



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kalu v Mudzomba & 2 others (Environment & Land Petition  
1 of 2021) [2022] KEELC 2798 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2798 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 1 OF 2021**

**JO OLOLA, J**

**JUNE 30, 2022**

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10(2), 19, 20, 22, 23, 24, 42, 69, 70, 159, 258 OF  
THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE CONTRAVENTION  
OF ARTICLE 42, 69 AND 70 OF THE CONSTITUTION OF KENYA, SECTIONS 101,  
102 AND 103 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION  
(NOISE AND EXCESSIVE VIBRATION POLLUTION CONTROL) REGULATIONS, 2009**

**BETWEEN**

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**VINCENT KITHI KALU ..... PETITIONER**

**AND**

**ELIUD MUDZOMBA ..... 1<sup>ST</sup> RESPONDENT**

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

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

**RULING**

1. By the Notice of Motion dated 20<sup>th</sup> January 2021 as filed herein on 5<sup>th</sup> February 2021, Vincent Kithi Kalu (the Petitioner) prays for orders:
  3. That a permanent injunction do issue restraining the 1<sup>st</sup> Respondent herein either by themselves, their servants, agents and/or employees from interfering with the title, user, occupation and/or quiet possession and enjoyment of the Petitioner's residential home;
  4. That a permanent injunction (do issue) restraining the 1<sup>st</sup> Respondent herein by either themselves, their servants, agents and/or employees from conducting



church services on the plot of land adjacent to the Applicant's to the detriment of the Applicant's family and ailing mother.

5. That this Honourable Court be pleased to issue an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to measure the noise levels emitted by the 1<sup>st</sup> Respondent as a discharge of their constitutional mandate;
  6. That the OCPD Kilifi and/or OCS Mariakani Police Station be authorized to supervise the execution of these orders; and
  7. That the costs of this application be provided for.
2. The application is supported by an Affidavit sworn by the Petitioner and is premised on the grounds that:
- (i) The 1<sup>st</sup> Respondent has leased a plot of land adjacent to the Petitioner's own and went ahead to construct a church thereon;
  - (ii) The 1<sup>st</sup> Respondent's Church has been conducting extremely loud Church services as well as praise and worship sessions that go on to the weekends thereby denying the Petitioner quiet possession and enjoyment of his adjacent parcel of land;
  - (iii) The Petitioner had tried unsuccessfully on numerous occasions while involving the Area Chief and the Environmental Officer to resolve the dispute amicably but the 1<sup>st</sup> Respondent has refused to heed the resolutions of the meetings and/or to reduce the noise levels. The 1<sup>st</sup> Respondent instead continues to threaten the Petitioner and his family terming them "an enemy of the Church and stating that anyone disputing their noisy services will die, be buried and be forgotten."
  - (iv) The Petitioner, his family and other neighbours in Misafini area in Mariakani have been forced to endure hours upon hours of constant loud noises emitted by the huge public address systems and speakers used by the 1<sup>st</sup> Respondent in his Church services yet the Church members are too few to need such elaborate public address systems; and
  - (v) The 1<sup>st</sup> Respondent actions have subjected the Petitioner to torture, untold psychological stress and trauma and has led to financial loss as the Petitioner's mother has been heavily affected and has had to undergo psychological treatment on account of the noise.
3. Eliud Mudzomba (the 1<sup>st</sup> Respondent) is opposed to the application. In his Replying Affidavit sworn on 20<sup>th</sup> March, 2021 as filed herein on 22<sup>nd</sup> March 2021, the 1<sup>st</sup> Respondent denies that he is the one who constructed a makeshift Mabati Church as the said Church is registered under the *Societies Act* and is operated by an organization known as the Pentecostal Evangelical Ministries Alliance and the 1<sup>st</sup> Respondent is only a Pastor commissioned to run the branch.
4. The 1<sup>st</sup> Respondent denies that the Church which has been in existence since 2012 plays loud noise. On the contrary he avers that the Church has been playing moderate music as regulated by the Interfaith Ministries as well as the National Environmental Management Authority (the 3<sup>rd</sup> Respondent) which 3<sup>rd</sup> Respondent visited the Church and regulated the loudness of the music to the required levels.



5. The 1<sup>st</sup> Respondent denies that he has threatened and cursed the Petitioner. He avers that as a man of God he does not throw curses to the wrong doers but instead prays for them to be forgiven.
6. The 1<sup>st</sup> Respondent further avers that the Petitioner is not a beneficial owner of the premises he lives in and has no proprietary rights and interest thereon and he cannot therefore come to Court to claim the purported rights.
7. The National Environmental Management Authority (NEMA) (the 3<sup>rd</sup> Respondent) is equally opposed to the application. In a Replying Affidavit sworn by its Acting Director, Compliance and Enforcement - Zephania Ouma, as filed herein on 29<sup>th</sup> April 2021, the 3<sup>rd</sup> Respondent avers that the Petitioner has failed to appreciate and/or comprehend the provisions of Articles 185, 186 and 187 of [the Constitution](#) and their implications in relation to noise pollution by suing the 3<sup>rd</sup> Respondent.
8. The 3<sup>rd</sup> Respondent avers that under the new Constitutional dispensation, it does not have any noise measuring equipment in its possession as the said function was devolved to the Counties. The 3<sup>rd</sup> Respondent therefore avers that the prayer seeking to compel the Authority to measure the noise levels is therefore untenable as the duty now falls within the purview of the County Government of Kilifi (the 2<sup>nd</sup> Respondent herein).
9. The 3<sup>rd</sup> Respondent further avers that the above notwithstanding, the Petitioner has not during the subsistence of the complaint herein brought the issue to its attention and the claim that it has relegated its Constitutional duties against the Petitioner is misguided, made in bad faith and based on poor miscomprehension of the law on noise pollution.
10. I have carefully perused and considered the Petitioners application as well as the response thereto by both the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates acting for the parties. The 2<sup>nd</sup> Respondent neither entered appearance nor responded to the application.
11. By his application herein, the Petitioner prays for an order of permanent injunction restraining the 1<sup>st</sup> Respondent from interfering with his title, use, occupation and/or quiet possession of his residential home. The Petitioner also prays for a permanent order of injunction restraining the 1<sup>st</sup> Respondent from conducting Church services on a plot of land adjacent to his own as well as an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to measure the noise levels emitted by the 1<sup>st</sup> Respondent.
12. In support of his case, the Petitioner accuses the 1<sup>st</sup> Respondent of constructing a make shift Mabati Church on the plot of land adjacent to his own and proceedings therein to conduct praise and worship services thereon by the use of loud speakers thereby disturbing his quiet and peaceful enjoyment of his parcel of land.
13. As it were, a party is not entitled to an order of injunction as a matter of right or course. The grant of an order of injunction is a matter within the discretion of the Court and such discretion is to be exercised in favour of the applicant only if it is proved to the satisfaction of the Court that unless the respondent is restrained by an order of injunction, an irreparable loss or damage will be caused to the applicant during the pendency of the suit.
14. In the matter before me, while the Petitioner accused the 1<sup>st</sup> Respondent of constructing a Church next to his land, he neither gives any particulars of the parcel of land nor any evidence of his ownership thereof. While he accused the 1<sup>st</sup> Respondent of putting up the Church on the equally unidentified



adjacent parcel of land, he neither give details of when the 1<sup>st</sup> Respondent did the same or any evidence of his having done so.

15. From the 1<sup>st</sup> Respondent's Replying Affidavit, it is apparent that he is just but a pastor in the Church which is otherwise registered under the *Societies Act* in the name of Pentecostal Evangelical Ministries Alliance. There was no evidence placed before the Court to demonstrate that the 1<sup>st</sup> Respondent is an official of the Church and it was clear to me that an order of injunction cannot issue against him in the manner sought herein and for the reasons given by the Petitioner.
16. At Prayers 3 and 4 of his application, the petitioner prays for orders of a permanent injunction to issue against the 1<sup>st</sup> Respondent yet the suit is yet to be heard. As was stated in *Kenya Power & Lighting Company Limited -vs- Sheriff Molana Habib* (2018) eKLR:

“... A permanent injunction which is also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since the temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the Court. Interim injunctions are normally meant to protect the subject matter of the suit as the Court hears the parties.”
17. That being the case, it was clear to me that the substantive prayers made for a permanent injunction to issue against the 1<sup>st</sup> Respondent are untenable and misconceived.
18. On the prayer to compel the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to measure the noise levels emitted by the 1<sup>st</sup> Respondent, it was clear from the foregoing that it was erroneous to accuse the 1<sup>st</sup> Respondent of being the one emitting any noise from the building said to be adjacent to the Petitioner's home. I was also not persuaded that the Petitioner had approached the two Respondents to take the necessary action and that they had declined to take their statutory and/or Constitutional duties in respect thereof. While the Petitioner purports at Paragraph 8 of the Supporting Affidavit to annex letters written to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents seeking their intervention, no such letters were annexed to the application.
19. It follows that the application before me is misconceived and devoid of merit. The same is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> JUNE, 2022.**

In the presence of:

No appearance for the Petitioner

No appearance for the Respondents

Court assistant - Kendi

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**J. O. OLOLA**  
**JUDGE**

