



Rotich & 2 others (As Chairman, Secretary and Treasurer of Riverside Westend Neighbourhood Association Westlands) v Director of Trade Licensing, Nairobi City County & 2 others (Environment and Planning Petition E017 of 2024) [2025] KEELC 1299 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E017 OF 2024**

AA OMOLLO, J

MARCH 13, 2025

BETWEEN

BILL KIPSANG ROTICH, FERDINARD BOLAY, DIPAK KUMAR GHOSH (AS CHAIRMAN, SECRETARY AND TREASURER OF RIVERSIDE WESTEND NEIGHBOURHOOD ASSOCIATION WESTLANDS) PETITIONER

AND

DIRECTOR OF TRADE LICENSING, NAIROBI CITY COUNTY 1ST RESPONDENT

WESTLANDS SUB-COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING COMMITTEE OF THE NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

IBURY LOUNGE 3RD RESPONDENT

JUDGMENT

1. The Petitioner is a Residents Welfare Association registration under the [Societies Act](#). It brought this petition dated 24th May, 2024 through its officials. The reliefs sought are;
 - a. A declaration that the act of the 1st and 2nd Respondents to licence the 3rd Respondent's to operate a public house (the iBury Lounge) that dispenses alcoholic, prays, or plays loud disco music at night, services patrons that cause chaos and emit human and vehicular voices at all times including the dead of the night, causes smelly sewer disposals and causes disposal of other wastes, along Sri Aurobindo Road, in Lavington, Nairobi, Next to the residents of the members of the petitioner is an egregious contravention to the fundamental rights of members of the Petitioners guaranteed under Article 42 of [the Constitution](#) of Kenya;



- b. A declaration that the act of the 1st and 2nd Respondents to Licence the 3rd Respondent's to operate a public house (the iBury Lounge)) that dispenses alcohol, plays, or plays loud disco music at night, services patrons that cause chaos and emit human and vehicular noises at all times including the dead of the night, causes smelly sewer disposals and causes disposal of other wastes, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the members of the Petitioner is an egregious contravention to the fundamental rights of members of the Petitioners to protection of human dignity, guaranteed under Article 28 of *the Constitution* of Kenya;
- c. A declaration that the act of the 1st and 2nd Respondents to Licence the 3rd Respondent's to operate a public house (the iBury Lounge)) that dispenses alcohol, plays, or plays loud disco music at night, services patrons that cause chaos and emit human and vehicular noises at all times including the dead of the night, causes smelly sewer disposals and causes disposal of other wastes, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the members of the Petitioner is an egregious contravention to the fundamental rights to protection of children of members of the Petitioner guaranteed under Article 53(1)(d) and (2)of *the Constitution* of Kenya;
- d. A declaration that the act of the 1st and 2nd Respondents to Licence the 3rd Respondent's to operate a public house (the iBury Lounge)) that dispenses alcohol, plays, or plays loud disco music at night, services patrons that cause chaos and emit human and vehicular noises at all times including the dead of the night, causes smelly sewer disposals and causes disposal of other wastes, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the members of the Petitioner is an egregious contravention to the fundamental rights to protection of elderly members of the Petitioner guaranteed under Article 57(c) of *the Constitution* of Kenya;
- e. A declaration that the act of the 1st and 2nd Respondents to Licence the 3rd Respondent's to operate a public house (the iBury Lounge) that dispenses alcohol, along Sri Aurobindo Road, in Lavington, Nairobi next to the residences of the members of the Petitioner is an egregious contravention of provisions of the *Alcoholic Drinks Control Act* (Chapter 21 of the Laws of Kenya) and the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 and *Physical and Land Use Planning Act*, No. 13 of 2019 – Zoning Rules.
- f. An order of certiorari to bring into this court and to quash the trade licenses issued by the 1st and 2nd Respondents to the 3rd Respondents to conduct bar business known as “iBury Lounge” or howsoever registered at its site along Sri Aurobindo Road in Lavington next to the residences of the members of the Petitioner.
- g. A mandatory Order of injunction compelling the Respondents to close down the bar business in the name and style and name of iBury Lounge or howsoever registered at its site, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the members of the Petitioner;
- h. A permanent injunction restraining the Respondents whether by themselves, agents, nominees or any person whosoever, from operating a bar of alcohol dispensing business in the name and style of iBury Lounge or howsoever registered at its site, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the Petitioner;
- i. An order for general damages for contravention of fundamental rights of members of the Petitioner;



- j. Costs of the petition on indemnity basis.
2. The Petitioner set out the rights guaranteed to its members under *the constitution* and in particular (i) articles 42 on the right to a clean and healthy environment. (ii) Article 53 which ensures every child is protected from abuse and harmful cultural practices and paramount importance on the best of interest of children. (ii) Article 28
 3. It is pleaded by the petitioner that the 1st Respondents have obligation to formulate a County planning framework that integrates economic physical, social environment and spatial planning. That the Nairobi City County Land Use Policy, 2023 therefore designates various zones within the city for different development uses. Zone 5C, Lavington Area, whose boundary extent is the area between James Gichuru Road, including Sri Aurobindo Road, is designated as “Mixed Use development: Residential (Single dwelling), Institutional, Educational, Offices.”
 4. The Petitioner avers that since the opening of the 3rd Respondent’s doors sometime in 2019, it has been everything but peace and quiet, hell for the said residents, including the aged and the children. The 3rd Respondents plays loud/disco music far beyond reasonable decibels, from dusk till dawn, to the extent that the area residents, including children and elderly persons have found it torturous and difficult to endure those living conditions. Further, the vehicles of the patrons of the 3rd Respondent (iBury Lounge) have insistently hooted, driven off loudly, at all times including the dead of the night, thereby making the environment around the club extremely unhealthy and uncomfortable.
 5. It is stated in the petition that disposal of solid waste from the establishment has caused and continues to cause serious prejudice to the area residents. That broken bottles, used condoms and other papers litter the neighbourhood including entrance of their residential areas.
 6. The Petitioners have severally engaged the Respondents, for urgent intervention but the said parties have neglected to act and protect the environment, this rendering this case the only available option for protection of the environment and protection of the fundamental rights of the Petitioners under Article 26, 28, 47, 42 and 70 of *the Constitution*.
 7. The Petitioner further pleads that the Respondents have contravened the provisions of the *Public Health Act*, Cap 242; the PLUPA No. 13 of 2019; and the *Alcoholic Drinks Control Act* Cap 21 of the Laws of Kenya (Section 12(1) by Virtue of Ibury Lounge being in a residential area and a learning institution. They urged that the petition be allowed and the court does issue the reliefs sought.
 8. The 1st and 2nd Respondents did a joint replying affidavit sworn by Kelvin Oloititip on 3rd October, 2024. He deposed that they have never received any police reports about alleged loud music, vehicles parked all over the road and rowdy people at the 3rd Respondents premises. He avers that since the 1st and 2nd Respondents are constitutionally mandated to license and regulate establishments such as the 3rd Respondent’s, they were never notified of the EIA report produced as BKR-3 by the petitioner. Hence the same cannot be taken as an authentic document.
 9. He proceeded to criticize the petitioner’s report that it was not specific on time when the assessment was carried out and the photographs enclosed do not show any violations of the petitioner’s constitutional rights. He stated that measurement of any alleged noise pollution is to be done 30 metres or more away from the impugned premises as provided for in Regulation 2, 4(b), 8(1) and 9(1) of the Environmental Management & Co-ordination (Noise and Excessive Vibration Pollution Control) Regulations.



10. The Nairobi City County Government as well as the 1st and 2nd Respondents were ever engaged to measure any alleged noise levels. Rather the 1st and 2nd Respondents were suddenly approached to shut down operations of the 3rd Respondent without any basis and justification.
11. That the 3rd Respondent's establishment is located in Dagoretti North Sub-County within the Riverside Area in Kileleshwa Ward bordering Lavington which is zoned as a mixed development area for commercial purposes. That according to Clause 1.3.2 of the Nairobi City County Land Use Policy 2023, an area designated for Commercial Land Use contains among others hotels and restaurants of which the 3rd Respondents is properly licensed under. (Annexed and marked KO-1 is a copy of the Nairobi City County Land Use Policy, 2023)
12. That when the 3rd Respondents was established as a medium restaurant with a bar to accommodate 11 to 30 seats, officers from the Environmental Monitoring Compliance and Enforcement Department inspected the premises and gave the green light to establish the premises. That no objections were received by the Petitioner and other stakeholders paving the way for issuance of a license to operate.
13. That as for as statutory provisions among them the *Physical and Land Use Planning Act* are concerned, the 1st and 2nd Respondents as well as the Nairobi City County Government have fully and lawfully discharged their mandate as far as a licensing of the 3rd Respondent is concerned.
14. The 3rd Respondent in contesting the petition filed a replying affidavit dated 16th September, 2024 and sworn by one of its directors called John Kimanzi Musyoka. He deposed that the Petitioner was under obligation to with a reasonable degree of precision to demonstrate the rights which had been infringed.
15. The 3rd Respondents avers that it is designated under zone 4C not 5C as alleged by the petitions. That Zone 4C is designated as mixed development; commercial, Residential and professional offices. He stated that Section 1.3.2 of the Nairobi City County Land Use Policy 2023 defence commercial land use to include utilization of land by hotels and restaurants. Therefore, the 3rd Respondent put the Petitioner to prove otherwise.
16. Mr. Kimanzi depones that the Petition has not adduced any probative material to demonstrate on prima facie basis that;
 - i. Motor vehicles hooted and driven loudly at all times.
 - ii. Noise making/pollution, quarrelling fighting and shouting by the patrons
 - iii. Disposal of solid and liquid waste, broken bottles and used contraceptive material,
 - iv. The association undertaking cleaning of such disposal at its own cost,
 - v. Patrons of the 3rd Respondent posing a security risk to the Petitioner
17. That additionally, contrary to the provision of Regulation 13 of Environmental (Impact Assessment Audit) Regulations (vis-à-vis Section 58 (5) of the Act), the purported Environmental Impact Assessment Report presented before this Honourable Court irregular and invalid by reason that the Petitioner/Applicant has not demonstrated that is formulated any terms of reference or sought approval of the National Environmental Management Authority to conduct the purported Environmental Impact Assessment and/or abide by the recommended guidelines and standards of the authorized entity in order to offer credence to the impugned report.
18. That similarly, too, without prejudice to any contestations contained herein, it is undisputed that it is disclosed that the purported Environmental Impact Assessment Report was prepared on the



30th December, 2021, a period of on or about twenty nine (29) months prior to the filing of this present Application and Petition; therefore; it cannot be relied upon by this Honourable Court as an accurate and/or correct representation of the current state of affairs of the 3rd Respondent. That in the alternative and without prejudice to any other contestations made herein, the impugned assessment report does not demonstrate and/or disclose any of the allegations made, in terms; vehicles being driven and hooted loudly, disposal of liquid waste, broken bottles, contraceptive material, noisemaking, quarrelling and fighting by the patrons and/or the Petitioners undertaking any cleaning and disposal at their own costs.

19. Consequently, the 3rd Respondent avers lack of relevant and requisite evidentiary material to warrant the reliefs sought. He urged that the petition be dismissed with costs.

Submissions

20. The Petitioners filed submissions dated 9th November 2024, 1st and 2nd Respondents filed submissions date 5th December 2024 and supplementary submissions dated 4th February 2025 while 3rd Respondent filed submissions dated 4th December 2024.
21. The Petitioners based their submissions on reliance of the case of Amani Residents Welfare Association v Senteu t/a Cocorico Wines & 5 Others (2024) stating that representing the residents of Riverside Westend in Nairobi, they seek to address the severe disturbances caused by the 3rd Respondent, a commercial establishment operating as a bar/club in their residential area.
22. That the residents, who had settled in the area for its peace and tranquillity, are subjected to excessive noise from loud music, disruptions from patrons, and unsanitary waste disposal from the said club located near Strathmore School and a religious temple, posing security risks and health hazards.
23. That the petitioners documented these issues with an expert's Environmental Impact Assessment, highlighting the deterioration of their quality of life, particularly the adverse effects on children, the elderly, and the community's well-being.
24. The Petitioners argue that their constitutional rights to peacefully enjoy their property and live in a clean and healthy environment have been violated by the actions and omissions of the Respondents, particularly the 3rd Respondent.
25. That despite their repeated efforts to address the situation, including formal complaints to the relevant authorities, the 3rd Respondent persisted in its activities, disregarding zoning regulations and local development plans and the Respondents deny receiving these complaints and dispute the authenticity of the environmental impact assessment report.
26. The Petitioners submitted that even after conservatory orders were issued, the establishment continued its operations without any attempt to remedy the situation, worsening the residents' living conditions.
27. The Petitioners contend that constitutional protections cannot be overridden by policy documents and in support relied in the case of Amani Residents Welfare Association/Mirema v Senteu t/a Cocorico Wines & 5 Others (Environment & Land Petition E031 of 2022) [2024] KEELC 5172 (KLR), which addressed similar issues in the Mirema area, including the cancellation of liquor licenses and injunctions against noise pollution.
28. They submitted that their claims stand to enforce these rights under provisions such as Section 3(3) of the Environment Management and Co-ordination Act, which empowers individuals to enforce the right to a clean and healthy environment. That the cited case references various constitutional articles,



- including Article 28 (right to dignity), Article 42 (right to a clean environment), and Article 53 (best interests of the child), which are in support of their petition.
29. That also, the roles of the county government in land use planning and licensing are emphasized in it, highlighting the unlawful commercial activities and liquor licenses granted within residential zones.
 30. The Petitioners submit that Nairobi City County Land Use Policy designates various zones of the city for different developmental uses and the 3rd Respondent is operating within Zone 5C, Lavington, designated as “Mixed Use development: Residential (Single Dwelling), Institutional, Educational, Offices” which is unlawful and their commercial activities also violate the constitutional rights of residents.
 31. That development and trade licenses should only be issued in compliance with relevant regulations, including the Physical & Land Use Planning Act and the *Alcoholic Drinks Control Act*. Section 66 of the Physical & Land Use Planning Act and Section 12 of the *Alcoholic Drinks Control Act* which prohibit issuing licenses for commercial or liquor use without the required development permissions.
 32. They submit that their claim revolves around several violations of fundamental rights under *the Constitution* of Kenya, specifically the right to a clean and healthy environment as guaranteed by Article 42 and further operationalized under Article 70, which allows individuals to seek redress if they believe their environmental rights have been violated.
 33. Citing the case of Amani Residents Welfare Association/Mirema v Senteu t/a Cocorico Wines & 5 Others (2024) and Muimara Estate Residents vs Nairobi City County & 2 Others (2018) eKLR, where it was emphasized that a clean and healthy environment should be free from pollutants such as noise, which can significantly impact residents' quality of life.
 34. That the noise, waste, and general environmental pollution caused by the 3rd Respondent's activities, including loud music and improper waste disposal, violate the rights of the Petitioner and its members, including vulnerable groups such as children and the elderly, to live in a dignified and healthy environment as enshrined in Article 42 of *the Constitution*.
 35. The Petitioners also relied on the decision in Amani Residents Welfare Association/Mirema(supra), to address the issue of waste disposal where the court found that the discharge of raw sewage by the 1st Respondent thereon was a health hazard and violated environmental laws, particularly Section 87 of the Environmental Management and Coordination Act (EMCA), which prohibits activities that harm the environment or public health.
 36. The Petitioners argue that the 3rd Respondent's failure to manage waste properly and the noise pollution from their establishment are clear infringements of their constitutional rights. Drawing from Criticos v National Bank of Kenya (2022) and the Elisabeth Kurer Heier (2020) cases, the Petitioner underscores that expert reports on noise pollution and environmental impact, which have not been effectively countered by the Respondents, further validate their claims.
 37. The Petitioners submitted that the 1st and 2nd Respondents, are tasked with issuing trade and liquor licenses within the Nairobi County and have neglecting their constitutional and statutory duties, leading to a violation of the Petitioner members' rights. In support of their argument, they cited the case of Amani Residents Welfare Association / Mirema (2024) (supra), where the the court highlighted the failure of government agencies to act upon complaints, violate the constitutional principles of responsiveness and accountability under Article 232 of *the Constitution*.
 38. That in the cited case, the 6th Respondent issued liquor licenses to establishments operating in residential areas, contrary to the Nairobi City County Alcoholic Drinks Control and Licensing Act,



- 2014 and similarly, the 1st and 2nd Respondents in this case have granted licenses to the 3rd Respondent without considering the detrimental impact on the residents, ignoring the constitutional requirement for fair administrative action under Article 47 of *the Constitution*.
39. The Petitioners contended that the 1st and 2nd Respondents rely on policies that override constitutional provisions and in support cited the case of Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others (2015), where the court emphasized that the national values and principles of governance in Article 10 of *the Constitution*, which include transparency, accountability, and respect for human rights, are justiciable and enforceable.
 40. That the failure of the Respondents to respond to complaints, coupled with their disregard for the law, has resulted in a violation of the Petitioners' rights to a clean and healthy environment and the enjoyment of their property.
 41. They submitted that the court's findings in Amani Residents Welfare Association reinforce this position, concluding that the 1st and 2nd Respondents abdicated their constitutional responsibilities, leading to a breach of the Petitioners' rights, and thus, the second issue merits a determination in the affirmative.
 42. The 1st and 2nd Respondents submitted that core issue in this petition is whether the Petitioner has demonstrated sufficient constitutional violations by them to justify the cancellation and revocation of the licenses granted to the 3rd Respondent.
 43. They submitted that the Petitioners failed to provide substantial evidence to support the allegations of constitutional violations, particularly regarding noise pollution and in support cited the landmark case of Anarita Karimi Njeru v Republic (1979), emphasizing that for constitutional redress, the Petitioner must precisely state the provisions allegedly violated and how they were breached.
 44. They stated that the Petitioners submitted an unverified report from Afriland Valuers, which lacked crucial details, such as authorship, date, and clear connection to the case at hand and additionally the pictures included in the report showed unidentified locations and were not backed by scientific data to prove the claimed noise pollution.
 45. They cited Kibos Distillers Limited & 4 others v Benson Ambuti Adegga (2020), which held that mere complaints are insufficient without technical proof.
 46. The 1st and 2nd Respondents defended their actions by referring to relevant zoning regulations and licensing processes, confirming that the 3rd Respondent's licenses were granted in compliance with the law and relied in the case of Orodí & 11 others v Oyugi & 3 others (2023), where a similar case was dismissed due to a lack of evidence of noise exceeding legally permissible levels.
 47. In their supplementary submissions, the 1st and 2nd Respondents submitted that on 23rd January 2025, it was observed that the Environment Impact Assessment (EIA) Report submitted by the Petitioners on 24th May 2024 was incomplete, containing only odd-numbered pages but they sought leave to file the missing even-numbered pages, which was granted by the Court. They submitted that the central issue for determination was whether the EIA Report, as the Petitioner's primary evidence, had probative value in the case.
 48. The 1st and 2nd Respondents argued that the EIA Report should be disregarded, primarily because it was produced without the expert author, Vincent K. Kiptoo, swearing an affidavit to explain the document's contents and in support cited the case of Maina Thiongo v Republic (2017)Eklr, which set out the requirements for expert evidence, emphasizing that an expert witness must establish their qualifications, provide the criteria of their expertise, and explain the facts supporting their conclusions.



49. That without Kiptoo’s testimony, the Respondents argued that the EIA Report lacked the necessary foundation for the Court to assess its accuracy. The Respondents further challenged the credibility of the EIA Report, noting several inconsistencies and weaknesses such that it was dated 30th December 2021 but was filed three years later in May 2024, raising concerns about its relevance and reliability.
50. That also the report contained unverifiable images and unsupported allegations, such as unsubstantiated claims of noise pollution and traffic congestion and in support relied in the case of *Mutonyi v Republic* (1982), where the Court emphasized that expert opinions must be based on empirical, technical evidence, which the Petitioners failed to provide in this case.
51. On the other hand, the 3rd Respondent submitted that Petitioner’s reliance on prior case law is misplaced, as there are key distinctions between those cases and the present Petition, for example, the Petitioner has failed to involve the National Environmental Management Authority (NEMA) or present an inspection report from them, which was a crucial part of the case the Petitioner cites as a precedent.
52. The 3rd Respondent submitted that the primary issue revolves around the burden and incidence of proof, particularly regarding the Petitioner’s reliance on an impugned expert report.
53. That the Petitioner, according to Sections 107 and 108 of the *Evidence Act*, must prove its allegations by presenting cogent and admissible evidence of which they have failed to demonstrate the requisite expertise in environmental science for Bill Kipsang Rotich, the purported expert, to properly adduce the report but also the said report fails to meet the legal standards of admissibility and cogency as per Section 48 of the *Evidence Act*, which requires that expert evidence must be provided by individuals with relevant scientific qualifications.
54. That the case of *Criticos* illustrates that for expert evidence to be considered, the expert must testify and provide the report and failure to do so renders the report inadmissible and, consequently, deprives the Respondent of a fair opportunity to rebut the evidence, violating their right to a fair hearing.
55. Further, the case of *Mutonyi vs Republic* (1982) KLR reinforces the need for expert witnesses to establish their qualifications before providing their expert opinion. That an expert must prove their special skills and ensure that the court can independently assess their conclusions and without such qualifications, the Petitioner cannot shift the burden of proof to the Respondents to disprove an unsupported claim.
56. Also as seen in *Mbuthia Macharia v Annah Mutua* [2017] eKLR, while the legal burden of proof remains on the Petitioner, the evidential burden may shift during trial based on the evidence presented and in this case, the Petitioner has failed to meet its burden of proof by not providing sufficient evidence to substantiate its claims, thus preventing the Respondents from having to disprove unproven allegations.
57. Regarding the violation of constitutional rights, the 3rd Respondent submitted that the Petitioner must demonstrate with precision the specific rights that were infringed and the manner in which the violations occurred, as established in *Annarita Karimi Njeru vs Republic* (No.1) [1979] KLR.
58. That the Petitioner’s claims about noise pollution, waste disposal, and security risks are not supported by credible evidence and as emphasized in the case of *Communications Commission of Kenya vs. Royal Media Services Limited & 5 Others* [2014] Eklr the Petitioner must show not only the rights infringed but also the basis of the grievance.



59. The 3rd Respondent submitted that the Petitioner has failed to provide any corroborative material to substantiate the alleged violations, such as receipts or proof of cleaning services for waste disposal. That the report produced is from 2021, a period well before the filing of this Petition, rendering it irrelevant to the current circumstances and in support cited the case of *Kibos Distillers Ltd & 4 others vs Benson Ambuti Adegwa* [2020] where it was held expert reports must be timely and relevant to the issues at hand.
60. Additionally, that the Petitioner has not provided sufficient evidence to challenge the zoning of the 3rd Respondent's establishment, which is situated in a mixed-use development zone. That a review of the Unified Business Permit (contained as JKM-1 in the 3rd Respondents Replying Affidavit) discloses that the 3rd Respondent is situated along Riverside Drive which is categorized as part of Kileleshwa; which under the zoning structure is classified under Category 4C, designated as a Mixed Development area such that it allows accommodation of the 3rd Respondent. Top of Form Bottom of Form

Analysis & Determination:

61. The parties proposed prosecution of the petition by way of written submissions. I have read and considered the submissions filed and will make references to the relevant portions in the body of this judgment. For the record, the petitioner's submission is dated 9th November, 2024 together with the case law attached. The 1st and 2nd Respondent's submissions are dated 5th December, 2024 which the 3rd Respondent's submission is dated 4th December, 2024.
62. Having considered the pleadings filed and submissions rendered, I frame the following questions for determination:
- i. Whether or not the Petitioner has proved all the headings of the violations alleged
 - ii. Whether or not the Petitioner proved the alleged violation of the Zoning Rules
 - iii. Whether the reliefs sought can be granted
63. The rights of the members of the Petitioner allegedly violated by the 3rd Respondent as captured in the petition were already highlighted in the paragraphs containing summaries of the pleadings. The 3rd Respondent also summarizes them in paragraph 36 of its submissions thus; Motor vehicles being hooted and driven loudly at all times Noise making/pollution, quarreling and shouting by patrons. Disposal of solid waste and liquid waste, broken bottles and used contraceptive materials. The Association undertaking cleaning of such waste at its own costs.
64. The Petitioner cited *Omange J. in the case of Amani Residents Association Vs Senteu t/a Coconio Wines and Spirits & 5 Others (2024) KEELC 5172 (KLR)* which it averred had similar facts to their case. That said, the Petitioner is obligated in law to demonstrate that the alleged rights of its members had been violated. In its endeavour to do so, it relied on its pleadings and the following documents;
- a. An EIA report of Ibury Lounge on title No. 3734/971 prepared by Afriland Valuers Ltd.
 - b. Letter dated 24th August, 2021 to the County Secretary Nairobi City.
 - c. Letter dated 6th June, 2022 by Echessa and Bwire Advocates addressed to the Director General, Nairobi Metropolitan Services.
 - d. Letter dated 19th March, 2024 by the same law firm to Principal Secretary Ministry of Interior and National Administration, the Inspector General of Police amongst others.



65. The 1st – 3rd Respondents have criticized the E.I.A report by the Petitioner for reasons inter alia that it lacks specificity and does not demonstrate any violation of the Petitioner’s constitutional rights. The report stated that the study was conducted to evaluate the impacts of operation of “Ibury Lounge” on the environment of the immediate residential neighborhood.
66. The report discussed the legal and regulatory frame work applicable to the matters he addressed. At page 11 of the report, there are pictures taken on 8th and 12th December, 2021 but there is no writing under it to offer any explanation of what the pictures were intended for. The author stated that the club operates 24 hours with the busiest times being between 5pm – 12 am.
67. Under paragraph 4.0, the report itemized and discussed what were identified as environment problems to include; incompatible land use, noise pollution, waste disposal and social disruptions. For disposal of water, the author said that “due to the intensive activities at the club and high population, the waste water system gets clogged frequently and an exhauster is brought in to remove the waste. The process of exhausting generates noise disturbing the peace in the immediate neighbourhood.”
68. This summary given above does not state particulars of how often the exhauster is brought to remove the waste and the source of data to support the argument of high population in the club and whether the level of noise from the exhauster exceeds the permissible levels.
69. The report further recited the First Schedule of the Regulations that provide for the permissible levels of noise. For residential areas, indoor level is set at 45 decibels and for outdoor at 50 decibels during the day and 35 decibels at night. It also put the permissible levels for mixed development at 55 decibels during the day and 35 decibels at night. While for commercial premises, the levels are put at 60 daytime and 35 at night. The Schedule also gives the noise rating levels ranging between 30-50 decibels day time and 25 decibels at night for all the premises stated herein.
70. The Petitioner’s case is that the 3rd Respondent’s club is emitting noise that is loud and in violation of the environmental rights. To prove their case, they rely on the report which gave the sources of noise to be from, the gathering of many persons patronizing the club and the equipment installed at the club. In regard to the claim of noise emanating from persons patronizing the club, the Petitioner’s expert stated these persons numbering 300-400 on busy days generate lively conversions whose pitch increases among those who imbibe alcohol as they become tipsy.
71. The Petitioner submitted and pleaded that patrons of the 3rd Respondent have persistently hooted and driven off loudly at all times including in the dead of the night. This may be true as a result of effects of alcohol on certain people. However, the 3rd Respondent denied the accusation which then placed a duty on the petitioner to prove. The 3rd Respondent cited the case of Phoebe Wangui Gakui Vs Lucy Wambui & 2 others (2021) eKLR for the proposition that any person who wants the court to determine in their favour must of necessity place before the court credible and sufficient material. In the instant case, what has been presented is statement in a report and affidavit of Bill Kipsang with no data or material to corroborate the assertions.
72. With regard to noise from equipment’s installed the Petitioner pleaded and submitted that the 3rd Respondent to-date insist on playing loud music far beyond reasonable decibels from dusk till dawn which the area residents find torturous and difficult to endure their changed living conditions. The report gave what it called sound levels measured inside the club at 21:09 p.m. The levels indicated in the picture of the sound meter at page 21 reads 83 and 84.
73. The regulations also prohibit the use of any sound amplifying equipment that is likely to be heard outside any building between the hours of 9p.m and 7:30a.m. without a valid license as per paragraph



16(2) of the Noise Regulations 2009. Under the First Schedule of the Regulations, the indoor levels are not supposed to exceed 25 decibels. The inference drawn is that even with a license, anything above the permitted levels is considered as noise pollution.

74. The 1st and 2nd Respondents stated that under Regulation 6 of the EMCA Noise Regulations they are mandated to measure alleged noise levels. They discredited the expert report produced by the Petitioner but despite having the mandate to measure the noise levels, they have not presented an alternative report to contradict the allegations of the Petitioner.
75. They also deposed that no objections were received from the Petitioner and the Stakeholders paving way for the issuance of the license to the 3rd Respondent. The 1st and 2nd Respondents do not however disclose details of how the stakeholders were contacted that would have made it possible for their giving of objections/feedback. This in itself contravened the provisions of article 10 and 47 of *the Constitution* on the right to fair administrative action for decisions which affected the Petitioner.
76. The 3rd Respondent deposed that the report relied on by the Petitioner did not set out the Terms of Reference and that they were not made aware when the exercise was being done. In paragraph 1.0 of the report, the author set out the scope of his instruction which was to evaluate the impacts of operation of Ibury Lounge on the neighbours and the regulatory framework. The report is produced as evidence from an opponent and therefore they were not under obligation to inform the 3rd Respondent about the exercise which generated the report. Nothing stopped the Respondents from either asking to cross-examine the maker and or preparing their own report to give the sound levels at the club at night.
77. The other issue raised by the Petitioners was on disposal of solid and liquid waste from the 3rd Respondent's establishment which included broken bottles and condoms. This is what the report said on solid waste;

“the patrons who frequent the club end up being disorderly when drunk and drop various items along Sri Aurobindo Avenue. These solids which at times include beer bottles litter the neighbourhood and make the place unsightly and pose health risks to pedestrians and neighbours”

78. The other issue raised was the unsightly disposal of waste by the 3rd Respondent. According to the Petitioner, the findings of the report confirmed their grievances. Again, the report did not present sufficient data and it is therefore inconclusive.
79. In respect to the validity of the license issued to the 3rd Respondent, the Petitioner quoted section 12 of the Alcoholic Drinks Control Cap 121 of the Laws of Kenya which states thus;
- (1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied—
- (a) that it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometre and the permitted maximum number of such premises as shall be prescribed by law:
- Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws;



80. All the Parties agree the neighbourhood where the premises housing Ibury Lounge is within residential premises. The point of departure is the averment by the Respondents that the area is now zoned as mixed development. The 1st and 2nd Respondents cited clause 1.3.2 of the Nairobi County Land Use Policy to justify that indeed the area is meant for mixed development. The document attached did not include a gazette notice to confirm that it has met the legal threshold for standards of an approved policy.
81. Besides, the clause 1.3.2 quoted reads thus “Commercial Land Use include town centers, local centers, markets, wholesale and retail shops, malls, financial institutions, small to medium scale businesses, hotels and restaurants. Professional offices and office blocks.” They argued further that the impugned area is zoned as 4C which includes the area between Riverside Drive, Dennis Pritt Road Oloitoktok road is for mixed development.
82. This policy, which lacks confirmation whether it is approved or not regulates the said area for mixed development, commercial, residential and offices. Thus the 1st and 2nd Respondents needed to demonstrate that area along Sri Aurobundo Road falls within which category of the four activities provided for. It is still within their mandate to plan which areas with zone 4C would be for office blocks or residential et al. Generalizing the matter is a sign dereliction of duty.
83. The 1st and 3rd Respondents argued that the Petitioner failed to show how the best interests of the children under Article 53 (2) of *the Constitution* of Kenya 2010 have been violated by the 1st and 2nd Respondent as well the rights of the older members of society under Article 57 of *the Constitution* of Kenya 2010. Once the Petitioner proved that the level of noise being emitted from the suit premises was beyond the levels permitted by the regulations means there was evidence of pollution being suffered.
84. The absence of a peaceful and quite environment does affect everyone in that neighbourhood and mentioning the rights of the children and older members of the society as being affected was intended to highlight the matter. I say so because, one cannot deny that these members mentioned are immuned to loud noise.
85. The Petitioner provided technical evidence in the form of a technical report which was not contradicted and this is in line by the case cited by the Court of Appeal in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others* (Civil Appeal 153 of 2019) [2020] KECA 875 (KLR) (31 January 2020) (Judgment), Hon. Justices Asike-Makhandia, Patrick Kiage and Otieno-Odek (the late), held as follows regarding proof of environmental pollution:
- ‘...Proof that a complaint had been raised years before is not proof of environmental degradation. Pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions.’
86. The 3rd Respondent submitted that this Petition should fail because of non-joinder of NEMA to these proceedings. I agree that the Environmental Management and Coordination Act gives NEMA overall coordination over environmental matters. However, this Petition is specific to a license issued by the 1st Respondent. Secondly, the 2nd Respondent has deposed that under regulation 6 of the Noise Regulations 2009, it is the body mandated to deal with measuring the noise levels within Nairobi City County. I do not find that failure to join NEMA was fatal to the Petition.
87. Without repeating myself, as regards the skills of Mr Vincent Kiptoo who prepared the report produced by the Petitioner, the parties agreed to prosecuting the Petition by way of affidavit evidence. Nothing



barred any of the Respondents to apply to cross-examine that witness before the filing of the written submissions. The 3rd Respondents cannot in their submissions now say that,

“that allowing the production of expert witness evidence by a non-expert not only deprives the Respondents; especially, the 3rd Respondent, of the opportunity to concisely examine the contents of the document and to offer adequate expert rebuttal but also creates an undesirable precedent where the expert’s evidence is produced in a casual manner and ends up being the basis of a conviction and/or finding of culpability; thereby violating the right to a fair hearing.”

88. On the question whether or not the Petition pleaded particulars of the alleged breach of the rights as stated in the *Annarita Karimi Njeru vs Republic (No.1) [1979] KLR 154*, I am persuaded it did. Therefore, taking the totality of the evidence presented and the submissions rendered, I am satisfied that the petitioner has proved violations of their rights under two headings from what was pleaded. These are; evidence of noise pollution and the issuing of the license contravened the provisions of article 10 and 47 of *the Constitution* and section 12 (1) of the *Alcoholic Drinks Control Act*, cap 121 of the Laws of Kenya.
89. Consequently, I enter judgement in favour of the Petitioner and grant the prayers (a), (c), (d), (e), (f), (h) and (i) of the Petition as follows:
- a. A declaration is hereby issued declaring that the act of the 1st and 2nd Respondents to licence the 3rd Respondent to operate a public house (the iBury Lounge) that dispenses alcohol, and plays loud disco music at night that emit noise at all times including the dead of the night, along Sri Aurobindo Road, in Lavington, Nairobi, Next to the residences of the members of the petitioner is an egregious contravention to the fundamental rights of members of the Petitioners guaranteed under Articles 42, 53(1)(d) & (2) and 57(c) of the Constitution of Kenya;
 - b. An order of certiorari is granted bringing into this court and quashing the trade licenses issued by the 1st and 2nd Respondents to the 3rd Respondent to conduct bar business known as “iBury Lounge” or howsoever registered at its site along Sri Aurobindo Road in Lavington next to the residences of the members of the Petitioner.
 - c. A mandatory Order of injunction is hereby issued compelling the Respondents to forthwith close down the bar business in the name and style and name of iBury Lounge or howsoever registered at its site, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the members of the Petitioner;
 - d. A permanent injunction is issued restraining the Respondents whether by themselves, agents, nominees or any person whosoever, from operating a bar of alcohol dispensing business in the name and style of iBury Lounge or howsoever registered at its site, along Sri Aurobindo Road, in Lavington, Nairobi, next to the residences of the Petitioner;
 - e. The Petitioner is awarded half costs of the petition.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 13TH OF MARCH, 2025

A. OMOLLO

JUDGE

