

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 540 OF 2016

GOLDEN WINGS RESTAURANT LIMITED T/A

AIRPORT LOUNGE.....APPELLANT

-VERSUS-

INTENSIVE CARE AIR AMBULANCE LIMITED.....RESPONDENT

Being an appeal from the ruling in Case No. 2646 of 2016 delivered on 12th August, 2015, before Hon. D.O. Mbeja (Mr) S.R.M. Milimani commercial

RULING

The respondent obtained an order against the appellant on 12th August, 2016 following an application filed before the lower court related to the operations of the appellant which were said to be causing some nuisance to the respondent's functions. The appellant was aggrieved thereby and filed an appeal to set aside the said orders.

There is a memorandum of appeal dated 16th and filed on 17th August, 2016. The respondent had filed a suit against the appellant complaining among other things that the appellant had been playing live band with related music, songs and tunes with musical instruments very loudly; has been staging loud entertainment dances by rowdy revellers; had permitted its customers and/revellers to sing loudly alongside musical instruments and to the tunes of the said live band and failed to contain, abate or to control noise pollution.

The respondent which is said to be operating emergency medical facilities at its premises complained that the actions of the appellant were affecting their facilities and business thereby incurring irredeemable loss and damage. Alongside the plaint an application for injunction was filed leading to the order now appealed.

The trial court made an order issuing an interim injunction restraining the appellant, its servants or agents from causing the nuisance complained of in their premises until further orders of the court. The application now before me seeks a stay of execution of the ruling and orders of the lower court. The reasons appear on the face of the application alongside an affidavit sworn by one Faith Murugi Mwaniki a director of the appellant.

The appellant contends that an appeal has been filed against the said ruling. The respondent has extracted and served an order to the applicant which were not issued, and that the orders touch on the business of the appellant which is their source of livelihood. Unless execution is stayed, the applicant's intended appeal shall be rendered nugatory. The application is opposed and there is a replying affidavit sworn by Charles Kabiru Theuri a NEMA lead expert and Senior Occupational Safety and Health Officer in the Directorate of Occupational Safety and Health Services. There are also grounds of opposition filed by counsel for the respondent.

It is clear from the order given by the lower court that the proceedings are still live, because the order was to subsist pending the hearing of the application inter partes or further orders of the same court. Parties herein have not exhausted proceedings in that court and therefore it is premature to come before this court as the order sought has not crystallized.

I do not deem it necessary to delve any deeper into this application otherwise the respective positions of the parties may be subject to prejudice. I can only add however that, I am alive to the provisions of Order 42 Rule 6 and 9 of the Civil Procedure Rules which are available to both parties after the proceedings in the lower court are exhausted. The application before me is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 16th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE