



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, GATEMBU & MURGOR, JJ,A)

CIVIL APPLICATION NO. NAL. 182 OF 2020

BETWEEN

B CONCEPT LIMITED T/A

B-CLUB NAIROBI.....APPLICANT

AND

KILIMANI PROJECT FOUNDATION Being sued on behalf of KILIMANI

RESIDENTS ASSOCIATION.....1ST RESPONDENT

KIZA RESTAURANT AND LOUNGE.....2ND RESPONDENT

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

EXPLORERS TAVERN.....4TH RESPONDENT

DIRECTOR OF ENVIRONMENT.....5TH RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....6TH RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....7TH RESPONDENT

CHAIRPERSON NAIROBI CITY COUNTY ALCOHOLIC DRINKS CONTROL

AND LICENCING BOARD8TH RESPONDENT

NAIROBI COUNTY GOVERNMENT.....9TH 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 at Nairobi

(Komingoi, J.) dated 17th October 2019

in

Petition No. 5 of 2019)

RULING OF THE COURT

The Notice of Motion dated 30th June 2020 arises out of the judgment of the Environment and Land Court (*Komingoi, J.*) delivered on 17th October 2019 wherein the court issued orders to compel **the 5th respondent, the Director of Environment, Nairobi City County Government, the 6th respondent, the National Environmental Management Authority and the 8th respondent, the Nairobi County Government** to enforce closure notices against **the applicant, B Concept Limited T/A B-Club Nairobi**, among others for having contravened the Environmental Management and Co-ordination Act (Noise and Excessive Vibration Pollution) (Control) Regulation 2009 and a further order compelling them to revoke all liquor licences issued to the applicant amongst others.

The motion is brought under **Articles 159 and 164 (3)** of the **Constitution, section 3A and 3B** of the **Appellate Jurisdiction Act** and **rules 1 (2), 5(2) (b)** of the **Court of Appeal rules** where the applicant seeks orders of stay of execution of the judgment pending the hearing and determination of the appeal. The motion was grounded on a host of complaints against the learned judge’s decision including, but not limited to complaints that the learned judge wrongly applied the noise level decibel readings recorded at the 3rd respondent, Space Lounge and Grill’s premises in the applicant’s case, and that further, the court also relied on measurements taken in a manner that was contrary to **regulation 6** of the **Environment Management & Coordination (Noise and Excessive Vibration Pollution Regulations, 2009)** in that they were not taken by the relevant lead agency or by a person duly authorized by the National Management Authority; that furthermore, the court should not have disregarded the applicant’s Noise Survey Report. Another complaint was that the learned judge failed to take into account the applicant’s evidence that the 5th, 6th and 8th respondents had certified that it had complied with all applicable environment laws both at the National and County Government level.

The applicant deponed that it risked losing its investment of over Kshs. 20,000,000, and that a closure would not enable it meet its financial obligations to its employees, creditors and suppliers who are reliant on its continued operations. That if the stay of execution was not granted and the appeal were to succeed, it would be rendered nugatory as the applicant would go out of business.

The application was supported by the affidavit of **Barry Ndengeyingoma**, the applicant’s Managing Director, which reiterated the contents of the grounds of the motion save to add that the debts had accrued partly due to the business closure on account of the Covid- 19 pandemic to comply with the government protection measures.

The applicant also filed written submissions reiterating the averments in the grounds and the supporting affidavit. No affidavit in reply or submissions were filed by any of the respondents.

In so far as applications filed under **rule 5 (2) (b)** of this Court’s rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

As to whether the appeal is arguable, the applicant’s main grievance is that the learned judge wrongly applied the sound level measurements taken in a third party’s premises to the applicant. Whether or not the measurements taken were correctly applied, is a matter that we consider to be arguable issue.

On whether the appeal would be rendered nugatory in the event it were to succeed, the applicant averred that the onset of the Covid -19 pandemic led to closure of its operations, which gave rise to some of the significant financial challenges it is facing. At this juncture, we are not persuaded that the appeal would be rendered nugatory.

In sum the motion dated 30th June 2020 is for dismissal, and is accordingly dismissed. We make no orders as to costs

It is so ordered

Dated and delivered at Nairobi this 18th day of December, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR