



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, GATEMBU & MURGOR, JJA)**

**CIVIL APPLICATION NO. NAL. 136 OF 2020**

**BETWEEN**

**KIZA RESTAURANT AND LOUNGE.....APPLICANT**

**AND**

**KILIMANI PROJECT FOUNDATION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF ENVIRONMENT**

**NAIROBI CITY COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**CHAIRPERSON NAIROBI CITY COUNTY**

**ALCOHOLIC DRINKS CONTROL**

**AND LICENCING BOARD.....4<sup>TH</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**B CONCEPTS LIMITED**

**T/A B-CLUB NAIROBI.....6<sup>TH</sup> RESPONDENT**

**SPACE LOUNGE AND GRILL.....7<sup>TH</sup> RESPONDENT**

**EXPLORERS TAVERN.....8<sup>TH</sup> 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 17<sup>th</sup> October 2019)*

*in*

*Petition No. 5 of 2019*

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**RULING OF THE COURT**

The Notice of Motion dated 29<sup>th</sup> May 2020 arises out of the judgment of the Environment and Land Court (*Komingoi, J.*) delivered on 17<sup>th</sup> October 2019 wherein the court issued orders to compel **the 2<sup>nd</sup> respondent, the Director of Environment, Nairobi City County Government, the 3<sup>rd</sup> respondent, the National Environmental Management Authority** and **the 5<sup>th</sup> respondent, the Nairobi City County Government** herein to enforce closure notices against **the applicant, Kiza restaurant and Lounge**, 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.

In the motion, the applicant sought for orders of stay of execution of the judgment pending the hearing and determination of the appeal, the grounds of which were that the applicant was a major business enterprise operating in three continents across the world, and offered a livelihood to more than 100 employees in Nairobi. It was contended that in the event the Court should decline to grant a stay of execution of the trial court’s orders the applicant’s business faced imminent closure, due to untold financial hardship, thereby rendering the intended appeal nugatory.

The motion was supported by the sworn affidavit of the applicant’s Manager and proprietor, **Judy Gitau**, and its written submissions where it was stated that the appeal was arguable for the reasons, *inter alia* that, the learned judge failed take into account the measures that the applicant had put in place to minimize the sound pollution; that the learned judge did not properly evaluate the evidence, and failed to take into account the applicant’s evidence on sound emission audits that it had conducted, and in so doing, wrongly concluded that the emissions were not within permissible levels.

The applicant also filed a supplementary affidavit sworn on 22<sup>nd</sup> June 2020, wherein it went on to state that its establishment had closed due to the Covid-19 pandemic; it complained that a further closure following the trial court’s order would cripple its business all together, given that it was already facing significant difficulties meeting its financial obligations.

In a replying affidavit sworn by its Chairman, **Irungu Houghton** on 22<sup>nd</sup> July 2020, the 1<sup>st</sup> respondent opposed the application and deposed that the application was based on material non disclosures that were aimed at misleading the Court. It further averred that for the Court to grant the stay of execution orders, would be to perpetuate an illegality.

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.”***

On the arguability of the applicant’s appeal, the applicant’s main complaint is that the learned judge failed to properly evaluate the evidence, and in particular failed to consider the applicant’s evidence regarding sound emission audits that it had conducted; that in so doing the judge wrongly concluded that the emissions were not within permissible levels. In our considered view, whether or not the trial court properly evaluated the parties’ evidence is indeed an arguable issue that ought to be ventilated before this Court.

Would the appeal be rendered nugatory in the event we were to decline to grant the orders sought and the appeal were to succeed?

The applicant’s case is that it is a major enterprise and that closure of its business on account of the trial court’s orders would result in it having to close down altogether and dismiss its employees. More importantly, the applicant averred that the onset of the Covid -19 pandemic led to the closure of its operations, which was the reason for the financial challenges it is facing.

We are not persuaded that the appeal would be rendered nugatory as to warrant the stay of execution sought.

In sum, the motion dated 29<sup>th</sup> May 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 18<sup>th</sup> 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**