

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC PETITION NO. E6 OF 2024**

**NICHOLAS RADFORD**  
**SVEN PIELETZKI**  
**LISSA RUBEN**  
**KAFYA NAJI**  
**DAVID HOPKINS**  
**MONICA           CICCOLINI           .....**  
**PETITIONERS**

**VERSUS**

**TUSCANY GARDENS LIMITED T/A**  
**ROSADA BEACH RESTAURANT           .....   **1<sup>ST</sup>****  
**RESPONDENT**

**PASQUALE PES T/A OLIMPIA CLUB           .....   **2<sup>ND</sup>****  
**RESPONDENT**

**DIRECTOR OF ENVIRONMENT,**  
**COUNTY GOVERNMENT OF KILIFI           .....   **3<sup>RD</sup>****  
**RESPONDENT**

**NATIONAL ENVIRONMENT**  
**MANAGEMENT AUTHORITY           .....   **4<sup>TH</sup>****  
**RESPONDENT**

**THE CHAIRPERSON KILIFI COUNTY**  
**ALCOHOLIC DRINKS CONTROL & LICENSING BOARD           .....   **5<sup>TH</sup>****  
**RESPONDENT**

**THE COUNTY GOVERNMENT OF KILIFI           .....   **6<sup>TH</sup>****  
**RESPONDENT**

**RULING**

1. The subject of this ruling is a Notice of Motion Application dated **10<sup>th</sup> February 2025** and brought under *Section 5 of the Judicature Act, Sections 1A and 3A, Cap 21, Laws of Kenya, Order 1 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules*. The Petitioners, who are the Applicants herein, have filed the present application seeking a finding that the proprietors of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in contempt of the court orders issued on 23<sup>rd</sup> January 2025. They further seek that the Court

imposes a fine or penalty upon the said proprietors and awards them the costs of the application.

2. The Petitioners' case was supported by the Affidavit of Nicholas Radford who deposed that pursuant to an earlier application, this Court, on 23<sup>rd</sup> January 2025, had issued orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from contravening the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009, and directing that noise levels be maintained at or below 45 decibels. A copy of the order was annexed as "NR-1." He claimed that despite being aware of the said orders, the Respondents had continued to emit noise levels exceeding the prescribed threshold, with readings ranging between 78-88 decibels. Copies of the decibel meter readings evidencing the said breaches were annexed as "NR-2." He further stated that the measurements had been taken from an approximate distance of 100-200 meters from the Respondents' premises, as shown in the Google Maps extract annexed as "NR-3."
3. The 2<sup>nd</sup> Respondent opposed the application. He filed a replying affidavit sworn on **23<sup>rd</sup> April 2025** wherein he denied willfully disobeying the Court's orders of 23<sup>rd</sup> January 2025 and stated that he has operated in compliance with the law and the said orders. He challenged the Petitioners' decibel readings as inaccurate, uncertified, and inadmissible, arguing that no qualified or authorized person took the measurements, nor was any certified equipment used as required under the EMCA Noise

Regulations, 2009. He further asserted that the Petitioners did not follow the lawful procedure of reporting to NEMA or the County Director of Environment for official investigation.

4. He stated that he previously received a noise-related notice in September 2023, after which he took corrective measures, and no further enforcement action has ever been taken against Olimpia Club. He added that the alleged enforcement operation of 17<sup>th</sup> February 2025 concerned the 1<sup>st</sup> Respondent, not him. He deposed that he has implemented soundproofing, regulated entertainment hours, monitored sound levels, and maintained valid licences. He contended that the application is speculative, unsupported by credible evidence, does not meet the standard of proof for contempt, and should be dismissed with costs.
5. The 6<sup>th</sup> Respondent, through the affidavit of **Jimmy Yaa**, the Director of Environment, County Government of Kilifi, sworn on 16<sup>th</sup> May 2025, responded to the contempt application. The deponent deposed that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents had performed their statutory duties by ensuring that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents committed to comply with the terms of their licenses. However, the 1<sup>st</sup> Respondent had repeatedly breached those conditions, including playing music past 11:30 p.m., contrary to the permitted hours of 11:00 a.m. to 11:00 p.m., and exceeding the permissible noise levels. He stated that the 1<sup>st</sup> Respondent had signed a commitment letter and attended stakeholder meetings

addressing noise concerns. Correspondence and the commitment letter were annexed as “JY1.”

6. The deponent further stated that since a stop order was issued in 2023, the 2<sup>nd</sup> Respondent had complied and no complaints had been lodged against it. He confirmed that enforcement efforts had continued, including an inspection visit to Rosada Beach Bar on 17<sup>th</sup> February 2025, the report of which was annexed as “JY3.” That report indicated noise readings of up to 85 decibels, which was above the legal threshold and in breach of the Court’s order. He maintained that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents had acted within their mandate and that the 1<sup>st</sup> Respondent was in contempt of the court orders and continued to violate the Petitioners’ right to a clean and healthy environment under **Article 42(1)** of the Constitution.
7. In another affidavit sworn by **Nicholas Radford** on **28<sup>th</sup> May 2025**, he reiterated his earlier affidavit and responded to the affidavits of Pasquale Pes and Jimmy Yaa. He asserted that the affidavits filed by the Respondents failed to address the role of the 2<sup>nd</sup> Respondent, which, together with the 1<sup>st</sup> Respondent, allegedly continued to operate loud music events in breach of the court orders and environmental regulations.
8. He added that enforcement by the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents was ineffective, save for a single raid conducted on 17<sup>th</sup> February 2025 which, according to him, did not deter the 1<sup>st</sup> Respondent, as operations resumed after officials left. He further averred that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to disobey the conservatory order between

January and March 2025, and that there was no evidence of effective enforcement or licence revocation. He also stated that the licenses permitting operations until 11:00 p.m. were inconsistent with the 45-decibel statutory limit.

9. The deponent referred to stakeholder meetings allegedly attended without authorized representatives of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and to communications with enforcement officials which he claimed yielded no action. He annexed WhatsApp communications (annexure “NR-1”), a report dated 22<sup>nd</sup> August 2024 served upon the Respondents (annexure “NR-2”), and minutes of a residents’ meeting held on 17<sup>th</sup> February 2025 that resolved to file the present application (annexure “NR-3”). The deponent maintained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were in contempt of court, that the authorities had failed to enforce compliance, and urged the Court to grant the application and the prayers sought in the interests of justice.

### **ANALYSIS AND DETERMINATION**

10. I have considered the application, the supporting affidavit, the replying affidavits together with their annexures, and the submissions on record. I am of the view that the sole issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in contempt of the court orders issued on 23<sup>rd</sup> January 2025.
11. **Order 40 Rule 3(1)** of the Civil Procedure Rules, 2010 provides that in cases of disobedience, or of breach of any such terms, the Court granting

an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

12. **Section 29** of the Environment and Land Court Act is also clear that any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

13. It is also an established principle of law as it was held in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** that in order to succeed in civil contempt proceedings, an Applicant has to prove

- (i) the terms of the order;
- (ii) knowledge of these terms by the Respondent; and
- (iii). failure by the Respondent to comply with the terms of the order.

14. Contempt of court is an offence of a quasi-criminal nature, and a party found liable may be deprived of their liberty. Accordingly, the standard of proof required is higher than that in civil proceedings. It must be proved with a high degree of certainty, though not as strict as proof beyond reasonable doubt.

15. The order issued on 23<sup>rd</sup> January 2025 was clear and unambiguous. It was issued in the presence of counsel for both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. A conservatory order was issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from contravening the First Schedule of EMCA (Noise

Pollution Vibration Pollution Control) Regulations, 2009, and restricting noise levels to 45 decibels within any time of the day, pending the hearing and determination of a notice of motion dated 17<sup>th</sup> December 2024.

16. The Petitioners relied on photographs of decibel meter readings to demonstrate non-compliance. However, these photographs were not accompanied by the certificate required under **Section 106B** of the Evidence Act. Consequently, the Court could not verify their time, date, accuracy, or integrity. In addition, whereas the affidavit of Jimmy Yaa referred to an enforcement visit on 17<sup>th</sup> February 2025, the annexed enforcement report records night surveillance on 17<sup>th</sup> February 2024. This temporal discrepancy was material and undermined the probative value of the report as evidence of non-compliance in 2025. No explanation was offered to reconcile this inconsistency. Accordingly, the Court could not accept those documents as conclusive proof that the Respondents breached the order of 23<sup>rd</sup> January 2025. As already established, contempt of court is a serious allegation, and the applicable standard of proof is higher than the ordinary civil standard, though not as high as beyond reasonable doubt.

17. In the circumstances, I find no merit in the application. The outcome is that the notice of motion application dated 10<sup>th</sup> February 2025 is hereby dismissed with costs.

**Dated, signed and delivered at Malindi on this 4<sup>th</sup> day of December 2025.**



**MWANGI NJOROGE  
JUDGE, ELC, MALINDI**

**Ruling read over MS Teams in the presence of:**

Mr Sigoma for The Petitioners;

Ms Lucy Mwangi for The 2<sup>nd</sup> Respondent;

Ms Mwabaya for The 3<sup>rd</sup> 5<sup>th</sup> And 6<sup>th</sup> Respondents.