



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL CASE 631 OF 1994**

- 1. DAVID YATES**
- 2. HARDY HAFNER**
- 3. ADOLF KIMMELMANN**
- 4. JOSEPH MUTTUKU**
- 5. GUNTHER KOLBERG**
- 6. G. NJUGUNA ..... PLAINTIFFS**

**Versus**

**PETER MUTUNGA GACHIGIT/a**

**PEE MCA MOTEL CLUB ..... DEFENDANT**

**RULING**

In this application brought under Order 39 rules 3 & 4 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act, the Applicant/Defendant is asking for orders discharging the injunction issued by this court on the 21st of October, 1994.

Such orders were as follows:-

- "1. The Defendant/Respondent, his servants, agents or otherwise be and are hereby restrained by injunction from playing or permitting to be played loud blaring disco music from dusk to dawn on Plot Number 616 Mtwapa in premises known as Peemca Motel Club.
2. The Defendant/Respondent is hereby permitted to play soft music on very minimal sound on the suit premises till the pending suit is heard and determined."

Although the chamber application brought by the Plaintiffs dated 13th of October, 1994 which lead to the above orders was duly served on the Defendant/Applicant herein, it was then not opposed.

However, rule 4 of Order 39 of the Civil Procedure Rules is wide and enough and covers the present application. It is as follows:-

- "4. Any order for an injunction may be discharged, or varied, or set aside by the court on

application made thereto by any party dissatisfied with such order."

This means that even though the initial application was not opposed, the subsequent order that was issued can still be varied or set aside if sufficient cause is shown by the party so affected.

In the present application, the Defendant alleges that the application for injunction which was granted by the court, was not brought by the Plaintiffs in good faith. He deposes that the Plaintiffs other than the 2nd Plaintiff, have been incited against him by the 3rd Plaintiff Mr., Adolf Kimmelman who had previously approached him to buy his premises but he refused. The 3rd Plaintiff then personally assured him that he would use his influence to frustrate his business. He goes on to say that this would explain why the Plaintiffs have opted to ignore another Bar and Restaurant known as Burn-Off-Bar & Restaurant is on a much more elevated place and plays music at a level more or less like his and yet it is only within a 50 meter radius from his restaurant. He deposes that the other Plaintiffs in that case may have been used by Mr. Kimmelman without their knowledge. He annexed a letter from the 2nd Plaintiff to show that he had not consented to being party to the suit and has in fact no complaints at all against the Defendant.

The Defendant mentions that he does not play loud blaring music from his Club and that to the best of his knowledge, the level of sound from his musical implements has been reasonable as they only play at position one on the amplifier. He goes on to say that his Club is in an enclosure which has wooden walls which definitely reduces any sound that may go out.

It is the contention of the Defendant that the Plaintiffs have proceeded against him on the basis of untruths. For example, the 3rd and 4th Plaintiffs live about 1/2 km away from his Club while the 6th Plaintiff lives at Nyali which is well over the 200 meters they allege. The 1st and 5th Plaintiffs are unknown to him and must either be landlords or people who live far away from Mt Wapa. He points out that his closest neighbour, the 2nd Plaintiff has now confirmed that he has no complaints against him as far as the level of sound from music in his house is concerned. He urged the court to discharge the injunction orders that were made against him.

The Plaintiffs other than the 2nd Plaintiff who does not want to pursue the case maintain that they all reside within a radius of 200 meters from the Defendant's Club. They maintain that they have been deeply affected by the nuisance emanating from the premises of the Defendant in form of loud blaring music which is always played from dusk to dawn. They all agreed together with the 2nd Plaintiff to cause the Defendant to reduce the level of music sound from his premises and when this failed, they decided to sue him. It is their contention that even the 2nd Plaintiff, Mr. Hafner had agreed to have the suit herein filed against the Defendant but he is now backing out simply because he has been evicted from the house where he was staying on Plot No. 618 and the Defendant has now agreed to accommodate him in one of the rooms from this Club. They further say that the 2nd Plaintiff is now broke filing the attachment of his household goods for non-payment of rent and is now living on charity and debts. They maintain that there is no sound proofing barrier in the suit premises and that the noise emanating from the said premises is simply irritating.

I think that it is settled law that an applicant seeking an equitable remedy of injunction, must come to court with clean hands.

It has been argued in this application that the Applicants/Plaintiffs in moving the court in this case had acted on bad faith as the 3rd Plaintiff had vowed to punish the Defendant who had refused to sell to him the suit premises. In other words, it was alleged that he had conspired with the rest of the Plaintiffs to institute the suit against the Defendant so as to punish him for refusing to sell to him the suit premises. The Defendant deposes in paragraph 8 as follows.

8..... I truly believe that the Plaintiffs here are motivated by an ulterior motive against me, as I have already elaborated in my defence, the 3rd Plaintiff is the one who has incited them (even without their knowledge) to bring this suit against me. The 3rd Plaintiff has laboured ill-will

against me since my refusal to sell to him the suit premises. He has assured me personally that he would use his influence to frustrate my business. In fact this explains to me why the Plaintiffs have opted to, ignore another Bar & Restaurant within a 50 meter radius from mine called Burn-Off-Bar and Restaurant, which is in a more elevated place, plays music at a level more or less like mine and its sound travels further, but have gone ahead to sue me".

In his statement of defence dated 8th of October, 1994, stated in paragraph 8 as follows:-

"8. The Defendant states that the whole suit was instigated by the 3rd Plaintiff out of his ill-will, spite and malice against the Defendant simply because the Defendant had earlier refused to sell to the 3rd Plaintiff the suit premises together with another property located in Shanzu belonging to the Defendant. Since the said refusal, the 3rd Plaintiff has threatened the Defendant that the 3rd Plaintiff having been a Commissioner of Police in Germany and now working for the International Police, he has high connections in the country which he would use to frustrate the Defendant's businesses. The Defendant states that it was the 3rd Plaintiff

" Who went round collecting signatures from the Others so as to sue the Defendant and even went ahead to add the list of Plaintiffs then the name of the 2nd Plaintiff who was not even aware of the suit?"-

Although the 1<sup>st</sup> Plaintiff substantially replied to the averments of facts by the Defendant in his supporting affidavit, I observe that there was no attempt made to specifically deny the allegation of bad faith and ill-will on the part of the 3<sup>rd</sup> Plaintiff. Paragraph 8 of the Statement of Defence has equally not been denied in the pleadings as there was no reply to the Defence filed. I believe that the allegation by the Defendant that the suit against him has been maliciously instituted at the instigation of the 3<sup>rd</sup> Plaintiff was such a serious allegation that ought to have been denied specifically if it was false. This was not done and in my respectful view, it seriously dents the Plaintiff's case before the court.

Furthermore, one of the Plaintiffs in the suit, the 2<sup>nd</sup> Plaintiff has now stated that he has no complaints at all against the Defendant. I accept the possible reasons for his about-turn which shows that he has done so for some financial gain from the Defendant as he is now in an awkward financial position. I do not therefore place much reliance on his intention to withdraw from the suit. However, the fact that the 6<sup>th</sup> Plaintiff does not himself reside near the Club in dispute and is therefore not personally affected by the sound of music from the Club as he stays far away in Nyali is another matter that dents the case for the Plaintiffs

The 3<sup>rd</sup> matter which I believe also casts some doubt in the Plaintiffs' case is the distance of another Bar and Restaurant, Burn-Off-Bar within the locality as Peemca Motel Club which also operates some disco music which surprisingly does not attract any complaints from the Plaintiffs.

I have given serious consideration to all the matters that were urged before this court in this application including the allegations made by the Plaintiffs that the Defendant has breached the court order which they now seek to be discharged or varied. I believe that the truth as to whether or not the sound of music from the suit premises is causing a nuisance in the neighbourhood would be determined conclusively by the court after the case is fully heard. As matters are, I think that there is some considerable truth in the allegation made by the Defendant that the suit against him has been instigated by the 3<sup>rd</sup> Plaintiff who has a personal interest in the suit premises which he wanted to buy from him but he refused. Since then the 3<sup>rd</sup> Plaintiff has developed a grudge against him and is out to ruin his business as a way of punishing him for refusing to sell to him the premises.

Where in a suit filed by several Plaintiffs all seeking an equitable remedy, it is shown as in this case, that one of them is acting maliciously in the case in furtherance of other interests not disclosed in their joint Plaint, the court can perfectly, so I believe, refuse to grant the remedies sought and where such remedy had been granted, it can be discharged.

In this case, it appears to me that the 3rd Plaintiff is pursuing interests other than those of co-Plaintiffs in the suit. Prima facie, he is acting maliciously against the Defendant with whom he had previously disagreed. In the circumstances, I think that the interest of justice will be served by discharging the orders that had been given restricting the Defendant only to play soft music at his premises.

For reasons given, I allow this application and discharge the injunction that I had imposed on the Defendant regarding the operation of his disco music at Peemca Motel Club.

Costs of this application will be costs in the cause. It is so ordered;

DATED and delivered at Mombasa this 30<sup>th</sup> day of January, 1995.

S.O. OGUK

JUDGE.