



**Aggarwal v Mint Shack Limited t/a Barrels and Stools Lounge (Environment & Land Case E193 of 2023) [2023] KEELC 21379 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E193 OF 2023**

**JA MOGENI, J**

**NOVEMBER 2, 2023**

**BETWEEN**

**NISHANT AGGARWAL ..... PLAINTIFF**

**AND**

**MINT SHACK LIMITED T/A BARRELS AND STOOLS  
LOUNGE ..... DEFENDANT**

**RULING**

1. This Ruling is in respect of the Defendant's Notice of Preliminary Objection dated 7/09/2023, through the firm of M/s Odindo & Co. Advocates, which seeks to have the Plaint dated 26/05/2023 struck out with costs on the following grounds:
  1. That this Honourable Court has no jurisdiction to hear and determine this suit as the Plaint offends the doctrine of exhaustion in so far as it relates to complaints regarding the condition of the environment in light of Sections 32 and 129 of the *Environmental Management and Co-ordination Act* (No. 8 of 1999) as read together with regulation 25 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
  2. That in the event the Plaint dated 26/05/2023 ought to be struck out with costs.
2. The Defendant also filed a Notice of Motion Application dated 10/07/2023, through the firm of Yano & Co. Advocates, pursuant to Section 3, 9, 32 and 125 of the Environment Management Co-ordination Act, Sections 3, 13 and 19 of the *Environment and Land Court Act*, Order 22 Rule 22, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A & 3A of the



Civil Procedure Act, Article 159 of the Constitution of Kenya and all other provisions of the law. The Defendant/Applicant is seeking for the following Orders:

1. Spent.
  2. That the National Environment Management Authority be enjoined in these proceedings as an Interested Party.
  3. That there be stay of execution of the orders made by this Honourable Court on 14/06/2023 pending the hearing and determination of this Application.
  4. That the orders made by this Honourable Court on the 14/06/2023 be set aside, vacated and revoked.
  5. The suit filed herein be struck out for want of jurisdiction.
  6. That the Plaintiff/Respondent, his agents, servants and any other person whomsoever be restrained by an order of injunction from entering, interfering, threatening or in any other manner howsoever dealing with the Defendant's/Applicant's business premises and its employees.
  7. That the costs of this application be provided for.
3. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the supporting affidavit of Binai Shah, a Director of the Defendant/Applicant herein, sworn on 10/07/2023 as well as the Supplementary Affidavit of Binai Shah, a Director of the Defendant/Applicant herein, sworn on 25/09/2023.
4. The Application is opposed by Nishant Aggarwal, the Plaintiff/Respondent herein vide a Replying Affidavit sworn on 18/09/2023.
5. The Defendant also filed Grounds of opposition dated 7/09/2023, through the firm of Odindo & Co. Advocates, opposing the suit on the following grounds:
1. That the Plaint dated 26/05/2023 is misconceived and a gross abuse of the process of the Honourable Court.
  2. The Plaint offends the doctrine of exhaustion in so far as it relates to complaints regarding the condition of the environment in light of Sections 32 and 129 of the Environmental Management and Co-ordination Act (No. 8 of 1999) as read together with regulation 25 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
  3. The Plaintiff has not placed any material before the Honourable Court to demonstrate That the noise complained about exceeds the permissible noise levels provided by the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
  4. The crux of the Plaint is the issue of noise pollution which issue is within the mandate of the National Environment Management Authority (NEMA). The failure to enjoin NEMA renders the Plaint fatally defective and incompetent;



5. The Plaintiff is scandalous, frivolous and vexatious and hence should be dismissed with costs to the Defendant.
6. The Notice of Preliminary Objection is opposed through a Replying Affidavit of Nishant Aggarwal, the Plaintiff/Respondent sworn on 14/10/2023.
7. Counsels agreed to canvas the application and the preliminary objection vide written submissions which they duly filed. The Defendant/Applicant, through the firm of Yano & Co. Advocates filed written submissions on their application dated 10/07/2023 on 18/10/2023, the Defendant/Applicant, through the firm of Odindo & Co. Advocates filed written submissions on the preliminary objection dated 7/09/2023 on 23/10/2023 and the Plaintiff/Respondent filed two separate written submissions to the application dated 10/07/2023 and to the preliminary objection dated 7/09/2023 on 26/10/2023.

### **Analysis and Determination**

8. This Court has considered the Defendant's application dated 10/07/2023 together with the affidavits filed in support thereof and the Plaintiff's Replying Affidavit. The Court has also considered the Defendant's Notice of Preliminary Objection dated 7/09/2023 and Grounds of Opposition filed by the firm of Odindo & Co. Advocates opposing the present suit. In my humble view, there are only three substantive issues for determination as follows: -
  - a. Whether the Preliminary Objection and Grounds of Opposition filed by the firm of M/s Odindo & Co. Advocates are properly on record.
  - b. Whether this court has jurisdiction to determine the Plaintiff's suit; and if so,
  - c. Whether the Defendant's Application dated 10/07/2023 is merited.

### **Whether the preliminary objection and the grounds of opposition both dated 7/09/2023 filed the firm of M/s Odindo & Co. Advocates are properly on record.**

9. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. The firm of M/s Odindo & Co. Advocates filed a Preliminary Objection and Grounds of Opposition both dated 7/09/2023 purportedly on behalf of the Defendant. The Plaintiff, in opposition the same, avers That the Defendant is purportedly being represented by two law firms, both of which are filing and serving the Plaintiff with pleadings in total violation of the law on representation under Order 9 of the Civil Procedure Rules. That the notice of change of advocates meant That the firm of Odindo & Co. Advocates had been replaced and could no longer act for the Defendant by filing pleadings. The Plaintiff therefore seeks That the pleadings filed on behalf of the Defendant by the firm of Odindo & Co. Advocates should be struck out for want of representation.
10. I note That there are two sets of pleadings filed on behalf of the Defendant herein from a perusal of the Court record. The firm of M/s Odindo & Co. Advocates came on record for the Defendant on 15/06/2023 vide a Notice of Appointment of Advocates dated 14/06/2023. The said firm thereafter filed a preliminary objection and grounds of opposition both dated 7/09/2023 on 11/09/2023. The firm of M/s Yano & Co. Advocates then filed a Notice of change of advocates dated 10/07/2023 together with their application dated 10/07/2023 and a draft defence on 10/07/2023. They served the Plaintiff with their application through email on 19/07/2023.
11. The firm of M/s Odindo & Co. Advocates only filed their preliminary objection and grounds of opposition both dated 7/09/2023 on 11/09/2023 which was after the firm of M/s Yano & Co.



Advocates had filed a notice of change of advocates on 10/07/2023. I also note That the firm of M/s Odindo & Co. Advocates purported to file another Notice of Appointment of Advocates dated 20/09/2023 which was irregular.

12. It is my considered view That the change of advocates by the Defendant had been properly effected as at 10/07/2023 and for this reason, I shall not render myself on the preliminary objection and grounds of opposition both dated 7/09/2023 filed by the firm of M/s Odindo & Co. Advocates as they were filed after 10/07/2023.

**Whether the Court has jurisdiction to handle the matter.**

13. I note That the Defendant has raised the issue of jurisdiction in their Application dated 10/07/2023 under prayer 5. However, when the issue of a court's jurisdiction to hear and determine a matter is raised, the court seized of the matter is then obliged to decide the issue right away on the material before it. It must first deal with it as jurisdiction of a court is everything as was held in the case of the Owners of the Motor Vessel Lillian 'S' Vs. Caltex Kenya Limited (1989) KLR 1.
14. The challenge on this court's jurisdiction to handle the present matter is mainly ventilated on the objection based on Section 125 and 129 of the *Environmental Management and Co-ordination Act* (No. 8 of 1999). The Defendant contended That the suit is fatally and incurably defective and the same cannot be ventilated before this court. They aver That the plaintiff has not exhausted the dispute resolution mechanism envisaged under the provisions of section 125 of the EMCA. That the matters pleaded in this suit are incompetent and the Plaintiff ought to have pursued the remedy under the Act being Public Complaints Committee. It is their case That the matter at first instance should have been heard and determined by the Public Complaints Committee.
15. The dispute before this Court is with regard to the Plaintiff's grievances regarding the noise pollution emanating from the Defendant's premises grossly violating the Plaintiff's constitutional right to a clean and healthy environment. The Plaintiff seeks a permanent injunction barring the Defendant from emitting noise pollution in any way That interferes with their rights to a healthy and clean environment. The Plaintiff also seeks general damages.
16. This Court derives its jurisdiction from Section 13 of the *Environment and Land Court Act* No. 19 of 2021 which stipulates as follows:
  - “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes?
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources.
    - (b) relating to compulsory acquisition of land.
    - (c) relating to land administration and management.



- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
- (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, 2010.
  - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  - (5) Deleted by Act No. 12 of 2012, Sch.
  - (6) Deleted by Act No. 12 of 2012, Sch.
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
    - (a) interim or permanent preservation orders including injunctions.
    - (b) prerogative orders.
    - (c) award of damages.
    - (d) compensation.
    - (e) specific performance.
    - (g) restitution.
    - (h) declaration.or
    - (i) costs.”

17. I have also considered the provisions of Section 129 of the Environmental Management and Co-ordination Act (No. 8 of 1999) which states as follows:

- (1) Any person who is aggrieved by—
  - (a) a refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder;
  - (b) the imposition of any condition, limitation or restriction on his license under this Act or regulations made thereunder;
  - (c) the revocation, suspension or variation of his license under this Act or regulations made thereunder;



- (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
- (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for That purpose.”

18. Under Section 129 of the *Environmental Management and Co-ordination Act* as reproduced above, the National Environment Tribunal is set up to hear and determine appeals arising from the decisions made by the authorities given powers under the Act including decisions by the National Environmental Management Authority (NEMA).
19. In this matter, the pleadings placed before the court clearly show That the Plaintiff is complaining about noise pollution emitted by the Defendant’s establishment. The plaintiff laments about the noise levels emanating from the restaurant, especially during live band performances have reached intolerable levels, depriving the Plaintiff and his household of peace, tranquility and the ability to enjoy a good night’s sleep adversely affecting their quality of life. That the Defendant exceeds the maximum permissible noise level for Zone D (Mixed residential areas with some commercial and places of entertainment) being 55 decibels during the day and 35 decibels at night as provided for by the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
20. The Plaintiff also laments That the Defendant exceeds the excessive vibrations of the set 30 meters’ distance from the source of sound in which they extend beyond the source of sound as stipulated in the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
21. Section 3 of EMCA provides as follows:

3. Entitlement to a clean and healthy environment

- (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with *the Constitution* and relevant laws and has the duty to safeguard and enhance the environment.
- (2) .....
- (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.



- (3) If a person alleges That the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, That person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land 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.



22. Article 42 and 70 of *the Constitution* of Kenya 2010 provide as follows:

“ 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.

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.

23. In my view, these noises have no nexus with any decisions made by NEMA. The issues raised by the Plaintiff cannot be severed to be heard by the Tribunal and the Court. The issue of a right to a clean and healthy can only be determined before this court.

24. The Plaintiff has a right both under EMCA and *the Constitution* to approach the court for redress for violation or threatened violation of their right to a clean and healthy environment. The National Environment Tribunal established under EMCA has no jurisdiction to determine issues regarding violation of a right to clean and healthy environment.

25. The provisions of section 129 of the EMCA do not oust the jurisdiction of this court to hear and determine 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* as the claim by the Plaintiff appears to be.



26. The claim in this suit appears to be for damage caused to the Plaintiff and his family by the noises emitted by the Defendant's establishment. It would be a misdirection to make a conclusion That the issues raised by the Plaintiff can only be severed to be heard by the National Environmental Tribunal and not this Court. I am of the view That the issue of a right to a clean and healthy environment can only be determined before a court. The Plaintiff's claim is anchored on the right to a clean and healthy environment.

27. In the case of Dominic G. Ng'ang'a & another v Director General National Environment Management Authority & 4 others [2020] eKLR Gacheru J held That:

“The court finds That the claim herein is a claim relating to violation of right to clean environment and even though numerous tribunals dealt with the issuance of licenses and approvals, those issues cannot be dealt separately and thus this Court is clothed with jurisdiction to deal with the claim herein as provided in Article 162(2)(b) of *the Constitution*”.

28. I am of the same view That this court has jurisdiction to hear and determine this suit.

### **Whether the Defendant's Application dated 10/07/2023 is merited**

29. The Defendant/Applicant has sought for the following orders: -

1. Spent.
2. That the National Environment Management Authority be enjoined in these proceedings as an Interested Party.
3. Spent.
4. That the orders made by this Honourable Court on the 14/06/2023 be set aside, vacated and revoked.
5. Spent.
6. That the Plaintiff/Respondent, his agents, servants and any other person whomsoever be restrained by an order of injunction from entering, interfering, threatening or in any other manner howsoever dealing with the Defendant's/Applicant's business premises and its employees.
7. That the costs of this application be provided for.

30. There are three (3) main issues under this instant application by the Defendant. They are: -

- a. Whether NEMA should be enjoined as an interested party in the proceedings herein.
- b. Whether the Court should set aside, vacate and revoke the orders given on 14/06/2023.
- c. Whether the Defendant has satisfied the conditions for the grant of a temporary injunction.

31. The Defendant/Applicant argues That the Plaintiff/Respondent failed to provide complete and true information to the court, leading to the ex-parte orders. They claim That the omission to involve



- NEMA in these proceedings was deliberate and deprived the court of crucial expertise. Consequently, they insist That NEMA should be included in these proceedings.
32. Furthermore, the Applicant asserts That the orders granted have severely impacted their business and could lead to its closure, resulting in potential job losses. They argue That setting aside the orders wouldn't harm the Plaintiff/Respondent.
  33. They also claim That principles of equity were not considered, as they were not given a fair chance to be heard before the orders were issued. They state That their right to be heard was violated due to the Plaintiff's non-disclosure, and the orders appear to have conclusively determined the case at an interim stage. The Defendant/Applicant were served with the pleadings on 9/06/2023 and hired legal representation, but the orders were already issued on 14/06/2023 without allowing them to submit their side of the case.
  34. Lastly, the Applicant asserts That the Plaintiff/Respondent has failed to present any substantial evidence to the court concerning the alleged noise pollution. They argue That the Plaintiff's complaint is clearly and directly linked to NEMA's mandate which is to address noise pollution.
  35. On the other hand, the Plaintiff/Respondent argues That the Applicant hasn't clearly explained why the Court was wrong in issuing the orders in question and That the Applicant mainly claims That the Court lacks jurisdiction to handle the matter.
  36. He states That the law regarding the inclusion of interested parties is straightforward and That there's no need to involve a party with no real interest in the case. He believes That NEMA doesn't have a stake in the matter and should not be joined. However, he suggests That if the Applicant wishes to involve NEMA, they should do so through the proper legal process.
  37. Regarding the issue of the Defendant not being heard, the Plaintiff/Respondent maintains That the Applicant was informed of the hearing date but chose not to attend court, indicating their lack of intention to contest the Plaintiff's application.
  38. The Plaintiff argues That the orders issued are interim, and the Applicant's options are either to appeal or seek a review. He believes That public interest in a livable environment should take precedence over the Applicant's desire to continue generating excessive noise, as it violates residents' rights.
  39. Additionally, the Plaintiff contends That playing loud music near schools infringes on the constitutional rights of children, as their best interests should be a top priority. The Plaintiff dismisses the claim of non-disclosure, asserting That the Applicant had the chance to oppose the suit but chose not to attend the inter-partes hearing.

#### **Whether NEMA should be enjoined as an Interested Party in the proceedings herein**

40. As to whether NEMA should be enjoined in these proceedings as an interested party, the defendant avers That it is imperative That NEMA be enjoined to these proceedings to provide the expertise it has in matters relating to noise pollution. Hence NEMA is a necessary party to these proceedings. The Applicant claims That the omission to involve NEMA in these proceedings was deliberate and deprived the court of crucial expertise. They insist That NEMA should be included in these proceedings. That the Plaintiff's complaint is clearly and directly linked to NEMA's mandate which is to address noise pollution.
41. The Plaintiff contended That He states That the law regarding the inclusion of interested parties is straightforward and That there's no need to involve a party with no real interest in the case. He believes



That NEMA doesn't have a stake in the matter and should not be joined. However, he suggests That if the Applicant wishes to involve NEMA, they should do so through the proper legal process.

42. Order 1 Rule 10(2) of the Civil Procedure Rules states as follows: -

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order That the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and That the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

43. The Applicant herein has sought for NEMA to be enjoined as an Interested Party to the suit for the reason That NEMA can provide the expertise it has in matters relating to noise pollution. Hence NEMA is a necessary party to these proceedings. That the Plaintiff's complaint is clearly and directly linked to NEMA's mandate which is to address noise pollution.

44. The first step will be to define who an Interested Party is in order to consider whether the Applicant herein falls in the same category/ definition. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

“interested party” means a person or entity That has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;”

45. Black's Law Dictionary defines an Interested Party as “a party who has a recognizable stake (and therefore standing) in the matter.”

46. In the case of Francis Kariuki Muruatetu & another v Republic & 5 others Petition No. 15 as consolidated with No 16 of 2013 [2016] eKLR, the Supreme Court set out guidance on the requirements for successful application for joinder as an Interested Party. In it the Court gave three principles to be followed. At paragraph 37 the Court stated That the Applicant(s) must show:

- “(i) The personal interest or stake That the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything That is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate That these submissions are not merely a replication of what the other parties will be making before the Court.”

47. The Supreme Court of Kenya in Communications Commission of Kenya and 4 Others ...Vs... Royal Media Services Limited & 7 Others Petition No. 15 OF [2014] eKLR relied on its earlier decision in the Mumo Matemo case where the Court in defining who an Interested Party is, and held as follows:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when



it is made, either way. Such a person feels That his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed That a party could be enjoined in a matter for the reasons That:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a. what is the intended party's state and relevance in the proceedings and
- b. will the intended interested party suffer any prejudice if denied joinder.?"

48. Subsequently, it is against That backdrop That I now consider whether or not the Application meets the above conditions.

49. The law on joinder of interested parties to suits has been settled by the Supreme Court of Kenya in the case of *Francis K. Muruatetu and another v. Republic & 5 others* (2016) eKLR, the court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follows: -

- “a. The Personal interest or stake That the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything That is merely peripheral.
- b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate That these submissions are not merely a replication of what the other parties will be making before the court.”

50. Further, in *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR Justice Munyao Sila in dealing with the issue of an Interested Party seeking to be enjoined in a suit stated as follows;

“In my view, for one to convince the court That he/she needs to be enjoined to the suit as interested party, such person must demonstrate That it is necessary That he/she be enjoined in the suit, so That the court may settle all questions involved in the matter. It is not enough for one to merely show That he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue That these others have an interest in the litigation. That is a fair argument,



but a mere interest, without a demonstration That the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration That the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown That the presence of That person is necessary, so That the issues in the suit may be settled, and That if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

51. The Applicant essentially relies on his assertion That Plaintiff’s complaint is directly linked to NEMA’s mandate which is to address noise pollution. On the other hand, the Plaintiff argued That he does not see it fit for NEMA to be enjoined for the reason That the intended interested party has no claim of its own or any interest in the matter, which in the circumstances may call for it to be tried alongside the claims of the incumbent Plaintiff and Defendant.
52. NEMA established under Section 7 of the *Environmental Management and Co-ordination Act* (EMCA) is the agency mandated to protect, manage and conserve the environment. NEMA being the government agency tasked with overseeing environmental issues in Kenya, addresses grievances related to noise pollution through the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations of 2009, which are in accordance with Article 42 of the Kenyan Constitution from 2010. However, I do not find That the Applicant has demonstrated on a balance of probabilities That NEMA has a clear and identifiable interest and stake in the present suit. The Applicant has not demonstrated sufficient grounds for NEMA to be enjoined and participate in this suit. The Applicant also failed to explain what prejudice it will suffer should this Application be denied.
53. In my view, I do not find That NEMA’s presence before this court as an interested party is necessary whose presence will enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. If anything, I opine That NEMA can properly be summoned as an expert witness at the instance of either party.
54. It is for the above stated reasons That I decline to grant Prayer 2 of this application.

#### **Setting aside of an ex-parte order**

55. Prayer 4 seeks for the Court to set aside, vacate and revoke the orders made on 14/06/2023.
56. The guiding provision of the law with regards to setting aside of ex-parte order is to be found in Order 51 Rule 15 of the Civil Procedure Rules which provides: -

“The court may set aside an order made ex parte.”



57. The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held That:
- “ This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.” (emphasis added)
58. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring That Justice has been done. There is thus no doubt That in deciding whether or not to set aside an ex parte order the Court is called upon to exercise its discretion. In exercising discretion, the Court is further called upon to determine whether there is sufficient reasons That has been given to warrant it exercise the said discretion.
59. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held That:
- “ Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application....”
60. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011) observed That:
- “ Sufficient cause means That the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...’
61. In this instant matter, the Defendant/Applicant argues That the Plaintiff/Respondent failed to provide complete and true information to the court, leading to the ex-parte orders. the Applicant asserts That the orders granted have severely impacted their business and could lead to its closure, resulting in potential job losses. They argue That setting aside the orders wouldn’t harm the Plaintiff/ Respondent.
62. They also claim That principles of equity were not considered, as they were not given a fair chance to be heard before the orders were issued. They state That their right to be heard was violated due to the Plaintiff’s non-disclosure, and the orders appear to have conclusively determined the case at an interim stage. The Defendant/Applicant were served with the pleadings on 9/06/2023 and hired legal representation, but the orders were already issued on 14/06/2023 without allowing them to submit their side of the case.
63. The Plaintiff/Respondent on the other hands contended That the Applicant hasn’t clearly explained why the Court was wrong in issuing the orders in question and That the Applicant mainly claims That the Court lacks jurisdiction to handle the matter. On the Defendant not being heard, the Plaintiff/ Respondent maintains That the Applicant was informed of the hearing date but chose not to attend court, indicating their lack of intention to contest the Plaintiff’s application. The Plaintiff argues That the orders issued are interim, and the Applicant’s options are either to appeal or seek a review. He believes That public interest in a livable environment should take precedence over the Applicant’s desire to continue generating excessive noise, as it violates residents’ rights.



64. The Court is guided by the case of CMC Holdings Ltd -vs- James Mumo Nzioka (2004) KLR 173 where the Court of Appeal held That;

“The discretion That a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure That a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

65. Furthermore, the fundamental principle of Natural justice was well reiterated in the case of Wachira Karani (supra) where it was found That,

“Court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is That they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice.”

66. The general position was restated in Halsbury’s Laws of England Fourth Edition Vol. 1 page 90 para 74 as follows:

“The rule That no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...”

67. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... A decision in breach of the rules of natural justice is not cured by holding That the decision would otherwise have been right since if the principle of natural justice is violated, it matters not That the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio.”

68. This was a restatement of Lord Wright’s decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 That:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

69. From the court record, the Court issued orders regarding service of the Plaintiff’s Application dated 26/05/2023 on 7/06/2023. The Court certified the said Application as urgent and directed That the Plaintiff serves the Application upon the Defendant for an inter partes hearing which was set for 14/06/2023. From the return of service on record, it is evident That the Defendant was duly physically served with the Plaint, Application and inter partes hearing notice and Court order on 9/06/2023. This was on Friday. The Plaintiff filed an Affidavit of service dated 12/06/2023 which demonstrates That service was done. The return copy was duly stamped with the defendant’s official stamp as seen on evidence produced before this court. Service was done on a Friday, 9/06/2023. This means That the Defendant had only two or so days to find legal representation. The return of service was filed in court



on 13/06/2023. I note That the defendant's notice of appointment dated 14/06/2023 and was filed on 15/06/2023, a day after the Defendant was supposed to appear before this Court for inter partes hearing of the Plaintiff's Application. I also note That the Defendant thereafter filed a notice of change of advocates on 10/07/2023.

70. Taking into account all the circumstances of this case, the reasons given by the Applicant in their Application seeking to have the order of 14/06/2023 set aside was essentially That the Defendant was condemned unheard. Having carefully considered the explanation given by the Applicant and having considered the implications of the orders issued by the court and the circumstances of this case, I am satisfied That the Applicant has demonstrated a sufficient cause upon which the court can exercise its discretion in their favour.
71. I am satisfied That the justice of the case mandates That the Defendant/Applicant be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice. See *M Mwenesi vs. Shirley Luckhurst & Another* Civil Application No. Nai. 170 of 2000 and *Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others* Civil Application No. Nai. 364 of 1999.
72. I have said enough to show That I find merit in Prayer 4 of the Defendant's Notice of Motion dated 10/07/2023.

#### **Whether the Applicant has satisfied the conditions for the grant of a temporary injunction**

73. Lastly, the Defendant/Applicant prayed for an injunction, That the Plaintiff/Respondent, his agents, servants and any other person whomsoever be restrained from entering, interfering, threatening or in any other manner howsoever dealing with the Defendant's/Applicant's business premises and its employees.
74. The grant of an injunction is an equitable remedy. It is granted on the basis of the exercise of discretion. But the discretion is to be exercised judiciously and not in a capricious manner. It therefore means That the Court will consider the facts of each case and weigh them against the law.
75. The conditions for the grant of an injunction were set out in the locus classicus case of *Giella v Cassman Brown* (1973) EA 358. The principles are enduring, given That fifty years after the decision was made, they are as applicable as if made yesterday. In the case the court held That:

“An applicant has to demonstrate firstly, That he has a prima facie case with probability of success. Secondly, an applicant has to show That he will suffer irreparable loss or damage if the interlocutory injunction is not granted, That is That an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”
76. A prima facie case was explained by the Court of Appeal in *Mrao Limited -vs- First American Bank of Kenya Limited & 2 Others* [2003] eKLR as follows:

“So what is a prima facie case? I would say That in civil cases, it 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 as to call for an explanation or rebuttal from the latter.”
77. It is clear to my mind That I am not conducting a mini trial to establish the merits of the case. All I need to ascertain is whether from the facts of the case before me the Applicant has made out a case on



a balance of probabilities That there is a right infringed or about to be violated so as to form a basis for the need to protect it through issuance of an order of injunction.

78. This Court, at this stage, only need to form an opinion as to the existence or otherwise of a violation of a right. As held by the Court of Appeal in *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others* [2014] eKLR:

“ All That the court is to see is That on the face of the person applying for an injunction has a right which has been or is threatened with violation.”

79. I am also guided by the case of *Showind Industries vs. Guardian Bank Limited & Another* (2002) 1 EA 284 where Ringera J. (as he then was) stated as follows: -

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches.”

80. I have studied the Application before me together with the supporting affidavit and supplementary affidavit and I find That the Application does not specify any argument in support of the relief being sought under Prayer 6. The Applicant has only challenged the orders of injunction given on 14/06/2023 and the jurisdiction of this Court. The prayer for injunction is therefore hanging. It is my considered view That the Applicant has not made out a prima facie case with a probability of success. I am not convinced That the Applicant will suffer irreparable harm That cannot be adequately compensated by an award of damages. The Applicant has not met the first two conditions precedent for the grant of injunction. I therefore decline to grant the order of injunction as prayed.

#### **Disposal order**

81. In the upshot, it is my considered view That the Court finds That the Defendant’s Application dated 10/07/2023 succeeds only in terms of prayer 4. Accordingly, I hereby set aside the order given on 14/06/2023. The Defendant is granted leave to file a response to the Plaintiff’s Application dated 26/05/2023. Mention on 9/11/2023 for further directions.

82. Costs shall be in the cause.

83. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER 2023.**

**MOGENI J.**

**JUDGE**

