



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 683 OF 2009

BETWEEN

PASTOR JAMES JESSIE GITAH

& 202 OTHERS PETITIONERS

AND

THE ATTORNEY GENERAL1ST RESPONDENT

MINISTER FOR ENVIRONMENT AND

MINERAL RESOURCES2ND RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY 3RD RESPONDENT

JUDGMENT

Introduction and Background

1. This Petition has been brought by 203 petitioners who are aggrieved by the provisions of the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009* contained in Legal Notice No. 61 of 2009 (“*the Regulations*”) which are made by the Minister under section 147 of the *Environmental Management and Coordination Act (“EMCA”)*.
2. The 1st petitioner is a Christian pastor, gospel musician and trader in the music industry. The other petitioners are musicians, gospel and secular artisans, traders and businessmen and women in the music industry. They are aggrieved by the *Regulations* which they claim interfere with their livelihood which involves the use of creative sounds and sound effects to reach the public.
3. The petitioners’ claim that they have been arrested and charged for contravening the *Regulations* and as a result they have sustained through loss of business as their sound equipment has been confiscated. They allege that their businesses remain threatened as long as the *Regulations* remain

in force.

Petitioners' Case

4. Through the petition dated 1st December 2009 and skeleton arguments filed on 18th February 2010, the petitioners challenge the **Regulations** on three broad grounds. First, that the Minister did not have the power to prescribe offences under **EMCA**. Second, that the law and procedure followed was contrary to the provisions of **section 34** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** as the **Regulations** were not placed before the National Assembly for approval. Thirdly, that the **Regulations** violate the fundamental rights of the petitioners as they are arbitrary, oppressive, impractical and disproportionate.
5. Mr Wanyaga, counsel for the petitioners, argued that **Part XIII, sections 137 -147** of the **EMCA** sets out "**Environmental Offences.**" Counsel contended that the section do not empower the Minister to create or prescribe additional offences. The contention was fortified by the argument that the Minister's power to make regulations is donated by **section 147** of the Act which does not vest the Minister with power to make regulations to define and prescribe criminal offences. Additionally, the petitioners argued that **section 101** of the Act merely empowers the Minister to prescribe standards for noise but does not permit him to create criminal offences in relation thereto.
6. **Section 34** of the **Interpretation and General Provisions Act** specifically requires that subsidiary regulations be laid before the National Assembly. The petitioner argued that this requirement was not fulfilled in respect of the impugned **Regulations** and since the Minister not justified the omission, the **Regulations** can only be deemed to be void. Counsel submitted that the laying of the **Regulations** before the National Assembly is a key safeguard to ensure that the people's representatives are satisfied with the legality, fairness, necessity and propriety of subsidiary legislation. Moreover compliance with the procedure affords the citizen an opportunity to lobby for correction or improvement of the regulations. The petitioners submitted that failure to comply with the mandatory provisions of the **Interpretations and General Provisions Act** rendered them null and void. Counsel relied on the case of **Cheong Seok Leng v Public Prosecutor Singapore (1988) LRC (Const.)** to support this argument.
7. The petitioners submit that the Minister's power to make rules under **EMCA** must strike a critical balance between ensuring environmental conservation on one hand and that legitimate economic activities is not outlawed by design or effect in a manner that violates the fundamental rights and freedoms of the individuals protected under the Constitution. Counsel relied on the case of **Park View Shopping Arcade v Kangethe & 2 Others KLR (Environment and Land)** where Ojwang J., underscored the need for this balanced approach to be taken in making environmental regulations.
8. The petitioners argued that the **Regulations** violated **sections 70, 72, 75 and 77** of the former Constitution in that the **Regulations** create strict liability offences in violation of **section 77** of the former Constitution as no *mens rea* is required for a person to incur criminal liability. That the **Regulations** criminalize specified activities such as hawking, peddling, preaching, advertisement, sales promotion and related commercial activities which interfere with the petitioners' right to livelihood. The petitioners aver that their businesses require them to use music and sound to attract customers and without proof the same cannot be construed as unreasonable, unnecessary, annoying, disturbing, injurious or endangering the comfort, repose, health or safety of identifiable persons and the environment. Therefore, the Minister is capricious in categorising the petitioners' economic activities as prohibited noise within the lawful meaning of the term 'noise' under the **EMCA**.
9. The petitioners further aver that **the Regulations** are void for being in breach of **sections 70, 72, 77 and 82** of the former Constitution in that there is no objective criteria to determine the persons or sections of the public annoyed, disturbed, injured or endangered in their comfort, repose, health

or safety and the environment. That the absolute prohibition of specified activities through criminal sanctions of noise levels in excess of the levels set in the First Schedule to the Regulations is capricious and amounts to standard less regulation in view of the fact that non-experts cannot determine such noise levels and the exclusive made of relevant lead agencies to take measurements of the noise levels. The petitioners complain that **Regulation 16** requires the applicants to apply for licence on the basis of the subjective criteria that the sound's source is likely to emit noise of excessive vibrations prohibited being likely to annoy, disturb, or endanger the comfort, repose, health of or safety of others or for being "excessive" of permissible noise levels.

10. Counsel for the petitioners submitted that the court should look at the purpose and object of the Regulations in order to determine its constitutionality as underscored in the case of *The Queen v Big M Drug Mart Ltd (Others intervening) Canada (1986) LRC (Const)*.

Respondents' Case

11. The Attorney General, represented by Ms Muchiri, opposed the petition on the ground that the imposition of fines under the **Regulations** conforms to the power conferred on the Minister by dint of **section 147** read with **sections 101, 102, 103 and 142(1)** of **EMCA**. Further, the power is not fettered by **section 31(e)** of the **Interpretation and General Provisions Act** which creates a general rule that provides that where an Act confers power on an authority to make subsidiary legislation, unless a contrary intention appears a breach of the subsidiary legislation attracts a penalty, not exceeding six thousand shillings or such term of imprisonment not exceeding six months or both, which the authority making the subsidiary legislation may think fit.

12. NEMA has also opposed the petition and supported the position taken by the Attorney General. Mr Ouma, counsel who argued the case submitted that the **Regulations** were made pursuant to Minister's powers under **section 147** of **EMCA** which is to be read with **section 142** which permits the Minister to impose a penalty. He argued that in making the regulations, the Minister did no more than give effect to the provisions of the Act.

13. NEMA denied that the Regulations violated the petitioners' fundamental rights and freedoms. It contended that the intention of the impugned regulations is to ensure that certain activities are carried out in a manner that is not inimical to the comfort and tranquillity of others.

Determination

14. From the petitions, depositions and submissions of the parties, three issues fall for determinations as follows;

- a. Whether the power to donated to the Minister to make rules under **EMCA** includes the power to prescribe offences under the **Regulations**.
- b. Whether the **Regulations** should be laid before the National Assembly
- c. Whether the **Regulations** violate the petitioners' fundamental rights and freedoms

15. This matter was commenced when the former Constitution was in force when the **Regulations** were made. I shall therefore deal with the matter the as it was filed but where necessary refer to the Constitution as **the Regulations** are still in force.

Whether the power to make rules includes the power to prescribe offences

16. Whether the Minister has power to make rules must be examined in the context of **EMCA**. **Section 147** of **EMCA** which empowers the Minister to make regulations under the Act provides as follows;

147. (1) The Ministry may, on the recommendation of the Authority and upon consultation with

the relevant lead agencies, make regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.

(2) Regulations made under subsection (2) may –

(a) make provisions for the issue, amendment and revocation of any licence;

(b) provide for the charging of fees and levying of charges;

(c) adopt wholly or in part or with modifications any rules, standards, guidelines, regulations, by laws, codes, instructions, specifications, or administrative procedures prescribed by any lead agency either in force at the time of prescription or publication or as amended from time.

17. **EMCA** is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Under **sections 101, 102 and 103** of **EMCA**, noise is considered a matter concerning the environment and is therefore a subject of legislation. The Act prohibits excessive noise and the Minister has broad power, under **section 147**, to make regulations to enforce the provisions of the Act including making of regulations concerning excessive noise.

18. Although **section 147** does not expressly confer the power to provide for penalty for offence, **section 144** provides for general penalty for breach of the regulations made under the Act. It provides as follows;

144. Any person who commits an offence against any provision of this Act or of regulations made thereunder for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings or to both such fine and imprisonment.

19. The petitioners singled out **Regulation 28** on the ground that it purports to prescribe a more stringent penalty outside the boundaries set by **section 31** of the **Interpretation and General Provisions Act**. **Regulation 28** provides for general penalty in the following terms: “Any person who contravenes any of the provisions of these Regulations, for which no penalty is stipulated, commits an offence and is liable, upon conviction, to a fine not exceeding more than three hundred and fifty thousand shillings or to imprisonment for a term not exceeding eighteen months or to both.” In my view, **Regulation 28**, which provides a general penalty for breach of the regulations, is not *ultra-vires EMCA* as it merely restates what the Act provides as a penalty for infraction of the regulations made under the Act.

20. Furthermore the power to make regulations includes the power to prescribe penalties for violation. This is implied in the provisions of **section 31(e)** of the **Interpretation and General Provisions Act** which provides as follows;

31. Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation –

(e) there may be annexed to the breach of subsidiary legislation a penalty, not exceeding six thousand shillings or such term of imprisonment not exceeding six months, or both, which the authority making the subsidiary legislation may think fit.

21. Where the subsidiary legislation does not prescribe a penalty then in the absence of contrary provision in the parent statute, the penalty prescribed is that under **section 31(e)** of the **Interpretation and General Provisions Act**. In the case of the **Regulations**, the penalty for breach

thereof is prescribed and is within the framework provided by **EMCA**. **Section 31** states that, ‘*unless a contrary intention appears*’ thus where a contrary intention is inferred from the unequivocal words of the statute as enacted in **section 144** of **EMCA**, whose contents I have set out at paragraph 16 above, the **Interpretation and General Provisions Act** has no application in this respect. As long as those regulations are not *ultra vires* the parent statute or the Constitution, then they cannot be voided. I therefore find and hold that the **Regulations** do not violate **section 77(8)** of the former Constitution which provides that, “*No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed by written law.*”

Whether the regulations should be laid before the National Assembly

22. The petitioner also condemned the **Regulations** on the basis that they were not tabled before the National Assembly as required under **section 34(1)** of the **Interpretation and General Provisions Act**. The section states that “*All rules and regulations made under an Act shall, unless a contrary intention appears in Act, be laid before the National Assembly without unreasonable delay...*” The provision makes it clear that while the law requires that subsidiary legislation made under an Act of Parliament be laid before the National Assembly, there are instances where this will not be required if the provisions of the Act in question make it apparent that this is not required.

23. The provision of **section 147** of **EMCA** empower the Minister “*on the recommendation of the Authority and upon consultation with the relevant lead agencies, make regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.*” A contrary intention cannot be inferred from the Act. However, the **Regulations** were published on the 22nd May 2009 and have continued to be applied for the span of over four years now. A practical approach must therefore be taken in dealing with the matter and in this respect I take the position of Ojwang’ J., in **Republic v Wilfred Onyango Nganyi and Another, Nairobi Criminal Appeal No. 96 of 2005 (Unreported)** where he observed as follows; “*I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament, and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only.*” (See also **Michael Mutua Ndunda and another v Attorney General & 3 Others, Nairobi Petition 226 of 2011, Republic v The Minister for Transport & Communications and others, ex parte Gabriel Limion Kaurai, Nairobi High Court Misc. Application No. 109 of 2004, Yuasa International Limited v Kenya Bureau of Standards Msa Petition No. 10 of 2011 [2012]eKLR**).

24. I therefore decline to find in favour of the petitioner that the Regulations are null and void on the ground that they have not been laid before the National Assembly.

Whether the Regulations violate the petitioners’ fundamental rights and freedoms

25. The petitioner’s counsel has correctly submitted that in determining whether the provisions of regulations are unconstitutional, the court must look at the purpose of the rules or its effects. This principle was clearly stated in the case of **The Queen v Big M Drug Mart Limited (supra)** where the court stated that, “*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized*

through the impact produced by the operation and application of legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus validity."

26. The Regulations are promulgated within the framework of **EMCA** whose object I have stated earlier is to provide a regulatory framework for the safeguarding and enhancing the environment. **EMCA** is now underpinned by the provisions of **Article 42** of the Constitution which makes the right to a clean and healthy environment a fundamental right and freedom. **Article 42** provides as follows'

42. Every person has the right? to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

27. To underlie the seriousness of environmental rights, **Article 70** of the Constitution provides a procedure for the enforcement, by any person whose environmental rights are threatened or violated to move the court for appropriate relief;

70. (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.

28. **Sections 101, 102 and 103** of **EMCA** deal with the issue of noise pollution by setting out a framework for establishing noise standards and prohibiting excessive noise. The 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 vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of noise through the **Regulations**.

29. **Part II** of the **Regulations** has 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 the 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 mechanical means or whether the notice can be controlled without effort or expense to the person making the noise. A violation of the general prohibition is an offence and attracts a penalty under the Act and the **Regulations**.

30. It is clear from what I have stated that the objects of the Act and indeed the **Regulations** fall within the range of activities that are necessary for the protection and promotion of a clean and health environment and are therefore not unconstitutional on this ground.

31. The petitioners have specifically attacked the provisions of **Regulation 10**, as it relates to the petitioners, on the ground that it violates **sections 70, 72, 75 and 77** of the former Constitution. **Regulation 10** provides as follows;

10(1) No person shall –

- a. *Preach, tout, advertise, promote or sell any goods; or*
- b. *Engage in any commercial activity,*

In such a manner as to emit noise by shouting within the Central Business District of any town, a residential area, a silent zone, or any other area declared as a silent zone by the Authority,

Provided that the provisions of this Regulation shall not be construed to prohibit selling the selling of merchandise, food and beverages at licenced sporting events, parades, fairs, circuses and other similar licenced public entertainment events.

(2) Any person who contravenes this Regulation commits an offence.

32. The offence contained in **Regulation 10** cannot be read alone but must be read within the context of the **EMCA** and the entire **Regulations**. The prohibition is not against noise generally but against noise as defined under the **Regulation 2**. The prohibition is not a blanket ban on noise but is limited to shouting within the CBD of any town, residential areas and silent zones as can be clearly seen from wholesome reading of the impugned regulation. Under the definition, “noise” means any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment.” **Regulation 5** further provides that, “No person shall make, continue or cause to be made or continued any noise in excess of the noise levels set out in the First Schedule to these Regulations, unless such noise is reasonably necessary to the preservation of life, health, safety or property.” Thus, the level of noise is measured by reference to the rating set out in the First Schedule. The schedule sets out various levels according to whether the place is a silent zone, place of worship, residential either indoor or outdoor, mixed residential and commercial areas with limits for both day and night.

33. The Director of NEMA has deposed in the replying affidavit sworn on 30th December 2009, that the levels of noise are not arbitrary as they are capable of scientific measurement and objective determination. The determination of the levels has been clearly set out in the First Schedule to the **Regulations**. It follows that where a person is charged with making excessive noise, the prosecution must discharge the burden of proving beyond reasonable doubt that the noise is beyond that permitted by the law.

34. Taking all these provisions into account, I find and hold that all the law requires of the petitioners is that they adhere to certain level of noise so as not to harm the public in the manner they conduct their business. Their livelihood is affected only to the extent that they cannot carry on their business through the use of excessive noise as defined in the **Regulations**. This is a case where the rights and freedoms of the petitioners must be balanced with those of the general public and that balance is reached through the **Regulations** governing conduct (see **Kenya Bus Services Limited v Attorney General and 2 Others [2005]eKLR**). Even when the **Regulations** are considered against the Constitution such limitations must be measured against the standard established in **Article 24** that such limitation of rights must be one that is; “reasonable and justifiable in an open and

justifiable society’ bearing in mind especially, ‘the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.’”

35. In filing a petition of this kind it is now well established that the petitioner must plead with particularity the breach of specific rights violated under the Constitution and demonstrate how these rights are violated (See *Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR*, *Cyprian Kubai v Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002* and *Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012*). The petitioners have cited **sections 70, 71, 72, 77, 78, 79 and 82** of the former Constitution. Each of these sections of the former Constitution apart from **section 70**, which is general in application, protect specific rights. It is the duty of the petitioners to demonstrate how these rights are violated. The petitioner has lumped the facts and arguments without pointing to specific violation of a specific right and as such the court cannot make a determination of the petitioners’ grievances in that respect.

36. Nevertheless on the matters I have been able to determine, I find and hold that the petitioners have not established that their fundamental rights and freedoms have been violated or threatened by the making and enforcement of *the Regulations*.

Disposition

37. In summary, the Court’s findings in relation to the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009* are as follows;

- a. The Minister has the power to make Regulations under **section 147** of *EMCA* and such power includes the power to prescribe offences whose penalty is set out in **section 144** of *EMCA*.
- b. The **Regulation 28** is not null and void as it sets out general penalty which is in *intra vires EMCA*.
- c. *The Regulations* are not null and void for failure to comply with the provisions of **section 34** of the *Interpretation and General Provisions Act*.
- d. The petitioners have not proved that the *Regulations* violate the Constitution or their fundamental rights and freedoms.

38. In light of the above findings the petitioners’ case is dismissed. Since the matter was brought largely in public interest there shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 27th day of September 2013

D.S. MAJANJA

JUDGE

Mr Wanyaga instructed by Kinoti and Kibe Company Advocates for the petitioners.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondents.

Mr Ouma instructed by Mereka and Company Advocates for the 3rd respondent.