



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 14 OF 2019

AMANI SEA RESORT LIMITED.....APPELLANT

VERSUS

ARMO AQUARIUS LIMITED T/A LILY PALM RESORT.....RESPONDENT

JUDGMENT

Background

1. By a Notice of Motion application dated 11th December 2018 as filed before the Chief Magistrates Court at Malindi in **Malindi CMCC No. 37 of 2018, Amani Sea Resort Ltd** (hereinafter the Appellant) sought a temporary order of injunction to issue restraining Armo Aquarius Ltd T/A/ Lily Palm Resort (hereinafter the Respondent) from playing or continued playing of very loud music in their hotel which exceeds the permitted levels under the law.

2. The said application was premised on the grounds that: -

- i) The Appellant's premises consists of a private residence made up of 49 individual houses while the Respondent occupies the adjoining property;***
- ii) The Respondent's establishment has been playing extremely loud music beyond the statutory set decibels causing excessive noise that prevents ordinary comfort and quiet enjoyment of the Appellant's premises;***
- iii) The noise from the Respondent's premises had made it difficult for the residents occupying the 49 individual houses to quietly enjoy their property contrary to the law and international standards;***
- iv) The Appellant has sought the intervention of the authorities but their intervention has been largely ignored by the Respondent; and***
- v) That if the application is not heard expeditiously and a temporary injunction be granted, there is a real danger that the Appellant's rights to quiet enjoyment of their premises would be further infringed during the Christmas period as the Respondent had advertised several beach parties during the said period.***

3. There was apparently no response to the application by the Respondent and the Appellant thereafter filed written submissions dated 14th June 2019 wherein it urged the Court to allow the application. However, upon consideration of the application and in her Ruling dated and delivered on 13th September 2019, the Honourable Dr. Julie Oseko, CM determined that the Appellant had not established a prima facie case to warrant the grant of an order of injunction and proceeded to dismiss the application.

4. Aggrieved by the said Ruling, the Appellant moved to this Court on 24th October 2019 and filed a Memorandum of Appeal dated the same day urging the Court to overturn the same and to allow the application for injunction on some eight grounds listed as follows: -

- 1. That the Learned Magistrate erred in law and fact when she reached at the conclusion that the Applicant had not established a prima facie case based on the evidence presented at the filing of the application.***
- 2. That the Learned Magistrate erred in law and fact, (and) misdirected herself in failing to consider the principles, description and definition of what amounts to a prima facie case.***

3. *That the Learned Magistrate erred in law and fact, (and) misdirected herself when she failed to consider the guiding principles in the award of a temporary injunction.*
4. *That the Learned Magistrate erred in law and fact and misdirected herself by failing to take into consideration the date of the filing of the application dated 11.12.2018 and filed on 13/12/2018 which was the subject of the ruling and which was supported by relevant evidence as of the time of filing.*
5. *That the Learned Magistrate erred in law and fact when she failed to completely consider the circumstances giving rise to the application and the consistent ignoring and/or disregard of the Respondent's character.*
6. *That the Learned Magistrate erred in law and fact and misdirected herself in using and invoking the legal principle of continuing nuisance which would have not only been canvassed at the hearing, but has been held to give rise to (a) cause of action each time it occurs.*
7. *That by invoking the principle of continuing nuisance the Learned Magistrate negated from the purpose of a temporary injunction and completely ignored the reasons and grounds advanced by the Appellant that sought to restrain the Respondent from the injuries complained of by the Appellant.*
8. *That the Ruling given by the Learned Magistrate offends the rules of equity, the freedoms and rights of the Appellant as well as the overriding objective of the Court.*

Analysis and Determination

5. I have perused and considered the Amended Record of Appeal dated 28th November 2020 and the submissions and authorities filed herein by Ms Njeri Ngunjiri Advocate for the Appellant. The Respondent neither entered appearance nor filed a response to the Appeal.

6. As the first appellate Court, this Court's role is to subject the whole of the evidence that was before the Learned Trial Magistrate to a fresh and exhaustive scrutiny and to make my own conclusions about the same (*see Selle & Another –vs- Associated Motor Boat Company Ltd & Others (1968) EA 123*).

7. In support of the Motion dated 11th December 2018, the Appellant's Managing Director Andrea Vernizzi had sworn a 14- paragraph Affidavit wherein he states as follows at the relevant paragraphs 3 to 10 thereof: -

“3. That the Plaintiff is the registered proprietor, owner and occupier of the dwelling-houses located on Land Reference No. 17 Watamu which is a private residence made up of forty -nine (49) individual houses.

4. That the Defendant's establishment, Lily Palm Resort, has been playing loud music beyond the statutory set decibels causing excessive noise that prevents ordinary comfort and quiet enjoyment of our client's residents.

5. That the said noise has made it difficult for the residents occupying the 49 individual houses to quietly enjoy their property contrary to law and international standards prompting the Plaintiff/Respondent (sic) to seek intervention of the County's appropriate authority, the Office of the Chief Officer Natural Resources, Forestry, Environment and Solid Waste Management.

6. That the said authority issued the Defendant/Respondent with an Improvement Notice which directed them to sound proof their facility, obtain the necessary licenses for social events and to ensure that their musical instruments did not contravene Regulations 5, 6 (1) and 11 of the Environmental Management and Coordination Noise and Excessive Vibration Act) (Control) Regulations, 2009. (Annexed hereto and marked “AV” is a true copy of the improvement Notice dated 1st December 2017).

7. That the said authority commissioned an investigation and concluded that indeed the noise emitted from the Defendant/Respondent's establishment exceeds the prescribed maximum under Regulation 8 of the Environment Management and Coordination (Noise and Excessive Vibration Act) (Control) Regulations, 2009. (Annexed hereto and marked “AV 2” is a true copy of the Noise Surveillance Report).

8. That subsequently the said authority also issued an Enforcement Notice (Annexed hereto and marked “AV3” is a true copy of the Enforcement Notice dated 13th December 2017).

9. That the Defendant/Respondent has refused, failed and or neglected to adhere to the terms provided by the Improvement and Enforcement Notices rendering this application necessary.

10. That the Defendant/Respondent has even advertised several Beach Parties during the said period in further contravention of the Improvement Notice (Annexed hereto and marked “AV4” is a true copy of the Lily Palm Beach Party Advertisement in Italian).”

8. As it were, the conditions required to be met to warrant a grant of an order of temporary injunction were long set in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358* where the Court held thus: -

“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.”

9. As to the definition of a prima facie case, the Court of Appeal offered guidance in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR* where the Learned Judges observed as follows: -

“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.”

10. A perusal of the Ruling dated 13th September 2019 reveals that the Learned Trial Magistrate was cognizant of these principles as reference is made thereto at paragraphs 8 to 11 of the Ruling. In appreciation of the evidence annexed to the Appellant’s application, the Learned Magistrate then states as follows at paragraph 12 of the impugned Ruling: -

12. The annexed enforcement notice dated 13th December 2017 from the County Chief Officer Natural Resources, Forestry, Environment and Solid Waste Management indicates that the noise level emanating from the Respondent’s premises has been above the allowable level affecting their neighbours in particular the applicant. It is then rather obvious that such noise at the level noted by the Chief Officer’s team would affect the peace and quiet enjoyment of a residential place.”

11. Having said that, the Learned Trial Magistrate went on to dismiss the application on the finding that the Appellant had failed to demonstrate that the noise nuisance was on-going as to warrant the grant of the orders one year after the Enforcement Notice dated 13th December 2017. It was also the Court’s position that the advertisement annexed to the application in support of the contention that the Respondent planned to hold beach parties during the 2018 Christmas season was in Italian language and that no translation thereof had been availed.

12. With respect, I did not think that those were relevant considerations to warrant the dismissal of the application. As at that stage, all the Appellant was required to demonstrate was that there was a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal.

13. The Appellant had demonstrated that he had reported the Respondent’s nuisance to the relevant authorities. Those authorities had carried out a Noise Surveillance Report which clearly revealed as the Learned Trial Magistrate herself found, that, “the noise level emanating from the Respondent’s premises has been above the allowable level affecting their neighbours.”

14. Indeed, the Appellant had indicated in their Supporting Affidavit that they had exhausted all available remedies by going to the relevant authorities but the Respondent had somehow managed to ignore and or disregard the intervention of those authorities. They had therefore come to Court as the last resort of justice and I think it was a grave misdirection on the part of the Court to turn them away on account that they had not demonstrated that the Respondent continued to discharge noise from its premises at levels that were unacceptable.

15. While the Learned Trial Magistrate dismissed the adverts placed by the Respondent in regard to the beach parties for being written in Italian, my perusal thereof reveals that those adverts were partly in Italian but were also written in the English language. There was no doubt from a perusal thereof that the Respondent planned to hold beach parties for Christmas and the New Year some two weeks after the matter came to Court.

16. At any rate, the Respondent had been served with the Appellant’s accusations. They did not have anything to say in rebuttal. The Learned Trial Magistrate herself captured this at paragraph 6 of the impugned Ruling as follows: -

“6. The Respondent sought and was granted leave to file its response but has not filed the same. In the premises, the application is unopposed.”

17. Arising from the foregoing, it was clear to me that the Appellant had demonstrated a prima facie case to warrant the grant of the temporary orders of injunction and that the Learned Trial Magistrate erred in dismissing the Appellant’s Notice of Motion dated 11th December 2018.

18. In the result, I allow the Appeal. The Ruling by the Learned Trial Magistrate dated 13th September 2019 is accordingly hereby set aside and substituted by an order allowing the Motion dated 11th December 2018 in terms of Prayer No. 3 thereof.

19. The Appellant shall have the costs of the Appeal.

Dated, signed and delivered at Malindi this 15th day of September, 2021.

J.O. OLOLA

JUDGE