



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 130 OF 2019

SOHAIL REGENCY MANAGEMENT COMPANY LIMITED.....PLAINTIFF

=VERSUS=

DÉJÀ VU t/a COCO GLAM NAIL AND TIPSY CORNER.....1ST DEFENDANT

KENYA CONTINENTAL HOTEL.....2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 9/4/2019. It contended that it was a management company incorporated by shareholders who owned residential premises in Sohail Regency Apartments, Raphta Road, Westlands Nairobi, in a residential neighbourhood. Its case was that the 2nd defendant owned property in the same neighbourhood and had leased the said property to the 1st defendant. The 1st defendant operated a night club in the said premises. The 1st defendant was constantly streaming music that was too loud from the said premises. The loud music and vibration had become a nuisance to the neighbourhood and specifically to the property owners and residents of Sohail Regency Apartments.

2. Consequently, they sought the following verbatim orders against the defendants;

a) A declaration that the 2nd defendant is not entitled to use its premises for any purpose other than for residential purposes.

b) A permanent injunction do issue against the 2nd defendant, their servants, agents, representatives, tenants and or any other person(s) acting on their stead prohibiting them from renting, leasing, subleasing and/or subletting the premises for any further operation of live music, streaming music and/or any other kind of noise that would destruct the quiet and peaceful possession of the plaintiff.

c) A permanent injunction do issue against the 1st defendant, their servants, agents, employees, representatives, tenants and or any other person(s) acting on their stead prohibiting them from any further operation of live music, streamed music and or any other music within Déjà vu Club situated along Rhapta Road, Nairobi.

d) A permanent injunction do issue against the 3rd defendant, their servants, agents, employees, representatives, tenants and or any other person(s) acting on their stead prohibiting them from issuing licences or approvals allowing the carrying out of commercial activities within the 2nd defendant's premises.

e) Dameges for nuisance.

f) Costs.

g) Interest on(e) and (f) above.

3. Together with the plaint, the plaintiff brought a notice of motion dated 19/4/2019; amended on 19/6/2019; and further amended on 8/8/2019, seeking interlocutory injunctive orders restraining the defendants against streaming loud music from their premises, among other prayers. The said application is one of the two applications falling for determination in this ruling.

4. The second application falling for determination in this ruling is the 2nd defendant's notice of motion dated 18/10/2019, through which the 2nd defendant seeks an order striking out this suit for being frivolous, vexatious, scandalous and a gross abuse of the court process. The

2nd defendant made an alternative plea that this suit be stayed pending the hearing and determination of **ELC Petition No. 2 of 2017** which relates to the same dispute.

5. The parallel applications were canvassed through written submissions. Because the 2nd defendant's application seeks an order striking out this suit, I will dispose it before I deal with the plaintiff's application.

6. The 2nd defendant's application dated 18/10/2019 is premised on the ground that there exists **Nairobi ELC Petition No 2 of 2017** which was filed by residents of Sohail Regency Apartments and relates to the same dispute as the dispute in this suit. Consequently, the 2nd defendant contends that the present suit is *res sub-judice* and offends **Section 6** of the **Civil Procedure Act**.

7. I have considered the application, the rival affidavits, and the rival submissions. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts invoke the doctrine of *res sub-judice* under **Section 6** of the **Civil Procedure Act**. The application under consideration is therefore to be evaluated on the basis of the framework in **Section 6** of the **Civil Procedure Act** which provides as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” [Emphasis mine]

8. The Supreme Court of Kenya outlined the tenor and import of the doctrine of *res sub-judice* in the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** as follows:

“...A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...” [Empashis]

9. I have perused the record relating to **ELC Petition Number 2 of 2017**. It is true that the said petition preceded this suit. It is also true that the said petition relates to the same dispute. Further, it is true that the said petition is alleged to have been filed by residents of Sohail Regency Apartments through their two representatives, Palvi Chunilal Shah and Azim Butt. However, the 1st respondent in the said petition is **Celino Limited** who is not a party to this suit. Secondly, Déjà Vu t/a Coco Glam Nail & Topsy Corner, the 1st defendant in this suit, is not a party to the said petition.

10. While I agree with the 2nd defendant that it would be improper to conduct parallel proceedings and come up with parallel findings relating to the same dispute, I do not think the full elements of *res sub-judice* exist in the circumstances of this suit. This is because, not all the parties to the preceding petition are parties to this suit. Put differently, the alleged authors of the torts which are alleged to emanate from the premises owned by Kenya Continental Hotel are different. Because the alleged authors of the alleged torts are different, it would be improper to strike out this suit or to stay it.

11. In the circumstances, the proper order to make is one consolidating the two suits to be heard together by the same court. The lead file will be the first of the two, that is **Petition No. 2 of 2017**.

12. In light of the foregoing, I will let the court seized of **Petition No 2 of 2017** dispose the plaintiff's further amended application taking into account any other orders or directions the court may have issued in **Petition No 2 of 2017**.

13. Ultimately, I make the following disposal orders:

a) This suit is hereby consolidated with ELC Petition No 2 of 2017. Petition No 2 of 2017 shall be the lead file.

b) The plaintiff's further amended application dated 8/8/2019 shall be placed before the court seized of Petition No 2 of 2017 for appropriate directions.

c) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JULY 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Apiyo h/b for Mr Marwa for the 1st Defendant

Ms Akoth h/b for Mr Kopere for the 2nd Defendant

