



Amani Residents Welfare Association/Mirema (Suing on Behalf of the Residents of Mirema Estate, Nairobi) v Mark Senteu t/a Cocorico Wines & 5 others (Environment & Land Petition E031 of 2022) [2023] KEELC 22651 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 22651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E031 OF 2022
JE OMANGE, J
MARCH 16, 2023**

BETWEEN

AMANI RESIDENTS WELFARE ASSOCIATION/MIREMA (SUING ON BEHALF OF THE RESIDENTS OF MIREMA ESTATE, NAIROBI) PETITIONER

AND

MARK SENTEU T/A COCORICO WINES 1ST RESPONDENT

**DANIEL MURIITHI KIBE DANIEL WAWERU MUGO DEDAN KIIRU
KAGUNYA T/A PARIS LOUNGE & GRILL 2ND RESPONDENT**

**ALEX KIPROTICH NDIEMA STEPHEN ANTHONY O. OTIENO ERIC
KIRIMI MURURU JOHN PARSAOTI KARASHA T/A LA TESSARA
ENTERTAINMENT 3RD RESPONDENT**

**REGISTERED TRUSTESS/MINISTER IN CHARGE TRINITY HOUSE
INTERNATIONAL MINISTRY 4TH RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT**

NAIROBI CITY COUNTY 6TH RESPONDENT

RULING

1. The Constitution guarantees every citizen the right to a clean and healthy environment.
2. By a Petition dated 18th July 2022, the Petitioner seeks the following reliefs:



- a. A declaration that the Petitioner's members' rights to peacefully enjoy their property and live in a clean and healthy environment has been violated by the actions and inactions of the Respondents as outlined in the Petition.
 - b. A declaration that the 1st, 2nd, 3rd and 4th Respondents continued operations within Mirema Estate is a violation of the Petitioner members' right to use and enjoy their property under Article 40 of the Constitution and a violation of their right to clean and healthy environment as contemplated in Article 42 of the Constitution.
 - c. A declaration that the decision of the 6th Respondent to issue licenses for the sale of alcoholic drinks to the 1st- 3rd Respondents whose operations are within Mirema Residential estate is illegal as the same contravenes Section 11(I)(a) of the Nairobi City County Alcoholic Drinks Control Licensing Act.
 - d. A declaration that the 5th and 6th Respondents have abdicated their Constitutional and statutory duties to ensure the implementation of all policies relating to the environment to control noise pollution and public nuisance and regulate the sale of alcoholic drinks respectively, within Mirema Estate, Roysambu, in Nairobi County.
 - e. An order by the Honourable Court under Article 70 of the Constitution cancelling the licenses issued by the 6th Respondent to the 1st- 3rd Respondents for the sale of alcoholic drinks within a residential estate.
 - f. A permanent injunction restraining the 4th Respondent from emitting noise beyond its precincts which interferes with Mirema residents' quiet use and enjoyment of their properties and to live in a clean and healthy environment.
 - g. An order that the OCS Kasarani Police Station and/ or the Roysambu Assistant County Commissioner does assist in the implementation of the orders of this Honourable Court.
 - h. An order for compensation for violation of fundamental rights and freedoms
 - i. Costs of the Petition and
 - j. Any other reliefs this Court may deem fit.
3. Contemporaneously with the Petition, the Petitioner filed a Certificate of Urgency Notice of Motion under seeking the following reliefs:
- a. Spent
 - b. Spent
 - c. That the court be pleased to grant a temporary order of injunction restraining the 4th Respondent whether by itself, its agents, servants or employees from playing loud music and/or emitting noise which is in any way interfering with the Applicant's members' quiet possession of their properties pending the hearing and determination of this Petition.
 - d. Spent
 - e. That the court be pleased to grant a temporary order of injunction restraining the 1st Respondent whether by himself, his agents, servants or employees from discharging raw sewer in undesignated places pending the hearing and determination of the Petition filed herewith.
 - f. Spent



- g. That pending the hearing and determination of this Petition, a conservatory order be issued restraining the 6th Respondent from further licensing, allowing or permitting the 1st - rd Respondents, or any other person, their agents, servants, and or any person acting on their behalf to operate a bar, club or alcoholic selling business within Mirema estate in Nairobi.
 - h. That the Officer Commanding Station (OCS) Kasarani Police Station and the Roysambu Assistant County Commissioner to assist in implementation of the orders of this Honourable Court.
 - i. That the cost of this application be borne by the Respondents.
 - j. Any other order and or directions as this Honourable Court deems just and fit to grant.
4. The Petitioner's application is based on the grounds inter alia that Uner the Nairobi City Development Ordinances and Zones, Mirema Estate within Roysambu is part of Zone 14- a low density residential dwelling estate. That the residents have for decades enjoyed a serene and peaceful surrounding until the 1st- 3rd Respondents and the 4th Respondents set up entertainment and alcoholic selling establishments and a place of worship respectively within the area. That the 1st- 3rd Respondents play excessively loud music which reverberates throughout the night to the early morning hours, while the 4th Respondent often hosts Sunday and overnight Friday services during which they use sound systems and musical equipment for preaching and ministration of songs whose sound resonates throughout the Mirema neighbourhood in deafening levels.
 5. That the loud and excessive music played by the Respondents within the Mirema Estate denies the residents the opportunity to enjoy a peaceful and/ or meaningful sleep/ rest thereby compromising their psychological well- being and endangering their health, that the 6th Respondent has illegally and unlawfully issued the 1st- 3rd Respondents with alcoholic drinks selling licenses allowing them to operate within the area despite the zoning restrictions.
 6. The Petitioners assert that the 1st- 4th Respondents' establishments are near learning institutions and the loud and obnoxious noise they emit is interfering with learning activities in total disregard of the best interest of the children residing and studying in the area.
 7. That despite receiving demand notices, the 1st- 4th Respondents have unabatedly continue to create public nuisance through noise pollution.
 8. The application was supported by the affidavit of Dominic N. Mbigi and John Koogi who described themselves as the Chairman of the Petitioner and a resident respectively. They also adduced a set of documentation including their registration Certificate, the Zoning guidelines, a copy of the Demand letters, correspondences to the National Environment and Management Authority, the Nairobi City County and a signed Petition from the residents.
 9. The Application and the Petition were opposed. The 1st Respondent filed a response, the 2nd Respondent filed a Replying Affidavit by Daniel Waweru Mugo, the 3rd Respondent filed a Preliminary Objection as the 6th Respondent who also filed an Affidavit by Abwao Eric Odhiambo, the 4th Respondent similarly filed a Replying Affidavit by Wilfred Macharia Wajie, the 5th Respondent filed a Replying Affidavit of David Ong'are.
 10. The 1st- 3rd Respondents' position is that they were duly licensed to operate night clubs and sell alcoholic beverages, and have installed sound proof walls, thus denied violating the Petitioners' rights as alleged. The 3rd Respondent's Preliminary Objection is based on the ground that the Petitioner, being a registered Association, lacks legal capacity to institute the suit.



11. On the 4th Respondent's part, the Application is opposed as they are fully compliant with the legal thresholds of noise. The 4th Respondent contended that the Petitioner lacks legal capacity to sue in its own name or in the name of all the residents who have not provided authority to sue as such. That the 4th Respondent has over 210 congregants, 90% of whom are residents of the Petitioner who have never complained of the 4th Respondent.
12. The 4th Respondent asserted that sometimes in August 2022, they held a meeting with the residents and their concerns were addressed and they agreed to adjust their volume by 40%, an Environment Impact Assessment was done on 12th September 2022, and they had since removed their public address systems from facing the street to facing the sanctuary- away from the Estate and road. That subsequently in October 2022, an assessment was conducted and found that they were operating within the required noise- levels being 80.9 decibels.
13. The 4th Respondent describes the Petitioner's suit as malicious, vindictive, unreasonable and frivolous as they had achieved 100% compliance, that Mr Koogi- one of the members was pursuing the matter with vendetta as he owns some private property which sits on a large structure right opposite the Church. The 4th Respondent insists that the Petitioners have no full authority of the residents some of whom have recognized the integral role the Church plays in the area, and that the Petition signed by the members of the Petitioner did not address any specific complaints against them. That the area has a number of other clubs which were omitted from the Petition including Attic Lounge, The Charm, and Timao Club.
14. The 4th Respondent's position was that it is not located too close to the Schools complained of, and the Church does not have any activities in the mid-week, except Friday evenings and the weekend, when everyone is ideally resting. They therefore contend that the Petitioner has not exhausted all avenues of dispute resolution and access to justice before approaching the Court. They relied on various correspondences, their brochure and an EIA Report.
15. The 5th Respondent's response indicated that considering the persistent complaints of noise pollution, they conducted site inspections of the 1st- 4th Respondents' establishments where they observed that the 1st Respondent was operating without an EIA license, but had a sound amplifying equipment and there were waste in contravention of the water quality regulations, the 2nd Respondent had no EIA License and had a concrete wall and sound amplifying equipment, the 3rd Respondent had no EIA License but had sound amplifying equipment while the 4th Respondent also had no EIA License. The Authority relied on the said inspection report.
16. The 5th Respondent indicated that the activities carried out by the 1st- 4th Respondent required an EIA License and they ought to have each carried out public participation to give the neighbours the chance to air their views on their respective operations , and the failure to obtain an EIA License or conduct public participation put them in default.
17. The Authority's position was that it gave the 1st- 4th Respondents a raft of requirements to fulfill, out of which, only the 4th Respondent committed to comply. That further enforcement actions have since been suspended to avoid interference with the process of this Court. The 5th Respondent therefore pointed out that it had not abdicated its obligations under statute.
18. The 5th Respondent supported the grant of the reliefs of injunctive orders against the 1st- 4th Respondent and indicated its preparedness to implement any legitimate orders that would arise from the Court.



19. The 6th Respondent's PO was that the Petition and Application offended the exhaustion doctrine and usurps the ADR jurisdiction and the mandate of the Nairobi City County Alcoholic Drinks Control and Licensing Board under Section 5 of the Nairobi City County Alcoholic Drinks Control Licensing Act, Section 9 of the Fair Administrative Action Act.
20. Other than the foregoing, the 6th Respondent's position was that ideally, its Sub County Alcoholic Drinks and Licensing Committee does not issue liquor licenses to establishments operated in residential areas unless on the ground of public interest or if the establishment does not share a wall with any institution pursuant to Section 11 of the County legislation. They asserted that the 1st- 3rd Respondent complied with these provisions at the time of issuance of their respective licenses.
21. However, the 6th Respondent asserted that it has never issued any structural approvals to the 4th Respondent for construction of any structures thus the 4th Respondents' operations are in breach of the law.
22. That upon receipt of complaints from residents and general public, the 6th Respondent issued a memo on 3rd October 2022 for its officers to start the process of cancelling, revoking and closing down offending structures. That the 1st and 2nd Respondents are among the premises targeted for cancellation, revocation of the license and closure, and for the 3rd and 4th, the process is ongoing.
23. The 6th Respondent therefore denied abdicating their responsibility under the laws and supports the issuance of injunctive orders against the 1st- 4th Respondents as sought by the Applicant.
24. In response to the Preliminary Objections, the Petitioners filed a Replying Affidavit by Damini Mbigi asserting that the Constitution of Kenya defines a person to include an Association and thus they are entitled to file a Petition as such to claim the rights or fundamental freedoms under the Constitution had been violated, thus they had the requisite locus standi. The Petitioner also asserted that prior to filing the Petition, it exhausted all other alternative mechanisms by writing letters to the 6th Respondent, which then prompted them to issue the infamous 3rd October 2022 memo.
25. Parties also filed submissions which I have considered together with their respective pleadings and documentary evidence.
26. The issue for determination at this stage is whether the Petitioner has made a good case for the grant of the conservatory orders sought against the 1st- 4th Respondents.
27. I note in the respective responses that the Respondents have raised issues with the jurisdiction of this Court, as well as the Petitioner's locus standi. I shall first delve into these.
28. Regarding the jurisdiction of the court, the 6th Respondent has found fault in the Petitioner's failure to exhaust remedies under Section 5 of the Nairobi City County Alcoholic Drinks Control and Licensing Act.
29. The said Section empowers the Alcoholic Drinks Control and Licensing Board to hear and determine appeals from the decisions of the Sub County Committees. The Sub County committee no doubt grants the liquor licenses.
30. The doctrine of exhaustion of remedies outside the Courts cannot be over-emphasized. Where dispute resolution mechanism has been established by a statute outside the courts, that mechanism should be exhausted before the jurisdiction of the courts is invoked. Therefore, where there is a legitimate statutory primary dispute resolution mechanism, such as a tribunal or Board, the courts should be the fora of last resort and not the first port of call.



31. The significance of the exhaustion doctrine was underscored by the Supreme Court of Kenya in the case of *Benard Murage v Fine Serve Africa Limited & 3 others* [2015] eKLR as follows:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”
32. Similarly, the Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR emphasized that where there is a clear procedure prescribed by the Constitution or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted before invoking the jurisdiction of the court.
33. The High Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR held that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution.
34. Therefore, it is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.
35. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.
36. The Environment and Land Court, though being a specialized Court, is no exception to this doctrine. A party, before filing a Petition or Cause to this Court ought to ensure that all the necessary mechanisms provided for under statute or laws are exhausted before invoking the jurisdiction of Court. Of course, I also wish to add that where those mechanisms exist but the situations such as extreme urgency exist that would not permit a litigant from seeking such intervention, then the Fair Administrative Action Act, as well as the inherent powers of this Court permits them to seek exemption from such observance.
37. In this case, the Petitioner challenges the grant of liquor licenses to the 1st- 3rd Respondents. No doubt, the liquor licenses are issued by the 6th Respondent's sub county committees, against which the Liquor Licensing Board can prevail. I find that this would be an alternative mechanism or remedy before approaching this Court. However, I also note that the Petitioners made a series of letters and correspondences to the said authorities seeking intervention. This is acknowledged by the 6th Respondent who has stated that they acted on the complaints from residents and the members of the Public, and have even began the process of revoking the licenses.
38. It is clear that the Petitioner's complaint led to some action by the 6th Respondent, action which the 6th Respondent claims to have earmarked some liquor licenses for revocation. The Petitioner cannot therefore be faulted for having not exhausted those mechanisms, which I find that it did. I am therefore not persuaded that the Petitioners did not exhaust those remedies and that objection fails.
39. The Petitioner is a registered association under the Societies Act. It has adduced in evidence a copy of their registration. However, the 3rd Respondent contends that it does not have locus standi to sustain



proceedings in its own name, while the 4th Respondent alleges that it is not duly authorized by its members to file the instant Petition.

40. In opposition, the Petitioner asserts that it has the requisite locus standi following the Constitutional definition of “a person” to include an Association and the wide rights to file cases alleging the violation of rights and fundamental freedoms under the Bill of rights.
41. No doubt, the issue of locus standi is one that is alive in any litigious discourse. The decisions made under the current constitutional dispensation held as much. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR observed that the conservative requirements of locus that existed in the old regime that treated litigants, other than those directly affected, as mere or meddlesome busy bodies had the negative effect of limiting access to justice. These are the ills that existed in our law that the Act and more recently the Constitution 2010 intended to cure and which must be emphasized. The Supreme Court in the same case (*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (supra) remarked on the importance of public interest litigation which had been thwarted under the old constitutional regime and stated as follows;

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it.”
42. Expanded locus standi under the Environmental Management and Coordination Act was further elaborated and upheld by the Court of Appeal in *National Environmental Tribunal v Overlook Management Limited & 5 others* [2019] Eklr.
43. Litigation locus standi where enforcement of the Constitution is sought, is different from civil claims. Section 18 of the Societies Act provides that Societies cannot sue in their own name, and resort should be made to the Society’s constitution to determine how a given society may file suit. This Court has not had the benefit of a copy of the Petitioner’s Constitution, but I note that a Petition by its members was signed to support the cause, and the affidavits in support of the suit have been made by the Chairperson and a member.
44. In this Court’s opinion, the issue of locus standi does not arise because the period post 2010 Constitution has expanded the scope of locus standi which includes incorporated and unincorporated entities. The petitioner being a duly registered society under the Societies Act is allowed to agitate the rights of its members, more so through the Chairperson. Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated. It therefore means that the Petitioner being an association duly registered under the Societies Act is mandated to file a constitutional petition alleging that the constitutional rights of its members have been infringed. I therefore find that the petitioner has locus standi to bring this petition.
45. The threshold for grant of conservative orders has been emphasized by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as



to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

46. From the foregoing, conservatory orders are granted on the basis of inherent merit, considering public interest, constitutional values and proportionate magnitudes.
47. I agreed with the observations in of the Court in Centre for Human Rights and Democracy & 2 Others V Judges and Magistrates Vetting Board & 2 Others Petition No 11 of 2012 that in deciding whether or not to grant conservatory orders, the following factors are relevance that is; the credential of the petitioner, prima facie correctness or nature of information available to the court whether the grievances expressed in applying for conservatory orders are genuine legitimate deserving or appropriate, whether the applicant has demonstrated the gravity or seriousness of the dispute or whether the applicant is engaged in wild vague indefinite or reckless allegations.
48. In this case, the Petitioner has alleged that the 1st- 4th Respondents’ establishment have been emitting noise of nuisance proportions. The said respondents have acknowledged the existence of such complaints prior to filing the suit, with the 4th Respondent stating that it has even taken remedial measures to address the complaints. The regulators- The NEMA and County Government have each deponed in Court that the 1st- 4th Respondents require an EIA License to operate, and none of them has.
49. I have considered the material placed before me, and the responses filed by the respective Respondents and I find that the concerns raised by the Petitioner are not wild vague and reckless allegations but satisfy the test for inherent merit. The 5th Respondent has indicated that it has stopped its regulatory obligations to allow the processes of the Court. The 6th Respondent on its part, has earmarked the 1st and 2nd Respondents for revocation and closure, and is ongoing with sanction processes for the 3rd and 4th Respondent.
50. Consequently, I am satisfied that the Petitioner has made a case to justify immediate intervention pending the final determination of the Petition in the following terms:
 - i. A conservatory order is hereby issued restraining the 1st, 2nd, 3rd and 4th Respondents from playing loud music and/ or emitting noise beyond the 5th Respondent’s recommended levels for residential areas within Nairobi City County.
 - ii. A conservatory order is hereby issued restraining the 1st Respondent whether by himself, his agents, servants or employees from discharging raw sewer in undesignated places pending the hearing and determination of the Petition filed herewith.
 - iii. The 5th Respondent is further ordered to conduct a further investigation within 30 days of this order, and file a report on the 1st- 4th Respondents’ Compliance with the relevant laws and regulations, and the actions recommended to be taken.
 - iv. The costs of the Petition shall abide the outcome of the Petition.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF MARCH 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Muchoki for the Petitioner

Mr. Nyowe for 1st Respondent

Ms Karambu.. for 2nd Respondent

Ms Kiau for 5th Respondent

Steve - Court Assistant

