



Odongo & 4 others (Acting on their Own Behalf and as Members of Kiembeni Hillside Residents Association) v Mndugu t/a Holistic Mission for all Nations Kiembeni Worship Sanctuary & 3 others (Environment & Land Petition 005 of 2022) [2022] KEELC 13706 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 005 OF 2022**

**NA MATHEKA, J
OCTOBER 26, 2022**

BETWEEN

**JAMES LUKIRI ODONGO 1ST PETITIONER
VINCENT KIKUMU MAINGI 2ND PETITIONER
BENJAMIN SAMWEL MWAI ADIENGE 3RD PETITIONER
STEPHEN NGOTHO KAMAU 4TH PETITIONER
VINCENT ONDUONGI WANYAMA 5TH PETITIONER
ACTING ON THEIR OWN BEHALF AND AS MEMBERS OF KIEMBENI
HILLSIDE RESIDENTS ASSOCIATION**

AND

**JOHN MWAIWE MNDUGU T/A HOLISTIC MISSION FOR ALL NATIONS
KIEMBENI WORSHIP SANCTUARY 1ST RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT
OFFICER COMMANDING POLICE DIVISION KISAUNI SUB-
COUNTY 4TH RESPONDENT**

JUDGMENT

1. The petitioners stated that they reside within Kiembeni Estate which area is designated as residential as per the Part Development Plan approved by the Chief Building Inspector on June 16, 2001 under



the auspices of the retired [Local Government Act](#) (cap 265). The petitioners and their fellow members of Kiembeni Hillside Residents Association had lived in peace and quiet until the 1st respondent began operating the church named Holistic Mission for All Nations Kiembeni Worship Sanctuary within the residential area sometime in the year 2015 under shadowy circumstances. Since then, the petitioners and the fellow members of Kiembeni Hillside Residents Association have known no comfort and peaceful repose due to the excessive noise emanating from the church. The excessive noise is through high voltage preaching, loud music and loud intercessory sessions. The excessive noise is emitted during the evening hours and during early morning hours on weekdays and Saturdays. The excessive noise is at its peak on Sundays when the church is in session the whole day. The excessive noise has been enhanced by electronic amplifying system without soundproofing thereby discharging into the petitioners' residence with unforgiving intensity. The petitioners and fellow members of Kiembeni Hillside Residents Association comprise of young families, school going children and the elderly. The excessive noise not only disturbs the petitioner's comfort and peaceful repose but also adversely affects school going children who have to struggle with their homework and revision under such hostile circumstances. The sick and elderly have not been spared. They have had to endure such objectionable noise that endangers their health and safety. The petitioners have severally appealed to the 1st respondent to reduce the earsplitting noise and put in lenitive measures but the petitioners' appeals have fallen on deaf ears. The petitioners have innumerable registered their complaints with the 2nd, 3rd and 4th respondents severally and collectively but the 2nd, 3rd and 4th have by default or design failed to take action towards taking measurements, prescribing or enforcing any remedial measures to arrest the loud noise emissions. The petitioners have no other recourse other than to seek this court's intervention at this point.

2. The petitioners have been denied their right to a healthy, clean environment that is devoid of excessive noise under article 42 of the [Constitution](#) at the hands of the respondents. The 2nd respondent has failed in its constitutional duty as the lead agency in control of noise pollution as per fourth schedule- part 2 clause 3 of the [Constitution](#). To this extent, the 2nd respondent has failed .in its duty to uphold the [Constitution](#) as well as observe, respect, promote, protect the petitioners rights under article 42 and ensure fulfillment of obligations relating to the environment under article 70 of the [Constitution](#).
3. The 3rd respondent as the entity tasked with general supervision and co-ordination of all matters relating to the environment and which also co-ordinates the various environmental management activities being undertaken by the lead agencies has failed in its duty to uphold the [Constitution](#), observe, respect, promote, protect the petitioners rights under article 42 and ensure fulfillment of obligations relating to the environment under article 70 of the [Constitution](#).
4. The 4th respondent has failed to act on the petitioners' complaints yet realization and enforcement of the petitioners' right to a healthy and clean environment that is noise free is a collaborative effort between the 2nd, 3rd and 4th respondents. To this extent, the 4th respondent has failed in its duty to uphold the [Constitution](#), observe, respect, promote, protect the petitioners' rights under article 42 and ensure fulfillment of obligations relating to the environment under article 70 of the [Constitution](#). The petitioners, having been denied their right to a healthy and clean environment under article 42, cannot enjoy their inherent dignity guaranteed by article 28 of the [Constitution](#). The excessive noise emissions have subjected the petitioners to great inconvenience, annoyance and discomfort.
5. The petitioners therefore pray for judgment against the respondents jointly and severally that:
 1. It is declared that respondents through their actions and inactions that have resulted in excessive noise emissions from the Holistic Mission for All Nations Kiembeni Worship



Sanctuary church situated in Kiembeni Estate are have violated the petitioners' rights to a clean and healthy environment.

2. The respondent is permanently enjoined whether by himself, his servants agents, or otherwise howsoever from preaching, playing music or holding intercessory sessions within Holistic Mission For All Nations Kiembeni Worship Sanctuary church situated in Kiembeni Estate area until such time as the 2nd 3rd and 4th respondents have concertedly undertaken such measures as will ensure full compliance with the *Environmental and Management Coordination Act*, No 8 of 1 999 and the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 for the elimination of excessive noise emissions from the Holistic Mission For All Nations Kiembeni Worship Sanctuary church.
 3. An order for compensation in form of damages for the inconvenience, annoyance and discomfort arising from the excessive noise emissions.
 4. Costs be provided for.
 5. Such other appropriate relief that the honorable court may deem just.
6. The 1st respondent stated that sometime on or about the year 2004 the 1st respondent purchased all that land known as subdivision number 7915 section il mn *vide* an agreement for sale dated September 28, 2004. That the 1st respondent subsequent to the purchase and taking over possession of subdivision number 7915 section II MN put up a temporary structure made of iron sheet where he has been operating a church. That subsequently, 1st respondent has gradually constructed a permanent structure even prior to the existence of any form of developments being carried out around the said premises. That at no point of the continued constructions by the 1st respondent did the petitioners ever raise any objection in respect of the said constructions of the said premises. That the 1st respondent church has in no manner infringed on any of the petitioners' constitutional rights to a healthy, clean environment that is devoid of excessive noise as alleged by the petitioners. That the 1st respondent further states that it has at all material times ensured that the church operations have not subjected the petitioners to any sought excessive noise through high voltage preaching, loud music and intercessory sessions as alleged by the petitioners. That the petitioners have not presented to this honorable court any form of evidence of the alleged actions by the 1st respondent church and the same is meant to wrongfully tarnish the 1st respondent church's name. That the 1st respondent carries out its operations at specific scheduled church services which include sunday church service which runs from 10:30am to 1:00pm and has been engaging reasonable amount of sound especially with the instruments.
7. That further the 1st respondent has upon being approached by the residents to reduce the sound emitted following its limited activities, he has obliged and reduced the sound to a reasonable level and any allegations that the same has not been complied to is a complete misrepresentation of facts. That to the knowledge of 1st respondent, who is listed as a member of Kiembeni Hillside Residents Associations, no meeting was convened where members held discussion on the said allegations as against the 1st respondent's church and a resolution to file this suit reached. That the 1st respondent further invites this honourable court to note that has fast developed and integrated both commercial and residential ways of life and the petitioners allegations that the area is purely residential does not hold water to warrant any interference with the 1st respondent's constitutional right to own property and benefit from the said property. That the honourable court is further invited to note that there are several schools, churches, mosque, shops and other business establishments within the kiembeni area and hence the 1st respondent should not be discriminated on account of the petitioners unsubstantiated allegations. That they have a constitutional right to own property and benefit from the property is



protected by the provisions of article 40 of the Constitution of Kenya and should not be defeated on flimsy grounds as raised by the petitioners in' the instant petition. That the 1st respondent has ensured that it has carried out its activities in ensure that the surrounding environment is duly considered while at the same time paying attention to the needs of the neighbors. That 1st respondent further avers that the church has always been keen to ensure that the surrounding environment is well protected while at the same time paying attention to the needs of the neighbors around the property.

8. The 3rd respondent stated that in recognition of the persistence of the noise pollution complaints through the lodging of the current suit, a site visit was conducted by their office on June 27, 2022 and the July 3, 2022 respectively and produced hereto as SL I(a) and (b) is the inspection report improvement order dated June 27, 2022 and the inspection report dated July 3, 2022 respectively. That the Improvement order SLI (a) was personally served on the 1st respondent. That during the said site visits, it was generally observed that there were indeed existing and persisting complaints of noise pollution from the 1st respondent's church. At the time of the 3rd July visit which was on a worship day, the church service was ongoing using sound amplifying devices. The sound is a pollutant in relation with regulation 3 (1) and (2) of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009. That Kiambeni area in Mombasa county where this church is located is a high-density residential area consisting of flats built on 50 or 100 feet by 100 feet plots. Though the area is semi-planned, there are no social amenity parcels of land designated. This therefore has forced social/religious and small businesses to crowd up in these small adjacent plots with no room for buffer, and no wide spaces public enjoyment that create a buffer to residential flats. This church is in close proximity (80 meters in area) to two other churches and the combined sound from the sound amplifying devices of these three churches is a noise pollutant. This church is located next to a residential building. As alluded the plot is small can barely hold even 2 car parked and is less than 10 meters to the nearest door of a neighboring household. The church is not sound proofed. That guided by section 117 of the EMCA, 1999, the following improvement terms and conditions were issued upon conclusion of the site inspection that the 1st respondent should engage the County Government of Mombasa, department of environment to conduct a noise survey; That the findings of the said noise survey be shared with the 3rd respondent; that the noise survey and sharing of the findings be conducted within one (1) month; that an environmental audit be conducted; and that a commitment and enumeration of measures put in place to control noise pollution be provided.
9. That while issues of noise, excessive vibrations, and pollution thereof may be reported to the Authority, whose goal is to ensure that all environmental matters are well managed, the said reports are only forwarded to the relevant County Government offices whose lead mandate air, noise (pollution), and excessive vibrations lies with by virtue of schedule 4, part 2 of the Constitution of Kenya, 2010.
10. That it is apparent that the present case is one of poor physical planning where informal structures or social amenities spring up in residential estates and conduct their businesses such as the 1st respondent has. The 2nd respondent certainly needs to reign in such situations. That an obviously begging alternative would be to relocate the church to a less densely populated area if not to have the same sound proofed or rid of the sound amplifying equipment.
11. That regulation 6 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 provides that where the lead agency (the County Government of Mombasa in this case) has failed to take action after being given reasonable notice by the authority, the measurement shall be taken by a person dully authorized by the authority, who is knowledgeable in the proper use of the measuring equipment.



12. That the 3rd respondent, has at all times, remained conscious of the statute and regulations in place and have made every step necessary in ensuring fidelity to the Constitution of Kenya, 2010. That the 3rd respondent is prepared and willing to implement any legitimate orders that would result from this honourable court's proceedings.
13. The 2nd respondent stated and submitted that in the year 2021 they received several complaints from Kiembeni Hillside Residents Association over noise pollution caused by three religious institutions namely; Jesus Manifestation Center, Kiembeni, Holistic Mission for all nations, Kiembeni Workshop Sanctuary and Salvation, Hope and Restoration Ministry. The department of environment and waste management on various dates between November 21, 2021 to November 25, 2021 carried out surveillance of noise regulation compliance and came up with a report which the submitted to the County Attorney and which has been produced in court. On the facility belonging to the 1st respondent it was established that the levels were high during praise and worship session where all equipment are used. During the session the measurement indicated an average noise level of 68.2dB. In a mixed residential area such as this one the noise level in accordance with the first schedule of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 is which is 55 db (a) during the day and 35db (a) at night.
14. This court has considered the petition and the submissions therein. Article 42 of the Constitution affords every person the right to a clean and healthy environment. Some of the factors likely to hinder the enjoyment of the right to a clean and healthy environment can be gleaned from EMCA and they include the discharge of effluent into the environment; emission of greenhouse gases and other sources causing air pollution; discharge of waste, oil, hazardous and toxic substances into the environment; noise and vibration pollution; radioactive substances and noxious smells. The regulations made under EMCA prescribe the standards for the control of pollution to the environment, which are intended to give effect to the enjoyment of every person of the right to a clean and healthy environment enshrined in the Constitution.
15. Article 69 of the Constitution enjoins the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and tasks it to eliminate processes and activities that are likely to endanger the environment. The Constitution defines "state" as the collectivity of offices, organs and other entities comprising the government, which in this case includes the National and the Nairobi County Governments.
16. Article 70 of the Constitution empowers any person who alleges that a right to a clean and healthy environment has been or is likely to be denied, breached or violated to apply to the court for redress. The person need not demonstrate that he has incurred loss or suffered damage. The petitioners in this case therefore did not need to prove the damage they had suffered as the 1st respondent urged.
17. To determine whether the noise complained of in this petition contravenes the right to a clean and healthy environment, some of the factors the court has to consider include whether the noise exceeds the limits prescribed by law; whether the noise levels are permitted by law and whether the noise is likely to cause danger to human health or damage to the environment. If the noise caused is loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment then this amounts to an offence for which the person making or causing the noise should be charged for contravening the regulations made under EMCA.
18. Section 101 of EMCA enjoined the Cabinet Secretary to set the standards for noise on the recommendation of NEMA. These include recommending the minimum standards for emissions



of noise and vibration pollution into the environment necessary to preserve public health and the environment; determining the criteria and procedures for measuring noise and vibration pollution into the environment and issuing guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.

19. Section 102 of EMCA makes it an offence for a person to emit noise that exceeds the standards established under that part. NEMA is permitted to grant temporary permits allowing noise in excess of the set standards in certain specified instances.
20. The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations* were promulgated in 2009. EMCA defines noise as any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. The regulations define noise pollution as the emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment.
21. Part II of the regulations sets out general prohibitions against the making or causing to be made, 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 neighborhood, whether the noise is recurrent, intermittent or constant, the level and intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise 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.
22. Regulation 5 bans anyone from making or continuing to make any noise exceeding the levels set out in the schedule to the regulations unless the noise is reasonably necessary to the preservation of life, health, safety and property. The first schedule to the regulations outlines the maximum permissible noise levels.
23. Regulation 6 enjoins the relevant lead agency to measure the noise levels. Section 2 of EMCA defines a lead agency as any Government ministry, department, parastatal or local authority in which any law vests functions of control or management or any element of the environment. Regulation 6 allows a person duly authorised by NEMA to take measurements where there is no lead agency to take the measurements or where the lead agency has failed to take action after being notified by NEMA.
24. In exercise of the said powers, the Authority enacted the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009*. The said regulations define the words “noise pollution” to mean:-

“The emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment.

On the other hand “excessive vibration” is defined to mean the presence of vibration which-

- a) Is of such intensity, duration, frequency or characters as to annoy, disturb, or cause or tend to cause adverse psychological or physiological effects on persons, or to damages or tends to damage personal or real property; and
- b) Exceeds 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source.

Section 3(1) of the regulations outlaws the making of or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs,



injures or endangers the comfort, repose, health or safety of others and the environment. Section 4 of the regulations similarly prohibits the making and or causing of excessive vibrations.

Under section 6 of the regulations, measurements to determine whether or not noise or vibration levels exceed the permissible levels shall be taken by the relevant lead agency. A “lead agency” is defined under the regulations as follows:-

“Lead agency” means any government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resources.”

In the absence of such a lead agency, section 6(3) and (4) of the said regulations provides that;

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“(3) In any cases where there is no relevant lead agency to take the measurements, or where the lead agency has failed to take action after being given reasonable notice by the Authority, the measurements shall be taken by a person duly authorized by the Authority, who is knowledgeable in the proper use of the measuring equipment.

(4) The Authority in consultation with the relevant lead agency may issue guidelines for the measurement of noise and excessive vibration.

In the instant case, the 3rd respondent NEMA visited the site on the June 27, 2022 and July 3, 2022 and made a report stating that the sound is a pollutant in relation with regulation 3 (1) and (2) of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 and a noise survey was recommended. The 2nd respondent did carry out the noise surveillance and did determine that the noise levels were beyond the recommended levels. On the facility belonging to the 1st respondent it was established that the levels were high during praise and worship session where all equipment are used. During the session the measurement indicated an average noise level of 68.2 dB. In a mixed residential area such as this one the noise level in accordance with the first schedule of the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009* is which is 55 dB (A) during the day and 35dB (A) at night. Be that as it may I find no evidence adduced before me that the 2nd 3rd and 4th respondents have failed in their duty to uphold the Constitution as well as observe, respect, promote, protect the Petitioners rights under article 42 and ensure fulfillment of obligations relating to the environment under article 70 of the *Constitution*. The award of damages has also not been proved by the petitioners and will not be awarded. I find that the petition has merit and I grant the following orders;

1. The 1st respondents through their actions and inactions that have resulted in excessive noise emissions from the Holistic Mission for all Nations Kiembeni Worship Sanctuary situated in Kiembeni



Estate, have violated the petitioners' rights to a clean and healthy environment.

2. The 1st respondent T/A Holistic Mission for all Nations Kiembeni Worship Sanctuary and the facility being within a mixed residential area to restrict the noise level in accordance with the first schedule of the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009*.
3. If the 1st respondent does not forthwith cease to cause or permit to be caused the noise pollution from their facility the 2nd and 3rd respondents are directed to prosecute the 1st respondents for the offences created under EMCA and the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations*.
4. The 2nd and 3rd respondents are directed to enforce EMCA and the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations* to ensure the abatement of unreasonable noise and vibration noise pollution emitted into the environment from any source within Mombasa county that may interfere with the comfort, repose, health or safety of members of the public.
5. The 1st respondent to bear the cost of this petition.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2022.

N.A. MATHEKA

JUDGE

