



Oyster Café Ltd v Nairobi City County Government & another; Nairobi City County, Urban Planning & 2 others (Interested Parties); Kariuki & 6 others (Intended Interested Party) (Judicial Review Application E045 of 2023) [2023] KEHC 25639 (KLR) (Judicial Review) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E045 OF 2023
JM CHIGITI, J
NOVEMBER 23, 2023**

BETWEEN

OYSTER CAFÉ LTD APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

**NAIROBI CITY COUNTY: COUNTY EXECUTIVE COMMITTEE
MEMBER – GREEN NAIROBI (ENVIRONMENT, WATER, FOOD AND
AGRICULTURE 2ND RESPONDENT**

AND

NAIROBI CITY COUNTY, URBAN PLANNING INTERESTED PARTY

**NAIROBI CITY COUNTY, ALCOHOLIC DRINKS CONTROL AND
LICENCING BOARD INTERESTED PARTY**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
(NEMA) INTERESTED PARTY**

AND

GEORGE IRUNGU KARIUKI INTENDED INTERESTED PARTY

VINCENT OUMA INTENDED INTERESTED PARTY

GILBERT KIRUI INTENDED INTERESTED PARTY

BEATRICE TARKWEN INTENDED INTERESTED PARTY

EVANSON MURIU INTENDED INTERESTED PARTY



DOROTHY JEMATOR INTENDED INTERESTED PARTY

DOREEN KURIA INTENDED INTERESTED PARTY

RULING

1. What is before this court is the Notice of Motion Application dated 28th September 2023 that is supported by the affidavit of even date sworn by one Vincent Ouma seeking that: -
 - a. ...spent
 - b. The intended or proposed interested parties be granted leave to enjoin the suit as interested parties forthwith.
 - c. The Intended or proposed interested parties be granted leave to file submissions in response to the Applicant's Notice of Motion dated 25th May 2023.
 - d. The suit be transferred to the Environment and Land Court Division for hearing and determination owing to the Court's want of jurisdiction.
 - e. An order of the Court mandating the 1st and 2nd Respondent as well as the 3rd Interested party NEMA to close down that Applicant's establishment operated on L.R Number 2/279 under the name Oyster Bay or by whatever other business name for failure to comply with the law.
 - f. The Applicant Application dated 25th May 2023 be dismissed with costs.
 - g. The costs of this Application be costs in the cause.
2. The Application is opposed.

The Applicants' case:

3. The Applicants, who are the Intended Interested Parties case is supported by the affidavit of Vincent Ouma that is sworn on behalf of the 74 residents of Cozy Garden Apartments which is located on L.R No 2/729; which according to him is less than 20 metres from the Applicant's establishment, Oyster Bay operated on L.R 2/37/2 the suit property.
4. They argue that they have a constitutionally entrenched right to a clean and healthy environment and are therefore crucial stakeholders as pertains to the reliefs being sought by the Applicant.
5. They raise issues around the Applicant's (Oyster Café Ltd) Change of Use from Residential to Offices which was approved on the 6th of September, 2022 and argue that the Applicant's establishment continuously plays loud music from aggravatingly amplified speakers playing annoying levels of music on a nightly basis with little or no regard for the inconvenience and discomfort that they cause.
6. They are concerned that the Applicant (Oyster Café Ltd) established a noisy night open/garden on the 9th of August, 2022 in a residential area without the Environmental Impact Assessment license and a Noise Control License and in defiance to the *Environment Management and Coordination Act*, 1999.
7. They intend to further argue that the continuously suffer from the insecurity risk, increased traffic congestion, obstruction, dangerous and reckless driving and environmental degradation as a result of dumping of waste caused by the Applicant since it operationalized the open/garden restaurant.



8. According to them (Intended Interested Parties), the Court lacks jurisdiction to adjudicate over environmental, urban land use and questions and issues a matter uniquely vested in the Environment and Land Court and the Environment and Land Planning Division of the ELC Court Under Article 162 of the Constitution of Kenya.

The Respondents case:

On whether this Court has jurisdiction to hear and determine this suit;

9. The Respondent invites the court to note that judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized, invalid or ultra vires.
10. Reliance is placed in the case of Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment) where it went on further to state that judicial review is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.
11. The Respondent also relies on the case of Samuel Kamau Macharia vs KCB & 2 Others, [2012] eKLR for the submission that a Court's jurisdiction flows from either the Constitution or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.
12. In view of the foregoing, it is contended that this court's jurisdiction to hear and determine this Application is created under Article 162 (6) of the Constitution of Kenya 2010 which provides thus:

“High Court

165.

- (1) There is established the High Court, which –
 - a. shall consist of the number of judges prescribed by an Act of Parliament; and
 - b. shall be organized and administered in the manner prescribed by an Act of Parliament.
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi – judicial function, but not over a superior court.” [Emphasis mine]

13. It is their case that under Section 9, the Fair Administrative Actions Act provides that application for judicial review remedies of any administrative action is done at the High Court or a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution of Kenya.
14. Since the primary issue in the substantive judicial review suit involved the question of whether the decision and act of the 1st and 2nd Respondent – in blocking the re-opening of the Applicant's restaurant despite authority and approval from the 3rd Interested Party, NEMA - violated the Applicants right to fair administrative action as set out under Article 47 of the Constitution of Kenya, it is the Respondents contention that this Court is properly placed to adjudicate the matter.



15. The Environment and Land Court is a creation of Article 162(2) (b) of the Constitution which mandated parliament to establish courts with the status of the High Court “to hear and determine disputes relating to the environment and the use and occupation of and title to land.” According to the Respondent, this court lacks jurisdiction to issue prerogative orders under Section 13 (2) of the Environment and Land Court Act.

On whether the Intended Interested Parties have sufficiently demonstrated that they have met the conditions to be joined in the suit;

16. The Respondent avers that the Black’s Law Dictionary, 9th Edition, defines ‘Interested Party’ (at page 1232) thus:

“A party who has a recognizable stake (and therefore standing) in a matter”

17. This definition is affirmed and elaborated further in the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR, where the court defined the term “interested party” as follows: -

“...one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he or she herself appears in the proceedings, and champions his or her cause...”

18. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(hereafter the “Mutunga Rules”), under Rule 2, defines the term “Interested Party” as “a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”

19. From the foregoing legal provisions, and from the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others (*Supra*), the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
[Emphasis Mine]

20. The Respondent argues that the Intended Interested Parties’ Application fails to clearly make out the case it intends to make before the Court. As such, it is difficult for the court to determine whether the joinder of the Intended Interested Party would offer novel and relevant insight in addition to what is already on record from the principal and other parties.



21. Further, the Respondent submits that in every case, whether some parties are enjoined as Interested Parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. (See *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR)
22. Accordingly, that, an Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court.
23. The Respondent reiterates that the main issue of the instant Judicial Review Application – the substantive suit - was the legality of the decision by the 1st and 2nd Respondent in blocking the re-opening of the Applicant’s restaurant despite authority and approval by the 3rd Interested Party to do so.

Issues for Determination

24. Following are the issues for determination are as follows: -
 - i. Whether this court has jurisdiction to hear and determine this suit.
 - ii. Whether the Intended Interested Parties have sufficiently demonstrated that they have met the conditions to be enjoined in the suit.
 - iii. Whether the burden of proof has been satisfied by the Intended Interested Parties.
 - iv. Whether the orders sought by the Intended Interested Parties, mandating the closure of the Applicant's establishment by the 1st and 2nd Respondents, as well as the 3rd Interested Party, can be issued.

Analysis and Determination

The first issue:

I. Whether this court has jurisdiction to hear and determine this suit.

25. The Final Report of the Committee of Experts (CoE) that prepared the draft that ultimately became the *Constitution* of Kenya 2010, leaves no doubt that the ELRC and its twin sibling, the ELC, were intended to be “specialized courts” with certain, specific and precise jurisdiction, in contradistinction to the High Court which enjoys unlimited original jurisdiction in criminal and civil matters; and the jurisdiction to interpret and apply the *constitution*, including enforcement of fundamental rights and freedoms. The report expressly refers to the two courts as “specialized” courts and further explains that the CoE rejected a proposal to remove the two courts from the *Constitution* and leave it to Parliament to establish “other courts” with such jurisdiction as it may determine. The CoE reasoned that to do so would give Parliament an opportunity to establish courts with broad jurisdiction capable of supplanting that of the other superior courts established by the *Constitution*, which “would not signal establishment of specialized courts” on employment and labour and land/environment, and might lead to competing jurisdiction with the High Court.
26. The Supreme Court emphasized this background in *Republic v Karisa Chango & Another* [2017] eKLR, when it stated as follows:

“The *Constitution* of Kenya, 2010 has pronounced itself clearly on the jurisdictional competencies of various courts of law in Kenya. The drafters of The *Constitution*, it appears, had the intention of clearly demarcating the jurisdictions of the said courts so as to pre-empt



lacunae and conflicts. Besides The Constitution, there are several statutes which demarcate the jurisdictions of various Courts and tribunals...” [Emphasis added]

Later on in the same judgment, the Supreme Court concluded as follows:

“Although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of The Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).

27. In the cases of Beatrice Wambui Kiarie & 2 others v Tabitha Wanjiku Ng'ang'a & 9 others [2018] eKLR and Isaac Kinyua & 3 Others v Hellen Kaigongi [2018] eKLR, Wilson Mtbui Mutungu v Beatrice Gathoni & Another [2016] eKLR, nGerick Kenya Limited v National Environment Management Authority [2015] eKLR and Republic v Chief Land Registrar & Another, JR ELC No. 11 of 2010 [2019] eKLR, the court held as follows on the issue of distinctiveness of jurisdiction of the High Court and courts of equal status as follows: -

“Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! ... The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.”

28. The issues raised by the Parties herein touch on environment, noise pollution and land use questions.
29. The Respondent has in its submission set out an analysis on whether the burden of proof has been satisfied by the Intended Interested Parties.
30. This court finds it important to rehash the same because it has a bearing on the issue of whether or not this court has jurisdiction or not.
31. The Respondent argues that the initial burden of proof with respect to this application lies with the Intended Interested Parties and in particular paragraphs 7, 8, 9, 19 and 20 of the intended interest parties' Supporting Affidavit dated 29th September 2023, the evidential burden of proof on whether the Applicant was culpable for noise and other forms of environmental pollution similarly lies with the Intended Interested Parties.
32. The Supporting Affidavit collectively describe the grievances and concerns of the individuals living in the residential area where the Applicant's establishment is located.
33. It argues that the allegations made against the Applicant within the aforesaid paragraphs have not been substantiated. For instance, there is no evidence on record to demonstrate that the Applicant's establishment in Oyster Bay continuously plays loud music from highly amplified speakers at annoyingly loud levels, causing inconvenience and discomfort for the nearby residents.



34. They argue that the Applicant have failed to demonstrate the noise complained about exceeds the permissible noise levels/decibels that are allowed for establishments such as the Applicant's restaurant.
35. It is the Respondents submissions that in the present case, the Intended Interested Parties have failed to provide any documented report of noise and excessive vibration measurements from a designated lead agency.
36. This absence of recorded data undermines their claim that the Applicant's establishment, despite NEMA's intervention and the recommended mitigation measures, persists in emitting excessively loud noises.
37. The crucial substantiation through formal measurement reports from a recognized lead agency is conspicuously absent in the records presented by the Intended Interested Parties.
38. The Respondent argues that the Intended Interested Parties have failed to produce any evidence of guidelines issued by NEMA for the measurement of noise and excessive vibration emanating from the Applicant's establishment. It is their case that this is noteworthy, especially since NEMA granted approval for the reopening of the Applicant's establishment, stipulating the need for ongoing monitoring to assess the efficiency and effectiveness of the implemented measures aimed at mitigating noise pollution.
39. The Respondent argues that absence of such guidelines raises questions about the foundation of the Intended Interested Parties' claims and further underscores the lack of comprehensive evidence supporting their contentions.
40. Notably, the Respondent states that even if there were guidelines established by NEMA for measuring noise and vibration levels, that there is still no indication in the records that any individual or organization possessing the requisite knowledge in the proper use of the measurement equipment was duly authorized by NEMA to conduct these measurements.
41. The Respondent submits that the allegations from the Intended Interested Parties that "the Applicant has not ameliorated the noise nuisance....as the Applicant's open garden restaurant operates for 24 hours and emits continuous annoying noise as it is not sound proofed and has sound amplifying equipment" is unsubstantiated and factually inaccurate.
42. It is the Respondent's case that in contradiction to the contentions of the Intended Interested Parties, and aligning with the recommendations of the 3rd Interested Party regarding the mitigation of noise pollution, the restaurant has implemented soundproof regulators as a result of which the 3rd Interested Party allowed the Applicant's restaurant to be re-opened in order to assess the effectiveness of such efforts.
43. The Respondent submits that the Intended Interested Parties have not provided any evidence in support of their allegations that the Applicant's establishment is responsible for noise pollution, insecurity risks, and increased traffic congestion amongst other environmental infractions. It is contended that all the Intended Interested Parties have done is to make general allegations which have not been substantiated.
44. Its submitted that, in view of the foregoing, its prayed that the Court finds that the Intended Interested Parties have failed to satisfy their burden of proof in the instance case.
45. It is this court's finding that the foregoing are matters that can only be proven through tendering evidence before the court which can be subjected to cross examination.



46. The same demonstrates the potential of production of expert reports. This court cannot ignore this possibility, since it has a duty to promote the right to fair hearing. Unlike the Environment and Land Court, the Judicial review proceedings do not have room for *viva voce* hearing.
47. On its part, the Environment and Land Court is vested with such facilities that take witness evidence to prove allegations like noise pollution, insecurity risks, increased traffic congestion amongst other environmental infractions. The Environment and Land Court also has powers to issue judicial review orders.
48. The jurisdiction of this court is well settled in the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

49. It is common knowledge that judicial review jurisdiction is supervisory by nature; it is the channel through which judicial supervision over administrative action is exerted; and, generally speaking, it is meant to cast doubt on any decision that is made in violation of the law. Lord Diplock’s classic dictum in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 provides a useful guide on what an unlawful decision entails. The learned judge spoke of these grounds as follows:

“...I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

50. It is this court’s finding that the issues raised in the suit go beyond judicial review ambit. They are not simply issues of illegality, irregularities or procedural improprieties.



51. Section 13 (7) (b) the [Environment and Land Court Act](#) provides that:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including prerogative.”

52. From the above analysis, as guided by the pleadings, it is quite obvious this suit is related to environment, use and occupation/use of land and; I so hold.

53. In the case of [Dickson Ngigi Ngugi v Commissioner of Lands](#) S.C Petition No. 9 of 2019 [2019] eKLR, [36] The Supreme Court made binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coramnon judice and amounts to a nullity because, as Nyarangi, JA famously said in the *locus classicus*, [Owners of the Motor Vessel “Lillian S” v Caltex Oil, \(Kenya\) Ltd](#) [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

Disposition:

54. I lack the jurisdiction to deal with the other issues before this court.

Order:

1. The Application dated 28th September, 2023 is allowed to the extent of the transfer of the suit.
2. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023

.....

J. CHIGITI (SC)

JUDGE

