



**Evergreen Apartments Management Limited v Foody Freshi t/a Hera Aqua Gardens & 6 others
(Environment & Land Case E451 of 2021) [2022] KEELC 2858 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E451 OF 2021**

**LN MBUGUA, J
JULY 7, 2022**

BETWEEN

EVERGREEN APARTMENTS MANAGEMENT LIMITED PETITIONER

AND

RUBY HOUSE KANDARA NINE T/A RUBY CUT

RESTAURANT 1ST DEFENDANT

FOODY FRESHI T/A HERA AQUA GARDENS 2ND DEFENDANT

VICTOR LUMUMBA 3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 4TH DEFENDANT

DIRECTOR OF ENVIRONMENT, NAIROBI CITY COUNTY

GOVERNMENT 5TH DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
DEFENDANT**

THE CHAIR, NAIROBI CITY COUNTY ALCOHOLIC DRINKS AND

LICENSING BOARD 7TH DEFENDANT

RULING

1. Coming up for determination is an application dated 22nd December 2021 in which the Plaintiff seeks the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application and suit, the Honourable Court does grant a temporary injunction against the 1st, 2nd and 3rd Respondents from continuing to operate the business of night clubs, wine



and spirits and selling of alcohol as they are located currently within a zoned residential area and in the vicinity of a learning institution along Kandara Road, Kileleshwa;

- iii. That the Honourable Court does grant a temporary injunction against the 1st, 2nd and 3rd Respondents from infringing the Applicant's rights to life, enjoying proprietary rights of a peaceful and quiet enjoyment of property and their right to a clean and healthy environment pending the hearing and determination of the application and suit;
 - iv. That the 4th, 5th and 6th Respondents be compelled in enforcing the compliance of order 2 above specifically that the 1st, 2nd and 3rd Respondents cease the operations of night clubs, wine and spirits and selling of alcohol as they are located currently within a zoned residential area and in the close proximity to a learning institution along Kandara Road, Kileleshwa;
 - v. That an order do issue to the Officer Commanding Station, Kileleshwa Police Station to enforce orders 2, 3 and 4 above;
 - vi. That pending the hearing and determination of this application and suit, there be a mandatory order compelling the 5th Respondent to cancel or suspend the liquor license it has issued to the 1st, 2nd and 3rd Respondents.
 - vii. That costs of this application be in the cause.
2. This application supported by the affidavits of Evelyn KM Kituku is premised on the grounds that the 1st, 2nd and 3rd Respondents have been carrying out liquor selling businesses within a residential area and learning institutions, where there are young school going children. This amounts to a violation of their fundamental rights to a peaceful clean and healthy environment and also exposes their children to indecent behaviour.
 3. The Applicant also adds that there was no change of user converting the premises from residential to commercial use. Stating that even if that was done, there was neither public participation of the residents nor a notice of the said change of user.
 4. The applicant further contends that an Environmental Impact Assessment was never conducted by the 1st and 2nd Respondents which would have given them an opportunity to oppose the business establishment. The Applicants averred that the 1st to 3rd Respondents were also not in possession of noise permits as required by the law. To this end, the 4th to 7th Respondents had abandoned their responsibility to safeguard the Applicant's peaceful and quiet enjoyment of their rights.
 5. The 1st Respondent in their Replying Affidavit sworn by its proprietor Mercy Chepngetich Koech dated 21st January 2022 averred that in July 2021, she leased a residential house along Kandara Road and established a restaurant, salon and children playground business upon approval of the change of user. She stated that she put up a public notice on the premise's gate and advertised the same on the Daily Newspaper on 24th September 2021 and upon maturity of the legal notice with no objection, she set up the business investment which became operational from November 2021. She added that an Environmental Impact Assessment was also undertaken which allowed her to set up the business and she continues to comply with all the requirements stipulated by the 4th, 5th, 6th and 7th Respondents.
 6. She stated that she has over 50 employees and 30 suppliers and has put in place measures to manage noise and excessive vibration from the restaurant adding that she has a sound meter approved by



- NEMA (the 6th Respondent herein) and that the restaurant was a child friendly family oriented business. She denies that her business was a risk to the environment and calls for an independent inspection.
7. She further contended that the Plaintiff's suit was discriminatory as there were liquor businesses estimated to be 10 meters directly opposite the Applicant's residential area adding that hawkers also operated freely within the same area.
 8. Further, the 1st Respondent stated that the law stipulated that should noise be above the set decibels, then a notice ought to be issued to the offender as per Section 25(1) of the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations* 2009 and as such the application should be dismissed with costs.
 9. The 2nd Respondent in the Replying Affidavit sworn by its proprietor George Owino Junior dated 21st January 2022 denied having converted a residential house into a night club or running a liquor selling business stating that his business was a boutique hotel which was duly registered and had the required licenses to run it.
 10. He also contested the jurisdiction of this court stating that disputes in relation to the 6th Respondent should be addressed through the National Environment Tribunal as mandated under Section 129 of the *Environmental Management and Coordination Act*.
 11. He also averred that the proceedings had not been instituted with authority under seal contrary to Order 4 rule 1(4) of the *Civil Procedure Rules* as there was no resolution of the Plaintiff's company approving institution of this suit.
 12. The 2nd Respondent has pointed out that the nature of Kileleshwa area had changed, thus they have not breached any zoning regulations. They contend that if indeed the area was a zoned area as claimed by the Plaintiff, then even the schools on that area were illegal entities. Adding that there has never been any complaint of noise from their premises and should there be any noise, then it could only have emanated from the 1st Respondent.
 13. The 2nd Respondent questions why the Applicant had singled them out whereas there were other business entities within the same area in particular Viva Lounge, Solar Gardens, Tunic Kitchen, White Star Restaurant and Sochati Casa Resort. They claim that under Article 70(3) of *the Constitution*, the Applicant should prove damages.
 14. The 3rd Respondent in his Replying Affidavit dated 21st January 2022 contested the application stating that he was an employee of Tunny Combs, a licensed business that sells wines and spirits at premises owned by the 4th Respondent and operated within the set timelines between 10.00am and 8.30pm. He also stated that the business had a license to sell liquor at the said location issued by the 7th Respondent. He denies having extended the premises to include a sitting area for customers to sit and partake alcoholic beverages. He also contested the allegation that the business premises was in close proximity to learning institutions and called upon the court to make a site visit to ascertain the allegations. He denies the allegations of noise, stating that he does not play music at the premises.
 15. He further avers that the suit was malicious because there were similar businesses located in the same area that had not been joined in the suit and called on the court to dismiss it with costs.
 16. The 4th, 5th and 7th Respondents in their Replying Affidavit dated 11th February 2022 sworn by the Acting County Solicitor Erick Abwao contested the jurisdiction of this court on grounds that the Applicant had not exhausted the dispute resolution mechanisms established under the law citing in particular Section 5(c) of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014,



noting that there was no good reason why that procedure had been bypassed. Reference was also made to Section 9(2) of the *Fair Administrative Action Act*.

17. These Respondents also stated that the Applicant had not met the criteria for grant of temporary injunction noting that should the court grant the orders sought, and the suit is ultimately dismissed, the Respondents would have suffered prejudice and as such the orders sought should be denied and application dismissed.
18. The 6th Respondent's Environmental Officer Anne Muriungi swore the Replying Affidavit dated 28th February 2022 contested having negated its functions to safeguard the environment as alleged by the applicant stating that the 6th Respondent was ready and willing to implement orders issued by court. She pointed out that following the filing of this suit, she together with two senior environment officers visited the 1st and 2nd Respondents premises on 9th February 2022 and annexed the said report as evidence. She confirmed that the said premises were located in a residential area and were operating without an EIA license as required under Section 58 of *EMCA* and Environmental Impact Assessment and Audit Regulations 2003; there were alterations within the 1st Respondent's premises without approval from the 6th respondent and there were sound amplifying equipment at the 1st Respondent's premises which they were asked to cease using until they obtained requisite approval from the 6th Respondent.
19. She deponed that what the 1st Respondent had annexed as MCK11 was not an EIA license but an audit report prepared and submitted to the 6th Respondent within a year after issuance of an EIA license pursuant to Section 68(3) of *EMCA* for purposes of monitoring compliance with the conditions set in the EIA license.
20. She added that the 4th Respondent was tasked with approving change of user applications, while the 7th Respondent is responsible for issuing liquor licenses.

Determination

21. I have duly considered the application at hand, the various affidavits in response thereto as well as the rival submissions. I frame the issues for determination as follows;
 - i. Whether this court has jurisdiction to entertain this suit.
 - ii. Whether the applicant has made out a case warranting grant of the orders sought in the application dated 22.12.2021; primarily the issuance of the injunctive orders and the cancellation or suspension of liquor licenses.

Jurisdiction

22. The Respondents (save 6th Respondents) have objected to this Court's jurisdiction on grounds that the National Environment Tribunal and the City County Alcoholic Drinks Control And Licensing subcommittee were the bodies tasked to address the dispute at hand.
23. In the Supreme Court of Kenya case of *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR it was stated that:

“Where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.”



24. Is this then a proper case for the court to down its tools in tandem with the above case law ?; Also see *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. I find that the provisions of Rule 25 (2) of the Environmental Management And Coordination (noise And Excessive Vibration Pollution) (control) Regulations, 2009 and Section 101(a) and 140 of the *Environmental Management and Co-ordination Act* provides for compliance standards of which none compliance thereof attracts penal consequences. On the other hand, the issues of grant, renewal, refusal, validity and transfer of Alcoholic licences are under the purview of the Alcoholic Drinks Control and Licensing Act (see section 9- 14 thereof). What resonates from the above laws and regulations and as pointed out by the applicant in their submissions is that the issues raised herein encompass mixed grill menu.
25. The provisions of Article 70(1) of *the Constitution* provides that:
- “(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. Emphasize added”
26. Thus the right to a clean and healthy environment is anchored under *the constitution* and can be litigated upon before the courts of law despite the existence of other legal remedies available under the relevant statutes. I therefore find that this court has jurisdiction to determine the application and the suit.

Injunction

27. The issue on grant of temporary injunctions was settled in the case of *Giella v Cassman Brown* (1973) EA and reiterated in several case laws including *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR; whereby courts held that the applicant must satisfy that they have a prima facie case with a probability of success. Secondly, an interlocutory order of injunction will not be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.



28. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] Eklr, the court held that;
- “An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.”.
29. The gravamen of the applicants case is that the 1-3 Respondents have set up trading establishments of night clubs as well as wines and spirit shops in a residential area. The drunken revellers and the music extravaganzas emanating therefrom cause uncontrolled noise and are bad influence to school going children. None of the respondents have refuted the averment of the applicant that the trading establishments are in a residential area and that there are schools in the vicinity.
30. The 6th Respondent has even visited the premises after the suit was filed (specifically on 9th February 2022) where they confirmed that the trading establishments were located in a residential area and were operating without an EIA license as required under Section 58 of EMCA and Environmental Impact Assessment and Audit Regulations 2003; there were alterations within the 1st Respondent’s premises without approval from the 6th respondent and there were sound amplifying equipment at the 1st Respondent’s premises which they were asked to cease using until they obtained requisite approval from the 6th Respondent.
31. In the case of *Mumara Estate Residents Association vs Nairobi County & 2 Others* [2015] Eklr, Mwita J observed that:-
- “it is therefore the law that there should be no liquor selling near schools or in residential areas. The reasons for this are not far to seek: schools are places for learning and inculcating morals and good upbringing of children and any young persons while residential areas are living places where residents and their families seek rest. After the hustle and bustle in their places of work, they retreat to residential areas for rest and wellness. That is also the place where they bring up their families. They expect least disturbance and that is why the law prohibits liquor selling in residential estates. Such places require peaceful and healthy environment for rest and co-existence”.
32. In the case of *Pastor James Jesse Gitabi & 202 Others vs Attorney General*, Pet No 683 of 2009 [eKLR], Majanja J. observed as follows:-
- “.....prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment”.
33. I have no doubts that the applicants have established a genuine and arguable case and that they stand to suffer irreparable damages of which an award of damages cannot be adequate compensation. In the case of *Justus Irungu Gitbae & 12 others v Attorney General & 4 others* [2016] eKLR, the court held that injury which was continuous in nature could not be quantified or assessed in terms of damages. Likewise in the current matter, the nature of injuries including noise and influence of bad behaviour to young children is of un-quantifiable nature.
34. Since the Applicant is seeking for injunctive orders, at this juncture, the court will not deal with the disputed issues with finality. The court cannot certainly deal with major reliefs at the interlocutory



stage (see prayer no. 3, 4 and 5 in the plaint), thus the less I say about these prayers at this stage, the better.

35. Equally, the court will not deal with the issue raised by the 1st Respondent regarding the authority of the plaintiff to institute the suit at this stage. Let the 1st Respondent raise the issue as a substantive preliminary objection to avoid convolution of the issues.
36. In the final analysis, the court allows prayer no 3 in the application dated 22.12.2021 to the extent that the 1st, 2nd & 3rd Respondents are hereby restrained from operating their business establishments in the area. The orders given shall remain in force for a period of one year. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Koki Mbulu for the Plaintiff / Applicant

Onyango holding brief for Ogesso for 1st Respondent

Ochieng for 2nd Defendant

Kirimi for the 3rd Respondent

M/s Kiogothi holding brief for Mr. Kago for 4th, 5th and 7th Respondents

M/s Muyai for 6th Respondent

Court Assistant: Eddel

