



Oyster Café Ltd v Nairobi City Council Government & another; Nairobi City County, Urban Planning & 2 others (Interested Parties); Kariuki & 6 others (Intended Interested Party) (Environment and Land Judicial Review Miscellaneous Application 1 of 2023) [2024] KEELC 3561 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 1 OF 2023**

AA OMOLLO, J

APRIL 11, 2024

BETWEEN

OYSTER CAFÉ LTD APPLICANT

AND

NAIROBI CITY COUNCIL GOVERNMENT 1ST RESPONDENT

**NARABI CITY COUNCIL: COUNTY EXECUTIVE COMMITTEE
MEMBER - GREEN NAIROBI (ENVIRONMENT, WATER, FOOD AND
AGRICULTURE) 2ND RESPONDENT**

AND

NAIROBI CITY COUNTY, URBAN PLANNING INTERESTED PARTY

**NAIROBI CITY COUNCIL, ALCOHOLIC DRINKS CONTROL AND
LICENSING BOARD INTERESTED PARTY**

NATIONAL ENVIRONMENT AUTHORITY (NEMA) INTERESTED PARTY

AND

GEORGE IRUNGU KARIUKI INTENDED INTERESTED PARTY

VINCENT OUMA INTENDED INTERESTED PARTY

GILBERT KIRUI INTENDED INTERESTED PARTY

BEATRICE TARKWEN INTENDED INTERESTED PARTY

EVANSON MURIU INTENDED INTERESTED PARTY

DOROTHY JEMATOR INTENDED INTERESTED PARTY



RULING

1. For determination is the application dated 29th September, 2023 filed by seven (7) people calling themselves Intended Interested Parties. The motion is premised on order 1 rule 10 of the Civil Procedure Rules, article 22, 23(1), 27(1) and 42 of the Constitution amongst other provisions of the law. The Applicants sought the following orders;
 - a. Spent.
 - b. The intended or proposed interested parties be granted leave to enjoin the suit as interested parties forthwith.
 - c. The Intended or proposed Interested Parties be granted leave to file submissions in response to the Applicant's Notice of Motion dated 25th May, 2023.
 - d. The suit be transferred to the Environment and Land Court Division for hearing and determination owing to the Court's want of jurisdiction.
 - e. An order of the Court mandating the 1st and 2nd Respondents as well as the 3rd Interested Party NEMA to close down that Applicant's establishment operated on LR Number 2/279 under the name Oyster Bay or by whatever other business name for failure to comply with the law.
 - f. The Applicant Application dated 25th May, 2023 be dismissed with costs.
 - g. The costs of this Application be costs in the cause.
2. The application was premised on the grounds listed on its face inter alia;
 - i. The Intended Interested Parties live opposite the Applicant's establishment, Oyster Bay Restaurant, less than 20 metres and have a stake in the matter in question as their constitutional rights to a clean and healthy environment are affected by the noise emanating from the Applicant's open/garden restaurant.
 - ii. Oster Bay is an establishment operated by the Applicant. The Intended Interested Parties are continually subjected to noise pollution from the activities of the Applicant. The Intended Interested Parties will suffer prejudice if not enjoined in the suit the substance of which is the legality of the 1st and 2nd Respondents noise control powers, which is enshrined in the Constitution of Kenya, 2010.
 - iii. The Applicant established a noisy night open/garden restaurant on 8th, September, 2022 in the Intended Interested Parties' residential area without an environmental impact assessment license or a noise control license as required by the provisions of the Environmental Management and Coordination Act 1999. The issue in controversy can only be determined fairly with the participation of the Intended Interested Parties as stakeholders.
 - iv. The Applicant suit is façade, disguised as a contravention of its rights by the Nairobi County Government and the Nairobi City County Alcoholic Control Board the 1st and 2nd Respondent herein. No prejudice will be suffered by the Applicant by the Intended Interested Parties joinder of the suit. The Intended/Proposed Interested Parties have a right to heard



on a matter which concerns their right to clean and healthy environment that is contrived as licensing violation by the 1st and 2nd Respondents against the Applicant.

3. The Applicant in opposition to the motion filed a replying affidavit sworn by Paul Mutioro Muriithi on 26th October, 2023. In brief, Mr. Muriithi deposed that joining these people to these proceedings is a waste of time because they were invited to a public participation forum on 25th April, 2023 which they deliberately shunned/ignored. He added that the Respondent and NEMA does not require any authorization from the Intended Interested Parties hence they are not necessary parties to this suit.
4. In responding to some of the issues raised by the Intended Parties, the exparte Applicant avers that NEMA already carried an Environmental Impact Assessment (EIA) and if they had found the establishment was a threat to the Community, the 3rd Interested Party (NEMA) would have necessitated the closure of the Restaurant. That their operations were given a green light vide NEMA's letter dated 14th April, 2023 thus denying the Interested Parties authority to impede on or interfere with the running of the business.
5. The exparte applicant states that the prayer seeking for closure of the business is malicious, unreasonable and does not hold water and it contravenes their right under article 43 of the Constitution as they have invested millions of shillings in the business. They added that they have reduced the number of speakers and the live DJs from the establishment to accommodate the residents and the surrounding neighborhoods. It also their argument that the letter of 20th June, 2023 commended them for their efforts to control noise pollution. It urges that the motion dated 29th September, 2023 be dismissed with costs.
6. Parties filed their respective submissions which were ably summarized by Chigiti (SC) J. in his ruling rendered on 23rd November, 2023 on the application transferring the case to the ELC. I have read the said submissions and do not see the need to summarize them again. By the determination of 23rd November, 2023, the prayer (d) seeking transfer was dealt with.
7. The remaining issues for determination is the prayer for joinder (prayer b) and prayer (e) which sought an order to close the Applicant's establishment. This suit was commenced by way of judicial review proceedings. The purpose and reach of judicial review and what it entails was discussed by the court of Appeal in the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Nairobi C. A. No. 185 of 200 (2002) 2002) eKLR as follows;

“That is the effect of this Court's decision in the *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others* Civil Appeal no 266 of 1996 case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at" Did those who made the decision have the apower, i.e. the jurisdiction to make it" Were the persons affected by the decision heard before it was made" In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters" These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision and that as we have said is not the province of judicial review.”



8. From the pleadings filed by the applicants herein, it is obvious that as private citizens they were not involved in the decision-making process and in particular refusing to allow the Ex parte Applicant carry out its businesses. The Ex parte Applicant has itemized the grounds upon which it was seeking the reliefs of judicial review to include the acts of the 1st and 2nd Respondents representatives who it stated refused to re-open the restaurant despite directives from NEMA.
9. The grounds listed by the Intended Interested Parties in support avers that the reliefs sought, if granted would affect them. They even referred to the powers of the Respondent under the 4th schedule, part 2, clause 3 of the Constitution which gave the County government control of air and noise pollution and other public nuisances. Further they added that they have a distinct and concrete identifiable interest being the victims of the Applicant's illegal bar and disco business disguised as a restaurant.
10. The gist of the ex parte Applicant's case the intended interested parties seek to join does not touch on the illegality or otherwise of the license. Neither is there any relief sought as against the Ex parte Applicant. At the end of the day, all the Applicant wants the court to examine is whether or not the Respondent have acted beyond their powers and or if they offered the Ex parte Applicant a fair administrative process. The Intended Interested parties have been given rights (as citizens of Kenya) both constitutionally and statutorily which if they feel are being violated, they can move the court to protect. However, judicial review proceedings is not one of such forums that their issues can be ventilated as the courts power are limited in terms of orders that can be issued.
11. It is my considered opinion and I so hold that the Intended Interested parties are not necessary parties to these proceedings as envisaged under order 1 of the Civil Procedure Rules. I decline to join them. Consequently, as non-parties, prayer (e) seeking closure of the establishment does not lie, neither are they entitled to the dismissal order of the application dated 25th May, 2023.
12. The notice of motion dated 29th September, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2024

A. OMOLLO

JUDGE

