



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CONSTITUTIONAL PETITION NO. 5 OF 2018

KILIMANI PROJECT FOUNDATION.....PETITIONER

(Suing on behalf of KILIMANI RESIDENTS ASSOCIATION)

=VERSUS=

B CONCEPT LIMITED T/A B CLUB NAIROBI.....1ST RESPONDENT

KIZA RESTAURANT AND LOUNGE.....2ND RESPONDENT

SPACE LOUNGE AND GRILL.....3RD RESPONDENT

EXPLORERS TAVERN.....4TH RESPONDENT

DIRECTOR OF ENVIRONMENT

NAIROBI CITY COUNTY GOVERNMENT.....5TH RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....6TH RESPONDENT

THE CHAIR PERSON-NAIROBI CITY COUNTY

ALCOHOLIC DRINKS AND LICENCING BOARD.....7TH RESPONDENT

NAIROBI COUNTY GOVERNMENT.....8TH RESPONDENT

RULING

1. The 1st and 4th Respondents have filed a notice of motion dated 31st October 2019. It is brought under articles 22, 23, 159(2), 258 and 259 of the Constitution, Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6(1) and (2) all other enabling provisions of law).

2. It seeks orders:-

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 17th October, 2019,

the resultant decree, as well as all other consequential orders issued therein, pending the filing, hearing and determination of the intended appeal.

5. That the costs of this application be provided for.

6. Such further or other orders be made as this honourable court may deem just and expedient in the circumstances.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 11.

4. The application is supported by the affidavit of Barry Ndengeyingoma, managing director and co-proprietor of the 1st respondent/applicant sworn on 31st October 2019. There is also an affidavit sworn by Antonio Leting, managing director and co-proprietor of the 4th Respondent/Applicant sworn on the 31st October 2019.

5. The 2nd Respondent has also filed a notice of motion dated 11th November 2019 brought under Article 22, 23, 159, 259 and 259 of the Constitution of Kenya, Section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 rule 6(1) and (2), and 51 of the Civil Procedure Rules, 2010 and all enabling provisions of law.

6. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That upon hearing this application inter partes, this honourable court be and is hereby pleased to issue an order of stay of execution of the decree and/or the judgement delivered don the 17th October, 2019 together with all the consequential orders flowing therefrom pending hearing and determination of the intended appeal herein.

(4) Any other order as this court may deem fit and just.

7. The grounds are on the face of the application and are set out in paragraphs 1 to 12. The application is supported by the affidavit of Judy Gitau, manager and co-proprietor of the 2nd respondent/applicant sworn on the 11th November 2019.

8. The 3rd respondent has also filed a notice of motion dated 6th November 2019 brought under Article 22, 23, 159 (2), 258 and 259 of Constitution, Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Act, Order 42 Rule 6(1) and (2) all other enabling provisions of law).

9. It seeks orders:-

1. Spent.

2. Spent.

3. That upon hearing this application inter-parties this honourable court be and is hereby pleased to issue an order of stay of execution of the decree and/or the judgment delivered on 17th October, 2019 together with all consequential orders flowing therefrom pending the hearing and determination of the intended appeal herein.

4. That the costs of this application be provided for.

10. The grounds are on the face of the application and are set out in paragraphs (a) to (i).

11. The application is supported by the affidavit of James Kungu Kariuki a director of the 3rd Respondent sworn on the 6th November 2019.

12. The applications are opposed. There are replying affidavits sworn by Irungu Houghton, Chairperson of Kilimani Project Foundation; petitioner sworn on the 9th December 2019 in response to each application. There is also an affidavit sworn by Maria Clara Rota, a resident of Kilimani at Orsolme Sisters Covenant sworn on 9th December 2019.

13. The applications proceeded by way of oral submissions on 9th March 2010.

14. It is the 1st and 4th respondents/applicants' submissions that the application has met the threshold for grant of stay of execution of the judgment of this court dated 17th October 2019. They relied on the case of **County Government of Kwale vs Saumu Said Nyanya & 3 Others [2017] eKLR** where it was held that **"the purpose of the application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safe guarded and the appeal if successful will be not rendered nugatory"**

Further that the application satisfies the conditions set out under order 42 of the Civil Procedure Rules. That the application has been brought without undue delay. That the 1st and 4th respondents will suffer substantial loss in terms of investment of Kshs. 150 million and 50 million respectively if the closure notices are effected. Also the livelihoods of over 70 employees and 50 employees respectively will be at stake if the establishments are closed. They also submit that the directors are ready and willing to comply with any conditions set by the court. They pray that the application be allowed.

15. The 2nd respondent submitted that it will be greatly prejudiced if the closure orders are effected. Its operations will come to a halt and an investment of over Kshs.200 million will be affected. Similarly that the livelihood of their employees will be greatly affected. Further that it is willing to abide by any conditions set by this honourable court.

16. It appears that the 3rd respondent did not make any submission by reason of absence of counsel. I will therefore rely on the affidavit in support of the notice of motion dated 6th November 2019.

17. Ms Achola appearing for Mr. Kithi for the 5th respondent told the court she wished to associate herself with the 1st, 2nd and 4th respondents submissions.

18. It is the petitioner's submissions that the respondents are still acting with impunity. It urged the court to note that there was a shootout at the premises of the 1st respondent during the pendency of the interim orders, a demonstration that it has no control over its clientele. It is further submitted that no document has been annexed to prove substantial loss by the respondents. It urged the court to find that the applications have not met the conditions for grant of stay of execution pending appeal and pray that they be dismissed with costs.

19. I have considered the notice of motions, the affidavits in support and the annexures. I have also considered the affidavits in response, the oral submission made by the respective parties and the authorities cited. The issue for determination is whether these applications are merited.

20. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

“No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Sub rule 6 provides that:-

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

It is clear from the above provision that it requires specific conditions to be met by the applicants in order for orders of stay to be granted.

21. The principles that guide the court in exercising of discretion in an application for stay pending appeal are now well settled:-

1. That the application has been brought without undue delay.

2. That unless stay is granted the applicant shall suffer substantial loss.

3. That the applicant has offered security for the due performance of decree that may ultimately found to be binding him.

In the case of **Feissal Amin Janmohammed t/a Dunvia Fowarders vs Shami Trading Co Ltd, [2014] eKLR**, Kasango J stated as follows;

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security”.

22. I have considered that the notice of motions herein were brought without undue delay. However, I agree with Ms Darr for the petitioner that the issue of substantial loss is a matter of fact. Each of the applicants ought to have demonstrated substantial loss by way of documents. They have not done so.

23. This court has already made a determination that the applicants herein ought not to be operating in a residential area. I find that granting the orders sought would be to the detriment of the residents of Kilimani.

24. Order 42 rule 6(2) of the Civil Procedure Rules requires specific conditions to be met by an applicant of which the applicants herein have not satisfied.

25. In conclusion, I find no merit in these applications and each of them is dismissed with costs to the petitioner/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21ST day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Petitioner

Mr. Malebe for the 1st Respondent

No appearance for the 2nd Respondent

No appearance the 3rd Respondent

Mr. Malebe the 4th Respondent

Kajuju - Court Assistant