



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, MURGOR & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 141 OF 2020**

**BETWEEN**

**EXPLORERS TAVERN.....APPLICANT**

**AND**

**KILIMANI PROJECT FOUNDATION.....1ST RESPONDENT**

**(Being sued on behalf of KILIMANI RESIDENTS ASSOCIATION)**

**B CONCEPT LIMITED T/A B-CLUB NAIROBI.....2ND RESPONDENT**

**SPACE LOUNGE AND GRILL.....3RD RESPONDENT**

**KIZA RESTAURANT AND LOUNGE.....4TH RESPONDENT**

**DIRECTOR OF THE ENVIRONMENT**

**NAIROBI CITY COUNTY GOVERNMENT.....5TH RESPONDENT**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY.....6TH RESPONDENT**

**CHAIRPERSON NAIROBI CITY COUNTY ALCOHOLIC**

**DRINKS CONTROL AND LICENSING BOARD.....7TH RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....8TH RESPONDENT**

*(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (Komingoi, J.) dated 17th October, 2019*

**in**

**Petition No. 5 of 2018)**

**\*\*\*\*\***

**RULING OF THE COURT**

By the “Practice Notes for the Conduct of Court Business During the Global Coronavirus Pandemic” hearing of applications will be considered by the Court on the basis of written submissions without the necessity of oral highlighting. **Komingoi, J.**, sitting at the **Environment and Land Court of Kenya at Nairobi in Petition No. 5 of 2018** delivered a Judgment on 17th October, 2019 where she

decreed that:

**“(a) A declaration is hereby issued that the 1st, 2nd, 3rd and 4th respondents continued operation of business within the petitioner’s area of residence is a violation of the petitioner’s rights to life and right to a clean and healthy environment as contemplated by Article 26(1) and Article 42(1) of the Constitution of Kenya.**

**(b) A declaration is hereby issued that the business permits and liquor licences to the 1st, 2nd, 3rd and 4th respondents by the 7th and 8th respondents thereby allowing them to operate their businesses in the manner complained of by the petitioner is unlawful and/or illegal.**

**(c) A declaration is hereby issued that issuance of licences and permits to businesses on establishment of the 1st, 2nd, 3rd and 4th respondents within residential areas by the 4th and 5th respondents is a violation to the petitioner’s right to a clean and healthy environment.**

**(d) A mandatory injunction is hereby issued against the 5th, 6th and 8th Respondents compelling them to issue and enforce closure notices against the 1st, 2nd, 3rd and 4th respondents for being in contravention of the EMCA (Noise and excessive vibration pollution) (Control) Regulation 2009, LN NO. 61 of 2009).**

**(e) A mandatory injunction is hereby issued against the 8th respondent compelling it to revoke all liquor licenses issued to the 1st, 2nd, 3rd and 4th respondents.”**

The applicant, Explorers Tavern, has filed a Notice of Appeal against that judgment.

By Notice of Motion brought under various provisions of law the applicant prays in the main that pending hearing and determination of the application and the determination of the intended appeal we stay execution of the said judgment and decree. In grounds in support of the Motion and in a supporting affidavit of **Antonio Leting**, the **Managing Director** and co-proprietor of the applicant, it is said that the Judge erred by relying on certain noise level readings attached to submissions of the 1st respondent; that:

**“... the Learned Trial Judge relied on noise levels of between 68 dB to 84 dB which were recorded at the 3rd respondent’s establishment (Space Lounge and Grill) and wrongly applied/juxtaposed them as if they were readings of the Applicant”;**

that the holding was against regulations of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Regulations, 2009) which provide for how measurement of noise levels will be taken; that the Judge erred by not holding that noise levels at the applicant’s premises was within allowable levels; that the Judge erred by usurping the functions of the 5th, 6th, 7th and 8th respondents; that there was no proof that Kilimani area is residential; that the Judge misapplied the law; that the Judge misapplied articles of the Constitution of Kenya, 2010; amongst other grounds.

**Judy Gitau**, Manager and proprietor of the 4th respondent (Kiza Restaurant Lounge) in an affidavit in support of the application depones amongst other things that she operates the said Kiza Restaurant Lounge which establishment is affected by the orders given by the trial court; that her establishment was granted all necessary approvals and licences; that a noise auditor had carried out the necessary audit prior to the 4th respondent commencing operations in 2015; at paragraph 12 of the affidavit:

**“THAT the 4th respondent’s business establishment is a major enterprise operating in three continents across the world and offers a source of livelihood to more than 100 employees in its Nairobi branch and has been always receptive of any ideas or interventions issued by relevant agencies”.....;**

that if the impugned judgment is not stayed the 4th respondent would suffer financial hardship as it has financial obligations to meet; that the Judge usurped the role of independent agencies competent to establish noise levels allowable in the area occupied by the 4th respondent; that the intended appeal is arguable and would be rendered nugatory if we refuse the Motion.

None of the parties filed a replying affidavit to the Motion.

The principles that govern our exercise of discretion under **rule 5(2) (b) of the rules of this Court** are well known and are the subject of many judicial pronouncements that have been issued by this Court. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. If the applicant crosses that hurdle he/she must, in addition, show that the appeal would be rendered nugatory, absent stay. These principles were summarized as follows in the case of **Stanley Kange the Kinyanjui v Tony Ketter & Others [2013] eKLR**:

**“i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court.**

**ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**

**iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.**

**iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.**

v) *An applicant must satisfy the court on both of the twin principles.*

vi) *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.*

vii) *An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.*

viii) *In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

ix) *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

x) *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

xi) *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.”*

This Court in the modern era of the liberal reaching of the Constitution of Kenya, 2010 has, in appropriate cases or circumstances, considered where the public interest lay in granting or refusing to grant stay of execution of judgments or orders of the High Court.

The applicant, as supported by the 4th respondent, has raised many issues in attacking the judgment intended to be appealed. It is said, for instance, that the Judge erred in relying on noise levels taken at Space Lounge and Grill (the 3rd respondent), but not noise levels recorded at the applicant's establishment. It is also said that the Judge erred by disregarding expert reports on noise levels emanating from the applicant's establishment. These we find to be arguable points and as we have seen in the case of *Ketter* (supra) case an applicant need not show or demonstrate a multiplicity of arguable points as one arguable point will suffice.

What about the nugatory aspect which the applicant must also demonstrate to be entitled to stay of execution pending appeal?

In the Petition presented before the Environment and Land Court at Nairobi various constitutional violations were alleged by the petitioner (1st respondent here) (Kilimani Project Foundation) and it was further alleged that there were breaches by the applicant (Explorers Tavern); the 2nd respondent (B Concept Limited t/a B-Club Nairobi); the 3rd respondent (Space Lounge and Grill) and the 4th respondent (Kiza Restaurant and Lounge) of various laws (The Environmental Management and Coordination Act; The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 L.N. No. 61 of 2009). Various declarations and injunctions were sought. The petitioner was supported by an affidavit of the Chairman of the 1st respondent who stated amongst other things, that the applicant together with the 2nd, 3rd and 4th respondents had in the year 2015 established nightclub businesses within a residential area in Kilimani in Nairobi County; that the peak hours of operation of the said night clubs was 6 p.m. to 8 a.m. from Wednesdays through Sunday and that noise emanating from the night clubs disturbed the comfort, repose and health or safety of residents of the area. Further that the loud music and chaos was causing residents to undergo a lot of anguish and stress forcing residents to spend nights and weekends away from their homes. That position was supported by many affidavits filed by residents of the area (members of the 1st respondent) who stated individual problems they were undergoing because of the noise levels complained of.

The applicant as supported by the 4th respondent says that it will suffer irreparable loss if stay of execution is not granted.

We started this ruling by referring to “Practice Notes for the Conduct of Court Business During the Global Coronavirus Pandemic”. It is well known that Covid-19 hit the world starting in China in or about December, 2019 and has affected literally the whole world and was declared a global pandemic by World Health Organization. When it did hit Kenya, in or about March, 2020, the government, to protect the citizenry ordered public establishments to close and not be open to the public. These facts are admitted by the applicant and the 4th respondent. Considering the facts of the case, the Covid-19 pandemic, and even the public interest we are not satisfied that the intended appeal would be rendered nugatory absent stay. For all these reasons the Motion fails and is dismissed. We make no order as to costs, the respondents not having filed affidavits in reply to the Motion.

**Dated and delivered at Nairobi this 7th day of August, 2020.**

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

*Signed*

**DEPUTY REGISTRAR**