



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 764 OF 2017

AJIT RIYAT.....1ST PLAINTIFF

AMARDEEP SINGH RIYAT.....2ND PLAINTIFF

VERSUS

ROOF TOP FORTY HOLDINGS LTD.....1 ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2 ND DEFENDANT

NAIROBI CITY COUNTY.....3 RD DEFENDANT

RULING

1. Through a notice of motion dated 7/2/2018, the plaintiffs sought a finding to the effect that the directors of the 1st defendant, namely, Allan Esabwa Igambi and Irene Wambui Njoroge, and the 1st defendant's manager, Ms Lailah, were in contempt of this honourable court's order dated 9/1/2018, on the ground that they had continued to allow loud music to be played in their establishment known as 40-Forty Lounge, situated on 9th Floor, Crossroad Plaza, Westlands, Nairobi. The application was supported by an affidavit sworn on 7/2/2018 by the 1st plaintiff. The 1st plaintiff deposed that the said order was served upon the 1st defendant on 9/1/2018 and was received by Ms Lailah, but the 1st defendant had refused to comply with the order.

2. It was further deposed that a search in the Companies Registry revealed that the directors of the 1st defendant were Allan Esabwa Igambi and Irene Wambui Njoroge. The deponent contended that the said directors were aware of the continued infraction of the court order and had chosen to do nothing about it.

3. The application was canvassed by way of written submissions. The plaintiffs filed their submissions on 28/6/2018. It was submitted that the 1st defendant was aware of the court order because the order was served on them personally and therefore, this court should hold them liable for contempt. Reliance was placed on **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] 1 KLR and Wildlife Lodges Ltd v County Council of Narok and another [2005] 2 EA 344 (HCK)** where the court held that courts should not condone deliberate disobedience of court orders. It was further held that even in instances where an order is irregular or void, such order should be obeyed.

4. The 1st defendant opposed the application through a replying affidavit sworn on 22/2/2018 by Maurice Obunga. He deposed that he was the Operations Manager of the 1st defendant. He further deposed that the 1st defendant was indeed aware of the court order issued in this suit and they had received advice from their counsel to comply with the order. He added that there were regulations which provided for maximum permissible noise levels and the plaintiffs had not demonstrated that the 1st defendant had exceeded those maximum permissible levels. He further deposed that they had taken measures to ensure that the music emanating from the 1st defendant's business premises was tolerable by changing the speakers. He added that the material court order did not state the decibel levels that were to be maintained, hence there was need for the parties to know at what point the sound affected the plaintiff because loud was relative. Mr Obunga further deposed that efforts to engage the plaintiffs for the purpose of sound assessment had been turned down by the plaintiffs. He contended that the plaintiffs were intent on having their business closed down. He urged the court to dismiss the application.

5. The 1st defendant further submitted that there was no evidence that the order was personally served on Allan Igambi Esabwa and Irene Wambui Njoroge. It added that the plaintiffs did not state that the orders were served on the directors or that they disobeyed the court order. It was argued that the corporate veil should have been lifted first before this suit was instituted. Reliance was placed on **Katsuri Limited v Kapurchand Depar Shah HCCC No. 25 of 2013**. Lastly, it was submitted that the plaintiffs had not established the essential features of contempt as outlined in the case of **Kasturi Limited v Kapurchand Depar Shah; Nairobi HCCC No 25 of 2013**. The 1st defendant contended that the plaintiffs were required to demonstrate that: (i) the terms of the order were clear, unambiguous, and were binding on the 1st defendant; (ii) the 1st defendant had knowledge of the terms of the order; (iii) the 1st defendant had acted in breach of the terms of the

order; and (iv) the 1st defendant's conduct was deliberate. The 1st defendant urged the court to dismiss the application.

6. I have considered the application together with the rival affidavits. I have also considered the relevant legal framework and jurisprudence. It is not contested that the 1st defendant was and is aware of the court order. The key issue in this application is whether there has been breach of the court order by the 1st defendant as alleged by the plaintiffs. Under Sections 107 and 109 of the Evidence Act, the burden of proof lies with the party who alleges and wishes the court to believe what he alleges.

7. The relevant part of the material order was in terms of prayer 2 of the notice of motion dated 19/12/2017 which read as follows:

“2. That pending the hearing and determination of this application interpartes, this honourable court be pleased to grant an interim injunction directed at the 1st defendant, its agents, employees, representatives or any other person prohibiting them from playing or streaming loud (sic) or causing vibrations within 40-Forty Lounge situated on Crossroad Plaza, Westlands, Nairobi, that interferes with the plaintiffs' quiet possession”

8. The court first granted the order on interim basis on 20/12/2017, and extended it on 8/1/2018. On 8/1/2018, the Officer Commanding Parklands Police Station was authorized to enforce the order.

9. In the application under consideration, the applicants contend that the 1st defendant breached the order by playing loud music from its business establishment. The applicants have not, however, placed before court any evidential material demonstrating the level of the sound or noise which constituted the alleged contempt.

10. My understanding of the above order is that it restrained the 1st defendant against playing or streaming loud music or vibration from its business premises. In my view, the loud music or vibration contemplated in the order is to be measured within the context of the existing legal framework which sets out the maximum permissible sound and noise levels within specific zones. That legal framework is the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009. Regulation 5 as read together with the First Schedule provide a schedule of permissible sound levels and noise rating levels applicable to different zones.

11. It was therefore the evidential burden of the plaintiffs to place before court evidential material to demonstrate that the 1st defendant had, in contravention of the court order, caused or allowed sound or noise beyond the permissible levels to be produced or streamed from their business premises. It was also the evidential burden of the plaintiff to adduce evidence relating to the zone within which the 1st defendant's business premises fell. Regrettably, the plaintiffs never bothered to deal with the said important evidential aspects.

12. Secondly, whereas the Officer Commanding Parklands Police Station was authorized to enforce the order, there is no mention of any attempt made by the plaintiffs to procure enforcement of the court order by the Officer Commanding Parklands Police Station. In my view, it was the duty of the plaintiffs to serve the order on the Officer Commanding Parklands Police Station and ask him to enforce the order within the above legal framework. In the event that the Officer Commanding Parklands Police Station failed to enforce the court order, the plaintiffs were at liberty to escalate the matter to the next office within the police command chain.

13. In light of the foregoing, I am not satisfied that the applicants have established a case of contempt by the 1st defendant and its officers, to warrant a finding of guilt on part of the 1st defendant and its officers. Consequently, the notice of motion dated 7/2/2018 is rejected. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Nyaga holding brief for Mr Maina for the plaintiff

Mr Onyango holding brief Mr Mugalo for the defendant

Court Clerk - June Nafula