



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bamrah v Botrack Limited (Environment & Land Case  
E073 of 2025) [2025] KEELC 3457 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E073 OF 2025**

**CA OCHIENG, J**

**APRIL 28, 2025**

**BETWEEN**

**KEEMTI BAMRAH ..... PLAINTIFF**

**AND**

**BOTRACK LIMITED ..... DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated the 26<sup>th</sup> February 2025 where he seeks the following Orders:
  1. Spent.
  2. Spent.
  3. Spent.
  4. Abandoned.
  5. That pending hearing and determination of this suit, a temporary order of injunction do hereby issue restraining the Defendant whether by itself /through his contractors, or whatsoever from carrying out/ continuing with excavations for its proposed residential development of apartments and basement parking on Plot LR 209/1509 along Arboretum drive in Kileleshwa thereby causing nuisance, sound and air pollution and vibration threatening destruction, wasting away and collapse of the Plaintiff's residential house as well as the boundary fence of the Plaintiff's plot Title Nairobi/Block 25/76 along Arboretum Drive in Kileleshwa in Nairobi City County and making the said residence hazardous and inhabitable.
  6. That in the alternative to prayer (2) and (5 ) above, a mandatory order be and is hereby given directing the Defendant to relocate and pay for the Plaintiff's rental costs to an alternative home of similar standard and area to the Plaintiff's residence on Title Nairobi/Block 25/76



on a suitable house of the Plaintiff's choice in Arboretum drive in Kileleshwa in Nairobi City County pending excavations and completion of proposed 16 level residential apartments and basement parking on the Defendant's plot LR No. 209/1509 along Aboretum Derive in Kileleshwa with definite completion date.

7. That cost this application be in the cause.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on 26<sup>th</sup> February 2025. He confirms being the registered owner of a four (4) bedroom residential property and home known as Title Nairobi/Block 25/76 (formerly LR No. 209/1520/3) measuring ½ an acre along Arboretum Drive in Kileleshwa, secured by electric boundary fence whereon he has been living with his family for more than twenty (20) years, while the Defendant owns Plot LR No.209/ 1509, which shares a common boundary with his property on the westside.
3. He contends that on diverse dates in late 2024, the Defendant put up a bill board on its property advertising development of a proposed sixteen (16) level residential apartments and basement parking comprising 197-unit apartments. Further, that it commenced massive excavations with heavy equipment for construction of the foundation and basement parking thereon.
4. He claims that the said excavations are causing nuisance with high sound pollution of over 70-80 decibels that is likely to cause permanent damage to hearing, air pollution of upto 70 BP rendering his residence uninhabitable. Further, this has greatly interfered with his quiet living and enjoyment of the suit property and violates his right to clean and healthy environment.
5. He avers that pursuant to an expert report from Engineer Nathaniel Matalanga t/a Ngasi Consulting Engineers, the excavations on the Defendant's parcel are causing heavy vibrations to the rock's strata and foundation of his house and boundary wall thereby exponentially weakening the foundation and structure of his house and boundary wall, which may lead to sudden collapse of his house and sections of the boundary wall bordering the Defendant's parcel.
6. Further, that the boundary fence on the side of the Defendant's plot has already collapsed and some electric poles were pulled out and stolen by unknown persons thereby heightening insecurity to his property causing hardship, inconvenience and interference with his quiet and peaceful enjoyment of the suit property.
7. The application is opposed by the Defendant vide a replying affidavit sworn by its Project Manager Mavji Varsani. He confirms that the Defendant owns LR No. 209/1509, which abuts the Plaintiff's property. He explains that in 2023, the Defendant started the process of applying for an Environmental Impact Assessment and a report thereof was submitted to NEMA on 7<sup>th</sup> February 2023. Further, that the Plaintiff was part of the public participation exercises conducted by the Defendant as he attended three (3) of its meetings in February and March, 2023 respectively.
8. He admits that the Defendant is in the process of excavating on its parcel but contends that during construction, there is a permissible level of noise that will occur, which is within the limits. Further, he disputes the claim by the Plaintiff with respect to sound decibel levels particularly the methods of measurement which are unilateral, measured at unknown times and using an unknown device.
9. With respect to the report by Engineer Nathaniel Matalanga, he contends that it is his opinion, it was solely commissioned by the Plaintiff but the Defendant has requested the Plaintiff to grant it access to his premises to view the alleged damage to foundations and boundary wall and engage an expert of its own as well.



10. He explains that the Defendant and the Plaintiff agreed that the boundary fence be repaired at the contractor's cost and the same was done and new electric fences were installed, after which the obligation to keep the fence powered rests with the Plaintiff.
11. He states that in the past, the Defendant has offered to install security personnel on the Plaintiff's property but he rejected the offer. Further, despite the rejection, the Defendant has installed high intensity lights on sight for vigilance during the night time to minimize security risks.
12. He reaffirms that while the Defendant has undertaken major upgrading of storm water drainage from the main road to the adjacent river at its own costs, the Plaintiff is drawing storm water through the Defendant's property, which itself is a nuisance thus the Plaintiff has approached the court with unclean hands and his requests are unreasonable attempting to steal a match /unjustly enrich himself by having the Defendant commit to undertakings beyond the scope of the EIA Licence issued by NEMA.
13. He points out that despite the Plaintiff sending a demand dated the 11<sup>th</sup> February 2025 and the Defendant offering to meet vide its reply dated the 18<sup>th</sup> February 2025, to discuss any difference and settle the matter amicably, the Plaintiff proceeded to file this suit.
14. He argues that if the project is stopped, the Defendant would suffer loss including damage, due to delays arising from the construction contract, delays in completing the project, which would lead to purchasers cancelling their contracts, default on bank loans and other escalating costs, which would lead to the project becoming unviable.
15. In his further affidavit, Mr. Varsani annexed two (2) reports of geotechnical inspections done on the site and contended that it was established during the excavation process that there was more hard rock underneath the surface than expected which resulted in a second report being commissioned. Further, that the Defendant also carried out a systemic test on 6<sup>th</sup> November 2024 with respect to the project site to ensure that every step is being done to carry out excavation and construction safely.
16. He reiterates that the varying geographical profile of the project site resulted in the prolonged and difficult excavation process and is the reason for minimal and elevated noise on several occasions but the Defendant has also done shotcrete and shoring during excavation to protect the integrity and foundations of the compound wall and the structure of the house from any run off soil.
17. He insists that the Defendant had taken out an insurance cover that would cater for third party risks in the event of any unfortunate circumstances that would befall during excavation and construction.
18. In response, the Plaintiff filed a supplementary affidavit reiterating his averments in his supporting affidavit. He contends that the replying affidavit herein is incompetent for want of requisite authority by the Defendant. He denies that he has been draining storm water to the Defendant's parcel and contends that the excavations are increasingly causing cracks and weakening of the rock's strata holding the foundation of his house. Further, that the effects of the sound pollution and heavy vibrations coming from the construction site will cause irreparable harm and damage particularly permanent hearing damage to his family, which irreversible loss.
19. He avers that there is no privity of contract between the Defendant's insurance and himself hence an insurance cover cannot mitigate the harm and irreparable loss that is flowing from the escaping vibrations and sound pollution from the Defendant's plot. Further, that the Defendant has no resettlement plan to mitigate the effects of the vibrations and sound pollution escaping from its plot to his.



20. He insists that no measure has been demonstrated to keep the noise within the site of works and that approval of the project does not mean approval of the potential risks and harm. He claims that the NEMA License dated the 6<sup>th</sup> June 2023, does not exempt the Defendant from consequences of strict liability tort forming the cause of action in this suit.
21. While noting that the EIA licences and project report have been provided in the replying affidavit, he claims that sound and air pollution compliance has not been demonstrated and that since the Defendant is the author of his misfortune, he cannot allege substantial loss resulting from the consequences of breach of the duty of care forming subject of the suit.
22. The parties made oral submissions to canvass the instant application.

### **Submissions**

23. The Plaintiff's Counsel submitted that the Structural Engineer's Report in the Plaintiff's bundle indicates that he has established a prima facie case and that he will suffer irreparable loss if the orders sought are not granted. He argued that clause 1.6, 2.12 and 2.14 of the NEMA License issued to the Defendant does not approve violation on the Plaintiff's property. Further, that since there is no Settlement Action Plan from the Defendant, the balance of convenience favours grant of orders of injunction.
24. On his part, Counsel for the Defendant submitted that there is no proof that sound and vibration effects are irreversible. He also argued that there is no violation of conditions set out in the NEMA license and that excavation is temporary to create a foundation. He submitted that the balance of convenience lies in the Defendant's favour since if construction is stopped or abandoned, it will lead to further security risk.
25. The Defendant's Counsel relied on its List of Authorities which included: *Alexander Juras & another v John Katana Baya t/a Club4fun Restaurant, Pool and Bar* [2019] KEELC 4888 (KLR), *Ndesandjo v Mint Shack Limited & 5 others; Peponi Road Resident's Association (Interested Party)* [2022] KEELC 12796 (KLR), *Jaygee Limited & Another v Githome t/a The Wine & Bottle Bar & Grill & 2 Others* [2024] KEELC 558 (KLR) as well as *Orbit Chemicals Industries v Professor David M. Ndeti* [2021] KECA 741 (KLR).

### **Analysis and Determination**

26. Upon consideration of the instant Notice of Motion application including the respective affidavits, annexures and Counsels' submissions, the only issue for determination is whether the Plaintiff has met the threshold for grant of interlocutory injunction as sought.
27. In line with the principles established in the case of *Giella v Cassman Brown* [1973] EA 358 and the description of a prima facie case as espoused in *Mrao Ltd v First American Bank Limited* (2003) eKLR, I will proceed to decipher whether the Plaintiff has established a prima facie case to warrant the orders as sought.
28. The Plaintiff has sought for orders of interlocutory injunction to restrain the Defendant or its agents from carrying out or continuing with excavations for its proposed residential development of apartments and basement parking on Plot LR 209/1509 along Arboretum drive in Kileleshwa or in the alternative that the Defendant be directed to relocate and pay for him, the rental costs to an alternative home of similar standard as well as area, pending excavations and completion of the proposed residential apartments.



29. The Defendant has vehemently opposed the instant application and claims that, it has obtained all the necessary approvals to put up residential apartments on its parcel of land, which is adjacent to the Plaintiff's residential home. It insists that excavation is temporary and that the noise emanating from the site is of permissible level. Further, that it repaired the Plaintiff's perimeter wall and stopping the project would cause it more harm.
30. I note the Plaintiff produced a Structural Engineer's report which was annexed to his supporting affidavit. Further, the Defendant did not deny that the excavations had caused some damage on the Plaintiff's perimeter wall and actually admitted conducting certain repairs on the said wall. The question we need to ponder is whether the Defendant is obliged to protect the adjacent Plaintiff's parcel of land even where its project is licensed or if the noise from vibration is causing irreparable damage to the Plaintiff and his family.
31. In *Registered Trustees of the Missionary Sisters of the Precious Blood of Kenya v Goodman Agencies Ltd & Another* (Environment & Land Case 750 of 2012) [2022] KEELC 2755 (KLR) (22 July 2022) (Judgment), it was held that:
- “It does therefore emerge from the totality of the evidence before this court that proper underpinning was required to protect the plaintiff's existing properties, taking into account the depth of the excavation and the fact that the defendants were carrying out a beacon to beacon excavation. They failed to do proper underpinning and instead opted to do shot-creting. The shot-creting failed.”
32. While in *Pastor James Jessie Gitahi & 202 Others v Attorney General* [2013] eKLR it was held that:
- “.....prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibrations transmitted to the human body though solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the levels of noise through the regulations.....which have a general prohibition against loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort repose, health or safety of others and the environment. In determining whether the noise is loud several factors are considered including the time of day, the proximity to a residential neighbourhood, whether the noise is recurrent, intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanized means or whether the noise can be controlled without effort or expense to the person making the noise”.
33. While in the case of *Alexander Juras & Another v John Katana Baya t/a Club4fun Restaurant, Pool and Bar* [2019] KEELC 4888 (KLR) it was held that:
- “In the matter before me, the Plaintiffs have not exhibited any guidelines that may have been issued by NEMA for the measurement of noise and excessive vibration. Nor have they demonstrated to this Court how they measured the noise levels emanating from the Defendant's establishment to determine that the same were excessively loud and injurious to their health and that of the environment.”
34. See also the case of *Jaygee Limited & Another v Githome t/a The Wine & Bottle Bar & Grill & 2 Others* [2024] KEELC 558 (KLR).



35. Based on the facts before me, while associating myself with the decisions cited, at this juncture, I opine that the only issue to confirm is whether the Plaintiff has established a prima facie case to warrant the granting of the orders sought. In my view, I find that the Plaintiff has indeed established a prima facie case as his perimeter wall was interfered with during excavation, while noise levels are interfering with his family, and he will indeed suffer irreparable harm which cannot be compensated by way of damages.
36. In the circumstances, I find the Notice of Motion application dated the 26<sup>th</sup> February, 2025 merited and will allow it in the following terms:
- i. That pending hearing and determination of this suit, a temporary order of injunction be and is hereby issued restraining the Defendant whether by itself /through his contractors, or whatsoever from carrying out/ continuing with excavations for its proposed residential development of apartments and basement parking on Plot LR 209/1509 along Arboretum drive in Kileleshwa thereby causing nuisance, sound and air pollution and vibration threatening destruction, wasting away and collapse of the Plaintiff's residential house as well as the boundary fence of the Plaintiff's plot Title Nairobi/Block 25/76 along Arboretum Drive in Kileleshwa in Nairobi City County and making the said residence hazardous and inhabitable.
  - ii. Costs of the application will be in the cause

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2025**  
**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Litoro for Applicant

Shah for Respondent

Court Assistant: Joan

