



**Sunlodges Kenya Limited (Suing on its own Behalf and on Behalf of the Residents of Diani Area Kwale County) v Alliance Development Limited t/a Safari Beach Hotel & 2 others (Environment & Land Petition E001 of 2023) [2025] KEELC 1277 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1277 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KWALE**

**ENVIRONMENT & LAND PETITION E001 OF 2023**

**AE DENA, J**

**MARCH 14, 2025**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 1,3,10. 19-24,40,  
42-43, 69 & 70 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF ENVIRONMENTAL  
RIGHTS UNDER ARTICLE 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURES, 2013**

**AND**

**IN THE MATTER OF THE PUBLIC HEALTH ACT  
CAP 242 LAWS OF KENYA UNDER SECTION 115**

**AND**

**IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS,1948 AND  
THE INTERNATIONAL CONVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS**

**AND**

**IN THE MATTER OF REGULATION 3 OF THE ENVIRONMENTAL  
MANAGEMENT AND COORDINATION (NOISE AND EXCESSIVE  
VIBRATION POLLUTION (CONTROL) REGULATIONS, 2009**

**AND**

**IN THE MATTER OF THE INHERENT JURISDICTION OF THIS HONOURABLE COURT  
& THE GENERAL PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW**

**BETWEEN**



**SUNLODGES KENYA LIMITED ..... PETITIONER**  
**SUING ON ITS OWN BEHALF AND ON BEHALF OF THE RESIDENTS OF**  
**DIANI AREA KWALE COUNTY**

**AND**

**ALLIANCE DEVELOPMENT LIMITED T/A SAFARI BEACH**  
**HOTEL ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>**  
**RESPONDENT**  
**COUNTY GOVERNMENT OF KWALE ..... 3<sup>RD</sup> RESPONDENT**

### **JUDGMENT**

1. The Petition the subject of this judgement is dated 11/09/2023. The Petitioner avers that it operates an accommodation business facility known as Ocean Village Club within Diani in Kwale County where it offers its diverse and exclusive clientele the serene and peaceful experience within its property.
2. That the 1<sup>st</sup> Respondent operates a hotel facility known as Safari Beach Hotel and the same is adjacent to the Petitioner's premises.
3. That the Petitioner's business model is anchored on its pride in offering accommodation to its diverse clientele on the assurance that the clients will experience privacy tranquility and peace of mind at the Applicant's premises.
4. That the business model that assures the Petitioner customers of tranquility, privacy, and peace of mind at the accommodation facility is a niche that the Petitioners have built over the years is so crucial to the Petitioner's business and to achieve peace and tranquility, the customers do not bring their children along during their stay since silence and peace of mind is a key factor.
5. That since the Petitioner's business establishment in the year 2014, the Petitioner accommodation facility together with its clients has enjoyed a serene peaceful, and noise-free environment until when the 1<sup>st</sup> Respondent purposefully started the habit of operating loud music and streaming loud music through amplified artificial sound systems within its premises. Recently 2023??
6. That the said live loud music, streamed music and vibrations emanating from the 1<sup>st</sup> Respondent's premises amount to noise pollution given that they are beyond the maximum decibels permitted by law.
7. That the noise can be characterized as annoying, disturbing and that which endangers the comfort and health of the Petitioner's personnel, guests, and other neighboring resident's contrary to Part 2 Regulation3(1) of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.
8. That the 1<sup>st</sup> Respondent's act of environmental pollution through over-gravitating amplified speakers resonates throughout the Petitioner's premises and neighborhood in deafening levels with no regard for the inconvenience and discomfort of the Petitioner personnel and guests and other people in the vicinity.



9. That the loud live music has compulsorily exposed unwilling persons to hear noise raised to unpleasant or obnoxious levels violating the right of others including the Petitioner's personnel and guests to a peaceful, comfortable and pollution-free guaranteed by Articles 10,42, and 69 of *the Constitution*.
10. That the 1<sup>st</sup> Respondent has further illegally constructed structures within its premises and now utilizes the structures for mounting and setting up the offending loud noise apparatus.
11. That the 1<sup>st</sup> Respondent constructed the illegal structures next to the Ocean Village without first seeking the requisite development permission under the *Physical and Land Use Planning Act* and further failed to secure the requisite NEMA approval as required under the Environment Management and Coordination Act.
12. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to properly discharge their obligations of ensuring the 1<sup>st</sup> Respondent complies with the provisions of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 and have issued licenses without due regard to the Environmental Impact Assessment of the 1<sup>st</sup> Respondents Business and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have further failed to monitor and take action against the 1<sup>st</sup> Respondents flagrant breach of the EMCA and *Physical and Land Use Planning Act* with regards to the illegal structures erected by the 1<sup>st</sup> Respondents in its premises.
13. That the 1<sup>st</sup> Respondents unlawful actions have occasioned upon the Petitioner untold difficulty in offering services to its guests and clients due to the 1<sup>st</sup> Respondents very loud live music as well as streamed music especially at wee hours of the night and guests keep complaining of sleep disturbance and general disturbance.
14. That the Petitioner's goodwill developed over a long period will be adversely affected due to the fact that its clientele are very sensitive to disruptions and will imminently in the circumstances terminate all future business transactions with the Petitioner.
15. The Petitioner further averred that it will lose a peaceful, comfortable, serene, and noise-free environment whose characteristics are very vital in the Petitioner's accommodation business the absence of which will automatically cripple the Applicant's business.
16. In conclusion the Petitioner averred that it is in the interest of justice that the orders sought herein are granted.
17. In light of the foregoing, the Petitioner prays for the following orders:
  - a. A declaration that the 1<sup>st</sup> Respondent has violated the Petitioner's Right to Property and Right to a clean and healthy environment and Economic and Social rights as enshrined in articles 40,42 and 43 of *the Constitution*.
  - b. A declaration that the 1<sup>st</sup> Respondent has erected unlawful structures next to the Ocean Village without first securing the requisite NEMA approval and development permission under the *Physical and Land Use Planning Act*.
  - c. A permanent injunction do issue against the 1<sup>st</sup> Respondent their agents, servants representatives, and /or any other persons acting on their stead prohibiting them from further operations of live music, streamed music and/or any other kind of noise that would destruct the quiet and peaceful possession of the Petitioner and its guests.
  - d. A permanent injunction do issue against the 1<sup>st</sup> Respondent their agents, servants representatives, and /or any other persons acting on their stead prohibiting them from further



operations of live music, streamed music and /or any kind of music within Safari Beach Hotel situated in Diani along Beach Road Kwale County.

- e. A permanent injunction do issue against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants representatives and /or any other persons acting on their stead prohibiting them from issuing licenses or approvals allowing the carrying out of loud music and loud streaming streamed within the vicinity of the Petitioners Ocean Village Club.
  - f. Damages for nuisance
  - g. Costs
18. The Petition is supported by the Affidavit of Ali Maawiya the director of the Petitioner Company sworn on 11<sup>th</sup> September 2023.
  19. The deponent avers that he is a director of the Petitioner company and duly authorized to swear the affidavit. He annexed copies of the Company's Authority under seal, Company's certificate of incorporation and CR-12 marked A-1(a), (b) and (c) respectively.
  20. That the Petitioner Company is in the industry of accommodation business and operates its business on property known as Kwale/Diani Beach/ Block 87. Copies of the Petitioners business permit and photographs of the Petitioners premises marked "A-2(a) and (b) respectively were annexed.
  21. It is averred that the Petitioner leased plot Kwale/ Diani Beach /Block 87 from Thornhill Holdings and the said property is adjacent to Safari Beach Hotel which is run and operated by the 1<sup>st</sup> Respondent. The title, Lease agreement are attached as "A-3(a) and (b).
  22. The deponent avers that the Petitioner's business model is anchored on its pride in offering accommodation to its diverse clientele on the assurance that the clients will experience privacy, tranquility and peace of mind at the Petitioner's premises.
  23. The rest of the contents of the affidavit largely reiterates the facts already enumerated above in terms of the business model and its requirement for serenity which had been enjoyed since its establishment in the year 2014. The deponent also highlights how this changed when the 1<sup>st</sup> Respondent started the alleged loud music leading to noise pollution herein.
  24. It is deponed that live loud music, streamed music and vibrations emanating from the 1<sup>st</sup> Respondent's premises amount to noise pollution given that they are beyond the maximum decibels permitted by law. A copy of an expert noise report dated 19/07/2023 for an assessment conducted between 14/07/2023 and 16/07/2023) is attached as "A-4"
  25. It is deponed that that the noise can be characterized as annoying, disturbing and that which endangers the comfort and health of the Petitioner's personnel, guests, and other neighboring residents contrary to Part 2 Regulation3(1) of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.
  26. That the 1<sup>st</sup> Respondent has further illegally constructed structures within its premises and now utilizes the structures for mounting and setting up the offending loud noise apparatus. Copies of photographic images of the alleged illegal were attached as "a-5"
  27. That the 1<sup>st</sup> Respondent constructed the illegal structures next to the Ocean Village without first seeking the requisite development permission under the *Physical and Land Use Planning Act* and further failed to secure the requisite NEMA approval as required under the Environment Management and Coordination Act.



28. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to properly discharge their obligations of ensuring the 1<sup>st</sup> Respondent complies with the provisions of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 and have issued licenses without due regard to the Environmental Impact Assessment of the 1<sup>st</sup> Respondents Business and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have further failed to monitor and take action against the 1<sup>st</sup> Respondents flagrant breach of the EMCA and *Physical and Land Use Planning Act* with regards to the illegal structures erected by the 1<sup>st</sup> Respondents in its premises.
29. That the 1<sup>st</sup> Respondents unlawful actions have occasioned the Petitioner untold difficulty in offering services to its guests and clients due to the 1<sup>st</sup> Respondents very loud live music as well as streamed music especially at wee hours of the night and their sensitive guests keep complaining of sleep and general disturbance risking the Petitioners future business. That the business extinction is possibly imminent given that the Petitioners business largely depends on the ability to offer peaceful accommodation characterized with serenity and noise-free environment.
30. That the Petitioners customers are now communicating negative feedback about the Petitioners premises by commenting online on the disruptive noise and negates its business model of peace and tranquility. That some customers have declined to settle accommodation charges after experiencing the loud noise and these collectively continue to harm the Applicants business reputation. An extract of negative online review posted by Thomas Jurgen, a customer, and the details of declined bill marked “A-7(a) and (b) respectively are attached.
31. It is deponed that if the orders sought herein are not granted, the Petitioner will suffer irreparable harm as outlined below:
  - a. The Petitioner, its clientele and the residents within the vicinity of the 1<sup>st</sup> Respondent are entitled to a peaceful and noise-free environment within the standards and levels prescribed by the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.
  - b. The 1<sup>st</sup> Respondent will continue to operate loud live and streamed music within its premises beyond levels which the expert advises that are contrary to the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.
  - c. The Petitioners goodwill will be adversely affected as its clientele are very sensitive to disruptions and will imminently in the circumstances terminate all future business transactions with the Petitioner.
  - d. The Petitioner will lose a peaceful, comfortable, serene, and noise-free environment whose characteristics are very vital in the Petitioner's accommodation business the absence of which will automatically cripple the Petitioners business.

### **Responses To The Petition**

32. In response to the petition, the 1<sup>st</sup> Respondent filled a replying affidavit dated 19<sup>th</sup> February 2024 and sworn by one Raymond Matiba the director of the 1<sup>st</sup> Respondent.
33. The deponent states that the 1<sup>st</sup> Respondent is the registered proprietor of Alliance Safari Beach Hotel which has been operational since 1986. The allegations of operating loud live music through amplified artificial sound systems are denied. It is stated the Petitioner continues to enjoy a serene peaceful environment and any music from the 1<sup>st</sup> respondent has been confined within the required legal limits. That during any special activities with large gatherings including festivities, weddings,



- the 1<sup>st</sup> Respondent has ensured to put in place mechanisms to ensure peaceful and environmentally complaint coexistence with its neighbor's to minimize issues. The licenses are attached ADL-1.
34. Referring to the environmental noise survey Report presented by the Petitioner its averred that sections 7 and 9 of the Environment Management & Coordination Act 1999 (EMCA) creates the 2<sup>nd</sup> Respondent charged with the functions to supervise and coordinate all matters environment. That section 3(1) of the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009 (Regulations) outlaws the making of or causing to be made any loud, unreasonable, unusual excessive noise which annoys disturbs, endangers health or safety of others including excessive vibrations.
  35. That Section 6 of the regulations provides that any measurements to determine compliance with the prescribed limits can only be determined by the relevant lead agency. That it is the 2<sup>nd</sup> Respondent to take control and measurements in respect to whether a person is causing any noise which exceeds the sound level set out in the first schedule of the regulations. That it is after the 2<sup>nd</sup> Respondent has failed to act that a party may instruct a qualified person duly authorized by the 2<sup>nd</sup> Respondent to take the measurements.
  36. It is stated that upon review of the expert report presented by the Petitioners, the same was not authorized neither does it disclose guidelines that were prescribed by the 2<sup>nd</sup> Respondent. The author lacked knowledge of use of the relevant equipment under the regulations. The report contravenes sections 6(3) and (4).
  37. The 1<sup>st</sup> Respondent denies breaching any of the conditions outlined in the licenses issued to them. The licenses are attached. That the Petition was meant to steal a match on the 1<sup>st</sup> Respondent and infringe on the 1<sup>st</sup> Respondents right to a fair hearing by placing reliance on the impugned report. Further to infringe on the 1<sup>st</sup> Respondents rights to operate its business within the threshold of its licenses. If allowed it is the 1<sup>st</sup> Respondent who will suffer since they don't run the same business models.
  38. It is further averred while the Petitioners allege negative feedback from their customers, a review of the Petitioners online reviews indicate positive reviews except one which still rated the petitioner 5/5. The online reviews were attached. It is stated that the complaints and bad reviews alluded to have not been attributed to the 1<sup>st</sup> Respondent. That the Petitioners cannot purport to impugn the annexed reviews presented by the 1<sup>st</sup> Respondent for want of certificate of electronic service which also applied to their annexures. This is termed as approbating and reprobating.
  39. It is deponed that the 1<sup>st</sup> Respondents structures alleged by the Petitioner to be illegally constructed for want of development permission are within the same line as the Petitioners structures. That the Petitioner cannot approbate and reprobate at the same time.
  40. It is further deponed that the 1<sup>st</sup> Respondents structures alleged by the Petitioner to be illegally constructed for want of development permission are within the same line as the Petitioners structures. A photographic map of the area is attached. That the Petitioner cannot approbate and reprobate at the same time.
  41. Denying all the allegations raised in the Petition it is averred that the petition is frivolous legally defective and the reliefs sought are not available. The 1<sup>st</sup> Respondent prays that the petition is dismissed with costs.
  42. The Petitioner filed a supplementary affidavit sworn by Ali Maawiya on 10/07/24 in response to the 1<sup>st</sup> Respondents averments hereinabove. The contents have been noted by the court including the annexures thereto being calibration certificates for the equipment's used by the 1<sup>st</sup> Respondent,



Environmental noise survey report undertaken between 29/12/2023 to 13/12/2023, Lahvens Limited Laboratory credentials by NEMA and licenses for officers who participated in the survey.

### **The 2<sup>nd</sup> Respondents Response to the Petition**

43. The 2<sup>nd</sup> Respondent responded to the Petition vide the replying affidavit of Duncan Okoth Ombui the acting County Director of Environment sworn on 24/07/2024. It is deponed that pursuant to section 9 of EMCA the 2<sup>nd</sup> Respondent exercises general supervision and coordination over all matters relating to the environment. That under schedule 4 part 2 of the Constitution of Kenya 2010, the function relating to management of noise, air and other pollution emanating from public nuisances was devolved to the county governments. That the 2<sup>nd</sup> Respondent has only a limited supervisory role and has trained and gazetted inspectors from the county and in some instances conduct joint inspections in matters noise pollution regulation.
44. That even if related complains may be filed or raised with the 2<sup>nd</sup> Respondent, the same are forwarded to the county government to deal as per their mandate. That at no time prior to this petition did the Petitioner register a complaint with the 2<sup>nd</sup> Respondent to enable it carry out its regulatory responsibility of conducting environmental monitoring and enforcement for compliance. That the petitioners' allegations that the 2<sup>nd</sup> respondent was always aware of the levels of noise and vibrations emanating from the 1<sup>st</sup> Respondent and has failed to act are false.
45. It is deponed without prejudice to the above that the 2<sup>nd</sup> respondent pursuant to its supervisory and coordination role and recognizing this petition on 10/10/2023 and between 11<sup>th</sup> to 16<sup>th</sup> July 2024 conducted an inspection of both parties' establishments. During inspection conducted on 16/10/2023 it was observed that the Petitioner had a noise survey report dated 19/07/2023. However the results therein could not be verified by the 2<sup>nd</sup> respondent since it had not been submitted to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for monitoring purposes. That no EIA expert practicing license and calibration certificate of the instrument used were presented with the report. That the county government has already taken up the regulatory function on noise pollution as per the regulations and the 1<sup>st</sup> Respondent had applied for and issued with a noise permit by the 3<sup>rd</sup> respondent in respect of an event that took place on 14 – 16<sup>th</sup> July 2023. The inspection report dated 19/10/23 is annexed.
46. That a second inspection was conducted on diverse dates between 11<sup>th</sup> to 16/07/2023 where it was generally observed that the Petitioner had undertaken another noise survey contained in report dated 17/01/2024 indicating the noise levels emanating from the 1<sup>st</sup> Respondents establishment was way above the recommended limits. The deponent observes that the 1<sup>st</sup> Respondent insisted the report was based on a one time event on 14<sup>th</sup> – 16<sup>th</sup> July 2023 when the 1<sup>st</sup> Respondent hosted a rugby event for which a license had been duly issued by the 3<sup>rd</sup> Respondent. The deponent further observed that the said event venue was not sound proofed. That a bar constructed next to the Petitioners establishment was also not sound proofed hence the likelihood of noise pollution especially when the sound is amplified beyond the recommended decibels. A copy of the inspection report dated 16/07/2024 is annexed.
47. The deponent reiterates the provisions of Regulation 6(3) as stated by the 2<sup>nd</sup> Respondent as to when and by whom measurements can be taken. That EIA experts are by virtue of their practicing licenses issued by the 2<sup>nd</sup> respondent, are authorized to take noise measurements. That the 2<sup>nd</sup> respondent has restrained itself from taking any enforcement actions as the matter is subjudice.
48. On the allegations that the 1<sup>st</sup> Respondent has illegally constructed structures within its premises, the deponent refers to paragraph 3.2 of the inspection report which confirms the said bar and restaurant



was issued with an EIA license on 24/01/22. The license is attached. That this has not been challenged at the Tribunal pursuant to section 129 (1) of EMCA. The deponent emphasizes the 2<sup>nd</sup> Respondent readiness to implement with any legitimate orders emanating from the present proceedings to ensure compliance with EMCA.

### **The 3<sup>rd</sup> Respondent Response**

49. The 3<sup>rd</sup> Respondent attended court on 25/01/2024 and 26/02/2024 when he informed the court they would not file any submissions on the application dated 11/9/2023 because the orders did not affect the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent subsequently did not file any response to the Petition.

### **Submissions**

50. The Petition is canvassed by way of written submissions which parties filed and exchanged.

### **The Petitioners Submissions**

51. The Petitioners submissions are dated 10/07/2024. The submissions identified three issues for determination, whether the respondents have violated the Petitioners right to clean and healthy environment under articles 42, 69 and 70; Whether the Petitioner has come to court prematurely and whether the Petitioner is entitled to the reliefs sought.
52. The Petitioner submitted, quoting the Ruling of this Honorable court delivered on 28/5/2024 in this matter where in discussing the seriousness of the Right to a clean and healthy environment the Court stated:
- “The right to a clean and healthy environment has been declared a universal human right. See the United Nations General Assembly Declaration (UNGA declaration of 28/7/2022. The seriousness as to the protection of this right has not only been taken up by Kenya but by several other countries within the African continent. Section 24 of the South African Constitution provides for the protection of the environment towards ensuring the health and well being of individuals. Section 20 of the Nigerian Constitution states that the state shall protect and improve the environment and safeguard Nigerias water, air land forest and wildlife.”
53. The Petitioner submitted further that the prevention of noise and vibration pollution is now recognized as a component of a clean and healthy environment. Reliance is placed on Regulation 6. Highlighting the documentary evidence presented by the Petitioner , it is submitted that the Petitioner has proved through the same that their right to clean and healthy environment has been infringed upon. Reliance is placed on the Court of Appeal decision in Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 others(2020)eKLR which also cited the case of Mumo Matetu vs Trusted Society of Human Rights Alliance & 5 others where it was held that it is a fundamental rule of law that evidence whether real, documentary, circumstantial or presumptive, is the basis of any judicial decision. This is why judicial decisions are not founded on a toss of the coin.
54. On whether the petition is premature the Petitioner cites Article 22(1) of *the Constitution* on the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
55. That there is no requirement under regulation 6 to notify the 2<sup>nd</sup> Respondent instead the law demands the former to undertake regular environmental monitoring and audits which role has been abdicated. That the Petitioner cannot be faulted for engaging the survey at its own costs to undertake roles



designated to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are equipped with tax payers' money. The court is referred to the case of Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 others (supra) where the court castigated NEMA for leaving the task of compiling the noise level reports to a litigant and failing to honor their obligations under regulation 6.

56. That the petition is brought pursuant to Article 165(1) (c) and section 13 of the *Environment and Land Court Act*, thus it is not premature before this Court. That Articles 23 and 70 of *the Constitution* gives this court Authority to uphold and enforce the Bill of rights.
57. On whether the Petitioner is entitled to the reliefs sought, the court is referred to articles 23 and 70 of *the Constitution* and to the case of Joyce Chepkoech Too vs Egerton University & Another(2021)eKLR where the Learned Judge stated what amounts to appropriate relief depends on the nature and circumstances of the case and appropriate relief should be an effective remedy for purposes of enforcing *the Constitution*, human rights and the rule of law. That if it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of all these important rights.
58. Ultimately the Petitioner submitted that having proved that the Petitioner's right to a clean and healthy environment has been infringed by the Respondent, he stated that he is entitled to the reliefs prayed for in the petition.

### **The 1<sup>st</sup> Respondent Submissions**

59. The 1<sup>st</sup> Respondent informed the court on 22/10/24 that they would rely on the Replying Affidavit filed.

### **The 2<sup>nd</sup> Respondents Submission**

60. The 2<sup>nd</sup> Respondent submissions are dated 18<sup>th</sup> October 2024 by leave of the court granted on 22/07/24. The court also granted corresponding leave to the Petitioner to file supplementary submissions in response.
61. The 2<sup>nd</sup> Respondent identified four issues for determination. Whether the Petition raises any cause of action against the 2<sup>nd</sup> Respondent, Whether the 2<sup>nd</sup> Respondent has been indolent in discharging its duties; Whether the 1<sup>st</sup> Respondent has constructed illegal structures within its premises and whether the court should issue the orders sought against the 2<sup>nd</sup> Respondent.
62. Rehashing the Petitioners case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vis a vis the provisions of regulation 6 which prohibits anyone from making noise exceeding the statutory levels and regulations 6(2) and (3) touching on the responsibility of enforcement placed upon the relevant lead agency or person authorized by the 2<sup>nd</sup> Respondent, it is submitted that the 2<sup>nd</sup> Respondents duties are limited by EMCA and *the Constitution*. That section 5(2) of the *County Governments Act* obligates the county's to undertake the functions in article 186 of *the Constitution* as assigned in the 4<sup>th</sup> schedule. That the said functions include management of noise and pollution emanating from public nuisances. That the 2<sup>nd</sup> Respondent being an entity of the national government can only exercise supervisory role upon failure or omission of the county and upon notice and supporting evidence.
63. That based on the above the county's have performed their function as evidenced by the noise permits issued by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent for an event that took place on 14<sup>th</sup> to 16<sup>th</sup> July 2023 and 23/11/23. Reliance is placed on the case of Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 others (supra) where the Court of Appeal noted that Part 2 clause 3 of the 6<sup>th</sup> Schedule of *the Constitution* places the responsibility for control of air and noise pollution and other public nuisances in the County Governments. The court is also referred to the case of Sohail



Regency Management Company Limited Vs Dejavu Coco Glam Nail and Tippy Corner & 3 Others (2022)eKLR.

64. It is submitted that the county was the relevant lead agency to take the noise measurements. The court is referred to several decisions where the respective county governments undertook noise measurements. It is stated that the 2<sup>nd</sup> Respondent could not interfere with the mandate of the county unless the former were completely unable to discharge their mandate. There was no evidence placed before court that the 3<sup>rd</sup> Respondent was unable to undertake this function. Reliance is placed on the case of Gichu Vs. Obuya Otieno Ritzau t/a Bamburi Community High School & 3 Others (2023) KEELC 19222 (KLR).
65. It is further submitted that despite the above and in recognition of its supervisory role inspection visits were conducted but enforcement actions could not be undertaken for the reason already cited. The court is urged to find that the 2<sup>nd</sup> Respondent has not breached any of the Petitioners rights and has at all times in relation to the subject herein acted within the law.
66. On whether the 1<sup>st</sup> Respondent has constructed illegal structures within its premises it is submitted that there is an EIA approval for the said premises and the petitioners' assertions lack basis.
67. The court is further urged that the prayers sought in the petition should not issue against the 2<sup>nd</sup> Respondent.

### **The 3<sup>rd</sup> Respondents Submissions**

68. The 3<sup>rd</sup> Respondent did not respond to the Petition neither did they file submissions.

### **Analysis And Determination**

69. I have considered the petition, its supporting affidavit, supplementary affidavit, the Replying affidavits in response to the petition together with the rival submissions and authorities cited by parties herein. The issues that commend determination are; -
  1. Whether the Petitioner's rights to a clean and healthy environment under articles 42, 69 and 70 have been infringed upon
  2. Whether the petition discloses a cause of action against the 2<sup>nd</sup> Respondent
  3. Whether the Petitioner is entitled to the orders sought
  4. Costs of the petition.
70. It is imperative to review if the petition satisfies the basic tenets of a constitutional petition. Article 22 (1) of *the Constitution* provides: -

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
71. Constitutional litigation serves to protect fundamental rights and freedom both under Article 22 and 258 of *the Constitution* of Kenya 2010. The filing is regulated under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 10 (1) sets out the content of a petition which includes the facts relied upon, the constitutional provision violated, the nature of the injury caused or likely to be caused.



72. In the case of Anarita Karimi Njeru Versus Republic [1979] KLR the court held that a petitioner must set out with a reasonable degree of precision the nature of the alleged violations, the person or institution responsible for the violation, the manner of the violation and the provision of *the constitution* which creates and gives the constitutional right that is under violation or threatened violation.
73. I have reviewed the petition. It has stated the facts which highlight the nature of the Petitioner's business and the events that have led to the filing of the petition being alleged noise pollution by the 1<sup>st</sup> Respondent which has allegedly infringed its rights to a clean and healthy environment. The Petitioner has also set out why the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are sued alongside the 1<sup>st</sup> Respondents. The legal foundations of the petition are also highlighted including the ones most proximal to the subject being article 42, 43, 69(1), 70 of *the Constitution* of Kenya and Sections 101, 102 of EMCA, Regulations 3,8,9,16 of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 and the Land Use & Physical Planning Act. The reliefs sought have also been pleaded. It is evident the petition specifies the provisions of *the Constitution* that are alleged to have been violated, the particulars of the rights infringed, and by whom, and the remedies sought.
74. It is therefore this court's finding that the petition has met the threshold for a constitutional petition.
75. I will now delve into the substance of the petition and which is to determine whether the Petitioner has proved the infringement of its rights as pleaded.
76. The court will highlight the constitutional and legal provisions set out in the petition as having been violated.
77. Article 42 of *the Constitution* specifies that every person has the right to a clean and healthy environment,
78. Article 43 is on Economic and Social rights and guarantees every person the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.
79. Article 69 is on obligations in respect of the environment and obligates the state to among others establish systems of environmental impact assessment, environmental audit and monitoring of the environment.
80. Article 70 is on enforcement of environmental rights and stipulates;-
- “If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.”
81. Section 101 of EMCA is on standards for noise pursuant to which the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 were gazetted setting out minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment. The regulations also set out procedures and criteria for the measurement of noise and vibrations.
82. Section 102 of EMCA is on Noise in excess of established standards. It prohibits and makes it an offence for any person to emit noise in excess of the noise emission standards established under EMCA unless exempted.



83. Regulation 3(1) sets out general prohibitions against the making or causing of loud unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose or health or safety of others and the environment.
84. Regulation 3(2) further provides several factors for determination of loud and unreasonable noise. These factors include;
- “(i) the time of the day;
  - (ii) the proximity to a residential area;
  - (iii) whether the noise is recurrent, intermittent or constant;
  - (iv) the level and intensity of the noise;
  - (v) whether the noise has been enhanced by any electronic or mechanical means; and
  - (vi) whether the noise can be controlled without effort or expense to the person making the noise.”
85. Regulation 6 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 provides thus:
- “No person shall cause noise from any source which exceeds any sound level as set out in the applicable column in the First schedule of the Regulations”
86. Regulation 8 is on Radio, TV, other sound amplifying devices and provides interalia that;-
- (1) No person shall use or operate any radio or receiving set, musical instrument, phonograph, television set, any other machine or device for the producing or reproducing of sound or any other sound-amplifying equipment in a loud, annoying or offensive manner such that the, noise from the device—
    - (a) interferes with the comfort, repose, health or safety of members of the public;
    - (b) creates a risk thereof, within any building or, outside of a building, at a distance of 30 meters or more from the source of such sound; or
    - (c) interferes with the conversation of members of the public who are 30 meters or more from the source of such sound.
87. Regulation 9 is on Parties and social events and states as follows;-
- (1) Any person in charge of a party or other social event which occurs on any private or public property shall ensure that the party or event does not produce noise in a loud, annoying or offensive manner such that noise from the party interferes with the comfort, repose, health or safety of members of the public within any building or, outside of a building, or recklessly creates the risk thereof, at a distance of 30 meters or more from the source of such sound.
  - (2) Any person who contravenes this Regulation commits an offence.
- .....
88. Regulation 16 is on requirement for Licence and stipulates; -



- (1) Where a sound source is planned, installed or intended to be installed or modified by any person in such a manner that such source shall create or is likely to emit noise or excessive vibrations, or otherwise fail to comply with the provisions of these Regulations, such person shall apply for a licence to the Authority.
  - (2) No person shall use any sound-amplifying equipment in such a way that such equipment is or is likely to be heard outside of any building between 9:00 p.m. of any day and 7:30 a.m. of the next day, without a valid license.
  - (3) Where any person uses or plans to use a public-address system which is likely to emit sound outside of a building, such person shall secure a licence under these Regulations.
89. The relevant provisions of law having been set out hereinbefore the court will embark to determine whether on a balance of probabilities the Petitioner has proved their rights have been violated by loud noise emissions from the 1<sup>st</sup> Respondents. As it is the 1<sup>st</sup> Respondent is the alleged emitter.
90. The Petitioner avers that it operates an accommodation business and offers its diverse and exclusive clientele a serene, peaceful and noise-free experience within its facility known as Ocean Village Club within Diani in Kwale County. The 1<sup>st</sup> Respondent operates a hotel facility known as Safari Beach Hotel adjacent to the Petitioner's premises. The Petitioner claims that the Petitioner's business established in the year 2014, has enjoyed a serene, peaceful and noise-free environment until recently when the 1<sup>st</sup> Respondent purposefully started the habit of operating loud music and streaming loud music through amplified artificial sound systems within its premises. Thus, denying the Petitioner its right to a clean and healthy environment to continue with its accommodation business. The Petitioner likewise claims that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have negated their roles as stipulated in the Fourth Schedule of *the Constitution* to control the noise pollution.
91. The Petitioner has presented two Environmental Noise Survey reports. The first report is dated 19/07/2023. My review of the report annexed as (A-4) to the affidavit in support to the petition, shows the survey was undertaken within the Petitioner's premises between 14/07/23 and 16/07/2023 between 6.30pm and 12.00 midnight. At paragraph 6.0 of the report is the summary of the noise level measurements for the three days the survey was conducted at different locations within the Petitioner's establishment herein.
92. The comparative statutory levels as per the 1<sup>st</sup> schedule of the regulations are set out at paragraph 3.2.1 of the report. It is not in dispute that the establishment falls in Zone A - mixed residential with some commercial places of entertainment and minimum permitted noise levels is 55 decibels as per the schedule 1 of the regulations. The nature of business undertaken by both the petitioner and 1<sup>st</sup> respondent speak for themselves. Paragraph 7.0 and 9.0 gives the observations and conclusion respectively. The observations are; -
- “From the results, it can be seen the noise generated is way above the allowed limit of 55 decibels in the first schedule. The noise was mainly due to electronically amplified sound from the speaker that is in Safari Beach Hotel compound near boundary of Ocean Village clubs restaurant.....”



The conclusion is

“The Noise survey indicated the noise generated was above allowable limit and therefore they should take immediate action in controlling noise pollution and institute monitoring mechanism to ensure pollution is adequately controlled.’

93. The second report is dated 17/01/2024. My review of the report annexed as (A-8) to the supplementary affidavit sworn by Ali Maawiya on 10<sup>th</sup> July 2024 in response to the 1<sup>st</sup> Respondent reply to the petition, shows the survey was undertaken within the Petitioners premises between 29/12/2023 and 31/12/2023 covering 6.30pm and 3.00am on behalf of Ocean Village club Diani, the trading name of the petitioners establishment. At paragraph 7.0 are the observations which state thus;-

“From the results it can be seen that noise generated is way above the allowed limit of 55 decibels in the first schedule. The noise was mainly due to electronically amplified sound from speakers that were used during events at Safari Beach Hotel, speaker near the boundary of Ocean Village Restaurant...”

94. The conclusion echoes the one given in the earlier report. Clearly from the foregoing the noise levels were beyond the allowable statutory thresholds for the zone the establishments were situate.

95. But what is the 1<sup>st</sup> Respondents response to the Petitioners claims and the reports presented?

96. The first report (A-4) is impugned by the 1<sup>st</sup> Respondent on the basis that the same was not authorized neither did it disclose guidelines that were prescribed by the 2<sup>nd</sup> Respondent. That the author lacked knowledge of use of the relevant equipment under the regulations. That the report contravenes sections 6 of the regulations. This section provides verbatim as hereunder; -

6. Measurement and control.

- (1) No person shall cause noise from any source which exceeds any sound level as set out in the applicable column in the First Schedule to these Regulations.
- (2) Measurements shall be taken by the relevant lead agency.
- (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 measurement shall be taken by a person duly authorized by the Authority, who is knowledgeable in the proper use of the measuring equipment.

97. Firstly, the question that arises therefore is who is the lead agency in the circumstances? According to the 2<sup>nd</sup> Respondent certain environmental functions including the management of noise, air and other pollution emanating from public nuisance control of noise and vibrations were devolved to County Governments under Schedule 4 Part 2 of *the Constitution* 2010.

98. The above position has been confirmed by the Court of Appeal in the case of Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 others (supra) cited by both the Petitioner and the 2<sup>nd</sup> Respondent. The learned judges of the court of appeal stated

“ Additionally, Part 2 Clause 3 of the 6<sup>th</sup> Schedule of *the Constitution* places the responsibility for control of air and noise pollution other public nuisances and outdoor advertising on County Governments, in this case the 1<sup>st</sup> respondent.’



99. From the above it is clear therefore that the lead agency is the 3<sup>rd</sup> Respondent, the County Government of Kwale and who was obligated to take the measurements. The options for a complainant to take the measurements are firstly the absence of a lead agency to take measurements, which does not apply in the instant case in my view as evidence has been led that the County government of Kwale had taken over the functions as seen in the licenses issued to the 1<sup>st</sup> Respondent. The second option is when the lead agency fails to take action following reasonable notice by the Authority. NEMA denies it was notified or that any complaint was lodged before it in this regard to enable it issue notice.
100. Citing Article 69(f) and (g) of *the Constitution* it is urged by the Petitioner that NEMA is obligated to undertake regular environmental monitoring and audits upon which it should notify the 3<sup>rd</sup> Respondent to undertake noise measurements. It is contended by the Petitioner that Regulation 6 does not demand that the Petitioner notifies either the Authority or the lead agency. That the role of notification is placed squarely within the ambit of the 2<sup>nd</sup> Respondent and that the Petitioner cannot therefore be faulted for engaging the licensed expert at its own cost.
101. I must resolve the above difference in interpretation. I will respectfully disagree with the Petitioners position. The Regulation in my view envisages the role of NEMA as a coordinator of the lead agencies and not NEMA as a lead agency. In my view this is the reason NEMA is expected to notify the 3<sup>rd</sup> Respondent. Section 9 (2) of the EMCA further provides that, NEMA shall;
- “co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya...”
102. I take the view that the Petitioner ought to have lodged a complaint with the 2<sup>nd</sup> Respondent upon which, the 2<sup>nd</sup> Respondent would notify the lead agency to undertake the measurements. The Petitioner cannot fail to inform NEMA and then plead NEMA ought to have known.
103. Be that as it may the above is an issue of procedure. I note that in Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 others (supra) the Court of appeal faulted the superior court decision on a finding that failure to follow the procedure in regulation 6 amounted to there being no evidence.
104. The report is also impugned by the 1<sup>st</sup> Respondent for being undertaken in what I would term unqualified persons. I have reviewed the impugned report (A-4) and noted that it is validated by Jared Milikau Sawanga who is the same person who has validated the report annexed as (A-8). In the later report which I note that Lahvens Limited Laboratory is designated by NEMA to undertake Air quality analysis and noise level measurements. EIA licenses were attached including calibration certificates. Even assuming I’m wrong on the 1<sup>st</sup> report, the 2<sup>nd</sup> report (A8) has attached the relevant documents.
105. Having resolved the above, the issue remains that there is evidence that the noise was above the permitted levels and that is evidence that cannot be wished away. From the reports the noises are clearly attributed to the 1<sup>st</sup> Respondents establishment.
106. Further, the Petitioner’s complaint is that due to the noise made by the 1<sup>st</sup> Respondent, some of the Petitioners clients gave negative feedback and others even refused to pay for the Petitioners services. The Petitioner referred the court to annexure A-7(a) annexed to the Affidavit of Ali Maawiya sworn on 11/9/2023. The said annexure is a google review of one Tommy Jurgensen who was hosted by the Petitioner in December 2023. A copy of his receipt were annexed as A-7(b). It is clear from the



annexure A-7(a) that the client did not give the Petitioner maximum positive review because of the bass power loud speaker at the 1<sup>st</sup> Respondents premises.

107. The report also outline the health and psychological effects on people exposed to noise surpassing the required limits.
108. The court has noted the 1<sup>st</sup> Respondents defence that in instances where they expect large crowds they put in place mechanisms to ensure peaceful and environmentally complaint coexistence with its neighbor's to minimize issues. They attached the licenses ADL-1 issued by the 3<sup>rd</sup> Respondent. The court had no advantage of seeing the conditions to the licenses and could not attach any value to them in terms of the noise report dated 19/07/23 which was conducted during the time of the private event. There was no explanation from the 3<sup>rd</sup> Respondent either. The other receipt AD2 was for a wedding after party event on 25/11/23 and would attach the same comments. Be that as it may the report dated (A8) was conducted way after 25/11/23 and shows noise levels beyond permissible level. There was no license in respect of the period 29<sup>th</sup> – 31/12/23 if the same would be anything to go by.
109. I pondered over whether a license can be a defense. While having a license to operate a potentially noisy business may be a requirement, it is not a complete defense to noise pollution. In my view it cannot be a defence. The schedule 1 on decibels do not differentiate whether one has a license or not. A license doesn't absolve the operator of responsibility to ensure their activities comply with permissible noise levels. This proposition is supported by Odunga J in Republic v Nairobi City County Alcoholic Drinks Control and Licensing Board & another Exparte Space Lounge Bar & Grill Limited [2017] KEHC 4433 (KLR) which I have persuasively cited elsewhere in this judgement.
110. In view of the foregoing, I am satisfied that the Petitioner well articulated and proved on a balance of probability that its rights to a clean and healthy environment were indeed infringed by the 1<sup>st</sup> Respondent.
111. Can the 2<sup>nd</sup> Respondent escape liability? The 2<sup>nd</sup> Respondent pleads and contends that the Petition does not raise any cause of action against it. I have already made a finding the functions relating to noise and pollution control and licensing thereto were devolved functions, the obligation to enforce was on the 3<sup>rd</sup> Respondent. There was no evidence placed before this court by the Petitioner that they booked any complaint with NEMA as the Coordinator of actions by the lead agencies. From the material placed before court the 2<sup>nd</sup> Respondent only came to be aware of the issue upon the filing of this petition upon which they undertook site inspection.
112. I would therefore not fault the 2<sup>nd</sup> Respondent. The blame as to the violations herein with regard to right to a healthy and clean environment relating to the Noise pollution herein lies squarely on the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent who issued some of the licenses herein and which licenses I have already commented on.
113. In arriving at the above conclusion this court is persuaded by the holding in Gichu v Obuya Otieno Ritzau t/a Bamburi Community High School & 3 others [2023] KEELC 19222 (KLR) where Naikuni J

“According to the Learned Counsel for the 4<sup>th</sup> Defendant, in compliance with *the Constitution* the body cannot interfere with the mandate of the County Governments unless the County Governments are completely unable to discharge their mandate. Devolution must be given a chance. This Honourable Court cannot agree more on these sound legal assertions. In the current case, the Plaintiff has not demonstrated neither is there evidence that the County Governments are unable to discharge their role to warrant the intervention



of the National Government through the 4<sup>th</sup> Defendant. Besides, it was clearly demonstrated that the Plaintiff never served the 4<sup>th</sup> Defendant with the letany of corresponces (sic) it claimed to have written to them. For nothing else, therefore, and from the very onset I find that no case against the 4<sup>th</sup> Defendant has been established. It can therefore be determined from the above law that the 4<sup>th</sup> Defendant has breached any of the rights of the Plaintiff and neither has it been indolent in discharging its duties.....’

114. It is noteworthy that as to the Petitioner’s prayer for a declaration that its constitutional rights to a clean and healthy environment have been violated, the prayer is only directed to the 1<sup>st</sup> Respondent. It is trite that a party is bound by its pleadings see *Galaxy Paints company Ltd Vs Falcon Guards Ltd (2000) E.A 885* and *Raila Amolo Odinga & Another VS Independent Electoral Boundaries Commission & 2 Others (2017) eKLR*.

115. Having made the foregoing findings what orders commend in the circumstances of this case? The prayers or reliefs the Petitioners craves have already been set out elsewhere in this judgement. Section 3(3) of the EMCA stipulates that;

“If a person alleges that the right to 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 to apply to the Environment and Land Court for the redress and the Environment and Land Court may make such orders, issue such writ or give such directions as it may deem appropriate to-

- a) Prevent, stop or discontinue any act or omission deleterious of the environment
- b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious of the environment
- c) Require that any on-going activity be subjected to an environmental audit in accordance with the provisions of this Act;
- d) Compel .....
- 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 a foregoing.”

116. Article 70 on Enforcement of environmental rights stipulates thus:

- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
  - (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;



- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
  - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
117. I have already discussed prayer a) seeking the declaration hereinabove and I will not belabor the point.
118. The Petitioner seeks a declaration that the 1<sup>st</sup> Respondent has erected unlawful structures next to the Ocean Village without first securing the requisite NEMA approval and development permission under the *Physical and Land Use Planning Act*. The 2<sup>nd</sup> Respondent in its replying affidavit to the Petition provided proof of the licence issued to the 1<sup>st</sup> Respondent for the construction as evidenced in annexure ‘NEMA-1’ where Approval No. NEMA /SPA/5933 is seen. On the failure to obtain Development Permission the correct forum on this issue in my view would be the County Physical Planning and Land Use Planning Liaison Committee. Moreover, no evidence was placed before court that such approval was not obtained. I decline to issue any orders in this regard.
119. A permanent injunction is sought against the 1<sup>st</sup> Respondent their agents, servants representatives, and /or any other persons acting on their stead prohibiting them from further operations of live music, streamed music and/or any other kind of noise that would destruct the quiet and peaceful possession of the Petitioner and its guests. The 1<sup>st</sup> Respondent states that it will be prejudiced were such orders to issue since the two establishments do not carry out the same nature of business.
120. It is noteworthy that the operations of the 1<sup>st</sup> Respondent predate that of the Petitioner, the former having been set up in 1986 and the later 2014. Both parties are entitled to be in business in tandem with their social and economic rights. This court however acknowledges that *the Constitution* of Kenya at Article 42 guarantees to all persons the right to a clean and healthy environment. This includes the right to peaceful environment devoid of noise beyond the allowable limits. Justice Odunga while dealing with almost similar issues of noise emissions in the case of Republic v Nairobi City County Alcoholic Drinks Control and Licensing Board & another Exparte Space Lounge Bar & Grill Limited [2017] KEHC 4433 (KLR) cited by the 2<sup>nd</sup> Respondent had this to say;
- “ 32. It is open the operators of leisure and social places to ensure that they conduct their businesses in a manner that does not violate the rights of others.....’
121. The court notes that the 2<sup>nd</sup> Respondent recognizing its supervisory role undertook a site inspection of both establishments and presented a report before court. The report in its conclusion and recommendations (see paragraph 4.0 (2) that condition 3.6 of the EIA license issued to the 1<sup>st</sup> Respondent which I have already referred to required the 1<sup>st</sup> Respondent to implement the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations during day to day operations of the facility. The report recommends that the 1<sup>st</sup> Respondent and the Petitioner should continually monitor and provide a report of their noise level on at least quarterly basis to the Authority and County Government of Kwale for monitoring purposes.
122. It is the view of this court that there should be room for co existence of the two establishments since the actions of the 1<sup>st</sup> Respondent can be monitored, mitigated and remedied. It is disclosed in the inspection visit report that the 1<sup>st</sup> Respondents facilities were not sound proofed which appears to be



a solution that may be considered. I'm not inclined to issue orders of permanent injunction in the circumstances of this case.

123. I have noted the prayers seeking a permanent injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prohibiting them from issuing licenses or approvals allowing the carrying out of loud music and loud streaming within the vicinity of the Petitioners Ocean Village Club. In my view this prayer as couched is too wide for the consideration by the court for every application made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents may have to be considered upon its own facts and merit.
124. On damages for nuisance the Petitioner has not led this court to a specific authority that delas with quantum and or proposals for the courts consideration. I have nothing therefore upon which to lay a basis for a decision on the damages. Guided by the law cited hereinbefore.
125. I will now proceed to consider reliefs I deem appropriate in the circumstances of this case. I'm further guided by the following dictum from the case of Mohamed Ali Baadi and Others Vs. Attorney General & 11 Others (2018)eKLR where the court stated;-

“Indeed, this Court is empowered by Article 23(3) of *the Constitution* to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others vs Treatment Action Campaign & Others thus:

“...appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.”

126. The upshot of the foregoing is that the court finds that the Petitioner has proved on a balance of probabilities that its rights to a clean and healthy environment have been infringed upon by the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent. The court does not find any wrong doing on the part of the 2<sup>nd</sup> Respondent.
127. Pursuant to the powers of this court conferred by article 70 of *the Constitution* 2010, Section 13 of the *Environment and Land Court Act* and Section 3(3) of the EMCA, the following orders issue to dispose of this petition
  - a. It is declared that the 1st Respondent has violated the Petitioner's Right to a clean and healthy environment and Economic and Social rights as enshrined in articles 40,42 and 43 of *the Constitution*.
  - b. To preserve and maintain public health and the environment the 1<sup>st</sup> Respondent and the Petitioner shall continually monitor and provide a report of the noise levels on at least quarterly basis to the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent County Government of Kwale for monitoring purposes.



- c. The 2<sup>nd</sup> Respondent shall coordinate (b) above and ensure joint inspections with the 3<sup>rd</sup> Respondent when required.
- d. In addition to (b) above the 2<sup>nd</sup> Respondent shall assist the 1<sup>st</sup> Respondent to develop and implement a noise control and mitigation program within 6 months of the date of this judgement aimed at enabling the 1<sup>st</sup> Respondent to meet the prescribed standards on noise levels at any time.
- f) Costs of the Petition are awarded in favor of the Petitioner as against the 1<sup>st</sup> Respondent.

Orders accordingly

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 14<sup>th</sup> DAY OF MARCH 2025.**

.....  
**HON. A.E DENA**  
**JUDGE**  
**14/3/2025**

