



**Ndesandjo v Mint Shack Limited & 5 others; Association (Interested Party) (Environment and Land Constitutional Petition 54 of 2021) [2022] KEELC 2246 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 2246 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 54 OF 2021  
LN MBUGUA, J  
APRIL 27, 2022**

**BETWEEN**

**RUTH BEATRICE NDESANDJO ..... PETITIONER**

**AND**

**MINT SHACK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
RESPONDENT**

**CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**THE CHAIRPERSON, NAIROBI CITY COUNTY ALCOHOLIC DRINKS AND  
LICENCING BOARD ..... 5<sup>TH</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**PEPONI ROAD RESIDENT'S ASSOCIATION ..... INTERESTED PARTY**

**RULING**

1. The petitioner moved this court by way of a petition dated December 17, 2021 where she is claiming that the 1<sup>st</sup> Respondent has put up a bar and restaurant establishment known as mint shack near the premises of the petitioner thereby causing noise pollution. The petitioner therefore claims violations of various rights including the right to a clean and healthy environment. The suit was filed contemporaneously with an application seeking inter-alia, temporary restraining orders. When the file



was presented to me on March 3, 2022, the 2<sup>nd</sup> Respondent indicated that they had filed a Preliminary Objection seeking to strike out both the application and the Petition, hence this ruling.

2. The grounds raised in the Preliminary Objection dated 2<sup>nd</sup> March 2022 are that;
  - i. The Petition discloses no constitutional issue and it is merely an attempt to constitutionalize matters provided for under the *Environmental Management and Coordination Act* as well as the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009*.
  - ii. The Petition offends the doctrine of constitutional avoidance by seeking application of *the Constitution* on matters fully addressed by a statute.
  - iii. The Petition offends the doctrine of exhaustion in so far as it relates to complaints regarding the condition of the environment in light of Section 32 of the *Environmental Management and Co-ordination Act* (No. 8 of 1999).
3. The court gave directions for parties to file written submissions in respect of the preliminary objection.

### **2<sup>nd</sup> and 5<sup>th</sup> Respondents written submissions**

4. The 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed their submissions dated 8<sup>th</sup> march 2022 where they framed the issue for determination as; Whether the Petition violates the constitutional avoidance and exhaustion doctrines.
5. It was submitted that the Petition could be addressed through other mechanisms and not as a Constitutional Petition and to this end, reference was made to the case of *Ernest C.O. Muga v Attorney General* (2018) eKLR, where it was stated that: "...I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the court which should be followed...". Reference was also made to the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR on the issue of Constitutional avoidance as follows: "...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis..."
6. It was submitted that the petitioner herself had invoked the application of the *Environmental Management and Coordination Act*, (EMCA) 1999 as well as the rules made thereunder. That the EMCA Act as well as the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009* outlined procedures on how disputes relating to noise pollution should be redressed. Rule 25 directed the environmental inspector to serve an improvement notice on any person emitting or likely to emit noise or excessive vibration and the petitioner had annexed a document marked RBN-004 which was a Noise Improvement Notice dated 18<sup>th</sup> October, 2018 adding that failure to comply with such a notice was an offense punishable under the aforementioned laws.
7. The 2<sup>nd</sup> and 5<sup>th</sup> Respondents therefore contend that this suit should not be sustained as a Constitutional Petition. The case of *Wildlife Director (Kenya) v Kenya Wildlife Services & 4 others; Kenya Wildlife Services (Defendant); National Environment Management Authority (Interested Party)* [2020] eKLR was also cited where the court held: "...Where there is a clear procedure for the redress of any particular grievance prescribed by *the constitution* or an Act of Parliament, that procedure should be strictly followed..."



## Petitioner's written submissions

8. No submissions were filed by the Petitioner by 17.3.2022 as directed by the court.

## Analysis and determination

9. I have considered the material and arguments placed before me. The key issue for determination is whether the application and the entire suit should be struck out as outlined in the preliminary objection.
10. It is trite law that a preliminary objection should be raised on points of law which are argued on the assumption that all the facts pleaded by the other side are correct. This was well established in the *locus classicus* case of *Mukisa Biscuits Manufacturing Co. Ltd v West End. Distributors Ltd* [1969] EA 696 and the Supreme Court case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR.
11. The 2<sup>nd</sup> Respondent's objection is on the grounds that the Petition does not disclose any Constitutional issues and it offends the doctrine of Constitutional avoidance as well as the doctrine of exhaustion. The claim of the petitioner is that the noise emanating from the bar and restaurant establishment of the 1<sup>st</sup> Respondent is an affront to her right to a clean and healthy environment.
12. This Court references the Supreme Court of Kenya in *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR where it was stated:
- “(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. (Emphasis own)”
13. Further, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR held:
- “(256) The principle of avoidance entails that a Court will not determine a ... constitutional issue, when a matter may properly be decided on another basis”.
14. The provisions of Rule 25 (2) of the *Environmental Management And Coordination (noise And Excessive Vibration Pollution) (control) Regulations*, 2009 stipulate that;
- “Any person who fails or refuses to not comply with the conditions in an improvement notice commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding more than twenty-four months, or to both”.



15. The provisions of Section 101(a) of the *Environmental Management and Co-ordination Act* provides that:

“The Cabinet Secretary shall, on the recommendation of the Authority...

- a. recommend minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment;

16. Section 140 thereof makes provisions for offences relating to standards.

17. The above provisions of law by and large relate to compliance standards of which none compliance thereof attracts penal consequences.

18. The provisions of Article 70(10) of *the Constitution* provides that:

- “(1) If a person alleges that a right to a clean and healthy environment recognised 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.”

19. Thus the right to a clean and healthy environment is anchored under *the constitution* and can be litigated upon as a constitutional issue despite the existence of other legal remedies available under the relevant statutes. In that regard, I find that the Preliminary Objection is not merited. The same is dismissed with costs to the Petitioner.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Monger for the Petitioner

Anyoka for the 1st & 5th Respondents



Ambala for the 1st Respondent

