



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CIVIL CASE NO. 593 OF 2017**

**DEEPAK HARAKHCHAND SOMCHAND**

**(Suing as the secretary of Mpaka Villas Association)...PLAINTIFF**

**VERSUS**

**BHAKTA THAPA.....1<sup>ST</sup> DEFENDANT**

**SUNIL KUMAR DHALI.....2<sup>ND</sup> DEFENDANT**

**NAIROBI COUNTY GOVERNMENT.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff who is suing as a secretary of Mpaka Villas Association, filed the application dated 14/9/2017 seeking a temporary injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, or their agents, servants or employees from carrying on commercial activities within L.R. No. 1870/304 situated off Mpaka Road along General Mathenge Drive in Westlands, Nairobi, pending the hearing and determination of the suit. He also seeks an order restraining the County Government of Nairobi from issuing licenses or approvals allowing the carrying out of commercial activities within the 2<sup>nd</sup> Defendant's plot pending the hearing and determination of this suit.

The application is premised on the grounds that the Defendant's business activities continues to cause undue inconvenience and discomfort to the residents of Mpaka Villas Estate. The Residents claim they are exposed to noise pollution, insecurity, traffic inconvenience due to Defendant's business and its client's vehicle movement and parking. They also urge that there is the potential risk of exposing the Resident's children and youth to immoral culture.

The application is supported by the Plaintiff's Affidavit in which he depones that the Defendant's business activities continues to cause undue inconvenience and discomfort to the Residents of Mpaka Villa Estate as the Defendants play loud music in their premises all the time affecting the Resident's peaceful enjoyment of their land. He depones that he wrote a demand letter on 15/8/2017 asking the Defendants to stop operating the said business but they declined, refused or rejected to owner the demand.

The 1<sup>st</sup> Defendant swore the Replying Affidavit in opposition to the application for injunction. He maintains that he was wrongly sued since he does not own Dafe's Lounge Hotel and Restaurant and that it is owned by Dafe's Lounge Hotel and Restaurant Limited. He further depones that the Suit Property is not a residential property anymore as its user was changed to a residential hotel. He attached a copy of the certificate of incorporation showing that Dafe's Lounge and Restaurant Limited was incorporated on 21/5/2017. He also annexed a copy of the business permit issued by the 3<sup>rd</sup> Defendant authorising Dafe's Lounge Hotel and Restaurant Limited to engage in the business of medium lodging house with restaurant and or bar B/C class basic standard with 6 to 15 rooms. The plot number indicated on the permit is 1870/1/304.

The 2<sup>nd</sup> Defendant also swore a Replying Affidavit in opposition to the application. He depones that General Mathenge Drive is not a residential area, that it is a mixed development area. He states that the user of the suit premises was changed to a residential hotel after following the process of advertising in *The Standard* on 11/1/2017. He also depones that a physical notice was erected on the suit premises informing the general public and the adjacent community of the intended change of user. The Defendants maintain that there were no objections hence the County Government of Nairobi approved the application for change of user. The 2<sup>nd</sup> Defendant annexed an incomplete copy of the lease entered into by the personal representatives of the estate of Gurcharan Dass Dhall and Dafe's Lounge Hotel and Restaurant Limited. Only pages 1, 7 and 8 of the lease were annexed. It is difficult to tell the terms of the lease.

On the noise issue, the National Environment and Management Authority (NEMA) prepared a report dated 31/10/2017. The report on the

environmental audit of the Suit Property states at paragraph 4.1.4 on noise pollution that the facility has limited guests with most coming during weekends. It also states as follows: -

“Dafe’s Lounge Hotel and Restaurant is a quiet environment with no loud music or sound systems. The facility has only provided TV’s to ensure they do not make noise to the surrounding environment. The activities being carried out at the facility do not involve production of noise levels expected to above CSL. A noise survey did not seem to be necessary as the noise levels within the facilities were relatively low to attract the survey in line with Rule 6 (1) of the Noise Prevention and Control Rules, 2005.”

Dominic Mutegi, the 3<sup>rd</sup> Defendant’s Director in charge of Development Management and Regularisation swore the Replying Affidavit in which he confirms that the 1<sup>st</sup> Defendant applied for change of user for the Suit Property from a single dwelling to residential hotel with restaurant on 24/1/2017. He states that the owner was informed to publish a notice in one of the daily newspapers and to erect a site board in order to allow for public participation. He states that since there were no objections the change of user was allowed on 23/2/2017.

The court has looked at a copy of public notice carried in *The Standard* of 11/1/2017 which reads as follows: -

“CHANGE OF USE”

The owner of plot number L.R. No. 1870/1/304 located along General Mathenge Drive in Westlands intends to change the user from single dwelling to residential hotel with a restaurant subject to approval from Nairobi County. Those with objection can forward them within 14 days to the County Secretary, Nairobi City County.

The court has considered the submissions filed by the parties. The Applicant relies on Section 36 of the Physical Planning Act on an Environmental Impact Assessment as well as Section 58 of the Environmental Management and Coordination Act. He argues that the relevant procedures under the Physical Planning Act were not adhered to and that the approval for change of user granted by the 3<sup>rd</sup> Defendant on 15/3/2017 in form PPA2 was subject to the Physical Planning Act. He further argues that there was no public participation. The Applicant relies on several authorities on the issue of public participation and compliance with Environmental Impact Assessment Study. The findings relied on by the Applicant were made after hearing the matter. The court is dealing with an interlocutory application in this case.

The Defendants basically submit that the proper legal channels were followed in obtaining the change of user and that the area in which the Suit Property is situated is a mixed development area encompassing both residential and commercial activities. They argue that the change of user did not require an environmental impact assessment to be carried out.

The Respondents submit that the Applicant has not satisfied the principles for the grant of an injunction. In their submissions, they concede that noise pollution is indeed a nuisance and a source of discomfort which may result in health problems such as stress and hearing problems. They however argue that only noise of above 50 to 55 Decibels would cause annoyance. The report done by NEMA confirms that no survey on the noise was conducted.

Having considered the matter, the court is inclined to order that the Defendants must ensure that there is no noise in the Suit Property until this matter is heard and determined as the residents in the area are also entitled to a clean and healthy environment. Noise which can cause health problems would certainly hamper the enjoyment of their right to a clean and healthy environment. The court agrees with the Defendants that prayers number 2 and 3 of the application can only be given after conducting the trial. Each party will bear its own costs.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of May 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Gitahi for the Plaintiff

Ms. Onyango holding brief for Mr. Kamura for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms. Ndambiri holding brief for Ms. Matunda for the 3<sup>rd</sup> Defendant

Mr. V. Owuor- Court Assistant