

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISC. APPLIC. NO. 406 OF 2018 ARISING FROM**

**HCCS NO. 153 OF 2018**

- 5        1. MANSUR SHARIF  
          2. RUSHEKESH VADODARIA  
          3. TIMOTHY M. KREUTTER  
          4. MALIK BHARWANI  
          5. ELIZABETH ROUSSOS.....APPLICANTS/PLAINTIFFS

10        V

1. CASABLANCA PUB, NIGHT CLUB AND RESTAURANT LIMITED  
          2. MEHARI ABRAHALE GEBREMICHAELI  
          3. SISAY BEKURE WOLDMICHAEL  
          4. LATIN EVENTS LIMITED T/A BIG MIKES  
15        5. HILL 16 PRODUCTIONS LIMITED T/A BUBBLE O' LEARY  
          6. OLY FOODS LIMITED T/A ATMOSPHERE RESTAURANT AND LOUNGE  
          7. WAVE LOUNGE LIMITED-UGANDA.....RESPONDENTS/DEFENDANTS

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**Introduction**

20        At the commencement of hearing this application, counsel Barenzi for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>,  
          5<sup>th</sup> and 7<sup>th</sup> for the respondent raised a preliminary objection directed at the jurisdiction of  
          this court to entertain the application, let alone the suit.

          In support of his submission, counsel cited regulation 43 (7) of the National Environment  
          ( Noise and Vibrations Standards and Control ) Regulations 2013, which designates the  
25        Magistrate's court as the court of first instance.

          Counsel Ikimana Faridah for the 6<sup>th</sup> respondent associated herself with submissions of  
          counsel Barenzi.

Counsel Arinaitwe for the applicants countered that the applicants' cause of action is in the  
30 common law tort of nuisance and not statute . Counsel further submitted the High Court has  
unlimited jurisdiction and therefore it is not precluded from hearing this suit.

An examination of the plaint shows the suit is founded in several causes of action:

1. Noise emission under the common law tort of nuisance
2. Right to a clean and healthy environment
- 35 3. Allowing use of tobacco and other narcotic substances which circulate in the air and  
interrupt the quiet enjoyment of plaintiffs' properties
4. Financial loss suffered as a result noise emissions.

The plaintiffs sought several orders against the defendants including declaratory orders that  
the business operations of 1<sup>st</sup> to 7<sup>th</sup> defendants violate the plaintiffs' right to a clean and  
40 healthy environment by emitting noise beyond maximum permissible levels; noise was  
beyond maximum permissible to create and protect a clean and healthy environment; high  
noise levels amounts to a breach of their constitutional duty ; general and special damages,  
among other orders.

**The National Environment (Noise and Vibrations Standards and Control Regulations)**  
45 **2013**

As suggested by counsel for the defendant, these torts have all been codified in statutes. The  
overriding law under which the plaintiffs' complaint is regulated is the (Noise and Vibrations  
Standards and Control regulations, 2013 ) .

These regulations are made under sections 28 of the National Environment Act cap 153 .  
50 Section 28 prescribes that the National Environment Management Authority will establish  
criteria and procedures for the measurement of noise and vibration pollution; minimum  
standards for the emission of noise and vibration pollution into the environment ; and  
guidelines for the abatement of unreasonable noise and vibration pollution emitted into the  
environment.

55 These regulations are enforced by NEMA, police and a local authority through monitoring;  
by a local council or Executive Director to whom a complaint can be lodged; and by the  
courts through a civil action or penalties for offences created under the regulations.

### **Civil action for noise pollution**

60 Regarding civil action in the courts, regulation 43(2) entitles any person or group of  
persons to bring an action in a court of competent jurisdiction to stop, prevent or control the  
emission of noise from any source or place.

The orders a court can make are authorised by regulation 43(8) and these include an order  
directing the person or body making or causing or responsible for the noise to take measures  
necessary to reduce noise or to take specified measures for the prevention or limitation of  
65 noise. The court has power under regulation 43(9) to stop, prevent or control the emission of  
noise from any source. Under regulation 43(10), any orders made by the court must be  
complied with. Under regulation 43(3), the complainant has a duty to show or prove  
personal loss, injury or discomfort caused by the emission.

From a law and policy perspective, the intention of the legislature was to create a statutory  
70 tort of noise pollution which has to be remedied under the statute that creates it. Counsel  
Barezi referred me to **Commercial Court MC No. 14 of 2014 Kawuki Mathias v  
Commissioner General URA** where the High court held that under the East African  
Customs Union Act, the High Court enjoyed appellate jurisdiction and not original  
jurisdiction and therefore the plaintiff had to take his complaint to the Tax Appeals Tribunal  
75 as a first step.

Where a statute confers original jurisdiction on a subordinate court, the High Court has a  
duty to give effect to that statute and only exercise appellate jurisdiction at the appropriate  
time. This means the submission of counsel for the applicants /plaintiffs on jurisdiction is  
without merit.

80 In **Peter Marcic v Thames Water Utilities Ltd [2002] EWCA CIV 65**, the Court of  
Appeal of England dealt with a situation where the Water Industry Act that sets out powers  
and duties of sewerage undertakers. Under this Act, the tort of nuisance by flooding of  
sewage was enacted into a statutory duty on the part of the undertakers to prevent

flooding and therefore breach of that duty was remedied under the statute and not the  
85 common law tort of nuisance.

With respect to the instant case, Noise and Vibrations Standards Control Regulations 2013  
impose upon occupiers, owners the duty to control noise levels and breach of that duty  
leads to administrative action by local authority or penal consequences or an aggrieved  
person or class of persons can bring an action under the regulations. By implication, the  
90 plaintiffs cannot bring an action under the common law tort of nuisance when there is a  
written law that regulates their complaint. Regulation 43 (7) designates the magistrate's  
court as the court of first instance which means, the High Court comes in on appeal.

With respect to breach of statutory duty by KCCA and NEMA, jurisdiction is with  
magistrate's court as court of first instance since only declaratory orders are sought.

#### 95 **Right to a clean environment**

With respect to the right to a clean and healthy environment, although this cause of action  
seems to be grounded in constitutional law it is based on the same facts that give rise to a  
statutory action. The declaratory order sought is not available under the Regulations which  
means this cause of action has to give way to the action envisaged by the regulations.

#### 100 **Tobacco Control Act 22 of 2015**

With respect to use and consumption of tobacco and other narcotic substances, these are  
remedied under the Tobacco Control Act that confers on everyone the right to tobacco free  
environment and prescribes offences for contravention of the Act.

#### **General and special damages for financial loss**

105 With respect to general and special damages sought by the plaintiffs, section 108 of the  
National Environment Act saves existing law that obtained immediately before the coming  
into force of the Act as it relates to environment but on the condition it shall have effect  
subject to such modifications as may be necessary to give effect to the Act.

110 The common law principle under Ryland v Fletcher that places a duty on an owner of land  
to control dangerous substances on his or her land from escaping and causing injury or  
damage to the neighbours and their property, is one such law that was preserved by section  
138 of the Act.

If the plaintiffs have a cause of action under the rule in **Ryland v Fletcher**, their claim is triable by the High court on account of limit to pecuniary jurisdiction of magistrates' courts.

It follows that the preliminary objection raised by counsel for the 1<sup>st</sup> to 7<sup>th</sup> defendants/respondents succeeds.

### **Orders**

1. The plaintiffs will bring an action for breach of statutory duties by the respondents under the Noise and Vibrations Standards and Control Regulations 2013 in the magistrates court.
2. The plaintiffs will pursue their right to a tobacco free environment under the Tobacco Act. In the absence of designated court, the court of first instance is the magistrates court.
3. If the plaintiffs have a cause of action under the rule in **Rylands v Fletcher**, they are free to amend pleadings to retain this specific cause of action only.
4. The effect of these orders is that the applications for interim and temporary orders cannot stand as the magistrates court has jurisdiction to issue orders with similar effect under regulations 43 (8).
5. Costs to the 1<sup>st</sup> to 7<sup>th</sup> defendants in any event.

**DATED AT KAMPALA THIS 26<sup>TH</sup> DAY OF FEBRUARY 2019**

**HON. LADY JUSTICE H. WOLAYO**

### **Legal representation**

Signum Advocates for applicants/plaintiffs

Barenzi & Co. Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> defendants/respondents

Nangumya & Co. Advocates for the 6<sup>th</sup> respondent

