



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Civil Suit 270 of 2009**

**WAKARI NJUGUNA ..... APPLICANT/PLAINTIFF**

**VERSUS**

**JASON KIMANI MWANGI ..... DEFENDANT/RESPONDENT**

**RULING**

On 16<sup>th</sup> December, 2009 this court made orders of mandatory injunction compelling the defendant to open up the plaintiff's business premises situated at Kilgoris Town, **Plot No. 20**, hereinafter referred to as "**the suit premises.**" If he failed to do so, the Officer Commanding Kilgoris Police station was directed to oversee the exercise of the plaintiff's break-in thereto. The defendant was further ordered to return all the plaintiff's properties that had been removed from the suit premises. Pending hearing and determination of this suit, the defendant, his agents, and/or servants were restrained from interfering with the plaintiff's use, possession and occupation of the suit premises.

On 17<sup>th</sup> February, 2010 the plaintiff filed an application seeking an order to restrain the defendant and the District Commissioner, Trans Mara, their agents, servants and/or employees from interfering with the running of his business. He also sought to have the defendant punished for disobeying the orders that were made on 16<sup>th</sup> December, 2009. He further sought that the District Commissioner, Trans mara, be cited for contempt of court.

In his affidavit in support of the application, the plaintiff stated that the orders issued by this court on 16<sup>th</sup> December, 2009 were served upon the defendant but on 25<sup>th</sup> January 2010, the defendant, through Nyatundo & Company Advocates, instructed Moco Auctioneers to levy distress for rent on his business premises. The Auctioneer was to recover an amount of **Kshs. 278,096.57** which was outstanding on account of rent and electricity bills. The Auctioneer proceeded to proclaim the plaintiff's properties. The plaintiff's advocate wrote to M/s Nyatundo & Company Advocates and informed them that the distress warrant was wrongful and in contempt of court. A copy of the letter was also sent to the Auctioneers and since then they did not proceed any further.

The plaintiff averred that on 9<sup>th</sup> February 2010, the District Commissioner, Trans Mara, one Mr. Mathioya, instructed the Officer Commanding station, Kilgoris police, (O.C.S.) to have his business closed. The O.C.S. proceeded there with his officers and directed the plaintiff to close the business premises. They also arrested the plaintiff's employees.

On 11<sup>th</sup> February 2010, the plaintiff's advocate wrote to the said District Commissioner and drew his attention to the aforesaid court orders. The plaintiff's view is that the defendant is using the District Commissioner to frustrate, intimidate and embarrass him in an effort to

circumvent the orders of this court.

The defendant filed a replying affidavit and stated that he complied with the orders issued by this court on 16<sup>th</sup> December 2009 by opening the plaintiff's premises as required. He stated that the premises remained open between 17<sup>th</sup> December and 9<sup>th</sup> February 2010. However, on 13<sup>th</sup> January 2010 one John Omondi, a Public Health Officer based at Kilgoris, served the plaintiff and himself a notice requiring them to provide sanitary facilities to the said premises. This was a reminder requiring them to construct four new pit latrines and a urinal in the premises. If they failed to do so within 30 days from the date of the letter the premises were going to be closed without any further correspondence.

Further, the plaintiff did not have a liquor licence for the year 2010 and consequently the premises were closed and his agent charged before the Kilgoris Law Courts.

**Gerishon Mbogo Mathioya**, the District Commissioner, Trans mara West District, filed a replying affidavit and denied having been involved in any manner whatsoever with the applicant's premises as alleged. He denied having ever instructed the O.C.S. to close the suit premises as alleged by the plaintiff. He was however aware that the closure of the suit premises by the O.C.S. and his officers on 12<sup>th</sup> February 2010 was due to the non renewal of the liquor licence for the year 2010 and not over the alleged dispute between the plaintiff and the defendant. He annexed to his affidavit a copy of a charge sheet indicating that on 12<sup>th</sup> February 2010 one Bernard Otieno and one Esther Mupusi were charged with operating a beer stockist without a liquor licence. They pleaded guilty and each was fined Kshs. 1,500/= in default one month imprisonment.

On 15<sup>th</sup> February 2010 he received a letter from the plaintiff's advocate purporting to serve him with the orders made on 16<sup>th</sup> December 2009 whereas the suit premises had been closed on 12<sup>th</sup> February 2010 for operating without a liquor licence. He therefore denied that he was in contempt of any court order as alleged.

From the affidavits on record, it is clear that following issuance of the court orders made on 16<sup>th</sup> December 2009, the suit premises were re-opened on 18<sup>th</sup> December 2009. An inventory of all the properties that were in the premises was taken. That information is contained in the defendant's further affidavit sworn on 19<sup>th</sup> March, 2010. The contents thereof were not disputed by the plaintiff. Although the plaintiff alleged that on 9<sup>th</sup> February 2010, the District Commissioner instructed the O.C.S. Kilgoris to close the business premises, there is no sufficient evidence in proof of that allegation. What is evident is that the plaintiff's workers were arrested and charged in **criminal case No. 91 of 2010** for operating the plaintiff's business without a liquor licence. They pleaded guilty and were convicted and fined accordingly.

However, there was no court order requiring the suit premises to be closed. Where a person is convicted of the offence of selling liquor without a licence, in addition to the sentence passed, the court may order the forfeiture of the liquor found in the unlicensed premises or in the possession of the person so convicted. The plaintiff was at liberty to apply for renewal of the liquor licence and subject to meeting all the necessary requirements, I believe he would have been issued with one.

It is not clear to this court why the police decided to close down the plaintiff's business. Under **section 40 (1)** of the **Liquor Licensing Act Cap 121 Laws of Kenya**, a police officer, furnished with written authority by a magistrate, may enter and search any unlicensed premises and seize any liquor found therein and the same may be forfeited by a court on conviction of the owner or any other person found in possession thereof. But where such written authority is likely to prevent the detection of an offence, a police officer may so act without authority. In such a case the police officer is required to report such action as soon as possible to a magistrate. In the absence of any valid order to close the plaintiff's business, the police overstepped their boundary and unlawfully involved themselves in a civil dispute

between the parties herein. The police could only arrest the plaintiff and/or his agents for operating his business illegally and no more.

As regards absence of sanitary facilities in the suit premises, **section 37 (1)** of the **Act** requires a Medical Officer of Health to report to the Chairman of a Liquor Licensing Court any licensed premises which are deficient of such facilities or in bad state of repair. Thereafter the Chairman of the Licensing Court, who is often the area District Commissioner, sets in motion the process of considering the complaint and if satisfied that the same is merited the court may cancel the liquor licence or make such other order as deemed appropriate.

As far as the plaintiff's application to have the defendant and the said District Commissioner cited for contempt of court, there is no sufficient evidence that the two disobeyed this court's orders in any way. I therefore dismiss the plaintiff's application with costs to the defendant and to Mr. Gerishon Mbogo Mathioya.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF MAY, 2010.**

**D. MUSINGA**

**JUDGE.**

**17/5/2010**

Before D. Musinga, J.

Mobisa – cc

N/A for the Plaintiff

N/A for the Defendant

Defendant – present

**COURT:** Ruling delivered in open court on 17<sup>th</sup> May, 2010.

**D. MUSINGA**

**JUDGE.**