



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 1 of 2006**

**CHARLES M. MBULO**

**FREDRICK SISSY MBULO T/A MAGONGO FLAMINGO BAR & RESTAURANT  
...APPLICANTS**

**VERSUS**

**THE LIQUOR LICENSING COURT MOMBASA DISTRICT.....  
RESPONDENTS**

**RULING**

Charles M. Mbulo and Fredrick Sissy Mbulo T/A Flamingo Bark and Restaurant, the applicants herein, took out a motion pursuant to Order XLI rule 4 of the Civil Procedure Rules in which they sought for an order a stay of the order of the Liquor Licensing court dated 14.11.2005 pending appeal. The applicants further sought for an order directing the Liquor Licensing Court to issue a license pending appeal. The motion is supported by the affidavit of Charles Makau Mbulo. The motion is opposed by the Liquor Licensing Court through the replying affidavit of Mohammed Maalim.

It is the submission of Mr. Mkan advocate for the applicants that their appeal has high chances of success and on that account this court should grant the orders sought for in the motion. Mr. Mkan illustrated this point by stating that the Liquor Licensing Court did not give reasons for its decision for refusal to renew the applicants' licence in compliance with the provisions of Section 16 of the Liquor Licensing Act. It is also the argument of Mr. Mkan that the applicants were not heard neither were they given the notice of objection under Section 10(2) of Cap. 121 Laws of Kenya. The applicants have urged this court to direct the respondent to issue them with a license pending appeal under Section 27(2) of the Liquor Licensing Court.

Mrs. Umara, counsel for the respondent, opposed the motion stating that an order of stay under Order XLI rule 4 of the Civil Procedure Rules is not available because the decision of the Liquor Licensing Court does not amount to an order under Section 2 of the Civil Procedure Act. The learned counsel was of the view that this court has no jurisdiction under Section 18 to grant an order of stay. She also complained that the applicants have failed to pay the requisite fees under Section 27(1) of the aforesaid Act so that the license can be issued pending appeal.

I have considered the submissions of Mr. Mkan and Mrs. Umara learned counsels for the applicants and the respondent respectively. I have also perused the motion plus the supporting and the replying affidavits. The history of the matter appears to be brief and straight forward. On the 14<sup>th</sup> day of November 2005, the Mombasa, Liquor Licensing Court sat to consider various applications within its jurisdiction. Amongst those applications is that of Charles Mbulo and Fredrick Mbulo T/a Flamingo Bar and Restaurant. The two had applied for their licences issued to them in 2004 to be renewed. The court refused to renew the license on the ground that the applicants landlord had lodged an objection against the renewal of the license. The applicants admit that they were not present when the licensing court deliberated on the matter. They say they saw no need to attend the proceedings because they had no notice of any objection. Being aggrieved by the respondents' decision the duo are now before this court on appeal. The appeal is yet to be heard. What is before this court is an application under Order XLI rule 4 of the Civil Procedure rules.

It is the submission of Mrs. Umara for the respondent that the provisions of order XLI rule 4 of the Civil Procedure Rules do not apply to this appeal hence this court cannot issue an order of stay. She was of the view that the applicants should have paid the requisite fees so that their license is renewed pending appeal. The question this court must decide now is whether or order XLI rule 4 of the Civil Procedure Rules can apply to an appeal arising out of a Liquor Licensing Court. The definition of the "court" is given under section 2 of the Civil Procedure as follows:

"The High Court or a Subordinate Court acting in the exercise of its civil jurisdiction."

It is obvious that Section 2 of the Civil Procedure Act did not contemplate the Liquor Licensing Court to be a court within that section. The order issued by the Liquor Licensing Court cannot therefore be stayed under Order XLI rule 4 of the Civil Procedure Rules which deals with orders or decrees arising from courts within the definition of Section 2 of the Civil Procedure Act. The provisions of Section 27 of the Liquor Licensing Act clearly shows the remedies available to an applicant whose application has been refused. That Section does not contemplate that an aggrieved party should rush to the High Court for an order of stay under Order XLI rule 4 of the Civil Procedure Rules. In order to appreciate the applicability of that Section, it is important to reproduce its contents as follows:

"S.27(1) If the renewal of a license is refused, the licensee shall, on payment of the proportionate part of the fees for the appropriate license, be entitled to a license of such description and for such period, not exceeding 3 months, as the licensing court may deem necessary for the purpose of disposing of the liquor or apparatus on the premises, such period to commence on the day after the last sitting of the court at which the renewal of his license has been refused, or on the day after the termination of his existing license, whichever day is the later.

**(2) If the renewal of the license is refused and the licensee appeals under S.18 against the refusal, the licensee shall on payment of the fees for the appropriate license, be entitled, unless the minister directs otherwise, to a renewal of the license which is the subject of appeal to be valid only until the appeal has**

**been determined, such a license to commence  
on the day after the determination of his  
existing license. Provided that if the appeal is  
refused the licensee shall be entitled to a  
refund of a proportionate part of the Fees  
paid.”**

It is quite explicit from the above provisions that the applicants are entitled to have their licenses temporarily extended for a specified period either to clear stocks or pending appeal. The extension is conditioned on payment of the fees or unless the minister concerned has given a directive otherwise. In the end I agree with the submissions of Mrs. Umara that the motion is improperly before this court. The applicants have not shown that they actually paid the requisite fees required under Section 27 of Cap 121 Laws of Kenya and that they were refused an extension. If well advised I think the applicants should exhaust the channels set out under the Liquor Licensing Act Cap. 121 Laws of Kenya for the remedies they are currently seeking from this court.

The upshot is that the motion is ordered struck out with costs to the respondents.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of May 2006.**

J.K. SERGON

JUDGE

In open court in the presence of Mr. Mkan for appellant and Mrs. Umara for the Respondent.