Mr. Edwin Mongare – Court Clerk