

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 118 OF 2005**

SAMUEL NJOROGE MUIRURIPLAINTIFF/APPLICANT

VERSUS

ROSE WAMBUI MBUGUA 1ST DEFENDANT/RESPONDENT

SOSPETER MAGUA NJOROGE..... 2ND DEFENDANT/RESPONDENT

RULING

By his application of the 21/2/2005 the Applicant seeks an order for the committal of the Respondents herein to civil jail for contempt of court and in default a fine.

The Applicant alleges that the Respondents have disobeyed my order of the 11/2/2005, which restrained the Respondents from making noise pending the hearing of this case.

The property from which it is alleges the noise emanates is owned by one Rosemary Wairimu Kamau and the second Respondent is her attorney duly appointed pursuant to this power of attorney the 2nd Respondent appointed the first Respondent as the caretaker of the said property.

In his supporting affidavit the Applicant depones that the Respondent has been playing excessively loud blaring music from the said property.

The Applicant states in paragraph 8 of his supporting affidavit that the Respondents were served on the 17/2/2005 with the court order issued on the 11/2/2005 to which was attached a penal notice. The copy annexed as SNM-IV is shown to have been served on Ibrahim, Isaack & Co., and the Affidavit of Michael Kimani Njuguna of the 21/2/2005 depones to the fact that he served the 1st Respondent with the order and penal notice on the 17/2/2005 and on the 2nd Respondent on the 18/2/2005, the 2nd Respondent being an advocate in the said firm.

Also annexed are a number of affidavits all almost in the same terms stating that on three cases on the 16/2/2005 they experienced excessively loud music and on two cases on the 15/2/2005.

In Response to the application Mr. Ahmed relied on the Replying Affidavit, which denied the charge of playing loud music and raised the question of a dispute between the Plaintiff and the said Rosemary Warimu Kamau who is his sister-in-law in connection with her ownership of the said property.

This Application however cannot succeed as the order and penal notice was served after the incident alleged both on the 15/2/2005 and 16/2/2005 by the Applicant's witnesses who deponed to the playing of loud music. In order to succeed in an application for contempt it must be shown that the order has been disobeyed after the order has been served with a penal notice on the alleged contemnor. As no evidence has been adduced of a breach of my order after the order and penal notice were served I must dismiss this application, which I do, with costs to the Respondents.

I would further add that in any event the 2nd Respondent not residing on the property unless he is shown to reside there cannot be guilty of playing loud music. It also appears that there is some element of an ulterior motive on the part of the Plaintiff in bringing this suit. However that is speculation. The injunction application with regard to nuisance has not yet been heard on its merits but as the matter is

before the Constitutional court I can do nothing further until that matter is disposed of.

Dated and delivered at Nairobi this 25th day of April, 2005

P.J. RANSLEY

JUDGE