



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**MOMBASA**

**ELC CIVIL SUIT NO. 52 OF 2015**

**BRIDGE HOTEL LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**BISHOP WILFRED MUTISO LAI**

**JESUS CELEBRATION CENTER.....DEFENDANT/RESPONDENT**

**RULING**

1. The notice of motion dated 23<sup>rd</sup> March 2015 is brought under Order 40 Rule 2 & 4 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking an order ;

**1. That pending interpartes hearing hereof the defendants/respondents be restrained by an order of temporary injunction from playing or continued playing of very loud music in their church which exceeds by the law and which has adversely affected the hotel/restaurant business of the applicants herein.**

**2. Costs of the application be borne by the Respondent.**

2. The application is supported by 10 grounds *inter alia*; since 2013, the applicant has been encountering difficulty in offering their service to guests since the Respondent plays very loud music at wee hours of the morning as guests complain of sleep disturbance. The applicant avers that they have held several negotiations with the Respondents over the issue of noise at their premises but the Respondents have not taken keen interest in it.

3. The application is also supported by an affidavit of Lawrence Karume. Mr Karume deposed that the applicant was established in 2013 whereas the Respondent was established in 1990s. That since the applicant was established, the Respondent has been playing very loud music that is beyond the maximum decibels that are permitted by law. This prompted the applicants to enter into negotiations with the Respondent who did not bother to reduce the nuisance and therefore they referred the matter to NEMA. NEMA intervened and told the Respondent to reduce the noise.

4. The Respondent reduced the noise temporarily and resumed again forcing the applicant to engage the services of a sound experts who duly prepared a report showing that noise levels recorded in the rooms adjacent to the Respondent when there are activities in the church are capable of causing sleep disturbance. That the applicant therefore decided to file this case seeking the present orders. Mr Karume annexed letters written by guests who complained about the noise coming from the 2<sup>nd</sup> Respondent's

premises.

5. The application is opposed by the Respondent by a replying affidavit deposed to by Rev Justus Kimeu. Rev Kimeu deposed that the 2<sup>nd</sup> Respondent does not exist as a legal entity therefore the suit against it is fatally defective. He also deposed that the application does not meet the threshold for grant of injunctive orders. The deponent added that next to the church are residential and business premises which have co-existed with the church for more than seventeen years and have not complained. He continued that the church consists of mature leaders who understand the importance of peaceful co-existence among neighbours. The 1<sup>st</sup> Respondent avers further that next to the plaintiff's premises is an open yard club which plays live band and noise from the said club can be heard from faraway distance.

6. The Respondents deposed to being aware of noise limits allowed by the law which they allege they have ardently observed. They questioned the manner in which the report marked as *BH – 7* was done. Rev Kimeu deposed that the Respondents are willing to have NEMA officials visit the church to confirm actual noise emission which according to him is within the legal limits. He admitted that their early morning service commences at 4.00 am – 5.45 am but singing is scanty thus noise is greatly reduced. Rev Kimeu deposed further that annexures *BH – 8 & 9* attached to the applicant's affidavit are general and fail to raise any actionable nuisance or any liability contemplated by law.

7. He also deposed that freedom of worship is a right guaranteed under the constitution and the Pentecostal Christian faith includes singing using stringed instruments, clapping of hands, shouting, ululations etc as a means of making joyful noise to God. Lastly that their membership is in excess of 500,000 which they cannot limit their shouting. Those members he deposed should also be joined to this suit to defend themselves. Lastly Rev Kimeu deposed that the plaintiff purchased the land where the hotel is constructed when the church was already in occupation. He contends that if indeed there was noise then the same should have influenced the design of the hotel. That is the applicant implying even when the windows are closed guests cannot sleep? The Respondent denied this. He urged the application to be dismissed with costs.

8. The parties then filed their rival submissions which they relied on in arguing the application. The applicant outlayed the facts and gave a definition of what is noise. It is their case that the Respondents should play music within the required decibel i.e not exceeding 30 d B (A). The applicant submits that their customers have been cancelling their bookings as a result of the excessive noise produced by the Respondents thus occasioning the applicant severe loss and damage. He cited the case of **Broder vs Sailland (1876) LR Zch D 467** which held that noise which prevents people from sleeping is calculated to prevent their ordinary comfort and enjoyment of their dwelling houses and such constitutes actionable nuisance.

9. The applicant also quoted **RA Buckley** on the law of Nuisance at page 25 which stated that the Courts have shown a willingness to restrain noise at night. The applicant submits he is rightly before this Court as his rights under article 70 and 42 of the Constitution have been infringed which gives the Court power to issue an order to prevent, stop or discontinue the act/omission complained of. The applicant submitted further that no rights under the Constitution are absolute thus even the Respondents' right under article 32 is limited. It is her submission that they have established a prima facie case with probability of success. The other case law cited relates to where a final judgement has been rendered therefore not relevant at this stage.

10. The defendants submitted that the 2<sup>nd</sup> defendant being a church registered under the Societies Act Cap 108 can only be sued through her trustees. Consequently the suit as filed against her is defective. On the orders sought, the Defendant submits that the applicant has failed to show that it is deserving of the equitable orders. The defendants quoted the provisions of section 102 and section 3, 9, 5 and 6 (2) of the Regulations. Particularly section 6 (2) provides that measurement shall be taken by the relevant lead agency. The defendants submitted that without an independent assessment by NEMA on the alleged noise complaint and authorization of the plaintiff's expert as required in section 6 (3) of the Regulations, it would be prejudicial to admit this evidence at this stage.

11. According to the defendants breach of the statute has not been proved neither have their assertions in paragraphs 6 – 14 of their affidavit answered. Further, the defendants submit that it is telling the plaintiff did not plead specific loss of business and no particulars were offered. The defence on this submission quoted a statement from Salmond on Torts 15<sup>th</sup> Edition at page 72, 73 that, “*The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities ....He who loves peace and quiet must not live in a locality devoted to business of making boilers or steamships*”.

They contend they would lose the most as the order would compel them to:-

- a. **Cease carrying out activities on its premises that are perfectly legal;**
- b. **It would be subject to the caprice of the plaintiff despite compliance with NEMA standards;**
- c. **Suffer consequences of third party actions;**
- d. **Effect structural changes to its premises to prevent breach of the Court’s order.**

11. On balance of convenience the defendant submits it tilts in their favour. The defence quoted **Miller & Another vs Jackson & Another (1977) 3 All ER 338** where the Court held “*It was not an appropriate case for the grant of an injunction since the Court had to weigh the interests of the public at large against those of an individual and on the balance the interest of the inhabitants of the village as a whole...*”

The defence also submitted on the heading of negligence or nuisance, distinguishing the two and concluded that the claim is wholly based on private nuisance to land vide noise pollution. The defendants urged the application be dismissed and the matter do proceed to be heard on its merits.

13. I do appreciate that both parties presented detailed submissions supported by relevant Statutory provisions and case law. The orders sought by the applicant is wanting in terms of procedure because she only sought temporary orders of injunction pending inter parties hearing. She did not add a prayer for grant of temporary injunctions pending determination of the suit. I could as well stop here because there is nothing to be determined. However if I did that, it would only be postponing an issue as the applicant will immediately return to Court seeking for temporary orders of injunction pending determination of the suit. Since both parties have argued the application as if it had an order pending determination of the suit, in the interest of justice I would have considered whether or not to grant the orders pending determination of this suit. But there is a preliminary point of law to be dealt with first.

14. The applicant called her prayers temporary orders while the defendants referred to them as mandatory injunctions. I will first determine the issue raised by the 2<sup>nd</sup> defendant that the suit against it is defective for want of capacity. To buttress this argument, they relied on the case of **African Orthodox Church of Kenya vs Charles Omuroka & another (2014) eKLR** where E.C Mwita J. in allowing a preliminary objection on capacity of a church agreed with the holding of **Onyancha J. in Eritrea Orthodox Church vs Wari Wax Generation Ltd (2007) eKLR** where the Court held that “*the plaintiff being a religious society registered under the Societies Act and therefore institution of proceedings by persons who form the society without complying with the Rules governing representative suit renders the suit null & void.*” Further the Judge quoted Bosire J (as he then was) in **John Otenyo Amwayi vs Rev George Abura & two others Civil Appeal No 6339/90** where the Judge had this to say:

“*The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names*”.

15. I have perused the Societies Act Cap 108 and the provisions therein does not give a society registered thereunder capacity to sue or be sued in its own name. The 2<sup>nd</sup> defendant is described in the plaint as “a

*church professing the Christian faith*". The issue of the capacity was taken up by Mr Munyithya appearing for it both in the replying affidavit deposed by Rev Julius Kimeu & the statement of defence filed. The applicant did not address the objection either by way of filing a further affidavit or deal with it in her submissions yet it goes into the root of her suit.

16. In the Eritrea Orthodox Church case supra, the Judge held that since a religious organisation is not a body corporate, it lacked legal personality to institute proceedings in its own name. In this instant, the 2<sup>nd</sup> defendant is not a body corporate. Similarly it lacks capacity to sue or be sued in its own name. The suit as filed against it is fatally defective. For now the suit against the 2<sup>nd</sup> defendant being fatally defective, no orders can issue against it as that would be issuing orders in vain. The only proper order I can issue against the 2<sup>nd</sup> Respondent at this stage and which I do hereby issue is that the plaintiff's suit together with the application against her is struck out for want of capacity. The question would then be whether to consider the merits of the application as against the 1<sup>st</sup> defendant as the Society Act has not bestowed on it legal personality. I am in agreement by the decisions of my learned brothers cited above. The suit can only be brought against the 2<sup>nd</sup> Respondent through its officials or trustees as the case may be.

17. The applicant deposed that it is the 2<sup>nd</sup> Respondent who was located next to its premises. The noise was being made by members of the 2<sup>nd</sup> Respondent probably the 1<sup>st</sup> Respondent being such a member. The orders therefore cannot lie solely as against the 1<sup>st</sup> Respondent. The application cannot thus stand against the 1<sup>st</sup> Respondent by himself as he would be doing his duties if any on behalf of the 2<sup>nd</sup> Respondent. Until the suit against the 2<sup>nd</sup> Respondent is properly commenced, the orders sought in the notice of motion dated 23<sup>rd</sup> March 2015 herein fails. In conclusion the notice of motion and suit against the 2<sup>nd</sup> Respondent be and is hereby struck out with no order on costs. The application as against the 1<sup>st</sup> defendant is dismissed with costs for want of merit.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of November 2016.**

**A. OMOLLO**

**JUDGE**