



**Ekutan & 6 others v Jasto Mwiti alias “Sizzler” (Environment and Land Case E001 of 2025) [2025] KEELC 5819 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5819 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT LODWAR  
ENVIRONMENT AND LAND CASE E001 OF 2025**

**CK NZILI, J  
JULY 30, 2025**

**BETWEEN**

**BENJAMIN EKUTAN ..... 1<sup>ST</sup> PLAINTIFF  
OMAR ABDIBOTHAN ..... 2<sup>ND</sup> PLAINTIFF  
PHILIP LORIU ..... 3<sup>RD</sup> PLAINTIFF  
LOMOSINGO WILLIAM ..... 4<sup>TH</sup> PLAINTIFF  
MICHAEL AUREN ..... 5<sup>TH</sup> PLAINTIFF  
LOKAALEI LOKIDOR ..... 6<sup>TH</sup> PLAINTIFF  
DAVID NGIBEYO ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**JASTO MWITI ALIAS “SIZZLER” ..... DEFENDANT**

**RULING**

1. Article 69 of *the Constitution* grants every person who alleges that a right to a clean and healthy environment under Article 42 of *the Constitution* is being or likely to be denied, violated, infringed or threatened, to apply to the court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application, the court may make an order or give an appropriate direction to prevent, stop, or discontinue any action, or omission that is harmful to the environment, or compel any public officer to take measures to prevent or discontinue any such act or omission harmful to the environment.
2. The applicants moved this court through an application dated 26/6/2025, seeking restraining orders against the respondent, who is allegedly operating a business in a residential area, which is emitting excessive noise, hence affecting the residents of Ngakoriek village, Kanamkemer Ward within Turkana



- County. The applicants aver that efforts and the intervention by the relevant authorities, following their complaint, led to reports attached as annexure BE-1, confirming their fears. Further, the applicants depose that they have written to the Deputy County Commissioner, the OCS and the National Environment Management Authority (NEMA), who are yet to take any remedial action, hence this suit.
3. The applicants have attached letters dated 10/4/2025 and 2/6/2025. It is the applicants' case is that loud music and disturbance arising out of the respondent's compound have made them suffer loss and damage, hence they seek the intervention of this court.
  4. The application is opposed by a replying affidavit of Justo Mwiti alias Jasto Mwiti, sworn on 10/7/2025. He deposes that he is the owner of L.R No. Nawaitorong /Block 3/029, located in Narewa village, whose right to peaceful use, ownership and occupation is interfered with by the applicants contrary to Article 40 of *the Constitution*, by purporting to play moral police and seeking to enforce their delusion of morality by roping this court into issuing an order that would deprive him of such ownership rights.
  5. The respondent deposes that the allegations by the applicants are not only scandalous but slanderous, for they are not supported by any evidence. The respondent denies that his premises have any illegal or harmful substances either stored, cultivated, or partaken by the revelers, or is a den of immorality as alleged; otherwise, he would have been subject to police investigations. The respondent deposes that annexures OA-1, OA-2, OA-3 and the video records attached to the applicants' affidavit clearly show that there is an ongoing construction on his premises, which project is incomplete. The respondent deposes that such video recordings were made without his knowledge or consent, which acts amount to trespass on his land.
  6. As to annexure BE-1, the respondent terms it as false and that it does not show a true account as the situation on his premises, which are locked and entry restricted to himself and his workers, otherwise the said report was conducted without the presence of any police officers or any prior notice to him, without an intention of manufacturing falsehoods against him. The respondent deposes that all the annexures by the applicants are unrelated and or unauthenticated. The respondent deposes that the condition in his premises remains incomplete and hence unfit for occupation.
  7. The respondent deposes that after he bought the suit premises, he applied for a survey, paid for it, made an application for development permission and eventually prepared a development plan in 2018, hence complying with the requirements as per annexures marked JM-1, 11, 111, 1V and V. Further, the respondent deposes that he has always observed the principles of good neighbourliness and at no time has his purchase of the land or ongoing construction caused noise or any environmental pollution. The respondent deposes that whereas the applicants complain of noise, the ongoing construction is yet to be opened for the public and neither the County Government of Turkana, Lodwar Police Station police officers, National Environment Management Authority, National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA), have sanctioned any activities or business on his parcel of land.
  8. The respondent avers that stopping him from erecting security installations on his parcel of land, which are critical to his security, has nothing to do with the applicants. The respondent deposes that the orders sought by the applicants are susceptible to abuse as any accidental noise including the ongoing construction, may be used by the applicants to interfere with his proprietary rights for it will give the applicants powers to accuse him of any noise complaint, which would lead to police officers raiding and harassing him and the constructions workers.



9. The respondent deposes that he has complied with the provisions of the Environmental Management and Coordination Act (Noise and Excessive Vibration Pollution Control) Regulation, 2009; otherwise, the orders sought cannot be granted without an independent report in line with Section 6 of the said Regulation. The respondent deposes that the applicants have not exhausted the mechanism set under Sections 31, 32 and 35 of the Environmental Management and Coordination Act (Public Complaints Committee) Regulation; otherwise, the suit is filed in the wrong forum, since the jurisdiction falls under the National Environmental Tribunal.
10. The respondent deposes that the orders sought do not take into account his rights to privacy and property; hence, it is in the interest of justice to have the application dismissed with costs for not meeting the principles in *Giella -vs- Cassman Brown* [1973] EA 358.
11. The issues calling for my determination are:
  - (1) If the suit is filed in the wrong forum.
  - (2) If the applicants are entitled to the reliefs sought.
12. The respondent has raised a jurisdiction question that the suit is filed in the wrong forum, the suit is speculative, it is a nuisance and is based on no evidence. What the plaintiffs are complaining about is noise pollution. The legal framework on noise is Articles 43 and 70 of *the Constitution* and the Environmental Management and Coordination Act. Noise is defined under the Environmental Management and Coordination Act (Noise and Excessive Vibration) Pollution Control Regulation 2009, as any undesirable sound that is objectionable or that may cause adverse effects on human health or the environment. Regulation 3(1) thereof sets out the general prohibition against the making or causing of loud, unreasonable, unnecessary, or unusual noise that annoys, disturbs, injures, or endangers the comfort, repose, health, or safety of others and the environment.
13. Regulation 3(2) thereof sets the factors to consider, including the time of the day, proximity to a residential area, if it is recurrent, intermittent or constant, level and intensity, whether enhanced by any electronic or mechanical means and whether the noise can be controlled without effort or expense to the person making the noise.
14. Regulations 5 and 6 thereof set out the levels as per the 1<sup>st</sup> Schedule, under which noise is reasonably necessary for the preservation of life, health, safety, or property, with the responsibility to measure the noise being bestowed on the lead agencies.
15. The applicants aver that they have reported the alleged noise to the relevant lead agencies, including the County Government of Turkana, which came and with a report marked BE-1. The applicants have attached annexures AO-1, AO-2 and AO-3, accompanied by a certificate of electronic evidence sworn on 26/6/2025.
16. In *Kenya Ports Authority -vs- William Odhiambo Ramogi & Others* [2019] eKLR, the court held that the High Court has unlimited jurisdiction on questions of enforcement of the Bill of Rights and therefore, the non-exhaustion doctrine serves the purpose of ensuring the postponement of judicial consideration to ensure parties are diligent in protection of their interest within the mechanism set in place outside courts.
17. In *Nicholus -vs- Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR) and *Kibos Distillers Limited & 4 others -vs- Benson Ambuti Adegwa & 3 others* [2020] KECA 875 (KLR), the court observed that under Section 4(1) and 13 *Environment and Land Court Act* as read together with Article 162(2) (b) of *the Constitution*, National Environment Tribunal (NET), Energy and Petroleum Regulatory Authority



(EPRA) and Energy and Petroleum Tribunal (EPT), have no jurisdiction to determine alleged violation of constitutional rights and freedoms.

18. In *Nicholus -vs- Attorney General* (supra), the court held that the existence of an alternative remedy was not a bar to access justice, especially where the alternative remedy is not efficacious, efficient, specific, or is incapable of handling the dispute.
19. In this suit, the applicants submitted to the jurisdiction of NEMA, which declined, neglected, or omitted to take remedial action. There can be no right without a remedy. The claim by the plaintiffs is that the defendant is playing loud music in the neighborhood every day from 9:00 p.m. until 3:00 a.m. in a residential area, which he has turned into an entertainment joint, without approval and licenses hence depriving the applicants, their children and the entire neighborhood peace, tranquility and ability to enjoy a good night sleep, hence affecting their quality of life.
20. In paragraphs 11, 12, 13, 14 and 15, the applicants list out the offices that they have reached out to for intervention in vain, and have continued to be subjected to untold suffering, discomfort, turmoil and sleep deprivation. In the statement of defence dated 10/7/2025, the defendant does not specify if the public complaint committee and National Environmental Tribunal have jurisdiction to grant the reliefs sought in this suit as to breach of the right to life. I find the non-exhaustion doctrine improperly raised.
21. Turning to whether the applicants are entitled to other reliefs sought, a party seeking temporary orders of injunction has to establish a prima facie case, show that there will be irreparable loss and damage and lastly, that the balance of convenience tilts in granting a temporary injunction.
22. A prima facie case is established where there is an arguable case, and a right has been infringed to call for a rebuttal from the opposite side. See *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR). Irreparable loss and damage is that which cannot be compensated by way of damages. Speculative loss or damage is not enough. It must be real, actual, apparent and imminent. See *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR).
23. Balance of convenience is what the applicant is likely to suffer in the absence of an injunction being greater than the respondent's, if an application is allowed and the suit is ultimately dismissed. See *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* [2018] eKLR and *Paul Gitonga -vs- Gathuthi Tea Factory Co. Ltd & Others* [2016] eKLR, Section 3(3) Environmental Management Coordination Act as read together with Articles 42, 69 and 70 of *the Constitution* grants the applicants the right to move to court for redress to prevent, stop, discontinue, or compel a public officer to take action or require an ongoing activity to be subjected to an environmental audit or restore the degraded environment. Control of pollution is constitutionally bestowed upon the County Government and National Environment Management Authority, under Articles 176, 185(2), 186(1) and 187(2) as read together with the Fourth Schedule of *the Constitution*.
24. In *Chebii & Others -vs- SBI International Holdings (AG) (K) & Another* [2024] KEELC 3294 [KLR] (11<sup>th</sup> April 2024) (Judgment), the court observed that a project proponent cannot be relieved of its duty to take steps for the safety of its neighbours and another person who may be affected by the project. The respondent in the replying affidavit has admitted that he is the owner of L.R No. LDW/Nawaitorong Block 3/029, located in Narewa Village, Kanamkerer Ward, where there are ongoing construction works as per annexure JM-1, 11, 111, IV and V. The respondent in paragraph 21 thereof deposes that he is in full compliance with the provisions of the Environmental Management and Coordination Act (Noise and Excessive Vibration Pollution Control Regulations, 2009).



25. In the inspection report dated 15/4/2025 by the Department of Public Health and Sanitation, County Government of Turkana, a site visit and environmental assessment on 7<sup>th</sup> and 8<sup>th</sup> March, 2025, made a specific findings that loud music was playing from the premises in violation of noise pollution regulations, the building has been erected without approval plans, the site inspection and there was lack of sanitary facilities. The report identified breach of Sections 118 and 135 of the Public Health Act, Sections 33 of the Tobacco Control Act and Sections 3 and 5 of the Narcotic Drugs and Psychotropic Substances Act. The report states that air and noise pollution were posing a danger to the applicants.
26. The conclusion and recommendation are that there is a gross violation of public health laws and natural regulations. The duty to safeguard and eliminate processes or activities likely to endanger the environment under Article 69(1) of the Constitution and Sections 3, 5, 9, 71 and 142 of the Environmental Management and Coordination Act reposes with the County Government and the National Environment Management Authority. See Martin Osano Rabera & Another -vs- Municipal Council of Nakuru & Another [2018] eKLR. In Kibos Distillers Ltd -vs- Benson Ambuti (supra), the court observed that pollution is primarily proved by empirical, technical and scientific evidence.
27. In John Chamia Nganga -vs- Attorney General & Another [2019] eKLR, the court observed that nuisance is an act or omission that interferes, disturbs, or annoys a person's right in connection with land, where such acts are not confined or escape to another land. Regulation 9(3) of the Environmental Management and Coordination Act Regulations, 2009 forbids loud, unreasonable, unnecessary, or unusual noise that annoys, disturbs, injures, or endangers the comfort, repose, health, or safety of others and the environment.
28. The inspection report falls under Section 97(1) of the Evidence Act. It has not been contradicted by any other report. The burden of proof was on the respondent to produce a rival report to show that he is not operating offensive activities or projects on the suit land. A layman's opinion, as held in Kibos Distillers Ltd -vs- Bensom Ambuti (supra), cannot contradict, challenge, or vitiate an expert report. The respondent admits that annexures OA-1, O1-2 and OA-3, as well as BE-1, are from the suit premises.
29. Article 70(5) of the Constitution provides that a petitioner complaining of a breach of environmental rights need not prove any damage or injury suffered. There is no evidence that the respondent has taken measures to soundproof, minimize, reduce, avoid, or eradicate the excessive noise or sound after an abatement notice was issued or recommended under Section 135 of the Public Health Act. Evidence that the respondent's actions comply with the framework set under Sections 58, 101-103 Environmental Management and Coordination Act and the Regulations thereunder is lacking.
30. An Environmental Impact Assessment license for the building and the ongoing construction has not been attached. The rights of the respondent to enjoy his property are subject to those of the neighbours. He has to operate or undertake activities on his land such that they do not violate the rights of others.
31. The upshot is that I find that the applicants are entitled to the prayers sought.
32. Orders accordingly.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 30<sup>TH</sup> DAY OF JULY 2025.**

In the presence of:

Court Assistant - Dennis

Gikonyo for the respondent present



Lotir for applicants present

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

