



Chemitei & 2 others v Murgor t/a Coco Grill & 3 others (Environment & Land Petition E006 of 2024) [2025] KEELC 4338 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4338 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION E006 OF 2024**

**CK YANO, J
MAY 15, 2025**

BETWEEN

**MARY JEMELI CHEMITEI 1ST PETITIONER
LYDIA JEMUTAI TUITOEK 2ND PETITIONER
LAMEK RONO 3RD PETITIONER**

AND

**DONALD MURGOR T/A COCO GRILL 1ST RESPONDENT
UASIN GISHU COUNTY ALCOHOLICS DRINKS CONTROL
BOARD 2ND RESPONDENT
UASIN GISHU COUNTY GOVERNMENT 3RD RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
RESPONDENT**

JUDGMENT

1. The Petitioners commenced this suit vide a Petition dated 18th July, 2024, against the Respondents, jointly and severally seeking the following Orders: -
 - a. Declaration that the 1st Respondent’s continued operation of Coco Grill within the Petitioners’ area of residence is a violation of the Petitioners’ right to life and right to a clean and healthy environment as contemplated by Article 28 and 42(1) of the Constitution of Kenya 2010 respectively.
 - b. A Declaration that the issuance of business permits and liquor licences to the 1st Respondent by the 2nd and 3rd Respondents thereby allowing them to operate their businesses in the manner complained of by the Petitioners is unlawful/ illegal.



- c. A Declaration that the issuance of licences and permits to businesses or establishments as the 1st Respondent's within residential areas by the 2nd and 3rd Respondents is a violation to the Petitioners' rights to a clean and healthy environment.
- d. A mandatory injunction against the 2nd and 4th Respondents compelling them to issue and enforce a closure notice against the 1st Respondent for being in contravention of the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 L.N. No. 61 of 2009.
- e. A Mandatory Injunction against the 2nd and 3rd Respondents compelling them to revoke the liquor license issued to the 1st Respondent.
- f. General damages for infringement/violation of the Petitioners' right under Articles 28 and 42 of the Constitution of Kenya.
- g. The Petitioners be awarded costs of the petition.
- h. Any other or further relief this court may deem fit to grant.

Petitioner's Case;

2. The Petition was premised on the grounds on its face and on the Supporting Affidavit sworn by the 1st Petitioner on even date and a Supplementary Affidavit sworn on 31.3.2025.
3. The petitioners aver that they are residents and registered proprietors of suit parcel Nos. Uasin Gishu/ Kimumu/ Plot No. 1172, 1173 and 3031 respectively, within Kimumu which is a residential area. The 1st Petitioner annexed copies of the respective title deeds in respect to the said parcels of land.
4. It is her claim that they have enjoyed peaceful and quiet possession of their parcels of land for a period of over 10 years, until sometimes in the year 2023, when the 1st respondent gained ownership of the adjacent parcel of land and began operating a bar and restaurant business under the name Coco Grill.
5. The petitioners contend that the operation of the bar and restaurant (Coco Grill) within the residential estate has resulted in not only noise pollution as a result of the loud music being played and the patrons making noise while enjoying themselves but has also posed a security risk by attracting all kinds of people who visit the bar.
6. That despite having several meetings between the Area Chief and the other residents to address their concerns on the illegal operations of the bar and raising complaints with the local authorities and to the 2nd and 3rd respondents, no action has been taken against the 1st respondent to stop the illegal operation of the bar.
7. It is their assertion that the inaction of the 2nd and 3rd respondents, who are legally obligated to ensure strict compliance of section 14 of the Uasin Gishu County Alcoholic Drinks Control Act, 2014, amounts to a disregard of the rule of law and constitutionally non-derogable principles and thus results to great loss and prejudice to the petitioners.
8. They further contend that the 1st and 2nd respondents have failed to enforce the directive from the Ministry of Interior Security (sic) which ordered the immediate closure of bars and clubs within the residential estates and learning institutions.
9. That as a result of the said failure and/or omission, the petitioners' rights to a clean and healthy environment as enshrined in Article 42 of the Constitution has been threatened and violated.



10. It is therefore their claim that unless restrained by the court, the petitioners' rights under Articles 28 and 42 of the Constitution shall continue to be violated and consequently cause hardship, inconvenience and irreparable loss. They urged the court to allow the petition as prayed.
11. In response to the allegations made by the 1st respondent in his affidavit that the petition has been filed prematurely, the 1st petitioner reiterated that the petition relates to the violation of the petitioners' rights under Articles 28 and 42 of the Constitution and this court is therefore vested with the requisite jurisdiction to determine the same.
12. She partially admitted the contents of paragraph 5 with regard to the provisions of Section 9 of the Uasin Gishu County Alcoholic Drinks Control Act, 2014. She however denied the claims that the Alcoholic Drinks Regulations Committee conducted any public participation on the 1st respondent's application as alleged.
13. She further stated that no evidence had been tendered of the alleged meetings between the said Committee and the members of the community. She reiterated that section 14 of the Uasin Gishu County Alcoholic Drinks Control Act, 2014 does not provide for licensing of sale of alcoholic drinks in residential areas.
14. In response to the allegations made by the 1st respondent in paragraph 10 of his Replying Affidavit, she averred that the 1st respondent through texts and WhatsApp messages to her, admitted that he was aware of the noise generated from his bar and that he was taking measures to curb further noise. She annexed extracts of the said text messages.
15. With regard to the violation of the 1st respondent's economic rights as alleged in paragraph 11 of his replying affidavit, she maintained that petitioners' rights cannot be violated at the costs of the 1st respondent's financial gain.
16. She reiterated that the petitioners had demonstrated the violation of their rights to a clean and healthy environment to warrant the grant of the orders sought.
17. The Petition was opposed. The Respondents filed their respective responses to the petition diversely dated outlining their grounds as hereunder.

1st Respondent's Case.

18. The 1st Respondent filed an Affidavit in response to the Petition dated 4th March, 2025 in response to the allegations made in the petition. He stated that he is the registered proprietor of land parcel No. Uasin Gishu/ Kimumu Scheme/7455.
19. He dismissed the petition as having been filed in court prematurely. It is his claim that the petitioners ought to have lodged a complaint before the Public Complaints Committee as established under sections 31 and 32 of the NEMA Act (sic) and to the National Environment Tribunal as per sections 125 and 126 if aggrieved by the decision of the Committee.
20. He relied on the provisions of section 9 of the Uasin Gishu County Alcoholic Drinks Control Act, which provides that the Alcoholic Drinks Committee in considering an application for license, shall visit and inspect the premises to determine the appropriateness and ensure that there is public participation.
21. He thus maintained that upon application for the alcoholic drinks license in the year 2022, the said committee visited his premises for inspection and deemed it appropriate and further invited members of the community for public participation.



22. It is his position that there was no objection to the grant of the license and that the petitioners are estopped from making an objection at this point when they elected not to do so from the onset.
23. He dismissed the claims by the petitioners that he is operating an illegal business and asserted that he has been operating the business since February 2023 with the approval of the relevant government agencies and attached the copies of the requisite licenses and receipts.
24. It is his contention that a mere claim of noise pollution from his business without cogent evidence is not sufficient basis to justify the closure of his business which he maintained is his source of livelihood and would as a result unjustly violate his constitutional right to economic and social justice.
25. He therefore urged the court to dismiss the petition with costs.

4th Respondent's Case;

26. The 4th Respondent filed a Replying Affidavit sworn by one, Solomon Kihiu, the County Director of the 4th respondent, dated 5th March, 2025 in response to the petition.
27. He explained the establishment, objectives and purpose of the 4th respondent institution and prescribed rules and guidelines which govern its running as provided under section 58 of the EMCA.
28. He added that pursuant to Schedule 4 Part 2 of the Constitution, certain environmental functions were devolved to the county governments, particularly the function relating to the management and control of noise and excessive vibrations, air and other public nuisances. That authority only has supervisory powers.
29. He further contends that where reports and complaints are made to the 4th respondent regarding noise, excessive vibrations and pollution, the said reports are forwarded to the county government offices which hold the mandate on matters touching on air and noise pollution. He however admitted having received a complaint letter of the alleged excessive noise.
30. It was also his claim that the licensing and regulatory oversight for the operation of the 1st respondent establishment is vested and executed by the 2nd and 3rd respondents and thus any allegations for non-compliance should be directed to them and not the 4th respondent. He thus deponed that the 4th respondent cannot be said to have neglected its statutory duty and mandate.
31. He thus maintained that the 4th respondent had neither issued any approvals to the 1st respondent for the operation of the establishment nor were there any application for such approvals
32. Consequently, it was his position that the 4th respondent is willing and prepared to implement any legitimate orders that may be issued by the court and any further actions necessary to ensure compliance with EMCA
33. In conclusion, he urged the court to dismiss any claims made against the 4th respondent with costs.
34. The 2nd and 3rd Respondents did not file any response to the allegations raised against them in the petition despite being duly served and the court's directions issued on 5th March, 2025. This is despite Mr. Ketter indicating to court on the 5/3/2025, that they had prepared their response and had forwarded the same to the client for signing and would be filing the same by close of business on 7/3/2025.
35. However, on 7th April, 2025, when the matter came up in court, Mr. Ketter informed the court that he was unable to file the responses on behalf of the 2nd and 3rd respondents on time and therefore informed the court that they would be adopting the responses and submissions by the 1st and 4th respondents.



36. The petition was canvassed by way of written submissions. The petitioners filed their submissions and authorities dated 21st March, 2025.
37. The 1st respondent filed his submissions and authorities dated 7th April, 2025 while the 4th respondent filed their submissions and authorities dated 28th March, 2025.
38. I have read and considered the rival submissions by parties and the same can be summarized as hereunder.

Petitioners' Submissions;

39. The Petitioners submitted on three main issues; whether this court has jurisdiction to hear and determine the petition, whether the petitioners' rights to peacefully enjoy their property and live in a clean and healthy environment has been violated by the actions and the inactions of the respondents and whether the petitioners are entitled to the reliefs sought.
40. On the first issue, it was their submission that the 1st respondent challenged the jurisdiction of this court to entertain the petition pursuant to the provisions of section 32 and 126 of the EMCA, which established the Complaints Committee and the Tribunal by maintaining that the suit had been filed prematurely.
41. They relied on the provisions of Article 22(1) of the Constitution which provides that every person has the right to institute court proceedings that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. They also relied on the decision in the case of Trusted Society of Human Rights Alliance vs AG & 2 Others [2012] eKLR.
42. They thus maintained that the petition herein is premised on the violation of the rights to life and clean and healthy environment as contemplated by Article 26(1) and 42(1) of the Constitution.
43. It is therefore their claim that the 1st respondent's operation of the Coco Grill for over 2 years, despite the complaints made to the respondents, has violated their rights to a clean and healthy environment as a result of the noise pollution emanating from the Coco Grill bar.
44. It is their contention that the petition has met the criteria set out in the Anarita Karimi Njeru vs The Republic (1976 – 1980) KLR. That they have specified the provisions of the Constitution that have been violated, the particulars of the rights infringed, by whom and the remedies sought.
45. Without prejudice to the foregoing, they also relied on the provisions of section 3(3) of the Environment Management and Coordination Act and on the decision in the case of West Kenya Sugar Co. Limited vs Busia Sugar Industries Limited & 2 Others [2017] eKLR and William Odhiambo Ramogi & 3 Others vs AG & 6 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] KLR.
46. In conclusion, they maintained that this court is vested with the requisite jurisdiction to entertain the matter as filed.
47. On the second issue, counsel submitted that the loud noise emission from the 1st respondent's bar within the petitioners' residential area of Kimumu and the 2nd – 4th respondents' failure to comply with their statutory obligation by permitting the operation of the bar in a residential area, is a clear violation of the petitioners' rights to dignity and healthy environment.
48. They quoted the definition of 'noise pollution' under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. Counsel thus



- maintained that an issue of noise interference or pollution thus amounts to a violation/infringement of the rights under Article 42 of the *Constitution* to a clean and healthy environment.
49. Counsel quoted the decision in *Pastor James Jessee Gitahi & 202 Others vs AG – Petition No. 683 of 2009*. He submitted that the 1st respondent in his replying affidavit neither denied being the owner of the Coco Grill Bar or that the same did not operate within the residential area. He urged the court to consider the annexures in the Supplementary Affidavit to further buttress this point and that no contrary evidence had been adduced by the 1st respondent.
 50. They further contend that the respondents violated the petitioners' rights to a peaceful residence by granting a liquor license to operate a bar in a residential estate in contravention to section 14(1) (a) of the Uasin Gishu County *Alcoholic Drinks Control Act, 2014*.
 51. They submitted that the law is clear that there should be no license of selling alcoholic drinks in residential areas or near learning institutions. That in the instant suit, there is a learning institution, AIC Chebisaas Boys Secondary School opposite the 1st respondent's bar.
 52. The petitioners also faulted the 2nd – 4th respondents for failing to carry out their constitutional and statutory mandate as required hence resulting to a violation of the petitioners' rights. That the petitioners availed evidence in the form of letters, minutes of the several meetings held by the residents of the area to demonstrate the efforts made to resolve the issue but no action was taken by the 3rd and 4th respondents.
 53. Counsel relied on the Court of Appeal decision in *Elizabeth Kurer Heier & Another vs County Government of Kilifi & 4 Others [2020] eKLR* which outlined the factors to consider in determining noise level measurement as per Regulation 3(2) of the EMCA.
 54. On the role played by the 4th respondent, counsel submitted that pursuant to the provisions of section 7 of the EMCA, the 4th respondent has a wide mandate to exercise general supervision and coordination of all matters environment.
 55. That section 9 of the said Act further vests the 4th respondent with the Supervisory role and ensuring that no environment pollution has been neglected. It is their contention that even though the 4th respondent confirmed to have received a complaint letter from the petitioners, at paragraph 9 of their replying affidavit, they did not stipulate any action taken by its agents to address the complaint.
 56. In conclusion, counsel submitted that the 2nd – 4th respondents failed to respect, protect, promote and fulfil the petitioners' rights to dignity and clean environment by their inaction.
 57. On the last issue, it was their submission that the petitioners are entitled to the reliefs sought in the petition. They maintained that the petition had been brought in good faith and for the common good of the residents of Kimumu Estate.

1st Respondent's Submissions;

58. Counsel for the 1st respondent submitted on 4 issues; whether the petition has been filed prematurely, whether the 1st respondent's license was lawfully issued, whether the 1st Respondent is liable for noise pollution and lastly who will bear costs.
59. On the first issue of filing the petition prematurely, the 1st respondent conceded that pursuant to the provisions of article 22 of the *Constitution* of Kenya 2010 as read with section 3 (3) of the Environment Management and Coordination Act (EMCA) enables anyone to seek for order to either Prevent, stop or discontinue any act or omission, Compel a public officer to act, Subject an activity complained of



- to environmental audit, Compel a person to pay damage or an Order for payment of compensation and to apply to the High Court.
60. He however submitted that the EMCA Act provides for mechanisms through which environmental issues can be redressed without necessarily rushing to court by first lodging a complaint to the Public Complaints Committee, which will carry out its functions as per section 32(a) and if aggrieved, to proceed to the National Environmental Tribunal, as per the provisions of section 125 and 126 of the Act.
 61. It is his contention that this matter ought to have been brought to this court on appeal pursuant to section 130 of ECMA. That way, this honourable court would have had the benefit of considering the recommendations of the Standards and Enforcement Review Committee, the decision of the Public Complaints Committee and the expert's determination on Appeal to the National Environment Tribunal.
 62. On the issue of the Exhaustion of remedied doctrine, counsel relied on the decision in the case of Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 175 others (2015) eKLR and maintained that this court ought to have been the last resort.
 63. In conclusion, he urged the court to find that the issues raised require specialized forum and resources that could have best been availed had the petitioners utilized the dispute resolution mechanisms provided under ECMA and to further find that the petitioners cannot be entertained in this court having elected not to be diligent in protecting their interests.
 64. On the second issue on licenses, counsel relied on the provisions of section 4,9,12 &14 of Uasin Gishu County *Alcoholic Drinks Control Act*-2014. It is their submission that the 1st Respondent has attached all the licenses and receipts on payment of relevant fees and is currently Licensed (under section 9 & 12 of the Act) to operate a bar and restaurant business within his property land parcel UASIN GISHU/ KIMUMU SETTLEMENT SCHEME/1175.
 65. It was his submission that the petitioners' claim that the bar business complained of is situated strictly within the residential area was not supported by any report from physical planning department or any other sufficient evidence to confirm that the business is not within a mixed development area.
 66. It was his argument that the license held by the 1st Respondent as at the date of filing the petition was renewed in the years 2023 and 2024 pursuant to section 12 of Uasin Gishu County *Alcoholic Drinks Control Act* 2014. That by this point in time, the question as to the location of the premises was no longer an issue. They submit that this petition is an afterthought and is not actuated by a genuine concern on the location of the business or of breach of right to healthy environment.
 67. On the issue of noise pollution, it was the 1st respondents' contention that he is licensed to play music by the Music Copyright Society of Kenya (MCSK). He thus maintained that playing music is not illegal.
 68. It is his contention that noise is not necessarily pollution. That excess noise is relative, depending on the zoning, nature of license issued and time. He relied on the provisions of section 2 of the Environmental Management & Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 on the definition of noise pollution.



69. That Section 6 (1) of the Environmental Management and Co-ordination (Noise & Excessive Vibration Pollution (Control) Regulations provides as follows: -

“No person shall cause noise from any source which exceeds any sound level set out in the applicable column in the first schedule to these regulation”

70. It was therefore submitted that since Column 'D' of the said schedule provides for the level of permissible decibels during the day and at night in the areas zoned as mixed residential (with some commercial and entertainment, it was possible for a license to be issued to entertainment enterprises within mixed residential areas. Thus, the onus of proving that the area in issue is strictly residential and so the running of said business is illegal laid with the petitioners which was not done.

71. They relied on the decision in the case of Sohail Regency Management Ltd vs Dejavu Coco Glam Nail & Tippy Corner and Others (2022) eKLR and urged your honour to find that no evidence was availed from an environmental management expert to demonstrate that the noise emitted from the business premises herein was excessive.

72. That the petitioners had no further evidence to prove that the business is in a location zoned strictly for residential purpose and that the court has not been provided with a basis upon which the orders sought can be granted. He therefore urged the court to dismiss the claim.

73. Without prejudice to the foregoing, it was their submission that closing the 1st respondent's business on the basis of the evidence adduced would be unsafe and extreme. That in order to balance the petitioners' right to health environment and the 1st respondent's economic and social right, the court should direct the 1st respondent to take steps to ensure compliance with the provisions of NEMA and EMCA and an expert's report on the extent of compliance be filed in court within such time as shall be ordered. The 1st Respondent urged the court to dismiss the petition with costs.

4th Respondent's Submissions;

74. The 4th respondent submitted on 3 main issues; whether the Petitioner's right to peacefully enjoy their property and to live in a clean and healthy environment has been violated by the actions and inactions of the 4th Respondent; whether the Petitioners are entitled to the reliefs sought and lastly who should bear the costs of the Petition.

75. On the first issue, they admitted that the 4th Respondent has a duty to ensure a clean and healthy environment by exercising general supervision and coordination over all matters relating to the environment. However, the said duty and powers are limited by EMCA and the Constitution of Kenya, 2010.

76. It was their claim that Schedule 4 of the Constitution of Kenya 2010 distributed functions between the national government and the county government, and the function relating to the management of noise, air and other pollution emanating from public nuisances was devolved to the county governments. It is therefore their contention that the 4th respondent only exercises a supervisory role in the said function.

77. They further relied on the provisions of Section 5 (2) of the County Governments Act that provides that the county governments shall be responsible for functions provided in Article 186 and assigned in the 4th Schedule of the Constitution.

78. It is their submission that pursuant to sections 101 and 147 of EMCA, the noise regulations were gazetted to set the minimum standards of emissions of noise into the environment and to determine



the procedures and criteria for the measurement of noise and vibration. That the enforcement of these regulations and which includes the issuance of noise permits and noise levels measurements was devolved to the county government and which function they continue to perform to date.

79. To further buttress this position, they quoted the Court of Appeal decision in the case of *The Court of Appeal at Mombasa in Elizabeth Kurer Heier & Another v County Government of Kilifi & 4 Others* [2020] eKLR which held that the 4th Schedule of the *Constitution* places the responsibility for control of noise pollution and other public nuisance on the county governments.
80. Consequently, the 4th respondent avers that it could not interfere with the mandate of the county governments unless the county governments were completely unable to discharge their mandate. That no evidence has been brought before this Court by the Petitioners or the 3rd Respondent to the effect that the 3rd Respondent was unable to discharge its role to warrant the intervention of the 4th Respondent. To this end, they also relied on the decision of the court in *Gichu v Obuya Otieno Ritzau t/a Bamburi Community High School & 3 Others* [2023] KEELC 19222 (KLR).
81. Be that as it may, it is their submission that in discharging their coordination and supervisory role/mandate, an inspection was conducted as indicated at paragraph 11 of the 4th Respondent's replying affidavit. That enforcement actions had not been taken because the premises had already been closed following a ruling delivered by this Honourable Court.
82. In conclusion, they urged the court to find that the 4th Respondent has not breached any of the petitioners' rights and that it has at all times acted within the law.
83. On the second issue of whether the petitioners are entitled to the orders sought, counsel submitted that the Petitioners seek various reliefs, including an order compelling the 4th Respondent to issue and enforce a closure notice against the 1st Respondent. On this regard, the 4th Respondent reiterated its statutory and constitutional role on the subject matter herein.
84. On the prayer for general damages, it was their submission that if the Court is to award the same, then it should be borne by the 1st Respondent as the parties carrying out the operations emitting the noise. They rely on the case of *Gichu v Obuya Otieno Ritzau t/a Bamburi Community High School & 3 Others* (Supra) where the court in awarding the plaintiff general damages for nuisance stated that the same was to be borne by the 1st Defendant only as it is the 1st Defendant's school and numerous church activities that were a nuisance and interfered with the plaintiff's resident's occupation of his property.
85. On the issue of costs, it was submitted that having demonstrated above that the petition against the 4th Respondent is devoid of any merit, it ought to be dismissed with costs to the 4th Respondent.

Analysis and Determination;

86. I have carefully reviewed the petition and the responses thereto, the respective annexures and the parties' rival submissions in totality and it is my considered opinion that the following issues arise for determination: -
 - a. Whether the petition has been filed prematurely, offending the doctrine of exhaustion of remedies;
 - b. Does the petition filed meet the threshold of what amounts to a proper Constitutional Petition;
 - c. Whether the actions and/or omissions of the respondents' have caused a violation of the Petitioners' rights



- d. Whether the Petitioners are entitled to the orders sought;
- e. Who should bear the costs of the Petition

Issue No. 1 - Does the petition as filed meet the threshold of what amounts to a proper Constitutional Petition;

87. It is the 1st respondent's claim that the petition has been filed prematurely. That the petitioners ought to have exhausted the remedies provided under the EMCA before proceeding to court.
88. That the petitioners should have lodged their complaint with the Standards and Enforcement Review Committee and thereafter to the Public Complaints Committee and if still aggrieved, lodge an appeal to the National Environment Tribunal. He maintained that the court would have been the last option and only on appeal, had the petitioners exhausted the mechanisms outlined in the EMCA for dispute resolution.
89. The petitioners on the other hand maintained that their claim is premised on the violation of their fundamental right to a clean and healthy environment and thus Article 22(1) as read with section 3(3) of EMCA, which grants them the right to institute court proceedings.
90. The doctrine of exhaustion of remedies was explained by the Court of Appeal in the case of Geoffrey Muthinja Kabiru & 2 others –vs- Samuel Munga Henry & 1756 Others [2015] eKLR in which it held:
- “The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside courts.”
91. Article 22(1) of the Constitution on the enforcement of bill of rights provides as follows;
- “22.
- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
92. Section 3(3) of the EMCA, on the entitlement to a clean and healthy environment also provides as that: -
- “(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...”

93. I have carefully looked at the grounds in the petition and the prayers sought therein and considered the provisions of the above-mentioned Article 22(1) and section 3(3) and I find that, the petition having been anchored on the violation of fundamental rights as enshrined under Articles 26(1) and 42(1) of the Constitution, nothing precludes the petitioners from instituting court proceedings.

94. It is therefore the finding of this court that the petition has not been filed prematurely neither does it offend the doctrine of exhaustion of remedies as alleged by the 1st respondent. This court is therefore vested with the requisite jurisdiction to entertain the petition as filed.

Issue No. 2 - Does the petition as filed meet the threshold of what amounts to a proper Constitutional Petition;

95. Before delving into the merits of the petition as filed; this court has a duty to ensure that the petition as filed meets the threshold set in the case of Anarita Karimi Njeru -vs- Republic 1976-1980 KLR wherein Trevelyan & Hancox, JJ, expressed themselves as follows;

“ We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (emphasis mine)

96. From the above, the onus is on the petitioners to set out their claim against the respondents with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been violated, infringed and/or threatened as alleged and how the respondents have infringed the said rights.

97. From a cursory look at the petition, it is the petitioners’ claim that their rights as enshrined under Articles 26(1) and 42(1) of the Constitution have been violated and/or infringed by the acts of the 1st respondent of putting up a bar (known as Coco Grill) within Kimumu residential area and which has resulted in noise pollution hence a violation of their right to a clean and healthy environment.

98. They have also explained how the omission by the 2nd, 3rd and 4th respondents have contributed to a continued violation of their rights to a clean and healthy environment and by explaining the steps and efforts they made to try and solve the complaint and how the failure by the 2nd – 4th respondents in discharging their mandate and enforcing the regulations on noise management led to a continued violation of their rights.

99. In view of the foregoing, I find that the petitioners’ have explained with a reasonable degree of precision their rights that were allegedly infringed and the manner in which the respondents allegedly violated the



said rights through their acts and omission. Consequently, the petition as filed meets the set threshold of what amounts to a proper constitutional petition.

Issue No. 3 – Whether the actions and/or omissions of the respondents’ have caused a violation of the Petitioners’ rights;

100. The Petitioners claim against the 1st respondent is that the 1st respondent’s operation of the Coco Grill bar within the residential area of Kimumu has violated their rights to a clean and healthy environment as a result of the noise pollution emanating from the said bar.
101. Their claim against the 2nd – 4th respondents is that the omission on the part of the 2nd – 4th respondents by proceeding to issue operation licenses for the operation of a bar within a residential area and near learning institution is contrary to section 14(1) of the Uasin Gishu County *Alcoholic Drinks Control Act*, 2014 and failing to take the necessary measure to ensure compliance with the noise regulations.
102. The petitioners further contend that despite making several efforts and writing complaint letters to the relevant authorities and to the 2nd – 4th respondents, no action was taken on their part to resolve their complaints and which in turn resulted in continued violation of their fundamental rights.
103. The 1st respondent on his part maintained that he operates the Coco Grill bar legally, having made payments and has been duly issued with the requisite licenses by the 2nd and 3rd respondents and which licenses are still valid to date.
104. It is his claim that at the time of obtaining the requisite license for the operation of the bar, he complied with the provisions of section 9 of the Uasin Gishu County *Alcoholic Drinks Control Act*, 2014 and that the 2nd respondent conducted public participation of the area residents through their Alcoholic Drinks Committee, to establish the suitability of the same and that no objection was raised by either the residents or the petitioners and thus the petitioners are estopped from raising an objection at this point.
105. The 2nd and 3rd respondents neither filed a response to the petition nor submissions. However, their counsel on record informed the court that they would be relying on the responses and submissions filed by the 1st and 4th respondents.
106. The 4th respondent on its part maintained that the nature of the claim complained of by the petitioners is out of their mandate and scope and that the same was devolved to the County Government, 2nd and 3rd respondents, pursuant to the provisions of the Fourth Schedule of the *Constitution*.
107. They further averred that the only role they play is a supervisory role and maintained that as an institution they cannot be held liable for any act or omission. They however admitted to have received a complaint letter from the petitioners on the noise pollution but did not act on the same as the subject matter is not within their mandate.
108. In relation to the license issued to the 1st respondent for the operation of his establishment Coco Grill, they maintained that they have never received an application for licensing nor issued any license to the 1st respondent.
109. The petitioners’ claim in my view gives rise to two major issues; one is on the operation of the 1st respondent’s coco grill business and secondly, the issue of noise pollution.



110. Section 14(1) of the Uasin Gishu County *Alcoholic Drinks Control Act*, 2014 provides as follows: -

“(1) The County Committee shall not grant a new Licence for licence for the sale of an alcoholic drink to be consumed on premises unless the County committee is satisfied-

(a) that it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometre and the permitted maximum number of such premises as shall be prescribed by law:

Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written law”

111. The provisio under section 14(1) above is very clear that no license should be granted to sell alcoholic drinks in any institution of basic education or any residential area. The only question that arises is whether the operation of the Coco Grill Bar is within a residential area, or institution of basic learning as stated above.

112. I think not, from a cursory look at the said photographs, one can only see buildings, including separate pictures of the establishment itself. A sufficient proof would have been a physical planners report, or a certified copy of the map of the said area and or a report from a surveyor, confirming the said averments. The petitioners could also have requested the court to visit the locus in quo which they did not. It is therefore my finding that it is not clear, from the photographs produced that the area is a residential area or a mixed development zone.

113. Be that as it may and without prejudice to the foregoing, had the said area been proved as a residential area, the next question would be whether the petitioners have proved their claim on noise pollution to the required threshold.

114. Section 101, 102 and 103 of the EMCA deals in the issue of noise pollution by setting out a framework for establishing noise standards and prohibiting excessive noise.

115. “Noise pollution” has been defined as: -

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

116. In the exercise of the powers vested upon the 4th respondent herein by section 147 of the EMCA, the Authority enacted the Environmental Management Coordination (Noise and Excessive Vibration Pollution (Control) Regulations 2009) and which governs claims on noise pollution.



117. Section 6 of the said Regulations provides that the measurements to determine whether or not noise or vibration levels exceed the permissible levels shall be taken by the relevant lead agency. A “lead agency” is defined under the Regulations as follows:
- “Lead agency’ means any Government Ministry, Departments, Parastatal, State Corporation or Local Authority, in which any law vests functions of control or management of any element of the environment or natural resources.”
118. Section 6(3) and (4) of the Regulations further provides as follows:
- “(3) In any cases where there is no relevant lead agency to take the measurement, or where the lead agency had failed to take action after being given reasonable notice by the Authority, the measurements shall be taken by a person duly authorized by 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.”
119. Excessive vibration has also been defined to mean the presence of vibration which:-
- (a) is of such intensity, duration, frequency or character as to annoy disturb or cause or tend to cause adverse psychological or physiological effects to persons or to damage or tend to damage personal or real property; and
- (b) exceeds 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source”.
120. Despite stating that they have written to the 2nd – 4th respondents complaining about the noise pollution within their area, there was no proof that the measurement of the noise was taken by a person duly authorized by the Authority who is knowledgeable in proper use of the measuring equipment or engaged the services of an expert in the field. There is no evidence that the Petitioners have sought the services of such person who is knowledgeable in the proper use of the measuring equipment. In the absence of such a measurement, in my view it is very hard for the court to determine as to whether or not the alleged noise exceeded the permissible levels/decibels.
121. This court cannot therefore fully ascertain the level and/or intensity of the alleged noise pollution or whether the noise emanating from the said establishment exceeded the level permissible or whether the same noises meet the definition of excessive noise and vibration as outlined above.
122. This court is however cognizant of the other determinants of noise pollution in addition to the noise measurements. Regulation 3(2) sets out these other factors which include; time of the day; proximity to residential area; whether the noise is recurrent; intermittent or persistent or constant; the level of intensity; whether the noise has been enhanced in level or range by any type of electronic or mechanical means.
123. However, in this case the petitioners did not produce either a copy of a Map, an RIM to prove the location of their premises or the zoning thereof as a residential area and they did not also produce any report of the level of noise measurement or even an Inspection Report to prove the existence of the other variable used in the measurement of noise pollution.



124. The totality of the foregoing is that the petitioners have failed to prove their claim on a violation of their rights to a clean and healthy environment on account of noise pollution resulting from the operation of the 1st respondent's Coco Grill Bar.

Issue No. 4 – Whether the Petitioners are entitled to the orders sought

125. Sections 107 and 108 of the *Evidence Act* are clear on the standard and burden of proof and the need for a party to satisfactorily prove their claim to warrant the grant of the orders sought. The effect of the orders sought by the petitioners is the closure of the 1st respondent's business and revocation of the licenses issued thereto.

126. This court therefore has the duty to ensure that there is sufficient grounds, justification and evidence adduced before it, before it can proceed to issue such drastic orders in the nature sought.

127. Having held that the petitioners have failed to sufficiently prove their claim on noise pollution to the required standard, it therefore follows that they are not entitled to the reliefs sought in the petition.

Issue No. 5 - Who should bear the costs of the Petition;

128. Costs are at the discretion of the court. However, the general rule is that costs follow the event unless the court considers otherwise.

129. In this case, it is my considered opinion that the petitioners' claim is a public interests claim and I therefore find that each party shall bear their own costs of the suit.

Conclusion:

130. In view of the foregoing, I accordingly find that the Petition dated 18th July, 2024 is not merited and is hereby dismissed with no orders as to costs.

131. It is so ordered.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 15TH DAY OF MAY, 2025.

HON. C. K. YANO

JUDGE

Judgment delivered virtually in the presence of: -

Ms. Kosgey for the Petitioners.

Ms. Kahuria for the 4th Respondent.

Ms. Nyaribo holding brief for Mr. Kipnyekwei for 1st Respondent.

Court Assistant – Laban

