



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Application 76 of 2012**

**IN THE MATTER OF: AN APPLICATION BY PATRICK OKUMU T/A SAMBA BAR AND RESTAURANT FOR**

**LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: RENEWAL OF ALCOHOLIC DRINK LICENCE FOR SAMBA BAR AND RESTAURANT**

**AND**

**IN THE MATTER OF: GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LIQUOR LICENCING BOARD (MSA)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE LIQUOR LICENCING BOARD.....RESPONDENT**

**EX PARTE: PATRICK OKUMU T/A SAMBA PUB AND RESTAURANT**

**MT. KENYA UNIVERSITY TRUST REGISTERED TRUSTEES.....INTERESTED PARTY**

**RULING**

1) On 13<sup>th</sup> September 2012 this Court, at the request of the Exparte Applicant (hereinafter called Okumu), stayed the decision of The Liquor Licensing Board Mombasa dated 11<sup>th</sup> September 2012. The order of stay directly affects the Interested Party, (Mt. Kenya University Trust Registered Trustees) (hereinafter called Mt. Kenya University) who are the owners of MKU – Plaza (formerly Makena House) where Okumu runs a Pub and Restaurant. These proceedings lie from that order granted on interim basis pending an interparties hearing.

2) This decision is about whether that stay should continue to subsist until the final resolution of these proceedings and also in respect to an application brought by Mt. Kenya University dated 25<sup>th</sup> September 2012 seeking the following orders-

**(a) That the ex-parte order of leave to apply for an order of certiorari and mandamus granted to the Applicant on the 13<sup>th</sup> September, 2012 be set aside or be discharged.**

**(b) That the order granting the said leave as stay of the decision of the Liquor Licencing Board be set aside and/or discharged.**

3) Okumu has been a tenant on the premises now called MKU Plaza. Although some argument was made by Mt. Kenya University as to whether the Bar is on Plot No. XXXXIV/21/MI or on MSA/BLOCK/XXIV/21, nothing much turns on this. What is undisputed is that Okumu is a tenant in MKU Plaza which was formerly known as Makena House. Shown to this Court was a letter of offer from the initial lessors granting him a lease of 5 years 3 months effective from 1<sup>st</sup> July 2011 in respect to premises on Makena House. Even more instructive is what Mt. Kenya University said in its letter of 18<sup>th</sup> July 2012 to The Provincial Commissioner, Coast Province which when making reference to Okumu's Pub, says in paragraph 2-

**“The above mentioned Pub & Restaurant is located on the ground floor of MKU-Plaza that houses Mount Kenya University – Mombasa Campus.”**

There cannot be much contest that the Liquor Licence which is the subject of these proceedings is in respect to the bar situated within MKU-Plaza.

4) While the Okumu's lease was subsisting, Mount Kenya University acquired ownership of Makena House and had themselves registered as proprietors thereof on 17<sup>th</sup> April 2012. Vide a Notice dated 27<sup>th</sup> June 2012 Mount Kenya University issued Okumu with a Notice under Section 4 of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 terminating that tenancy with effect from 1<sup>st</sup> September 2012. Okumu opposed the Notice and has filed a reference before the Business Premises Rent Tribunal. That reference is pending hearing and determination and for that reason Okumu remains a tenant.

5) In the meantime, on 19<sup>th</sup> July 2012, Okumu applied for renewal of his Alcoholic Retail Drinks Licence. In a letter dated 11<sup>th</sup> September 2012 The District Alcoholic Drink Regulation Committee communicated its decision not to renew Okumu's previous Licence No. MSA 058 to operate a bar and directed him to cease operations by 14<sup>th</sup> September 2012. Okumu thinks that the action by the Committee was instigated by Mount Kenya University. In the Statement filed in support of the application for leave, Okumu complains that the Committee was biased and the decision offended the rules of natural justice.

6) The Chairman of The District Alcoholic Drinks Regulatory Committee, Solomon Kitiyo Chepton responded to the allegations made by Okumu in an affidavit sworn on 28<sup>th</sup> September 2012. In it the Chairman explains that Okumu was a holder of a General Retail Alcoholic Drinks Licence No. Msa 058 issued on 2<sup>nd</sup> November 2011 and which expired on 30<sup>th</sup> June 2012. Okumu had applied for the renewal of the Licence. The Committee received an objection by Mt. Kenya University to the grant of the renewal. The Committee upheld the objection for the following reasons quoted from that decision;

**(i) The licence issued by the District Alcoholic Drink Committee expired on 30<sup>th</sup> June, 2012 and therefore your operations are in contravention of the Law.**

**(ii) Your continued operation within the mentioned plot is a security risk to students and members of staff of Mount Kenya University. Criminals may access the University premises and steal vital equipment, or attempt to commit Robbery. Drunk persons also harass female students and hence jeopardize reputation of the University. Continued presence of hired goons at the**

premises poses a security threat to members of the University and students.

(iii) It is an official directive that bars should be located at least more than 300 metres from learning institutions. Your Pub is located in the same building with Mount Kenya University and hence cannot be allowed to conduct bar business.

(iv) Loud Music played in your Bar find finds its way into the lecture halls and staff room and hampering teaching and lessons proceedings.

(v) The Patrons frequenting your Bar park their vehicles right in front of the institution denying their students and staff space and access. In light of the above developments, the committee deems it necessary not to renew your General Retail Alcoholic Drink Licence and therefore directs that you cease operations by Friday, 14<sup>th</sup> September, 2012, date of winding up notice being effective from Tuesday 11<sup>th</sup> September, 2012.”

7) That is the short background. Let me set out the principles that will help me decide this matter.

8) When granting leave to commence Judicial Review proceedings the Court considers the material presented to it, and without a detailed analysis of the matter, whether there is an arguable case deserving of leave (**Njuguna –Vs- Ministry of Agriculture No. 144 of 2000**). Of course, once granted, such leave is open to challenge by persons affected. In entertaining a challenge the Court will be invoking its inherent jurisdiction. That said, the application must be brought promptly upon the affected parties learning of the order. Secondly, the jurisdiction to set aside permission will not be exercised routinely and only in clearest of cases. It must be shown, for instance, without need for too much argument, that the permission was granted when the action is statute-barred or on the basis of material non-disclosure or for such other plain reason.

9) As to the issue of stay the Court may consider together or separately (as the circumstances may require) the following-

§ Whether the stay sought is efficacious.

§ The effect of not granting the stay;

(i) Does it render the main motion nugatory or academic?

(ii) Does it impose an onerous, impracticable or unreasonable burden on the Applicants?

§ Where the stay involves a competition between individual rights and public interest, the Court must be astute to balance the competing interest.

§ Lastly the Court should keep in mind the following words of Lord Goff of Chieveley in **Reg –Vs- Secretary of State for Transport Exparte Factortame Ltd (No. 2) [1991]1 AC 603**. He said-

**“In the end, the matter is one for the discretion of the Court, taking into account all the circumstances of the case. Even so, the Court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.”**

That said, the circumstances here calls for this Court to apply an additional test.

10) Although the stay granted stops, on a temporary basis, an administrative action, it directly affects Mount Kenya University who are running an institution of higher learning at MKU Plaza. The stay order allows Okumu to continue operating the bar. And it must be remembered that the decision of the Committee was partly, if not wholly, at the instance of the objection lodged by Mt. Kenya University. In this way it takes the complexion of injunction application between Okumu and Mt. Kenya University. For

this reason an additional test to be applied is the normal test for grant of injunctions. That this is the approach to take was proposed on the decision of **Regina –Vs- Inspectorate of Pollution and Another Ex parte Greenpeace Ltd 1 W.L.R [1994]570**. This is how Scott L. J explained it-

**“That then, however, raised for the Judge this difficult question, on which, so far as I know, there is no authority: where it is sought to stay a decision of a government department, and the effect of granting the stay will be to affect detrimentally the operations of a third party who are not parties to the proceedings, what is the proper approach for the court, from which the stay is sought, to adopt? If the third parties are made third parties to the proceedings, as they could be, and if an interlocutory injunction were sought against them, then the answer to the question would be clear: the court would then apply the normal principles it applies when an interlocutory injunction is sought, those laid down in American Cyanamid Co. v. Ethicon Ltd. [1975] A. C. 396.”**

11) This Court will determine the Applicants main motion by testing the procedural rectitude of the Committees decision. It will not concern itself with the merits of that decision. If the Committee got the procedure right then the Court will not intervene to quash its decision. My duty now is limited to assessing whether or not the application reveals a prima facie case with a probability of success. Even as I carry out this assessment I must relent from discussing this question in a manner that determines the entire proceedings with finality.

12) The Alcoholic Drink Control Act 2010 commenced on 22<sup>nd</sup> November 2010. Section 9 of the Act prescribes the manner in which a person intending to operate an establishment for the sale of an alcoholic drink applies for a licence. That provision covers applications for both renewals and new licences. Under Section 9(5), any person may lodge objection to such application. Section 9 provides the procedure for processing objections and dealing with applications. For now, Sections 9(5), (6), (7), (8), (9), (10) and (11) are relevant. These read-

**(5) Any person may lodge objection to an application.**

**(6) Every objection to an application shall be made in writing to the Secretary to the District Committee, and the objector shall serve notice of the grounds of the objection on the applicant, personally or by post, at least seven days before the hearing of the application and the onus of proof of such service shall be on the objector.**

**(7) A District Committee may of its own motion take notice of any matter or thing which, in the opinion of the Committee, constitutes an objection to an application, whether or not any objection has been otherwise lodged.**

**(8) Where in respect of an application a District Committee acts in pursuance of subsection (7), the Committee shall inform the applicant of the nature of the objection, and shall, if the applicant so requests, adjourn the hearing for such period, not being less than seven days, as the District Committee considers necessary to enable the applicant to reply thereto.**

**(9) Every person making an application shall, save as otherwise provided, appear in person or by an advocate before the District Committee, and shall satisfy the District Committee that there is need for the grant of a licence of the type applied for in the particular locality in respect of which the application is made.**

**(10) A District Committee may require the personal appearance before it of the applicant, or of the manager of the premises to which the application relates, or of both of them and of any other person whose attendance is considered by the committee to be necessary.**

**(11) Any objector may appear personally or by an advocate at the hearing of the application. (my emphasis)**

13) Basically, where an objection to an application is made, the Objector must serve that notice of

objection on the Applicant at least 7 days before the hearing. As clearly provided by Section (6) the onus of proof of such service shall be on the Objector. The requirement for service is mandatory not directory. The Applicant is given an opportunity by the law to appear in person or by an Advocate at the hearing. From the evidence presented, Okumu was not notified of the objection lodged by Mt. Kenya University either by Mt. Kenya University or the Committee itself. He was not given an opportunity to react to the objection. The Committee processed the objection in a unilateral fashion and simply communicated the decision to Okumu.

14) It seems to me that the Committee may have breached the procedure prescribed by Statute, the rules of natural justice and Article 47 of The Constitution on fair Administrative action. Article 47 requires administrative action to be, inter alia lawful, reasonable and procedurally fair. Also, it is trite law that a decision made in contravention of the rules of natural justice is made outside jurisdiction and void (**Ridge –Vs- Baldwin [1963] 2 ALLER 66**). It needs to be said, I think, that Mount Kenya may have contributed to the breach of procedure as it did not serve the Applicants with the objection as required under Section 9(6).

15) I now turn elsewhere. It was argued with some force by Counsel for Mt. Kenya University that the decision of the Committee was right because-

(a) **Okumu’s licence had already expired.**

(b) **Okumu’s application to the Committee was out of time.**

(c) **There was compelling public interest to refuse the licence as the learning of the students is jeopardized.**

It may be so, Okumu’s application to the Committee may be weak, undeserving or late. Counsel even thought that it factually and “scientifically” impossible for the Committee to grant such an application. Yet even a totally hopeless Applicant must be given a hearing as statute requires. When this is not done then any decision reached is just as hopeless, in fact void. The purpose of Judicial Review is to ensure that public authorities adhere to levels of fair administrative action when dealing with issues before them.

16) Should Okumu have pursued an appeal provided under Section 15 of the Act instead of questioning the decision by way of Judicial Review? Section 15 provides-

**“An applicant whose application for a new licence, to renew or transfer a licence has been refused or cancelled may within twenty-one days of such refusal appeal against such refusal to the High Court.”**

It is my view that this procedure is provided to challenge decisions made *intra vires*. If a person thinks that a decision is ultra vires and therefore void then the remedy available is in Judicial Review.

17) I have to reach a decision that the Okumu has made out a prima facie case with good prospects of success in respect to his prayer for quashing of the decision.

18) But the second prayer for mandamus may well be a cropper. The leave sought for mandamus read-

**“That the Applicant be granted leave to apply for an order of Mandamus compelling the LIQUOR LICENCING BOARD – MOMASA to issue the PATRICK OKUMU T/A SAMBA PUB AND RESTAURANT liquor licence for the year 2012-2013.”**

Even if this Court were to quash the decision of the Committee, it cannot direct the Committee to accept or decline Okumu’s application. Where Statute donates power or discretion to a public body, then the public body must be left to exercise that power or discretion without fetter as long as it does so within the parameters and procedure prescribed by the law and statute.

19) I have already said that Okumu's application, on a preliminary assessment, appears to suggest procedural failure on the part of the Committee. What the order of stay does is to prevent the implementation of a decision that may have been arrived at unprocedurally. In that sense it protects the Applicant and is efficacious. If on the other hand I did not grant him stay then Okumu would have had to shut down his bar. That would render the main application moot as the substratum of the application would have ceased to exist. It is for these reasons that I decline to set aside or vary my orders for leave for certiorari and that of stay. I am nevertheless persuaded that the application for mandamus as worded is not grantable however attractive the arguments for its grant may be. See my reasons in paragraph 18 above. I set aside the leave granted in that respect.

20) Lastly, this Court is not unconcerned that Okumu's Pub is within premises of a learning institution. But there is a history that cannot be ignored. It is common ground that Okumu was running his bar in the premises before MKU Plaza was acquired by Mt. Kenya University. Mt. Kenya University found him there and I must wonder whether Mt. Kenya University were not alive to this when they set up the learning institution within the Plaza! But they were, because having acquired the building they immediately sought to terminate Okumu's lease. If Okumu's operations must bow to the learning institution then it must be done within the context of the law!

20) Let me rehash the outcome-

(i) The stay order granted on 13<sup>th</sup> September 2012 shall abide the hearing and determination of these Judicial Review proceedings.

(ii) The application to set aside or vary the permission granted to commence proceedings for an order of certiorari is declined.

(iii) The permission granted on 13<sup>th</sup> September 2012 to commence proceedings for an order of mandamus is hereby set aside.

(22) On costs, the Exparte Applicant will get costs on the application for stay. There shall be no order on costs on the Interested Party's application of 25<sup>th</sup> September 2012 as each party succeeded partly.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of November, 2012.**

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**No appearance for Applicant**

**Adoch for Interested Party**

**Eredi for Respondent**

**Court clerk - Moriasi**

**F. TUIYOTT**  
**JUDGE**