



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 45 OF 2019**

**ALEX MOSETI T/A MOLLY'S BAR .....APPELLANT**

**VERSUS**

**TOURISM REGULATORY AUTHORITY....1<sup>ST</sup> RESPONDENT**

**THE TOURISM FUND.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 8<sup>th</sup> March 2019, the plaintiff, *Alex Moseti T/A Molly's Bar* (hereinafter the applicant) instituted suit against the defendants, *Tourism Regulatory Authority* (1<sup>st</sup> respondent) and *the Tourism Fund* (2<sup>nd</sup> respondent) seeking the following reliefs:

**a. A declaration that the plaintiff is not a restaurant and does not fall within the meaning of tourism activity as specified in the Tourism Act No. 12 of 2011.**

**b. Costs of this suit.**

**c. Any other remedy deemed justifiable by the court.**

2. Subsequent to the institution of the suit, the applicant filed a Notice of Motion dated 22<sup>nd</sup> March 2019. The first two prayers sought orders pending the hearing and determination of the application which are now spent. What is pending my determination is prayer 3 which seeks the following order:

**“that a permanent injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/ respondents whether by themselves officers, directors, servants and or their agents or whomsoever is acting on its behalf from continuously demanding payment of levies from the plaintiff/applicant not due to the defendants/respondents through threats of arrest, intimidation, harassment and interfering with the plaintiff's/applicant's business at I.R. No. 1870/14/114 Woodvale Grove, under No. BN/2014/263245 pending the hearing and determination of this suit.”**

3. The application is supported by grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant on 22<sup>nd</sup> March 2019 and the annexures thereto. It is the applicant's case that he operates a one room bar in Westland's which is licensed under the *Alcoholic Drinks and Control Act* and *The Public Health Act* and is only limited to selling alcoholic drinks to its customers; that his business is not a restaurant and does not qualify to be a tourism activity or enterprise which ought to be regulated by the 1<sup>st</sup> respondent and for which the applicant would be statutorily required to pay levies to the 2<sup>nd</sup> respondent under the *Tourism Act* and the Regulations made thereunder.

4. The applicant further states that the 1<sup>st</sup> respondent has unlawfully and unjustifiably purported to categorise his business as a restaurant which has paved way for the 2<sup>nd</sup> respondent to start demanding the payment of levies through threats, harassment of his employees and other forms of intimidation; that on 27<sup>th</sup> August 2018, he was forced to apply to the 1<sup>st</sup> respondent for issuance of a tourism licence and to pay monies as penalties after his employees were arrested and detained after he was found operating without the licence; that if the order sought is not granted, he will suffer irreparable loss and damage as the respondents will continue with their acts of transgressions and violations of the law which will result to loss of goodwill by his customers and eventual collapse of his business.

5. The application is opposed by both respondents. *Yusuf Mohamed*, the acting regional manager of the 1<sup>st</sup> respondent, Nairobi Region, swore a replying affidavit on behalf of the 1<sup>st</sup> respondent which was filed on 3<sup>rd</sup> May 2019. In the affidavit sworn on its behalf, the 1<sup>st</sup>

respondent maintains that the applicant's bar business falls under *Class 'B' of Schedule 9 of the Tourism Act* as the applicant trades on drinks and beverages; that it therefore falls under the 1<sup>st</sup> respondent's regulation and requires a tourism licence to be in lawful operation; that in demanding the payment of licence fees and penalties accruing from 2014, the 1<sup>st</sup> respondent was only carrying out its statutory function in accordance with the law. The 1<sup>st</sup> respondent therefore urged the court to dismiss the application for lack of merit.

6. On its part, the 2<sup>nd</sup> respondent opposed the motion through a replying affidavit sworn on its behalf by *Barbara Akoth*, the 2<sup>nd</sup> respondent's Nairobi Regional Manager. The deponent supported the 1<sup>st</sup> respondent claim that by its nature and scope, the applicant's business qualified to be a tourist activity or enterprise and was statutorily required to obtain a licence under the *Tourism Act* (hereinafter the Act) and to pay tourism levies set out under the Act in addition to payment for permits, licences or other levies under the *Alcoholic Drinks and Control Act* or the *Public Health Act*. *Ms Akoth* further asserted that the 2<sup>nd</sup> respondent acted within the law in demanding unpaid levies and accrued penalties from the applicant which penalties the applicant was aware of.

7. It is the 2<sup>nd</sup> respondent's case that the application is not merited as the applicant had not demonstrated the irreparable loss he stood to suffer if the order of injunction was denied or how his constitutional rights had been violated by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent joined the 1<sup>st</sup> respondent in urging the court to dismiss the application noting that if the order of injunction was granted, it might have the effect of crippling the functions of the 2<sup>nd</sup> respondent.

8. By consent of the parties, the application was prosecuted by way of written submissions. The applicant filed his submissions on 29<sup>th</sup> May 2019 while the respondents filed joint submissions on 19<sup>th</sup> June 2019. The submissions were orally highlighted before me on 29<sup>th</sup> July 2019. Learned counsel *Ms Menchi* appeared for the applicant while learned counsel *Mr. Kiptoon* represented the respondents.

9. I have carefully considered the application, the affidavits on record, the written and oral rival submissions made on behalf of the parties and all the authorities cited. Having done so, I find that the only issue for my determination is whether or not the applicant has demonstrated that he is deserving of grant of orders of an interlocutory prohibitory injunction.

10. The principles to be considered by the court in the exercise of its discretion in deciding whether or not to grant orders of interlocutory injunction were set out in the celebrated case of *Giella V Cassman Brown & Company Limited, (1973) EA* as follows:

**“(a) The applicant must first establish a prima facie case with a probability of success.**

**(b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.**

**(c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.”**

11. Starting with the first principle, before delving into a consideration of whether or not the applicant has established a *prima facie* case with a probability of success, it is important to understand what is meant by a *prima facie* case. The Court of Appeal in *Mrao Limited V First American Bank of Kenya & 2 Others, [2003] eKLR* defined a *prima facie* case in the following terms:

**“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Court further opined that:

**“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”**

12. From the above definitions, it is clear that for an applicant to succeed in satisfying the first principle, he must demonstrate that he not only has an arguable case but that there is a threat to infringement of a right and that his case has a high probability of success at the trial.

13. Having perused the pleadings in this case and the application including the reliefs sought in the plaint, it is my finding that the resolution of the application and indeed the entire case rests on the determination of whether or not the applicant's business fits within the definition of a 'restaurant' as defined in the *Tourism Act No. 28 of 2011* or whether it amounts to a tourist activity or enterprise whose regulation falls under the mandate of the 1<sup>st</sup> respondent and which was in the same vein statutorily required to pay certain levies to the 2<sup>nd</sup> respondent.

14. The applicant has maintained that his business is a one room bar business whose scope is limited to the sale of alcoholic and non-alcoholic drinks; that it does not deal in food and is therefore not a restaurant; that since it is not a restaurant, it is exempted from paying any levies to the 2<sup>nd</sup> respondent.

15. Section 2 of the Act defines a restaurant as:

**“any premises on which the business of supplying food or drink for reward is carried on.”**

Schedule 9 of the Act lists the enterprises, activities or services regulated under the Act. Class 'B' of the Schedule includes restaurants and other food and beverage services as enterprises which are regulated under the Act.

16. Given the definition of the term 'restaurant', I find that the same is too general and vague and may not be helpful in determining whether a business such as the one undertaken by the applicant falls within that definition. The applicant has contended that his business is operated in a single room and this has not been disputed by the respondents. He has maintained that he does not sell any food in his premises and this has also not been controverted by the respondents.

17. It is instructive to note that the 2<sup>nd</sup> respondent was established under the *Tourism Act*. The objective for which the Act was enacted according to its preamble was to provide a legal framework for the development, management, marketing and regulation of sustainable tourism and tourism related activities and/or for connected purposes.

Given the positions taken by the parties in this application and the fact that this suit revolves around the respondents' claim that the applicant's business is supposed to be regulated under the Act which is denied, it is my view that a conclusive determination of whether or not the applicant's business is one which qualifies to be a regulated service or enterprise under the Act can only be made after parties adduce evidence during the trial.

It is not a determination that can be made at this interlocutory stage. Suffice it to say however that *prima facie*, the applicant has managed to prove that his business may not be among the tourist activities contemplated for regulation under the Act.

18. The fact that the applicant has previously applied for a license under the Act or paid penalties demanded by the respondent is not of itself proof that the business is a regulated enterprise. The applicant has consistently asserted that he paid for the licences and penalties under duress due to harassment perpetuated by the respondents' agents in the form of arrests and detention of his employees. The applicant has annexed evidence to his supporting affidavit to substantiate this claim.

19. In view of the foregoing, it is fair to conclude that the applicant has demonstrated that if the order sought is not granted, the respondents will continue to demand for payment of tourism levies which he will be forced to pay before the issue of whether his establishment falls within the mandate of the respondents is finally determined by this court.

20. Turning to the second principle on irreparable harm or loss, the Court of Appeal in *Lucy Wangui Gachara V Minudi Okemba Lore, [2015] eKLR* expressed itself as follows on the subject:

**“...If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.”**

21. The applicant has maintained that if the order sought is not granted, the respondent will be at liberty to continue harassing and arresting his employees as a way of intimidating him into paying the levies and penalties required to be paid under the Act; that this will in turn lead to the collapse of his business as he shall lose the goodwill of his customers. If this happens and the applicant subsequently succeeds in his suit, I am doubtful whether such a loss is one that can be adequately compensated by an award of damages.

22. For the foregoing reasons, I have come to the conclusion that the applicant has fully satisfied the first two requirements for grant of orders of an interlocutory prohibitory injunction. It is thus not necessary for me to establish where the balance of convenience falls as between the parties although going by my foregoing analysis, it is obvious that the balance of convenience would tilt more in favour of the applicant. Taking everything into account, I am convinced that the applicant and his business deserve protection of this court by issuance of the order sought pending determination of the suit.

23. Consequently, it is my finding that the Notice of Motion dated 22<sup>nd</sup> March 2019 is merited and it is hereby allowed on terms that each of the respondents whether by themselves or through their servants or agents are hereby restrained from demanding payment of levies through threats of arrest, intimidation, harassment and or interfering with the conduct of the applicant's business on LR No. 1870/14/114 Woodvale Grove pending the determination of the suit. I will not make any order as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of November, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Cheruiyot holding brief for Mr. Koceyo for the applicant

Mr. Kiptoon for the respondents

Mr. Salach: Court Assistant