



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**MISC. CIVIL APP. NO. 4 OF 2013 (J.R)**

**IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: AN APPLICATION BY DETLEFT HEIER &  
ELISABETH KURER-HEIER FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI,  
PROHIBITION AND MANDUMUS**

**AND**

**IN THE MATTER OF: ALCOHOLIC DRINKS CONTROL ACT OF 2010**

**AND**

**IN THE MATTER OF: COMEBACK RESTAURANT, LOUNGE & DISCO,  
WATAMU**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**THE REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN**

**DISTRICT ALCOHOLIC DRINKS REGULATION COMMITTEE....1<sup>ST</sup> RESPONDENT**

**MUNICIPAL COUNCIL OF MALINDI.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KILIFI.....3<sup>RD</sup> RESPONDENT**

**THE OFFICER COMMANDING POLICE DIVISION, MALINDI...4<sup>TH</sup> RESPONDENT**

**THE DISTRICT ENVIRONMENT OFFICER,**

**SAMUEL NG'ANG'A.....5<sup>TH</sup> RESPONDENT**

**AND**

**KIOKO ENTERPRISES LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**TULENTA FIDDEN LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

***Ex-parte*:.....DETLEF HEIER & ELISABETH KURER-HEIER**

### **RULING**

1. What is before me is the 2<sup>nd</sup> Interested Party's Notice of Preliminary Objection dated 18<sup>th</sup> July 2013 and filed on 19<sup>th</sup> July 2013.
2. The Notice of Preliminary Objection is based on the grounds that this court lacks jurisdiction to entertain the Ex-parte Applicants' Motion dated 24<sup>th</sup> May, 2013; that the Application dated 24<sup>th</sup> May 2013 is *sub judice* in view of a similar judicial review application pending before the High Court in Malindi Misc. Civil Application Number 31 of 2011 and that the Ex-parte Applicant's Application is grossly frivolous and an abuse of the court process because it seeks to obtain orders under Order 53 when the Applicant has failed to comply with the specific mandatory provisions under statute.
3. The Preliminary Objection is finally premised on the grounds that the Applicant is seeking to enforce private law rights as opposed to public law principles and that there are clear statutory procedures for redress under the Alcoholic Drinks Control Act, 2010 that the Applicant has failed to exploit or comply with.

### **BACKGROUND**

4. The Ex-parte Applicants moved this court by way of a Chamber Summons dated 6<sup>th</sup> May 2013 seeking for the leave of this court to apply for orders of Prohibition to prohibit the 1<sup>st</sup> Respondent from issuing any liquor licence to the Interested Parties.
5. The Ex-parte Applicants finally sought for the leave of the court to apply for orders of mandamus to compel the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to carry out investigations as to whether the Interested Parties are holding any licence to operate Comeback Restaurant and Disco and if not to arrest its Directors and prefer charges against them.
6. The Ex-parte Applicants prayed for the leave so granted to operate as a stay of any further operation of the bar/alcoholic business and the Disco by the Interested Parties within Comeback Restaurant, Lounge and Disco pending the hearing of the main Motion.
7. When the Ex-parte Applicants' advocate appeared before me on 6<sup>th</sup> May 2013, I granted to the Applicants leave to commence Judicial Review Proceedings as prayed in the Chamber Summons dated 6<sup>th</sup> May 2013. I however declined to grant the prayer of leave to operate as a stay of the activities within the Interested Parties bar/restaurant.
8. The Ex-parte Applicants filed the substantive motion on 24<sup>th</sup> May 2013 pursuant to the leave of the court of 6<sup>th</sup> May 2013.
9. On 3<sup>rd</sup> July 2013, the 1<sup>st</sup> Interested Party filed an Application seeking to stay the Ex-parte Applicants' Notice of Motion dated 24<sup>th</sup> May 2013 pending the hearing and determination of the Applicant's Notice of Motion dated 1<sup>st</sup> November 2011 in Malindi High Court Miscellaneous Application JR. NO. 31 of 2011 on the grounds that the current Application is *res-sub-judice*.
10. The main ground of the current Preliminary Objection by the 2<sup>nd</sup> interested party is basically the

- same as the grounds that the 1<sup>st</sup> Interested Party is relying on in his Application filed on 3<sup>rd</sup> July 2013.
11. However, unlike the 1<sup>st</sup> Interested Party's Application, the 2<sup>nd</sup> Interested Party is seeking to have this suit to be struck out altogether.
  12. The parties agreed to dispose of the Preliminary Objection by way of written submissions. The 1<sup>st</sup> Interested Party's Advocate filed his submissions and authorities on 13<sup>th</sup> August 2013. The Ex-parte Applicants' advocate did not file his submissions despite the fact that he was in court on 22<sup>nd</sup> July 2013 when I gave directions on the filing of the written submissions.
  13. I have noticed from the skeleton file that was opened at the registry that the Ex parte Applicants' advocate filed a letter dated 30<sup>th</sup> August, 2013 in which he was requesting for more time to file his submissions. The said letter was received at the registry on 2<sup>nd</sup> September, 2013.
  14. The Ex parte Applicants' advocate did not file his submissions with the said letter despite the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' advocates served him with their submissions on 23<sup>rd</sup> August, 2013 and 15<sup>th</sup> August, 2013 respectively (according to his letter). He however filed his list of authorities on 6<sup>th</sup> September, 2013 which I have considered.
  15. The 1<sup>st</sup> Interested Party's advocate submitted that the Ex-parte Applicants have not complied with the Provisions of Section 9(2) and (3) of the Law Reform Act and Order 53 of the Civil Procedure Code which provides that an Application for leave for orders of certiorari must be made not later than six months after the date of the proceedings and that the Applicants must lodge a copy of the decision to be quashed before the hearing of the Motion.
  16. It was submitted that because of the failure by the ex-parte applicants to attach a copy of the order or record that they are seeking to quash as required by the law, it becomes fundamentally impossible to determine the time limits.
  17. On the second limb of his Preliminary Objection, the 2<sup>nd</sup> Interested Party's counsel submitted that in the absence of a clear indication by the Applicant as to the action complained of, then an action brought under judicial review becomes an abuse of the process and ought to be dismissed.
  18. The 2<sup>nd</sup> Interested Party's Counsel finally submitted that under section 9 (6) – (16) of the Alcoholic Drinks Control Act, 2010, the procedure for challenging any licence to be issued by an objecter is outlined. It was submitted that the Ex-parte Applicants have not indicated the attempts they have made to utilize the said provisions. Counsel relied on the case of **Jimmy Mutinda VS IEBC & 2 Others Ex parte Shaileshkumarata Verbrah Patel & 2 others; Mis Application NO. 2 & 11 of 2013** where Odunga J held that where there is an alternative remedy provided by an Act of Parliament, which remedy is effective, the court ought to ensure that the dispute is resolved in accordance with the relevant statute.
  19. On his part, the 1<sup>st</sup> Interested Party's advocate submitted that the Ex-parte Applicants Motion is incurably and fatally defective as it is *res sub-judice*.
  20. Counsel relied on the provisions of Section 6 of the Civil Procedure Act and submitted that the matters in issue in the current Motion are not merely in part but the subject of the Application herein is in its entirety covered in a pending judicial review Misc. App. Number 31 of 2011 on the same subject matter with the same parties.
  21. The 1<sup>st</sup> Interested Party's counsel submitted that indeed, the Ex-parte Applicants' Verifying Affidavit admits at paragraph 5 of the existence of Miscellaneous Application No. 31 of 2011; that Misc. Application number 31 of 2011 is very much alive and has never been terminated; that the substantive motion in Misc. Application number 31 of 2011 was filed within time and that this court should not condone the Ex-parte Applicants' blatant attempt to abuse the process of the court by filing a *res sub judice* Application.
  22. Counsel relied on the cases of **Stephen Somek Takwenyi & Another VS David Mbutia Githare & 2 others Nairobi HCCC No. 363 of 2009; Kiama Wangai VS John N. Mugambi & Another (2012) e KLR and Benja Properties Limited VS Savings & Loans Kenya Limited (2005) e KLR.**

#### ANALYSIS:

23. I will firstly deal with the issue raised by the 2<sup>nd</sup> Interested Party's counsel that the failure by the

- Ex-parte Applicants to attach the proceedings or the record being challenged is fatal to their Motion.
24. Order 53 Rule 7 (1) of the Civil Procedure Rules provides that ***in the case of an Application for an order of certiorari, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the High Court.***
  25. Indeed, the requirement to attach on the affidavit the decision that an Ex-parte Applicant wishes to challenge is paramount considering that the High Court ought to determine whether such a decision was arrived at either in excess or without jurisdiction, irrationally or unreasonably or in breach of the rules of natural justice. In the absence of the impugned decision or an explanation to the satisfaction of the court of its absence, an Application for an order of certiorari would not be granted.
  26. However, that is an issue which can only be determined after the substantive Motion has been heard. The issue cannot be raised as a preliminary point of law considering that under Order 53 Rule 4 (2) of the Civil Procedure Rules, the court may allow the Ex-part Applicants to file further affidavits to deal with new matters arising out of the affidavits of any other party to the Application.
  27. It is possible that the Ex-parte Applicants would still have filed, with the leave of the court, further affidavits to attach the impugned decision(s) or to explain to the satisfaction of the court at the hearing of the Motion the failure to attach the said decision. The said preliminary point of law was raised prematurely and I dismiss it.
  28. On the issue as to whether the Ex-parte Applicants had an alternative remedy in challenging any licence to be issued by an objector as provided for under section 9(6)-(16) of the Alcoholic Drinks Control Act, 2010, I find and hold that that is an issue which can only be determined by the court upon the hearing of the substantive Motion. That issue is not purely a point of law considering the fact that, as I have stated above, the Ex-parte Applicants would still have filed further affidavit(s). Whether the Applicants complied with the provisions of the Alcoholic Drinks Control Act, 2010 or not are issues of fact.
  29. The only preliminary point of law that this court should consider at this stage is whether the filing of the present Motion is an abuse of the court process in view of the pending Misc. Civil Application number 31 of 2011.
  30. The Ex-parte Applicants have admitted at paragraph 5 of their Verifying Affidavit the existence of Malindi High Court JR Application Number 31 of 2011 in which all the parties are identical to the present parties. The Applicant has deposed as follows:

***“5. THAT there are no other proceedings and there have not been any previous proceedings in any court between myself and any of the Respondents and/or Interested Parties herein over the same subject matter herein save for Malindi High Court J. R. Application No. 31 of 2011 wherein all the parties were identical to the present parties save that our advocates then on record omitted, neglected and or refused to file the main motion within the statutory twenty one (21) days period thereby terminating the said proceedings.”***

31. I have gone through the record of Malindi Misc. Civil Application JR. NO. 31 of 2011. The parties in that suit are the same parties as in the current Motion. The orders being sought in JR. NO. 31 of 2011 are the same orders that are being sought herein.
32. The Ex-part Applicants herein obtained leave to commence Judicial Review Proceedings in J.R. No.31 of 2011 on 1<sup>st</sup> November 2011. The Ex-parte Applicants filed the substantive Motion on 23<sup>rd</sup> November 2011.
33. According to the Ex parte's Applicants' deposition, the only reason that made them to file a fresh suit is because the substantive Motion in J.R. NO. 31 of 2011 was filed out of time.
34. Mr. Ole Kina, counsel for the 1<sup>st</sup> Interested Party submitted that if time is computed in accordance with the provisions of Section 57 of the Interpretation and General Provisions Act, Cap 2, the substantive Motion filed by the Ex-parte Applicants in J.R. No. 31 of 2011 was filed in time.
35. It is not for this court, and especially in these proceedings, to determine if the main Motion in J.R

- No. 31 of 2011 was filed within the requisite period.
36. Whether the Motion in J.R. No. 31 of 2011 was filed by the Ex-parte Applicant within time or not, is not, in my view, relevant.
37. The Ex-parte Applicants cannot be heard to say that the only reason why they filed the present suit, which is similar, word by word, to the suit in J.R. No 31 of 2011 was because they discovered that the Motion in J.R No. 31 of 2011 was filed out of time. That is an act which falls within the definition of what abuse of the court process is all about.
38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found the previous suit (s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.
39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice. That is what the Ex-parte Applicants have done by filing the present proceedings before withdrawing J.R. No. 31 of 2011.
1. This court has the inherent jurisdiction to prevent an abuse of its process. In the circumstances, and for the reasons I have given above, I strike out the Ex-parte Applicants' Motion dated 24<sup>th</sup> May, 2013 with costs.

Dated and Delivered in Malindi this 20<sup>th</sup> day of **September**, 2013

**O. A. Angote**

**Judge**