



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
JR. MISC APP NO. 31 OF 2011

IN THE MATTER OF: RDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

**IN THE MATTER OF: AN APPLICATION BY DETLEF HEIR & ELISABETH
KURER-HEIR FOR LEAV TO APPLY FOR ORDERS
OF CERTIORARI, PROHIBITIO AND MANDAMUS**

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.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MALINDI2ND RESPONDENT

THE OFFICER COMMANDING POLICE DIVISION, MALINDI.....3RDRESPONDENT

THE DISTRICT ENVIRONMENT OFFICER, SAMUEL NG'ANG'A.....4TH RESPONDENT

AND

KIOKO ENTERPRISES LIMITED.....1ST INTERESTED PARTY

TULENTA FIDDEN.....2ND INTERESTED PARTY

DETLEF HEIER &

ELISABETH KURER-HEIER.....EXPARTE APPLICANTS

R U L I N G

1. The Application before me was filed by the 2nd Interested Party under a certificate of urgency on 23rd July 2013. I fixed the Application for hearing for 29th July 2013.
2. The ex parte Applicant's advocate was served with today's hearing notice. He did not file a Replying Affidavit or Grounds of Opposition. The Advocate was also not in court when the matter was called out.
3. The 2nd Interested Party's Application is seeking for the following reliefs:
 - a. ***THAT the court be pleased to certify this application as urgent and service of the same be dispensed with in the first instance.***
 - b. ***THAT the orders for leave serving as stay prohibiting the 1st Respondent from issuing any Liquor Licence issued on 2nd November 2011 by Honourable Lady Justice C. Meoli be hereby vacated pending the final hearing and determination of this Application interpartes.***
 - c. ***THAT the orders for leave serving as stay prohibiting the 1st Respondent from issuing any Liquor Licence issued on 2nd November 2011 by Honourable Lady Justice C. Meoli be hereby vacated pending the final hearing and determination of this Application filed on 23rd November 2011 by the Claimant/Respondent***
 - d. ***THAT the Orders for leave serving as stay of any further operation of the DISCO or any other loud music by the interested parties within Comeback Restaurant, Lounge and Disco in Watamu and issued on 2nd November 2011 by Honourable Lady Justice C. Meoli be hereby vacated pending the final hearing and determination of this Application interpartes.***
 - e. ***THAT the Orders for leave serving as stay of any further operation of the DISCO or any other loud music by the interested parties within Combeback Restaurant, Lounge and Disco in Watamu and issued on 2nd November 2011 by Honourable Lady Justice C. Meoli be hereby vacated pending the final hearing and determination of this Application filed on 23rd November 2011 by the Claimant/Respondent.***
4. By way of a Chamber Summons dated 31st October 2011, the Ex-parte Applicants moved Meoli J under a Certificate of Urgency on 1st November 2011, the main complaint being that the Interested Party was operating a disco for 24 hours within a residential area with unbearable loud music and that the Interested Parties were operating the said business without any licence or at all.

5. The Ex-parte Applicants sought for leave of the court to commence Judicial Review proceedings and the leave to operate as stay regarding the disco and loud music pending the hearing of the substantive motion.
6. Meoli J granted the Ex-parte Applicants the leave to commence Judicial Review Proceedings. The said leave was also to operate as a stay solely with respect to prohibiting the Interested Parties from continuing to operate and play loud disco music in the neighbourhood. The Ex-parte Applicant was also ordered to deposit Khs.10,000 as security for costs within 30 days.
7. The 2nd Interested Party, upon being served with the Orders of the court of 1st November 2011 moved Meoli J on 4th November 2011 to set the said orders aside. The Application was heard interpartes and on 2nd December 2011, the Judge disallowed the Interested Party's Application in the following terms:

“Leave granted will operate as stay SOLELY to prohibit the Interested Party from violating the provisions of the Environmental Management and Coordination (Noise and Excessive Vibration and Pollution (control) Regulations, 2009 and conditions issued to the Interested Parties by any of the Respondents.

8. The Application now seeks to have the orders of Meoli J delivered on 2nd November 2011 be vacated pending the hearing of the substantive Application which was filed by the Ex-parte Applicant on 23rd November 2011 on the ground that the Application has never been set down for hearing and that the ex-parte orders staying and prohibiting any determination of an application for a Liquor Licence is materially prejudicial to the 2nd Interested Party.
9. I have quoted verbatim the orders of Meoli J of 2nd December 2011.
10. The learned Judge did not grant orders staying and prohibiting the issuance of a licence(s) to the 2nd Interested Party either to sell alcohol or to operate a disco or to play music.
11. What the Judge stayed or prohibited was for the 2nd Interested Party not to violate the provisions of Environmental Management and Coordination (Noise and Excessive Vibration and Pollution (control) Regulations), 2009 and or conditions issued to the Interested Parties by any of the Respondents.
12. Consequently, and for clarity of Meoli J Orders, I make the following orders:-

(a) There is no order prohibiting or staying the 1st Respondent from issuing any Liquor Licence to the 2nd Interested Party.

(b) There is no order by the court staying the operation of the DISCO or Music by the Interested Parties within Comeback Restaurant, Lounge and Disco in Watamu save that the Interested Parties should abide by the provisions of Environmental Management and Coordination (Noise and Excessive Vibration and Pollution (Control) Regulations, 2009 and or conditions issued to the Interested Parties by any of the Respondents.

(c) The Application dated 23rd July 2013 is hereby marked as spent with no orders as to costs.

Dated and Delivered in Malindi this 29th day of July, 2013

O. A. Angote

Judge