



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 212 OF 2018**

**ALEXANDER JURAS**

**ELMIRA ALEYNIKOVA.....PLAINTIFF/APPLICANTS**

**VERSUS**

**JOHN KATANA BAYA T/A CLUB4FUN**

**RESTAURANT, POOL AND BAR.....DEFENDANT/RESPONDENT**

**RULING**

1. By this Notice of Motion Application dated and filed herein on 19<sup>th</sup> November 2018, the two Plaintiffs-Alexander Juras and Elmira Aleynikova pray for orders restraining the Defendant from carrying on with restaurant and open air disco activities in the business now known as Club4Fun Restaurant, Pool and Bar, Watamu pending the production of an environmental report in accordance with Section 58(1) of the Environmental Management & Coordination Act No. 8 of 1999(hereafter EMCA), pending the hearing and determination of the suit herein.

2. In addition, the Plaintiffs also crave an order of injunction restraining the Defendant from continued pollution of the environment by emitting high levels of noise, vibrations and disposal of waste into the environment from the premises where the Defendant is running the business.

3. The application is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff and is based on the grounds that:-

*i) The Plaintiffs own the house situated on Plot No. Kilifi/Jimba/537 in Watamu having purchased the same for its quiet and peaceful ambience for vacations and the same is adjacent to the Defendant's Plot in which there is an attempt to operate an outdoor music club;*

*ii) On 14<sup>th</sup> July 2018 the Defendant opened the establishment known as Club4Fun Restaurant, Pool and Bar which saw playing of loud music, loud announcements and noise from partying guests;*

*iii) The noise can be characterized as annoying, disturbing and that which endangers the comfort and health of the Plaintiffs contrary to Part 2 Regulation 3(1) of the Environment Management and Coordination(Noise and Excessive Vibration Pollution Control) Regulations, 2009;*

*iv) The establishment is situated within a residential area and noise from the same not only affects the Plaintiffs but also their neighbours;*

*v) An Environment Restoration Order was issued against the establishment by the National Environment Management Authority(hereafter NEMA) to cease from operating until an Environment Impact Assessment Licence had been issued which order the Defendant has blatantly disregarded and continues with his operations;*

*vi) The Defendant's actions are not only a blatant disregard of the law but also a continued danger to the Plaintiff's comfort, health and the environment contrary to Section 3(1) of the EMCA;*

*vii) The Defendant is involved in disposal of waste in a manner that causes pollution to the environment and danger to the Plaintiffs' health and comfort contrary to Section 87(1) OF EMCA;*

**viii) The Plaintiff continues to suffer financial loss as they are unable to rent out the property due to the continued action of the Defendant.**

4. In filing the suit, the Plaintiffs had named one William Fondo Katana as the Defendant running the restaurant and pool bar as aforesaid. However, when this matter came up for inter partes hearing it turned out that the named Defendant was merely an employee of one John Katana Baya who runs the establishment. Accordingly and pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, the name of the said William Fondo Katana was struck out and in its stead John Katana Baya who was present in Court at the time was enjoined as the Defendant herein.

5. In a Replying Affidavit sworn on and filed herein on 14<sup>th</sup> December 2018, the said John Katana Baya avers that the entire suit as filed is maliciously instituted with the sole intention to frustrate him from operating his business.

6. The Respondent further avers that the Applicants caused him to be charged at Malindi Chief Magistrates Court Criminal Case No. 856 of 2018 but the same was withdrawn by the Director of Public Prosecutions for lack of evidence. It is the Respondent's case that he is a law abiding citizen who has at all times complied with all laid down protocol in order to lawfully operate his business.

7. The Respondents asserts that he has at all times acquired the necessary permits and licences to enable him operate and denies that the said business has in anyway threatened the Applicants' health and hygiene as alleged.

8. I have considered the Plaintiff's application and the Defendant's response thereto.

9. Section 3(1) of the Environmental Management and Coordination Act, No. 8 of 1999(EMCA) provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment. In order to safeguard this entitlement, Section 3(3) of EMCA stipulates that:-

***“(3) If a person alleges that the rights to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group of class of persons, members of an association or in the public interest apply to the Environment and Land Court for the redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to:-***

***a) Prevent, stop or discontinue any act or omission deleterious to the environment;***

***b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;***

***c) Require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;***

***d) Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practical to its immediate condition prior to the damages; and***

***e) Provide compensation for any victim of pollution and the cost of beneficial users lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”***

10. In the matter before me, the Plaintiffs asserts that they bought a house in Watamu for its quiet and peaceful ambience for vacations. Adjacent to their house is a Plot of land in which the Defendant has opened an establishment known as Club4Fun Bar and Restaurant.

11. It is the two Plaintiffs' case that in the course of his business within the said establishment, the Defendant plays loud music and makes loud announcements and the noise therefrom and the partying guests is annoying, disturbing and a danger to the comfort and health of the Plaintiffs and their neighbours.

12. The Defendant however denies the Plaintiffs' allegations. According to the Defendant, he is a law abiding citizen who has at all times material endeavoured to obtain necessary permits, approvals and licences as by law required in the operations of its business. In support of his case, the Defendant has annexed to his Replying Affidavit an Alcoholic Drink Licence issued by the County Government of Kilifi on 4<sup>th</sup> July 2018, an Application for a Gathering Permit issued by the Kenya Police Service Watamu on 8<sup>th</sup> December 2018, a Communication to the Public License issued by the Kenya Association of Music Producers on 10<sup>th</sup> July 2018 as well as a license issued by the County Government of Kilifi under the Food, Drugs and Chemical Substances(Food Hygiene) Regulations on 4<sup>th</sup> July 2018.

13. In my mind, I think, in the circumstances herein, it was imperative for the Plaintiffs to demonstrate that the noise complained of exceeds the permissible noise levels that are allowed for an establishment such as the one run by the Defendant and further how the Defendant had failed to comply with the requirements for hygiene.

14. Under Section 7 and 9 of EMCA, the National Environmental Management Authority (NEMA) is created as a body corporate charged with the functions to supervise and coordinate all matters relating to the environment and is the principal instrument of the Government in the implementation of policies relating to the environment. Section 147 of the Act vests the Authority with powers to make such regulations as it may find relevant in the discharge of its duties.

15. In the exercise of the said powers, the Authority enacted the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. The said Regulations define the words “noise pollution” to mean:-

***“The emission of uncontrolled noise that is likely to cause danger to human health or damage the environment.”***

16. On the other hand, “excessive vibration” is defined to mean the presence of vibration which:-

***a) Is of such intensity, duration, frequency or character as to annoy, disturb, or cause or tend to cause adverse psychological or physiological effects on persons, or to damage or tends to damage personal or real property; and***

***b) Exceeds 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source.”***

17. Section 3(1) of the Regulations outlaws **the making or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures, or endangers the comfort, repose, health or safety of others and the environment.** In addition Section 4 of the Regulations prohibits the making and or causing of such excessive vibrations.

18. Be that as it may, it was not left for every individual or entity to determine the level of noise or excessive vibration. Under Section 6 of the Regulations, measurements to determine whether or not noise or vibration levels exceeds the permissible levels are required to be taken by a relevant lead agency. A “lead agency” is defined under the Regulations as follows:-

***“Lead agency” means any Government Ministry, department, parastatal, State Corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resources.”***

19. In the absence of such a lead agency, Section 6(3) and (4) of the said Regulations provides that:-

***“(3) In any cases where there is no relevant lead agency to take the measurements, or where the lead agency has failed to take action after being given reasonable notice by the Authority, the measurements shall be taken by a person duly authorized by the Authority, who is knowledgeable in the proper use of the measuring equipment.***

***(4) The Authority in consultation with the relevant lead agency may issue guidelines for the measurements of noise and excessive vibration.***

20. In the matter before me, the Plaintiffs have not exhibited any guidelines that may have been issued by NEMA for the measurement of noise and excessive vibration. Nor have they demonstrated to this Court how they measured the noise levels emanating from the Defendant’s establishment to determine that the same were excessively loud and injurious to their health and that of the environment.

21. While it is true as the Plaintiff’s states in their submissions that commencing a Project without an environmental Impact Assessment Licence (EIA) is an offence punishable in law, nothing was placed before me to demonstrate that an establishment in the nature of the one operated by the Defendant required such a licence. In any event, it is to be noted that pursuant to another complaint allegedly filed by the Plaintiffs, the NEMA had on 12<sup>th</sup> September 2018 charged the Applicant with the said offence. Those charges were on 26<sup>th</sup> September 2018 terminated under Section 87(a) of the Civil Procedure Act. While it was contended by the Applicants that the Defendant had been issued with an Environment Restoration Order requiring him to cease operations until an Environmental Impact Assessment (EIA) Licence was issued, no evidence of the issuance of such was placed before me.

22. Accordingly in the circumstances of this case, I was not satisfied that the Plaintiffs have met the threshold to warrant a grant of the orders of injunction sought herein.

23. The application dated and filed herein on 19<sup>th</sup> November 2018 is as a result dismissed with costs to the Defendant/Respondent.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**