



REPUBLIC OF KENYA



KENYA LAW
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**Exeter Pearl Apartments Management Ltd v Bar Next Door Ventures
Limited t/a the Bar Next Door Bar & Grill & 6 others (Constitutional
Petition E012 of 2024) [2025] KEELC 4115 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4115 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION E012 OF 2024

JO MBOYA, J

MAY 26, 2025

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 42(1) & ARTICLE 70 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF RULES 3 & 17 OF THE CONSTITUTION OF KENYA
(PROTECTION AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE
CONSTITUTION) PRACTICE AND PROCEDURE RULES 2012 AND ALL OTHER
ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF THE ENVIRONMENT AND MANAGEMENT
COORDINATION (NOISE AND VIBRATION
POLLUTION) (CONTROL) REGULATION 2009**

AND

**IN THE MATTER OF THE NAIROBI CITY COUNTY ALCOHOLIC DRINKS
CONTROL AND LICENSING ACT, 2014**

BETWEEN

EXETER PEARL APARTMENTS MANAGEMENT LTD PETITIONER



AND

BAR NEXT DOOR VENTURES LIMITED T/A THE BAR NEXT DOOR BAR & GRILL	1ST RESPONDENT
THE KETTLE HOUSE BAR & GRILL LTD	2ND RESPONDENT
SAMAKI SAMAKI SEAFOOD AND JAZZ	3RD RESPONDENT
DIRECTOR OF ENVIRONMENT NAIROBI CITY COUNTY GOVERNMENT	4TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	5TH RESPONDENT
THE CHAIRPERSON NAIROBI CITY COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING BOARD	6TH RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT	7TH RESPONDENT

RULING

1. The Petitioner/Applicant [hereinafter referred to as the Applicant] approached the court vide Notice of Motion Application dated the 28th February 2024; and wherein the Applicant sought the following reliefs;
 - i. That this Honourable Court be pleased to certify this application as urgent on the grounds set out in the certificate of urgency and the same be heard ex-parte in the first instance.
 - ii. That a conservatory order be issued prohibiting the 1st, 2nd and 3rd Respondents by themselves, their agents, and/or servants from operating The Bar Next Door, The Kettlehouse Bar & Grill And Samaki Samaki Seafood And Jazz pending the hearing and determination of the instant application.
 - iii. That a conservatory order be issued prohibiting the 1st, 2nd and 3rd Respondents by themselves, their agents, and/or servants from operating The Bar Next Door, The Kettlehouse Bar & Grill And Samaki Seafood And Jazz pending the hearing and determination of the petition.
 - iv. That costs of the Application be provided.
2. The instant application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one, namely; Stephen Abimbola sworn on even date and wherein the deponent has averred that same is the Director of the Applicant. In addition, the deponent has averred that the 1st, 2nd and 3rd Respondents have been operating businesses within the neighbourhood of the Applicant and that the businesses in question emits loud music and chaos and thus causing discomfort and nuisance to the residents of Applicants apartment.
3. Additionally, the deponent of the affidavit averred that as a result of emission of loud music and noise coming from the 1st, 2nd and 3rd Respondents premises, the Applicant herein was constrained to mount a complaint with the 4th and 5th Respondents, who are the statutory bodies chargeable with regulating noise and related environmental pollution.



4. Furthermore, the deponent of the supporting affidavit averred that despite mounting the complaints with the 4th and 5th Respondents, same have failed to put in place appropriate measures to abate [avert] the noise and related environmental pollution from the 1st, 2nd and 3rd Respondents premises. To this end, the Applicant has therefore contended that the actions and/or omissions complained of constitutes breach, violation and/or infringement of the Applicants right to clean and healthy environment.
5. The 1st Respondent proceeded to and filed a replying affidavit and wherein same denied the claims by and on behalf of the Applicant. In particular, the 1st Respondent posited that the music being played within its business premises accord with the prescription of the law.
6. The 2nd Respondent filed a replying affidavit sworn by one Benjamin Kariuki Kimani and wherein the deponent averred inter-alia that its establishment is located along Muthangari Road, in Lavington, Nairobi. Furthermore, the deponent averred that its establishment sits more than 1 kilometre away from the Applicant's residential apartment which are located on Othaya Road.
7. Moreover, the 2nd Respondent contended that its business is duly licensed and the 2nd Respondent procured and obtained an EIA License, after due compliance with the statutory requirements prescribed under Environment Management Coordination Act, 1999 [2015] [EMCA].
8. The 4th, 6th and 7th Respondents filed a preliminary objection dated the 9th May 2024 and wherein same contended that the entire petition and the consequential application are premature and misconceived. Moreover, the 4th, 6th and 7th Respondents contested the jurisdiction of the court to entertain and adjudicate upon the dispute on the basis of the doctrine of exhaustion. In particular, the named Respondents cited and referenced the provisions of Sections 125 and 129 of EMCA [1999].
9. The instant application came up before the court on various dates resting with the 31st July 2024 whereupon the advocates for the parties entered into a consent on terms. For coherence, the import and tenor of the consent was to the effect that the 5th Respondent was to designate a lead expert to visit the locus in quo [the Petitioners residential apartment] and thereafter to determine the extent of the noise being emitted from the 1st, 2nd and 3rd Respondents premises.
10. Furthermore, the consent under reference also granted liberty to the Petitioner on one hand; and the 1st, 2nd and 3rd Respondents to engage an expert who were obliged to accompany the lead expert appointed by the 5th Respondent to visit the locus in quo and to determine the scope and/or extent of the noise emission.
11. Given the significance of the term[s] of the consent under reference as pertains to the determination of the subject application, it is imperative to reproduce the terms thereof. For ease of appreciation, the terms of the consent are reproduced as hereunder:-

By consent of the advocates for the parties:

1. The application dated the 28/02/2024 be and is hereby compromised and settled on terms.
2. The 5th Respondent herein namely, NEMA be and is hereby ordered to appoint/designate a lead expert on noise pollution who shall be tasked with the mandate of ascertaining whether the extent of the noise being emitted by the 1st, 2nd and 3rd Respondents herein exceed/surpass the maximum permissible levels in accordance with the current Environmental Management and Coordination Act Noise Regulations 2009.
3. The designation/nomination of the lead expert herein in terms of clause (2) hereof, shall be undertaken within seven (7) days from the date hereof.



4. The Petitioner and the rest of the Respondents including the 5th Respondent shall be at liberty to engage and/or appoint a lead expert on own account to accompany the designate lead expert during the exercise and/or task/assignment under reference.
5. The lead experts, if any, engaged by the Petitioner and the rest of the Respondent shall be paid by the person(s) responsible for such engagement/retention.
6. Nevertheless, the reasonable charges of the lead expert appointed and designated by NEMA shall be borne equally by the pet and the 1st, 2nd & 3rd Respondents herein. For coherence, the said reasonable charges shall be pro-rate shared by the said parties.
7. The designated lead expert shall appoint and designate a suitable date for the exercise in consultation/agreement with the lead experts, if any, appointed by the Petitioner and the Respondent of the Respondents.
8. Upon the completion of the exercise, the designated expert shall prepare and file a report on the status of compliance with the notice regulations 2009 and the report shall be filed with the court within sixty (60) days from the date of the exercise.
9. The lead experts appointed by the Petitioner and the rest of the Respondents shall be at liberty to file own reports, if any, and where deemed apposite.
10. Be that as it may, the designated lead expert by the 5th Respondent herein shall be the umpire during the exercise. Nevertheless the report by the said umpire [lead expert designated by NEMA shall take into account the comments and sentiments of the other lead experts where appropriate.
11. The maker herein shall be mentioned on the 15/10/2024 to ascertain/confirm the status of the exercise and for further orders/directions.
12. Either party shall be at liberty to apply.
13. Cost[s] shall be in the cause.
12. Following the entry into and the adoption of the consent under reference, the 5th Respondent herein proceeded to and designated a lead expert who thereafter visited the locus in quo in an endeavor to determining the extent of the noise emission emanating from the 1st, 2nd and 3rd Respondents business premises. In addition, the designated lead expert thereafter proceeded to and filed a report with the court.
13. Even though the terms of the consent had provided and granted liberty to the Petitioner; 1st, 2nd and 3rd Respondents to designate experts to accompany the lead expert, it appears that the Petitioner; 1st, 2nd and 3rd Respondent did not comply with the terms of the consent. For good measure, the experts by the said parties did not accompany the lead expert designated by the 5th Respondent.
14. On the contrary, it appears that the Petitioner on one hand and the 2nd Respondent on the other hand retained retained experts who proceeded to undertake their own measurements and thereafter filed own reports. Suffice it to state that the reports by the experts appointed on behalf of the Petitioner and the 2nd Respondent are also on record.
15. Upon the filing of the report, by the lead expert designated by the 5th Respondent, the advocates for the parties covenanted to file and exchange written submissions as pertains to the application. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.



16. The Petitioner/Applicant thereafter filed two sets of written submissions namely the submissions dated 11th July 2024 and rejoinder submissions dated the 25th January 2025 and wherein the Petitioner/Applicant has highlighted two salient issues, namely whether the court is seized of the requisite jurisdiction to entertain the subject application; and whether the Applicant has met the threshold for the grant of the conservatory orders sought.
17. The 1st Respondent filed two sets of written submissions including the submissions dated the 31st January 2025 and wherein same has highlighted one salient issue. For good measure, the 1st Respondent has posited that the Applicant has failed to establish and or demonstrate the existence of a prima facie basis/case to warrant the grant of a conservatory orders.
18. The 2nd Respondent filed written submissions dated 29th July 2024 and wherein same has equally highlighted two issues for consideration, namely whether the honourable court is seized of jurisdiction; and whether the Applicant has met the threshold for the grant of the conservatory orders sought.
19. The 4th, 6th and 7th Respondents filed written submissions dated 16th July 2024 and wherein same have highlighted and canvassed two salient issues for consideration by the court. The issues canvassed by the named Respondents include whether the honourable court is seized of the requisite jurisdiction to entertain the subject Petition and by extension the application beforehand; and whether the petition is premature on the basis of the doctrine of exhaustion.
20. Having reviewed the application beforehand, the responses thereto, the report filed by the designated lead expert; the reports by the experts appointed by the Petitioner and the 2nd Respondent, respectively; and upon taking into account the written submission on record, I come to the conclusion that the determination on the subject application turns on two key issues, namely; whether this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the Petition and by extension the application; and whether the Applicant has established a basis for the grant of the conservatory orders or otherwise.
21. Regarding the first issue, namely; whether this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the Petition and by extension the application, it is imperative to observe at the onset that the dispute beforehand touches on and concerns the issue of excessive emission of noise and thus a claim pertaining to breach/violation of the right to clean and healthy environment.
22. Suffice it to state that the right to clean and healthy environment is one of the rights enshrined in *the constitution* 2010. For coherence, the right to clean and healthy environment is espoused vide Article 42 of *the Constitution* 2010.
23. The provisions of Article 42 of *the Constitution* 2010, stipulates as hereunder;
 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.
24. There is no gainsaying that the right to clean and healthy environment, is a right that inheres and vest on each and every citizen. Furthermore, all and sundry are obligated to comply with and adhered to the said right. [See Article 3, 10[1], 19[1], 20[3] and 21[1] of *the Constitution* 2010].
25. Moreover, where there is a complaint touching on and or concerning breach, violation and/or infringement on the right to clean and healthy environment, courts of law and in particular the environment and land court is clothed with the jurisdiction to entertain and adjudicate upon such



claims. Suffice it to posit that the jurisdiction to adjudicate upon and entertain such claims concerning breach, violation and or infringement is underpinned by Article 69 and 70 of *the Constitution* 2010.

26. Pertinently, the provisions of Article 70 of *the Constitution* 2010, stipulates as hereunder;

Enforcement of environmental rights.

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.

27. My understanding of the provisions of Article 70 [supra] is to the effect that where there is a breach and/or violation of the right to clean and healthy environment, any person is obligated to approach the court with a view to enforcing such rights. To this end, the right of any person to approach the court in an endeavor to enforce the right to clean and healthy environment is fortified by the provisions of Article 22, 23 and 258 of *the Constitution*.

28. Flowing from the foregoing, I am not persuaded by the contention raised by the 4th, 6th and 7th Respondents that this court is not seized of the requisite jurisdiction to entertain and adjudicate upon the subject petition and by extension the application. In any event, the provisions of Section 125 and 129 of the EMCA, which have been referenced by the named Respondents are inapplicable.

29. Moreover, there is no gainsaying that the provisions of Section 129 of the EMCA, which has been referenced by the 4th, 6th and 7th Respondents only comes into play where NEMA [5th Respondent] has made a decision which has aggrieved a party. It is the existence of a decision made by NEMA that would activate the provisions of Section 129 of EMCA and not otherwise.

30. Furthermore, it is also worthy to recall and reiterate that the jurisdiction of the Environment and Land Court to entertain and adjudicate upon matters pertaining to the right to clean and healthy environment and by extension actions that occasion environmental degradation has also been espoused by the provisions of Section 3[3] of the EMCA.

31. The provisions of Section 3[3] of EMCA states and stipulates as hereunder;

- (3) If a person alleges that the entitlement conferred under subsection
 - (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully



available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

- a. prevent, stop or discontinue any act or omission deleterious to the environment;
- b. compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- c. require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- d. compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- e. provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

32. In addition, the jurisdiction of environment and land court to entertain and adjudicate upon on matter impacting on the right to clean and healthy environment is also espoused by the provisions of Section 13[3] of the *Environment and Land Court Act*, 2011.

33. For ease of appreciation, the provisions of Section 13 [3] [supra] are reproduced as hereunder;

- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

34. The totality of the provisions, which I have referenced in the preceding paragraphs highlight and underscore the jurisdiction of the environment and land court to entertain disputes pertaining to and concerning breach, violation and/or infringement of the right to clean and healthy environment. In this regard, I am afraid that the objection touching on and concerning the jurisdiction of this court is misconceived and in any event premised on misapprehension of the various provisions of the law.

35. Finally, and as concerns the relevance of the doctrine of exhaustion, it is imperative to underscore that the doctrine itself is not absolute. There are instances where the statutory mechanism provided for may be less effective and or efficacious. In such a situation, a litigant cannot be held at ransom and be compelled to approach the ineffective statutory forum. In this case the nature of reliefs sought including a conservatory order could not in any event be granted by NEMA.

36. Other than the foregoing, it is also common ground that the supreme court of Kenya has since settled the law as pertains to the application on the doctrine of exhaustion. Instructively, the apex court has agitated the deployment of a nuanced approach in an endeavor to ensure the right of access to justice is a reality and not an illusion.

37. In the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment);

100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and



not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows: “What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* *CA No 2 of 2008*. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:

“Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”

101. Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer.

This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR.) (17 February 2023) (Judgment).



38. In a nutshell, I come to the conclusion that the doctrine of exhaustion and constitutional avoidance, which would ordinarily postpone the assumption of jurisdiction by this court in respect of the subject matter, does not apply. In this respect, the jurisdiction of the court was timeously and properly invoked.
39. Turning to the issue of whether the Applicant has met or satisfied the threshold for the grant of the conservatory order, it is imperative to observe that it was incumbent upon the Applicant to place before the court, plausible, cogent and credible evidence to demonstrate that the noise being emitted from the 1st, 2nd and 3rd Respondents premise exceeded the prescribed limit.
40. For good measure, the demonstration that the noise being emitted from the 1st, 2nd and 3rd Respondents premises exceeded the prescribed limit called upon the Applicant to place before the court evidence vide an expert report in the manner prescribed under Section 6 of the Regulations pertaining to noise and pollution.
41. The provisions of Section 6 of the Regulation stipulates thus;
6. Measurement and control
- (1) No person shall cause noise from any source which exceeds any sound level as set out in the applicable column in the First Schedule to these Regulations.
 - (2) Measurements shall be taken by the relevant lead agency.
 - (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 measurement shall be taken by a person dully 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.
 - (5) Any person who makes noise in excess of the prescribed levels commits an offence.
42. Notably, the Applicant bore the burden of placing before the court evidence of breach of the provisions of Section 6[1] of the Regulation under reference. However, it is not lost on this court that the Applicant did not file any expert report at the onset, when the Petition was filed.
43. First forward, on the 31st July 2024, the advocates for the parties entered into a consent whereby it was agreed that NEMA [5th Respondent] was to designate a lead expert who was tasked to visit the locus in quo in the presence of other experts appointed by the adverse parties and thereafter determine whether the noise emitted from the 1st, 2nd and 3rd Respondents premises was outside the prescribed limit.
44. Bearing in mind that expert may arrive at different and varying conclusion, the consent was crafted in such a manner that the designated lead expert nominated by the 5th Respondent was to be the umpire. In this regard, the said lead expert was to undertake the exercise in consultation with other expert, but the final report, and the binding conclusions were to come from the umpire, namely the lead expert designated by NEMA.
45. Nevertheless, it is imperative to state that when the designated lead expert visited the Petitioner's premises with a view to complying with the terms of the consent same was denied and deprived of access. In this regard, the said designated lead expert was thereafter constrained to determine the scope and extent of the noise emission from grate number 6 on Othaya Road and not the designated locus in quo.



46. The fact the designated lead expert was denied and deprived of the opportunity to perform his court ordained duty was conceded by learned counsel for the Petitioner/Applicant. [See the submissions dated the 25th January 2025].
47. Having denied and deprived the designated lead expert opportunity to access the locus in quo and thereafter determine the scope of the noise emission from the locus in quo, the question that does arise is whether the complaints by the Applicant are bona fide or better still whether same were driven by ulterior motive.
48. The answer to the question posed in the preceding paragraph shall have to await the plenary hearing of the Petition. However, I must point out that the conduct of the Applicant creates a basis for adverse inference.
49. Be that as it may, it is not lost on this court that before an Applicant can partake of and accrue of a conservatory order, such an Applicant must demonstrate a prima facie case. The case must be genuine and arguable. Furthermore, the Applicant must venture forward to demonstrate that the failure to grant a conservatory order would create undue prejudice and worsen the Applicants rights which are contended to be the subject of breach.
50. The prerequisite conditions to be established and proven before a conservatory order can issue were elaborated upon in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, where the court stated as hereunder;
25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of Centre for Rights Education and Awareness and 7 Others –v- The Attorney General [HCCP No. 16 of 2011]:
- “[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*”.
26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others CP No. 7 of 2011, who whilst agreeing with Musinga J’s statement in Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General (Supra) stated as follows:-
- “I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success” (emphasis).
27. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in Jimaldin Adan Ahmed & 10 Others –v- Ali Ibrahim Roba and 2 Others [2015] eKLR and Micro Small Enterprises Association of Kenya (Mombasa Branch) –v- Mombasa County Government [2014] eKLR respectively.



28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.
 29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others CP No. 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.
 30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.
 31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others CP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.
51. Moreover, the supreme court of Kenya in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, stated as hereunder;
- (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
52. Flowing from the principle enunciated in the decision [supra], there is no gainsaying that the Applicant bore the burden of demonstrating the existence of a prima facie case and the likelihood of prejudice being suffered if the orders sought are not granted. Furthermore, the Applicant was also obliged to demonstrate bona fides in pursuit of the conservatory orders. For good measure, where a party seeks to procure the intervention of the court, such a party must also demonstrate that same has approached the seat of justice with clean hands.
53. I am not convinced that the Applicant herein has met and/or satisfied the threshold for the grant of the conservatory orders sought. In this regard, I am not persuaded to allow the application.



54. Before concluding this matter, I beg to state that the mere fact that the court has declined to grant the application does not provide the 1st, 2nd and 3rd Respondents with a blank cheque to emit noise beyond the prescribed limit. Suffice it to underscore that the 1st, 2nd and 3rd Respondents are still obliged to abide by and comply with The Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations.
55. On the other hand, the 4th and 5th Respondent are still under an obligation to perform and/or execute their statutory mandates and/or obligations including closure of any establishment that emits noise and pollutes the environment beyond the prescribed statutory limits. In any event, the provisions of the EMCA remain operational and must be adhered to.

Final Disposition

56. For the reasons that have been highlighted in the body of the ruling, I come to the conclusion that the application dated the 28th February 2024 is devoid and bereft of merits.
57. In the premises, the final orders of the court are as hereunder;
- i. The Application dated the 28th February 2024 be and is hereby dismissed.
 - ii. Costs of the Application shall abide the outcome of the Petition.
58. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI ON THE 26TH DAY OF MAY, 2025.

OGUTTU MBOYA, FCI Arb, CPM [MTI].

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Mutua h/b for Mr. Miller for the Petition/Applicant

Mr. Mutea for the 1st Respondent

Mr. William Kabaiko for the 2nd Respondent

Mr. Bogongo for the 4th, 6th and 7th Respondents

Ms. Brenda Majune for the 5th Respondent

N/A for the 3rd Respondent

