



**Ndesandjo v Mint Shack Limited & 5 others; Peponi Road Resident's Association (Interested Party) (Environment and Land Constitutional Petition E054 of 2021) [2022] KEELC 12796 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E054 OF 2021  
LN MBUGUA, J  
SEPTEMBER 30, 2022**

**BETWEEN**

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

**AND**

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

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

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

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

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

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

**AND**

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

**JUDGMENT**

1. Coming up for determination is an application dated December 17, 2021 which seeks the following orders:
  - i. Spent.



- ii. Pending the hearing and determination of this application *inter partes*, a temporary injunction do issue restraining the 1<sup>st</sup> respondent, its servants, agents or assigns from causing or permitting to be caused noise nuisance at Mint Shack along Peponi Road including the loud music played at the bar, drunk customers shouting, yelling and screaming deep into the night up to early hours of the morning, drivers getting in and out of the premises hooting and causing traffic snarl up, and other dangerous activities including the parking of cars along the road blocking the applicant's gate and compound.
  - iii. Pending the hearing and determination of the petition, a temporary injunction do issue restraining the 1<sup>st</sup> respondent, its servants, agents or assigns from causing or permitting to be caused noise nuisance at Mint Shack along Peponi Road including the loud music played at the bar, drunk customers shouting, yelling and screaming deep into the night up to early hours of the morning, drivers getting in and out of the premises hooting and causing traffic snarl up, and other dangerous activities including the parking of cars along the road blocking the applicant's gate and compound.
  - iv. Pending the hearing and determination of the petition, a temporary mandatory injunction do issue compelling the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents to issue and enforce closure notices against the 1<sup>st</sup> respondent for being in contravention of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 LN No 61 of 2009.
  - v. Pending the hearing and determination of the petition, a temporary injunction do issue restraining the 1<sup>st</sup> respondent, its servants and/or agents from carrying out their businesses in the subject residential area.
  - vi. The officer in charge of Spring Valley police station, assist in compliance of these orders.
  - vii. Such further and other relief be granted to the applicants as this court deems fit.
  - viii. Costs for this application be provided for.
2. This application is premised on the grounds set on the face of the application and in the petitioner's supporting affidavit dated December 17, 2021 where she contends that she has been residing on her property, parcel number LR No 1870/VIII/81 (plot number 54) located at Spring Valley Estate along Peponi Road Nairobi county for a period of over 46 years. That the area is designated as a residential area.
  3. The applicant avers that sometime in April 2017, the 1<sup>st</sup> respondent set up a restaurant at plot number 56 which has been a nuisance to her right to clean and healthy environment by emitting excessive noise from loud music, drunk patrons and customers as well as vehicles hooting throughout the night. She avers that this noise has affected her health, work and psychological well-being. Constant traffic snarl ups which even block her gate are also a nuisance. The 2<sup>nd</sup> – 6<sup>th</sup> respondents had failed in protecting her rights and discharging their mandate because she had complained of the noise to them but no action had been taken.
  4. The 1<sup>st</sup> respondent in the replying affidavit dated May 23, 2022 sworn by its proprietor Binai Jayantilal Shah has opposed the application averring that the same is frivolous and vexatious on grounds that before setting up the business, he undertook due diligence and obtained requisite licenses and permits from the national and county governments including conducting environmental impact assessment study on the suitability of the restaurant whereby the report was filed with the National Environment Management Authority and were issued with a license to set up the restaurant.



5. He went on to depone that since the existence of the 1<sup>st</sup> respondent, they have never been asked to address any outstanding issues, adding that the restaurant was surrounded by a stone perimeter wall and an adjacent sound proof wall in order to restrain most of the noise emanating from the premises.
6. The 1<sup>st</sup> respondent also pointed out that the restaurant was located in a mixed residential zone and there were other entertainment and business establishments within the same area that were also licensed to operate which emitted a lot of noise but the petitioner had not complained about them. As such, the application was maliciously filed.
7. The 1<sup>st</sup> respondent also contested the issue of cars parking in front of the applicant's gate stating that his establishment had enough space for vehicles and that there was no evidence to back the claim that the 1<sup>st</sup> respondent allowed cars to park in front of the 1<sup>st</sup> respondents' gate.
8. The 1<sup>st</sup> respondent also contested existence of the interested party stating that he had no idea of such an association but was aware of Spring Valley Residents Association where if there was a dispute or concern, the petitioner ought to have raised it with them.
9. The other parties don't seem to have filed any responses or submissions to the application.

### **Analysis and Determination**

10. I have duly considered the application dated December 17, 2021, the replying affidavit of the 1<sup>st</sup> respondent and the rival submissions of the two parties. I discern that the issue falling for determination is;
  - i. Whether the notice of motion application dated December 17, 2021 meets the threshold set for grant of temporary and mandatory injunctions.
11. The petitioner has sought for grant of temporary injunction against the 1<sup>st</sup> respondent from carrying out business pending the hearing and determination of this petition as well as a mandatory injunction to the 2<sup>nd</sup> to 6<sup>th</sup> respondents to issue enforcement closure notices to the 1<sup>st</sup> respondent stating that the 1<sup>st</sup> respondent has been in contravention of her rights to a clean and healthy environment since year 2017 resulting to her mental, emotional and physical anguish. The 1<sup>st</sup> respondent has contested this claim stating that the establishment has adhered to the set rules and regulations in the control of noise and that the orders sought are frivolous and vexatious.
12. On the issue of grant of temporary injunctions, the celebrated case of *Giella v Cassman Brown* (1973) EA 358 sets out the grounds for grant of interlocutory injunctions providing that a party seeking a temporary injunction has to establish a *prima facie* case; whether the party seeking injunction will suffer irreparable damage if injunction is denied; and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience. These principles were buttressed in the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court stated:

“... Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

  - (a) Establish his case only at a prima facie level,
  - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and



- (c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted..."

13. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 the court defined a *prima facie* case as follows:

"In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation..."

14. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, the court held that;

"An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration."

15. I have taken into consideration all the material presented before me. I find that by and large, the orders sought in the application are similar to the ones sought in the petition in that the gist of the applicant's



prayer is to have the establishment of the 1<sup>st</sup> defendant closed. In the case of *Daniel Atibu Jasimba v Ainea Sandanyi Magana* [2013] eKLR, the court had this to say in respect of a prayer relating to a major relief;

“Since the plaintiff’s suit is for eviction of the defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing”.

16. In the Court of Appeal case of *Kenya Breweries Ltd and another v Washington Okeyo* (2002) 1 EA 109, it was held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”

17. This cannot be said to be a simple and straight forward case. After all, the 1<sup>st</sup> respondent had apparently been operating its business since April 2017, a period of over 4 1/2 years up to the time this suit was filed. I have also keenly perused the record of this file in both the digital format and the physical file and I am unable to trace the affidavit of service of the petition and the application upon the respondents and the interested party, particularly the 3<sup>rd</sup> respondent.

18. I must point out that the affidavit of service on record is the one serving the order issued on May 6, 2022 but the same does not capture the aforementioned primary documents. This court is interested in knowing the nature and extent of the licenses issued to the 1<sup>st</sup> respondent which enabled him to carry on its business for a period of over 4 1/2 years and it is therefore crucial for the National Environment Management Authority to be fully on board this suit unless they out-rightly decline to do so.

19. In the end this court is not convinced that the petitioner has set out any special circumstances that warrant the grant of the prayed mandatory injunction at this stage. Further, the court finds that it is not in order to grant major reliefs at the interlocutory stage. The final prayers are as follows;

1. The notice of motion application dated December 17, 2021 is dismissed and costs there of shall abide the outcome of the main suit.
2. The petition is to be heard on priority basis.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Njoroge holding brief for Mongeri for Petitioner

Ambwa for the 1st Respondent

Fatma Ali for the Attorney General

Court assistant: Joan

