



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 23 OF 2016

**IN THE MATTER OF: THE ENRIONMENT AND COORDINATION (NOISE) AND EXECESSIVE VIBRATION
POLLUTION) (CONTROL) REGULATION, 2009**

**IN THE MATTER OF: SECTION 101, 102, 103, 142, 144 & 147 OF THE ENVIRONMENTAL MANAGEMENT &
COORDINATION ACT (EMCA)**

IN THE MATTER OF: ARTICLE 10, 19, 28, 29, 35, 42, 50, 69, 70 AND 232 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF: THE KILIFI COUNTY LIQUOR CONTROL ACT, SECTION 11(7) (12), SECTION 14(1) (C)
AND SUBSECTION 3(B) AND SECTION 47(1) (C)**

BETWEEN

ELIZABETH KURER AND DETLEF HEIR (Suing on their behalf

and on behalf of aggrieved residents of Watamu within

Kilifi County).....PETITIONER/APPLICANT

=VERSUS=

COUNTY GOVERNMENT OF KILIFI.....1ST RESPONDENT

OFFICER COMMANDING POLICE DIVISION KILIFI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

KIOKO ENTERPRISES LTD.....4TH RESPONDENT

MARVAL LTD T/A/ COMEBACK

RESTAURANT, LOUNGE & DISCO WATATU.....5TH RESPONDENT

JUDGMENT

1. By an Amended Petition dated 5th December 2016, the two Petitioners Elizabeth Kurer Heier and Detlef Heir humbly pray for:-

a) A declaration that the Petitioners' right to a clean and healthy environment has been violated by the actions and inactions of the Respondents as outlined in the Petition;

b) A Conservatory Order in the nature of an injunction be issued against the 4th and 5th Respondents, their servants, agents, employees, tenants, and or any other person(s) acting on their behalf, prohibiting them from further operation of Comeback Restaurant, Lounge and Disco situated in Watamu and any further playing of live music, streamed music and or any other music within Comeback Restaurant, Lounge and Disco situated in Watamu;

c) Costs of the Petition; and

d) General damages

2. The Petition is premised on the Petitioners' contention that since the year 1998, the 4th and 5th Respondents have played excessively loud music at night thus causing the Petitioners and other residents of Watamu sleepless nights. Kioko Enterprises Ltd(the 4th Respondent) is the registered proprietor of the Parcel of land on which Marval Ltd(the 5th Respondent) operates an entertainment spot in Watamu town known as Comeback Restaurant, Lounge and Disco whose main entertainment menu is said to be playing of very loud music.

3. It is the Petitioners' case that the said Restaurant operated by the 5th Respondent is situated in a residential area and is less than 300 metres from four learning institutions for persons under the age of 18 years. The Petitioners aver that the continued operation of the Restaurant is interfering with the learning activities of the four institutions and further that the noise emanating therefrom has greatly interfered with their peace and quiet enjoyment of their properties which neighbour the Restaurant and has violated their right to a clean and healthy environment.

4. The Petitioners accuse the County Government of Kilifi (the 1st Respondent) of miserably failing to implement the Kilifi County Liquor Control Act which they state has been brazenly breached by the 4th and 5th Respondents despite the Petitioners complaints thereabout. In addition, they accuse the 1st Respondent and the officer Commanding Police Division Kilifi (the 2nd Respondent) of declining to stop the activities perpetuated by the 4th and 5th Respondents and violating Article 35 of the Constitution by continually declining to supply information within their possession in regard to the proper owners of the Restaurant.

5. Arising from the foregoing, the Petitioners aver that they are entitled to certain rights and fundamental freedoms within the Constitution which rights and freedoms have been grossly violated by the Respondents and hence their Petition to this Court for a hearing and redress thereof.

6. In response to the Amended Petition, the 1st Respondent did on 27th July 2017 file Grounds of Opposition dated 26th July 2017 in which they oppose the Petition on the following grounds, among others:-

i) That the Amended Petition makes no allegations against the 1st Respondent of any infringements or violation of the Petitioners' right or any of the aggrieved residents;

ii) That the Petitioner has also failed to plead any particulars of such infringements by the 1st Respondent as required for a case to meet the constitutional threshold;

iii) That it has not been shown that the 1st Respondent has infringed or facilitated the infringement of the Petitioners rights as alleged. If anything, the 1st Respondent has, as evidenced from the material placed before the Honourable Court, been trying to resolve the issues between the Petitioner and the 4th and 5th Respondents.

iv) The Petitioner has not placed any material before the Honourable Court to demonstrate that the noise complained about exceeds the permissible noise levels provided by the National Environment(Noise Standards And Control) Regulations 2003;

v) The Amended Petition as drawn presupposes that the Petitioner has exhausted Regulation 15(2) and (4) (of the) National Environment (Noise Standards and Control) Regulations, 2003 which provides an elaborate procedure to be followed in the prevention or control of the emission of noise from any source or place; and

vi) The orders sought in the Petition could be properly issued by the Magistrates (Court) as encapsulated under (Regulation) 15(2) and (4) (of the) National Environment (Noise Standards and Control) Regulations, 2003 which provides the Magistrates Court as a Court of first instance.

7. The Honourable the Attorney General (the 3rd Respondent) on his behalf and on behalf of the 2nd Defendant equally filed Grounds of Opposition on 22nd November 2016 objecting to the Petition on the grounds that:-

i) The Petition does not disclose any cause of action against the 2nd and 3rd Respondent;

ii) That (the) mandate to license, inspect and recommend closure of any entertainment premises within Kilifi County falls on the 1st Respondent;

iii) The crux of the petition is the issue of noise pollution which issue is within the mandate of the National Environment Management Authority (NEMA). The failure to enjoin NEMA renders the Petition fatally defective and incompetent;

iv) The Petitioners have failed to set out with reasonable precision the manner in which their Constitutional rights have been infringed by the 2nd and or 3rd Respondents; and

v) The Petition lacks merit and should be dismissed with costs as against the 2nd and 3rd Respondents.

8. In its Answer and Response to the Amended Petition filed herein on 24th July 2017, the 4th Respondent denies that the Petitioners are entitled to any of the reliefs they are seeking on the ground that the Petition is incompetent, frivolous and legally defective. The 4th Respondent avers that the Petitioners have failed to sufficiently demonstrate how their rights to a clean and healthy environment have been violated by the 4th Respondent. It is further their case that the issue of noise pollution falls within the mandate of the National Environmental Management Authority (NEMA) and the failure to join NEMA herein renders the Petition incompetent.

9. The 5th Respondent neither entered appearance nor filed any response to the Petition.

10. I have taken into consideration the Petition and the various responses thereto. I have equally taken into account the written submissions and authorities placed before me by the Learned Counsels for the parties herein.

11. Section 3(1) of the Environmental Management and Coordination Act, No. 8 of 1999 (hereafter EMCA) provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment. In order to safeguard this entitlement, Section 3(3) of EMCA stipulates that:-

“(3) If a person alleges that the rights to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest apply to the Environment and Land Court for the redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to-

a) Prevent, stop or discontinue any act or omission deleterious to the environment;

b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

c) Require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

d) Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damages; and

e) Provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

12. There is no requirement for the person applying for such redress to show that the action complained of has caused him any personal loss or injury. Section 3(4) of the said EMCA provides that:-

“(4) A person proceeding under subsection (3) of this Section shall have the capacity to bring an action notwithstanding that such a person cannot show that the Defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action:-

a) Is not frivolous or vexatious; or

b) Is not an abuse of the Court Process.

13. In the matter before me the Petitioners contend that in violation of their rights and fundamental freedoms, the Respondents and in particular the 4th and 5th Respondents operate an entertainment spot in Watamu town within Kilifi County known as Comeback Restaurant, Lounge and Disco. It is their case that the said Restaurant plays excessively loud music and the noise emanating therefrom greatly interferes with their peace and quiet enjoyment of their properties situated within the same area as the Restaurant.

14. In support of their Petition the Petitioners have annexed to their Supporting Affidavit a number of correspondences addressed to the Restaurants Owners between the years 1998 and 2011. In the cause of time, the Petitioners filed two cases being Malindi High Court Judicial Review Case No. 31 of 2011 and No. 4 of 2013. While JR Application No. 4 of 2013 was dismissed by the Court for being an abuse of process (as it was filed during the pendency of JR Application No. 31 of 2011), the Petitioners later withdrew JR No. 31 of 2011.

15. It is indeed apparent that sometime in 2013, some residents of Watamu town complained to the 1st Respondent’s Governor about the noise pollution said to be emanating from the Restaurant. This prompted a number of the 1st Respondent’s officers to visit the Restaurant which was at the time being operated by the 4th Respondent. The officers then issued an improvement Notice to the Restaurant and stopped all discos therein until clearance was obtained from the 1st Respondent’s office in charge of the Environment.

16. In the proceedings before me however, the 1st Respondent states that it has been trying to resolve the issues between the Petitioners and the 4th and 5th Respondents and denies infringing on the Petitioners’ rights in any manner whatsoever. Of particular interest to this Court is the challenge the 1st Respondent throws at the petitioners’ feet to demonstrate that the noise complained about exceeds the permissible noise levels that are allowed for establishments such as the 5th Respondent’s Restaurant.

17. Under Section 7 and 9 of the EMCA, the National Environmental Management Authority (NEMA) is created as a body corporates charged with the functions to supervise and coordinate all matters relating to the environment and is the principal instrument of the Government in the implementation of policies relating to the environment. Section 147 of the Act vests the Authority with powers to make such regulations as it may find relevant in the discharge of its duties.

18. In exercise of the said powers, the Authority enacted the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. The said Regulations define the words “noise pollution” to mean:-

“The emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment.

19. On the other hand “excessive vibration” is defined to mean the presence of vibration which-

a) Is of such intensity, duration, frequency or characters as to annoy, disturb, or cause or tend to cause adverse psychological or physiological effects on persons, or to damages or tends to damage personal or real property; and

b) Exceeds 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source.

20. Section 3(1) of the Regulations outlaws ***the making of or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.*** Section 4 of the Regulations similarly prohibits the making and or causing of excessive vibrations.

21. Under Section 6 of the Regulations, measurements to determine whether or not noise or vibration levels exceed the permissible levels shall be taken by the relevant lead agency. A “lead agency” is defined under the Regulations as follows:-

“Lead agency” means any Government Ministry, department, parastatal, State Corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resources.”

22. In the absence of such a lead agency, Section 6(3) and (4) of the said Regulations provides that:-

“(3) In any cases where there is no relevant lead agency to take the measurements, or where the lead agency has failed to take action after being given reasonable notice by the Authority, the measurements shall be taken by a person duly authorized by the Authority, who is knowledgeable in the proper use of the measuring equipment.

(4) The Authority in consultation with the relevant lead agency may issue guidelines for the measurement of noise and excessive vibration.

23. In the matter before me, the Petitioners did not exhibit any guidelines that may have been issued by NEMA for the measurement of noise and excessive vibration. Similarly, the measurements which the Petitioners sought to rely on as contained in an email sent by the 1st petitioner on 7th September 2014(attached to the Supporting Affidavit as annexure “EKH 16(a)” to prove that the noise and vibration levels emanating from the Restaurant were excessive did not emanate from a lead agency or any person appointed by the Authority but were made by the Petitioners themselves.

24. Even if there were guidelines to measure noise and vibration levels prepared by NEMA, I am neither persuaded that the Petitioners were authorized by NEMA to carry out the measurements nor that they had knowledge in the proper use of the equipment as provided under the Regulations.

25. The upshot is that while I admire the spirited nature in which the Petitioners have followed up on their rights to a clean and healthy environment, this Petition must fail.

26. Again while I did not intend to punish the Petitioners for their spiritedness in pursuit of this matter, I think it was a gross error on their part to include the 4th Respondent whose only mistake if at all, was to lease the property to the persons operating the impugned Restaurant in these proceedings.

27. Accordingly, I shall dismiss this Petition and award costs to the 4th Respondents.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE



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