



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. PETITION NO. 16 OF 2017**

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(2), 19, 20, 22, 23, 24, 42, 69, 70, 159, 258 & 259 OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLE 42 OF THE CONSTITUTION OF KENYA, SECTIONS 101, 102 & 103 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (NOISE AND EXCESSIVE VIBRATION POLLUTION) (CONTROL) REGULATIONS, 2009;**

**BETWEEN**

**ALI RONOW HASSAN HAJI AND FRED KONDO ATHUOK**

**T/A ISSACK AND COMPANY ADVOCATES.....PETITIONERS**

**VERSUS**

**AIRTEL KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**DIXONS ELECTRONICS LIMITED.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioners, who are advocates of the High Court of Kenya and whose place of business is Ibrahim, Issack & Company Advocates, Hughes Building 8th Floor, Kenyatta Avenue, brought this petition claiming that their right to a clean and healthy environment had been violated by the Respondents. The Petitioners claim that the 1<sup>st</sup> and 4<sup>th</sup> Respondents operate an Airtel Shop in Phoenix House located on Kenyatta Avenue within the Nairobi central business district from which noise has been emanating from the loud speakers placed at the shop's entrance. They claim that loud music is played in that shop while an announcer intermittently advertises the products available for sale in the Airtel shop.

2. The Petitioners claim that the noise emanating from the 1<sup>st</sup> Respondent's premises is loud, annoying, offensive and interferes with the comfort, repose, health and safety of members of the public hence amounting to an offence under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations of 2009 made under the Environmental Management and Coordination Act (EMCA). The Petitioners alleged that the 1<sup>st</sup> Respondent's actions amount to hawking within the Nairobi central business district which is prohibited by the Regulations made under EMCA; and that the Respondents' actions have adversely affected the work environment for offices within the central business district. The Petitioners contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed in their duty to control the noise pollution caused by the 1<sup>st</sup> Respondent despite demand being made of them to discharge their mandate.

3. The Petitioners sought an order to compel the 1<sup>st</sup> Respondent, its agents or assigns to stop or to discontinue the noise pollution it was causing or permitting to be caused by the Airtel Shop in Phoenix House on Kenyatta Avenue in the central business district of Nairobi. They also sought an order to compel the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to prosecute the 1<sup>st</sup> Respondent if the 1<sup>st</sup> Respondent did not cease to cause or permit to be caused noise pollution at the Airtel Shop in Phoenix House, Kenyatta Avenue. The Petitioners also sought an order to compel

the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent jointly or severally to prosecute all parties causing noise pollution using loud speakers for marketing purposes within Nairobi County as well as any other orders or directions the court may consider appropriate for the preservation of a clean and healthy environment within the Nairobi central business district.

4. The Petition is supported by the Affidavit sworn jointly by Fred Kondo Athuok and Ali Ronow Hassan Haji, who are the managing partners of Ibrahim, Issack & Company Advocates. They deponed that despite demand being made of the Legal Regulatory Director of Airtel Kenya to ensure the noise in the Airtel Shop is abated through the letters of 28/7/2016 and 3/8/2016, the noise continued.

5. The 1<sup>st</sup> Respondent filed a preliminary objection urging that it was non-suited as a party since it is neither a lessor nor is it a lessee of the demised premises complained of. It also argued that it has no control over the acts or omissions complained of as it relates to the demised premises and the 1<sup>st</sup> Respondent is not the owner of those premises.

6. The Petitioners amended the petition on 27/2/2018 and added the 4<sup>th</sup> Respondent as a party to the proceedings. Lilian Mugo, the 1<sup>st</sup> Respondent's Legal Affairs Manager, swore the affidavit in opposition to the Amended Petition. She denied the allegations of infringement of the rights and fundamental freedoms of the Petitioners. She stated that the 1<sup>st</sup> Respondent entered into a franchise agreement with the 4<sup>th</sup> Respondent for the sale of the 1<sup>st</sup> Respondent's products and services to the 1<sup>st</sup> Respondent's customers. She stated that the agreement obligates the 4<sup>th</sup> Respondent to comply with all the applicable laws, regulations and statutory requirements. She maintained that the 1<sup>st</sup> Respondent does not have control over the 1<sup>st</sup> Respondent. She further averred that the Petitioners have not met the threshold for the infringement of rights and fundamental freedoms for the court to grant the orders sought in the petition. The 4<sup>th</sup> Respondent did not file a response despite being served.

7. Parties filed and exchanged submissions which the court has considered. The issues for determination are:

- a) Is the 1<sup>st</sup> Respondent liable for the noise complained of by the Petitioners?
- b) Is the Petitioners' claim against the 2<sup>nd</sup> Respondent misplaced?
- c) Has the Petitioners' right to a clean and healthy environment been contravened by the noise emanating from the 4<sup>th</sup> Respondent's shop while advertising the 1<sup>st</sup> Respondent's products?
- d) Should the court grant the orders sought by the Petitioners?

8. The 1<sup>st</sup> Respondent submitted that it is not liable for the Petitioners' claim since the 4<sup>th</sup> Respondent is required under the franchise agreement to comply with all provisions of the law. It denied that the doctrine of vicarious liability applied in this case as urged by the Petitioners. The 1<sup>st</sup> Respondent further argued that the 4<sup>th</sup> Respondent sells and advertises its products to its customers and clients but is required to comply with all legal requirements.

9. The court has looked at Clause 3 of the Service Agreement entered into between Airtel Networks Kenya Limited and Dixons Electronics Limited which deals with promotions. It states at clause 3.1 that the franchise retailer and Airtel shall jointly undertake the marketing and promotion of Airtel products. The retailer is expected to participate in all marketing and promotion as shall be communicated by Airtel from time to time. In the court's view, the 1<sup>st</sup> Respondent's argument that it has no control over how the 4<sup>th</sup> Respondent carries out the marketing and promotion of its products cannot hold in light of clause 3.1 of the Service Agreement between the 1<sup>st</sup> and 4<sup>th</sup> Respondents. The source of the noise complained of is the advertisement and marketing of the 1<sup>st</sup> Respondent's products. Clause 3.1 shows that the 1<sup>st</sup> Respondent plays a direct role in the marketing and promotion of its products, which should be jointly undertaken with the 4<sup>th</sup> Respondent. The court finds that both the 1<sup>st</sup> and 4<sup>th</sup> Respondents are liable for the noise pollution complained of emanating from the Airtel Shop on Kenyatta Avenue.

10. The Petitioners wrote to the 1<sup>st</sup> Respondent on 28/6/2016 complaining about the noise coming from the Airtel Shop on Kenyatta Avenue while seeking the abatement of the noise. The letter was copied to the Directorate of Environment, Nairobi County Government and the National Environmental Management Authority (NEMA). The 1<sup>st</sup> Respondent has not shown what steps it took to get the 4<sup>th</sup> Respondent to comply with the noise levels prescribed by EMCA when it received the Petitioners' letter complaining of noise from the Airtel Shop.

11. The 2<sup>nd</sup> Respondent filed Grounds of Opposition on 2/12/2016. It opposed the petition on the grounds that no demonstrable rights of the Petitioners have been breached by the 2<sup>nd</sup> Respondent; that the Petitioners had not produced a scientific printout of the degree of the vibrations; that the 2<sup>nd</sup> Respondent had not authorised any noise pollution and that 2<sup>nd</sup> Respondent manifests its authority through permits and licences none of which the Petitioners had attached to the petition. The 2<sup>nd</sup> Respondent blamed the 3<sup>rd</sup> Respondent and submitted that the 3<sup>rd</sup> Respondent is the one tasked with the responsibility of controlling noise pollution under the law. The 2<sup>nd</sup> Respondent submitted that it is the 3<sup>rd</sup> Respondent's duty to regulate noise in Nairobi City County. Despite being served, the 3<sup>rd</sup> Respondent did not file a response or participate in these proceedings. It did not respond to the Petitioners' letter of 28/6/2016.

12. The Petitioners wrote to the Nairobi County Government on 3/8/2016 enquiring about the action taken with regard to the nuisance caused by the Airtel Shop situated on Kenyatta Avenue which was affecting their work. There does not seem to have been a response to that letter. The Petitioners submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had failed in their duty to control the noise pollution caused by the 1<sup>st</sup> and 4<sup>th</sup> Respondents within the County of Nairobi generally. The Petitioners alluded to media reports to the effect that the 3<sup>rd</sup> Respondent's inspectors had stormed and closed down various business premises in Nairobi including Kiza Lounge, Space Lounge and B-Club following complaints of noise by members of the public. The court cannot place much weight on this submission since the Petitioners did not place the media reports or other evidence of this before the court.

13. NEMA, the 3<sup>rd</sup> Respondent is established under Section 7 of EMCA. Its object under Section 9 is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment. The 2<sup>nd</sup> Respondent is established pursuant to Article 176(1) of the Constitution. County governments and the national government have distinct roles. One of the functions of the county governments, such as the 2<sup>nd</sup> Respondent under Part 2 (3) of the Fourth Schedule to the Constitution, is the control of air pollution, noise pollution, other public nuisances and outdoor advertising.

14. It is therefore clear that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have a role to play in matters concerning the environment including noise pollution and the roles are somewhat intertwined. Where there is doubt as to what role each level of government is supposed to play, Article 182 of the Constitution applies.

Article 186(1) and (2) of the Constitution provides that;

*Except as otherwise provided by this Constitution, the functions and powers of the national government and county governments, respectively, are set out in the Fourth Schedule.*

*A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of the levels of government.*

15. The Petitioners urged that their right and that of the public to a clean and healthy environment under Article 42 of the Constitution had been violated by the Respondents and that the loud, annoying and offensive noise emanating from the 1<sup>st</sup> and 4<sup>th</sup> Respondents' premises was interfering with the comfort, repose, health and safety of members of the public and amounted to an offence under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009.

16. To determine whether the noise complained of contravenes the right to a clean and healthy environment, some of the factors the court has to consider include whether the noise exceeds the limits prescribed by law; whether the noise levels are permitted by law and whether the noise is likely to cause danger to human health or damage to the environment. If the noise caused is loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment then this amounts to an offence for which the person making or causing the noise should be charged for contravening the Regulations made under EMCA.

17. Article 42 of the Constitution affords every person the right to a clean and healthy environment. Some of the factors likely to hinder the enjoyment of the right to a clean and healthy environment can be gleaned from EMCA and they include the discharge of effluent into the environment; emission of greenhouse gases and other sources causing air pollution; discharge of waste, oil, hazardous and toxic substances into the environment; noise and vibration pollution; radioactive substances and noxious smells. The Regulations made under EMCA prescribe the standards for the control of pollution to the environment, which are intended to give effect to the enjoyment of every person of the right to a clean and healthy environment enshrined in the Constitution.

18. Article 69 of the Constitution enjoins the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and tasks it to eliminate processes and activities that are likely to endanger the environment. The Constitution defines "State" as the collectivity of offices, organs and other entities comprising the government, which in this case includes the National and the Nairobi County Governments.

19. Article 70 of the Constitution empowers any person who alleges that a right to a clean and healthy environment has been or is likely to be denied, breached or violated to apply to the court for redress. The person need not demonstrate that he has incurred loss or suffered damage. The Petitioners in this case therefore did not need to prove the damage they had suffered as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged.

20. Section 101 of EMCA enjoined the Cabinet Secretary to set the standards for noise on the recommendation of NEMA. These include recommending the minimum standards for emissions of noise and vibration pollution into the environment necessary to preserve public health and the environment; determining the criteria and procedures for measuring noise and vibration pollution into the environment and issuing guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.

21. Section 102 of EMCA makes it an offence for a person to emit noise that exceeds the standards established under that part. NEMA is permitted to grant temporary permits allowing noise in excess of the set standards in certain specified instances.

22. The Petitioners urged that the noise pollution from the Airtel Shop amounts to a public nuisance. Black's Law Dictionary, 10th edition defines public nuisance, which is also termed as common nuisance, as an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards. The dictionary quotes Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* 10 (1906) which states as follows:

*"A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferences with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury or damage may be unequal or may vary in its effect upon individuals."*

23. The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations were promulgated in 2009. EMCA defines noise as any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. The Regulations define noise pollution as the emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment.

24. Part II of the Regulations sets out general prohibitions against the making or causing to be made, loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. In determining whether the noise is loud, several factors are considered including the time of the day, the proximity to a residential neighborhood, whether the noise is recurrent, intermittent or constant, the level and intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise. A violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations.

25. Regulation 5 bans anyone from making or continuing to make any noise exceeding the levels set out in the schedule to the Regulations unless the noise is reasonably necessary to the preservation of life, health, safety and property. The First Schedule to the Regulations outlines the maximum permissible noise levels. The maximum permissible noise levels for commercial zones is 60 dB(A).

26. Regulation 6 enjoins the relevant lead agency to measure the noise levels. Section 2 of EMCA defines a lead agency as any Government ministry, department, parastatal or local authority in which any law vests functions of control or management or any element of the environment. Regulation 6 allows a person duly authorised by NEMA to take measurements where there is no lead agency to take the measurements or where the lead agency has failed to take action after being notified by NEMA.

27. The Petitioners commissioned the conduct of a survey of the noise and a noise survey report was prepared on 23/3/2017 by Moses Mutungi Muthee, a NEMA registered lead expert No. 2245. The report which was produced in court indicates that the noise levels emanating from the Airtel Kenya Limited Shop along Kenyatta Avenue was beyond 60dB(A) which is the maximum permissible level for commercial zones. The report shows that between 2017-02-06 and 2018-02-05 measurements were taken from the Petitioners offices and the readings recorded ranged from 76.7 to 84.7 dB(A). The 1<sup>st</sup> and 4<sup>th</sup> Respondents were not granted a permit by NEMA to emit noise in excess of the set standards.

28. The 2<sup>nd</sup> Respondent relied on the case of **James Jessie Gitahi & 202 Others v Attorney General [2013] eKLR** in which the Petitioners' had challenged the Regulations and the Minister's power to make the Regulations for which they had been arrested and charged for contravening. The court found that the Minister had power to make Regulations under Section 147 of EMCA which power included that of prescribing offences whose penalty was set out in Section 144 of EMCA. Majanja J. found that the Petitioners had failed to prove that the Regulations violated the Constitution or their fundamental rights and freedoms and proceeded to dismiss their petition. That case does not assist the 2<sup>nd</sup> Respondent in this case.

29. The court finds on the evidence that the loud advertising by the 4<sup>th</sup> Respondent of the 1<sup>st</sup> Respondent's products is unreasonable and without regard for the interests of surrounding offices along Kenyatta Avenue. The court finds that the Petitioners' right to a clean and healthy environment protected by the Constitution has been contravened by the noise emanating from the 4<sup>th</sup> Respondent's shop while advertising the 1<sup>st</sup> Respondent's products.

30. It has not been demonstrated that the Airtel Shop cannot find alternative means to advertise the 1<sup>st</sup> Respondent's products and operate commercially in accordance with the law without causing the noise pollution complained of. The court is not persuaded that any of the Respondents is unable to prevent the public nuisance complained of.

31. The court grants an order compelling the 1<sup>st</sup> and 4<sup>th</sup> Respondents, their agents or servants to discontinue all noise pollution being caused by them or being permitted to be caused by them in the Airtel Shop in Phoenix House, Kenyatta Avenue in the Central Business District of Nairobi.

32. If the 1<sup>st</sup> and 4<sup>th</sup> Respondents do not forthwith cease to cause or permit to be caused the noise pollution from the Airtel Shop in Phoenix House, Kenyatta Avenue in the Central Business District of Nairobi the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are directed to prosecute the 1<sup>st</sup> and 4<sup>th</sup> Respondents for the offences created under EMCA and the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations.

33. The court issues an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally to prosecute any person causing noise pollution including those using loud speakers for marketing purposes within the Nairobi County in accordance with EMCA and the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations.

34. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are directed to enforce EMCA and the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations to ensure the abatement of unreasonable noise and vibration noise pollution emitted into the environment from any source within Nairobi County that may interfere with the comfort, repose, health or safety of members of the public.

35. The Petitioners are awarded the costs of this petition to be borne by the Respondents.

Dated and delivered at Nairobi this 19<sup>th</sup> day of February 2019.

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. C. M. Mwangi for the Petitioners

Ms. D. Nthiwa holding brief for Mr. Njenga for the 1<sup>st</sup> Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents