REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE 449 OF 2011

REVERENDJOSEPH M. KIILU……..…..1ST PLAINTIFF

PASTOR ESTHER MUENI.....2ND PLAINTIFF

VERSUS

NEW EXCEL ACCESSORIES LIMITED……..……..DEFENDANT

R U L I N G

By Motion on Notice dated 26th August 2011 expressed to be brought under the provisions of **Order 40 Rules 1, 2, 4** and **8** of the Civil *Procedure Rules, 2010* and **section 1A, 1B & 3A** of the *Civil Procedure Act, 2009 Cap 21 Laws of Kenya* and all other enabling provisions of the Law, the plaintiffs seek the following **orders**:

"1. THAT service of this application be dispensed with in view of urgency.

2. THAT a temporary injunction do issue restraining the Defendant its directors servants agents officers or any person acting on its behalf from terminating, bresaching or in any other way interfering with the plaintiffs' tenancy at 3rd Floor Wing "A" EXCEL SHOPPING COMPLEX at L.R. No. 209/525/24, Dubois Road, Nairobi pending the hearing and determination of this suit.

4. THAT the Honourable Court do make such other or further orders that it deems just and appropriate to meet the ends of justice.

5. THAT the Defendant be condemned to pay the costs of this motion".

The application is supported by an affidavit sworn by **Joseph M. Kiilu,** the first plaintiff herein on 26th August 2010. According to the deponent, he aligns himself to the contents of the plaint herein and makes the same part of the affidavit. I doubt the wisdom in attempting to make a pleading part of an affidavit. A pleading, unlike an affidavit is not evidence and is amenable to an amendment. An affidavit, on the other hand, is evidence and cannot be amended. To incorporate the contents of a pleading into an affidavit may have the consequence of turning the contents of the pleading into evidence hence being incapable of being amended. I do not see what is so difficult about a party incorporating the factual averments contained in the plaint into an affidavit instead of purporting to incorporate the plaint into an affidavit.

Nevertheless, the deponent states that the Defendant agreed to let to **Pastor Martin Kihara**, **Pastor Esther Mueni** and himself the 3rd Floor, Wing "A" of its building Excel Shopping Complex, erected on LR No. 209/525/24 situated along Dubois Road, Nairobi. According to the deponent the said lease agreement was effective from 26th March 2010 at the monthly rent of Kshs. 50,000/= renewable annually upwards by 10%. According to him the said premises were to be used strictly as a church and the lease would be terminated if the rent remained unpaid on the 15th day when the same fell due. However, no nuisance was to be caused during the said agreed period. One of the pastors, **Martin Kihara**, apparently left. The said church services, according to the deponent, are carried on Wednesdays, Thursdays and Fridays in the evenings between 5.30pm and 7.30pm while on Sundays the same services take place between 9.30am to 12.30pm during which time a sound system and musical equipment for preaching and ministration of songs are used. It is contended that the same mode of carrying out the services has been in operation for over 1and ½ years. However, by a letter dated 16th June 2011, the defendant manager alleged that the plaintiffs were making excessive noise and barred the plaintiffs from using the sound system during weekdays. After a meeting between the parties, the plaintiff toned down the sound system considerably. According to the deponent, a complaint raised by a neighbour with respect to the noise was resolved before the complaint raised by the defendant. It is further contended that there is a tenant who operates a barber and music studio and who plays loud music on the 1st floor of the premises the whole day and the defendant has not raised a finger about it. The plaintiffs' church services are carried out after office hours when businesses are either closing or closed. By a letter dated 28th July 2011, the Defendant terminated the said tenancy with effect from 31st August 2011 an action which the plaintiff contend is illegal since the letter was not addressed to the tenants, there was no provision in the tenancy agreement for termination save for default in rents and the notice was unreasonably short. The plaintiffs, the deponent contends, have expended a lot of money painting and decorating the suit premises and have just finished constructing offices therein. It is contended that unless the defendant is restrained, it will lock the plaintiffs out and hence disrupt the plaintiffs' operation and scatter the congregation yet it is not easy to get alternative premises within the City Centre within a short period of time.

The defendants in opposing the application filed a plethora of affidavits. There is a replying affidavit sworn by **John Macharia Mureithi**, the defendant's manager on 8th September 2011. Together with this replying affidavit are 4 other affidavits sworn by people who purport to be tenants in the suit premises. The said affidavits are not expressed to be in reply to the application and their purpose for the purposes of the present application is not disclosed.

Order 51 rule 14 of the *Civil Procedure Rules* provides as follows:

14. (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents-

(*a*) a notice preliminary objection: and/or;

(*b*) replying affidavit; and/or

(*c*) a statement of grounds of opposition;

It is therefore clear that it is a respondent who is entitled to, as a mater of right, to file the said documents. That avenue cannot be exploited by strangers to the proceedings to gate-crash into proceedings wherein no invitation has been extended to them. Where such affidavits are necessary it is always prudent to seek leave of the court before the same are filed. The aim of the *Civil Procedure Rules* is to provide for an orderly conduct of civil litigation so as to enable parties properly and adequately articulate their respective cases. Therefore the rules of procedure must be adhered to and where it is not possible to do so appropriate directions should be sought from the court. Parties should not take upon themselves to ignore the rules of procedure with impunity lest the due process is turned into a circus. Parties are entitled to clear pleadings if they are to prepare their cases. Justice, it has been said, must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent. It would make no sense to have express rules of procedure, which are not enforced and enforced with

consistency. As if the foregoing was not bad enough, the defendant filed two further affidavits on 7th October 2011 and 12th January 2012. I have perused the record and I must agree with the plaintiff that the later affidavits were filed without leave of the court being obtained. They were filed in flagrant breach of the rules of procedure. Apart from relying of *Article 159(2)(d)* of the Constitution no attempt has been made to explain why this despicable action was found necessary. To flagrantly disobey the rules of the court under the guise of the exercise of Constitutional rights should not be tolerated by a Court worthy of that name. Constitutional provisions do not, in my view, allow parties to abuse the process of the court but are meant to achieve justice. Justice cannot be achieved where parties take it upon themselves to decide which provisions of the law to obey and which ones to ignore. I accordingly disabuse the defendants of the notion that they can successfully plead the provisions of the said article to abuse the court process by sneaking documents into the court file without the knowledge of either the court or the other side and without even attempting to explain such action. In the premises the only order that commends itself is to strike out all the documents filed in breach of the rules of the Court. Accordingly all the affidavits filed on behalf of the defendant save for the replying affidavit sworn by **John Macharia Mureithi** herein on 8th September 2011 and filed on 9th September 2011 are hereby struck out.

According to the said affidavit, the plaintiffs are the defendant's tenants in the suit premises on the 3rd floor which they occupy as a church. According to the deponent apart from the time indicated by the plaintiffs, they also hold church services on Wednesdays between 9.00 am and 1.30 pm during which time a public address system which produces excessive noise is used to the detriment of other tenants whose business hours run from 8.00 am to 6.00 pm and sometimes later. The Wednesday services, it is deposed is most notorious causing unbearable noise thus paralysing the operations of all other businesses, a fact which the defendant contends was not disclosed. One complaint is confirmed by a letter of complaint relied upon by the plaintiffs. Whereas the defendant has no problem with the Sunday services or with regulated noise on any other day which does not cause nuisance to other tenants, most of the tenants have threatened to vacate with one of them making good his threat by vacating as a result of the noise which the plaintiffs have refused to regulate. Following the failure to arrive at any amicable settlement the defendant was left with no option but to terminate the tenancy which it believes was lawful. Other previous tenants who faced similar situations were forced to vacate, it is deposed.

In their submissions the plaintiff contend that the defendants has not shown any limits, parameters of what is termed noise or the acceptable limits thereof. It is submitted that the defendant was well aware that the plaintiffs would no doubt use sound equipment and that no document has been produced to show any restriction as to business hours. It is submitted that the plaintiffs have occupied the suit premises for the last 1 and ½ years before the defendant started raising problems. Accordingly, it is submitted that the defendant is only raising the noise issue as an excuse to recover the premises since no formal complaints have been made by any tenants. The period of notice given by the defendant of about 34 days is too short and unreasonable even if there was a breach. By accepting rents from the plaintiffs for the month of September 2011, it is contended that the termination notice cannot stand. Under the tenancy agreement, the same could only be terminated for failure to pay rent on due dates a condition which the plaintiffs have not breached. Accordingly, the plaintiffs contend that they have established a prima facie case.

With respect to irreparable harm it is submitted that the plaintiffs' church has established a membership which if closed, would lead to scattering of the flock as well as loss of improvements carried out in the premises. The plaintiffs also contend that the balance of convenience tilts in their favour and they have given undertaking in damages.

In response the defendant submits that the suit premises are in Nairobi CBD and that a part from the plaintiffs there are other tenants who have complained about the noise whose veracity have been confirmed. As a result of the failure to amicably settle the mater the defendant gave a termination notice. The plaintiffs, the defendant submits are in breach of the terms of the tenancy agreement which outlaws nuisances amongst other illegalities by using intolerable sound systems. Accordingly, the defendant is entitled to terminate the tenancy since the breach herein is fundamental. Failure to disclose that they were conducting services on Wednesdays between 9.00 am and 1.30 pm amounts to misleading the court according to the defendant. The defendants further contend that the plaintiffs have been conducting other extra church services some going on till 4.00 am. It is submitted that the notice that was given to the

church is also proper. It is contended that if the injunction sought is granted and the Plaintiffs allowed to perpetuate their current trend of excessive noise during business hours, the tenants will lose business and their livelihood and hence the defendant will lose tenants which two scenarios represent irreparable loss on the part of the Defendant. According to the defendant no prima facie case has been made out.

On balance of convenience, it is submitted that considering the number of tenants involved and the vastness of the Defendant's business empire, the balance tilts in favour of evicting one tenant and saving the other businesses and livelihoods. It is further submitted that the plaintiffs are not only guilty of late payment of rents but also of paying rents by instalments contrary to the terms of the tenancy. Accordingly the plaintiffs conduct does not warrant the grant of the orders sought.

Having considered the foregoing this is the view I form of the matter. The conditions necessary for the grant of interlocutory injunction in this country is generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which Spry, VP who delivered the leading judgement of the Court stated as follows:

"The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially…The conditions for grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of **section 1A(2)** of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under **section 1A(1)** of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore, the first issue for consideration by the Court is whether a prima facie case has been made out. It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether

the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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".

On the issue whether or not there is a prima facie case the plaintiffs contend that no valid notice was issued. The defendant takes the view that the notice that was addressed to the church was a valid notice. It is not disputed that the tenants were not the church but individuals. The notice was, however, addressed to The General Overseer, Miracle Life Assembly Church. Whether or not such a notice would suffice for the purposes of a notice to the individual tenants in my view establishes more than an arguable case and hence establishes a prima facie case. Whether or not the plaintiffs will succeed on the matter cannot be determined at this stage.

With respect to the issue whether the plaintiff stand to suffer irreparable loss, whereas it is true that the plaintiffs themselves may not suffer such a loss, a church by its nature offers spiritual nourishment to its flock and I am not aware of how this spiritual nourishment can be measured in terms of damages since its reception by the flock is not a matter which can be scientifically and empirically determined. The interest of third parties likely to be affected, in this case, the congregation, must be taken into account. It is therefore my view that the two conditions set out in ***Giella Vs. Cassman Brown Case*** have been satisfied by the plaintiff. Those conditions are however, not exhaustive. In this case, apart from the plaintiffs there are other occupants of the suit premises who carry out their daily business activities unrelated to the church activities carried or conducted by the plaintiffs. The principle of proportionality and equality of arms under the overriding objective requires that the court should balance the interests of the plaintiffs *vis a vis* those of the other occupants of the suit premises since both freedom of worship and the right to property are protected under the Constitution. Whereas the worshippers should be allowed to conduct their services undeterred, likewise those who have nothing to do with the said services should be given a conducive atmosphere to conduct their business without undue harassment from the church. In other words give to God what belongs to him and give to the Pharaoh what belongs is due to him. The spiritual nourishment should be promoted as well as the temporal and material needs of the person.

Accordingly, the order that commends itself to me is to grant prayer 2 of the Notice of Motion dated 26th August 2011 as prayed. Pursuant to prayer 3 of the same motion the said prayer 2 is granted on condition that the plaintiffs will within a period of 30 days take appropriate measures to ensure that the level of the noise emitted from the suit premises by virtue of the church activities therein does not exceed the recommended decibels permitted by the authorities established under Environmental Management and Co-ordination Act and will within the said period obtain a certificate from the said authority to that effect.

Ruling read, signed and delivered in court this 18th day of May 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Lutta for Plaintiff

Mr. Kariuki for Mr. Mutiso for Defendant