



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CONSTITUTIONAL PETITION NO. 5 OF 2018**

**KILIMANI PROJECT FOUNDATION.....1<sup>ST</sup> PETITIONER**

**=VERSUS=**

**B CONCEPT LIMITED T/A B CLUB NAIROBI.....1<sup>ST</sup> RESPONDENT**

**KIZA RESTAURANT AND LOUNGE.....2<sup>ND</sup> RESPONDENT**

**SPACE LOUNGE AND GRILL.....3<sup>RD</sup> RESPONDENT**

**EXPLORERS TAVERN.....4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF ENVIRONMENT**

**NAIROBI CITY COUNTY GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT**

**AUTHORITY.....6<sup>TH</sup> RESPONDENT**

**THE CHAIR PERSON-NAIROBI CITY COUNTY**

**ALCOHOLIC DRINKS AND LICENCING BOARD.....7<sup>TH</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....8<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. This petition is filed by non government organization, the Kilimani Project Foundation whose key concerns and core objectives involve caretaking of the welfare of the residents of Kilimani area. The petition is brought in a representative capacity, on behalf of the residents of Kilimani, area residential area within Nairobi County.
2. The matter was first filed in the High Court, Constitutional and Human Rights Division and later transferred to this court.
3. The residents of Kilimani are aggrieved by the conducts of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents who operate night club business in Kilimani area. The residents claim the operators of these businesses play loud music daily and host rowdy drunken revelers thereby depriving them of sleep and security. Their (residents) constitutional rights have been breached.
4. The petitioner contends that the said night clubs and bars operated by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have become a nuisance to the residents as they have been deprived of the basic necessity of sleep on a regular basis. What goes on these establishments is causing a bad influence to the children thus violating their rights and fundamental freedoms. Some of other negative effects from the said establishments release noise, littering by patrons, obstruction of motor vehicles of the patrons, exposure to immoral and indecent behavior by the patrons inside their vehicles, property prices being driven down as a result of all those activities and loss of income by some residents.

5. The petitioner seeks the following reliefs:

*(1) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's continued operation of business within the petitioners' area of residence is a violation of the petitioner's rights to life and right to a clean and healthy environment as contemplated by Article 26(1) and 42(1) of the Constitution of Kenya 2010 respectively.*

*(2) A declaration that the issuance of business permits and liquor licences to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents by the 7<sup>th</sup> and 8<sup>th</sup> thereby allowing them to operate their businesses in the manner complained of by the petitioners is unlawful/illegal.*

*(3) A declaration that issuance of licenses and permits to businesses or establishments as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents within residential areas by the 7<sup>th</sup> and 8<sup>th</sup> respondents is a violation to the petitioner's rights to a clean and healthy environment.*

*(4) A mandatory injunction against the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> respondents compelling them to issue and enforce closure notices against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents for being in contravention of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution ) (Control) Regulations 2009 L. N. No. 61 of 2009.*

*(5) A mandatory injunction against the 8<sup>th</sup> respondent compelling him to revoke all liquor licences issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.*

*(6) A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents, their agents and/or servants from carrying out their businesses in the subject residential areas.*

*(7) The petitioner be awarded costs of the petition.*

*(8) Any other or further relief this court may deem fit to grant.*

#### **The 1<sup>st</sup> Respondent's Response**

6. The 1<sup>st</sup> respondent filed grounds in opposition to the petition. They are undated and filed in court on 2<sup>nd</sup> October 2017. The 1<sup>st</sup> respondent states that it is a restaurant and lounge/club situated along Galend Road and is duly licensed within the laws to carry on such business. That it complies fully with all National and Nairobi City County Laws in its operations as it has all requisite licences and permits.

7. Further that in order to ensure its operations were within the noise limits, the 1<sup>st</sup> respondent in the year 2016 independently commissioned a noise audit and the resultant noise survey report established that the noise levels were within the permitted levels. It has a compliance letter from National Environment Management Authority and Nairobi City County.

8. That Galaria Plaza where the 1<sup>st</sup> respondent is located has its own parking where patrons park and not an access roads and residents' compound. In addition the 1<sup>st</sup> respondent has employed parking attendants who help in organizing traffic and parking to and from the establishment. The 1<sup>st</sup> respondent is enclosed on its own compound and it observes high standards of cleanliness. It denies that it has violated Article 42(1) of the Constitution.

#### **The 2<sup>nd</sup> Respondent's response**

9. The 2<sup>nd</sup> respondent, prior to beginning operations applied for and was granted all necessary approvals and licenses required to engage in the business of a restaurant and/or club has been in operation uninterrupted since 2015. The 2<sup>nd</sup> response has put in place mechanisms and has taken initiatives at its expense to ensure that there is a peaceful and environmentally compliant coexistence with its neighbours to minimize issues that may arise as a result of the transition from a purely residential to a more vibrant commercial and/or mixed used area.

10. The 2<sup>nd</sup> respondent commissioned an independent duly registered noise pollution auditor licensed to practice as an associate expert in accordance with the provisions of the EMCA 1999 to audit its sounds emissions to ensure compliance with environmental regulations and the said report was duly served upon the county government of Nairobi. That according to the findings of the audit, the 2<sup>nd</sup> respondent's establishment was found to have reasonably implemented the environmental requirements as stipulated in the noise pollution management plan and therefore compliant. That it further engaged the residents through the petitioner herein where there were fruitful engagements which led the 2<sup>nd</sup> respondent, deploying additional mechanisms to ensure that its sound levels were within the permissible levels as provided by law. It went further to install glass roof at the terrace and reduced the number of speakers to ensure that very minimal sound gets emitted from the premises.

11. The 2<sup>nd</sup> respondent has recruited traffic wardens to help ensure that there is a smooth flow of traffic at all times along Galana road for the benefit of other road users who include the petitioners herein.

12. The location of the 2<sup>nd</sup> respondent does not border immediate residential dwellings, as its specific location is surrounded by many other commercial entities as would be expected in a mixed use area. This court ought to exercise its critical balance between ensuring that the regulatory provisions on noise pollution are complied with on one hand and that the 2<sup>nd</sup> respondent's legitimate economic activities guaranteed by law are not disadvantaged in a manner that violates the fundamental rights and freedoms of other individual protected under the constitution.

### **The 3<sup>rd</sup> respondent's response**

13. John Gitonga a director of the 3<sup>rd</sup> respondent has sworn a replying affidavit on the 23<sup>rd</sup> June 2017 and filed in court on the same date. The 3<sup>rd</sup> respondent does not operate within a residential area but in a commercial zone along Ngong road. Further that it does not play loud music. In paragraph 4 of the replying affidavit it states that it has carried out extensive sound proofing to the required standard. That it has fully complied with the Nairobi city County Government as well as National Environment Management Authority in a self audit report which is annexed to the said affidavit. Further that the 3<sup>rd</sup> respondent has over eighty (80) employees whose livelihood would be jeopardised if the orders sought are granted against it.

14. It appears the 5<sup>th</sup> – 7<sup>th</sup> respondents did not enter appearance and/or file any responses to the petition.

### **The 4<sup>th</sup> respondent's response**

15. The 4<sup>th</sup> respondent carries on the business of a restaurant and lounge/club along Ole Dume road. It has complied with all National and Nairobi City County Laws in its operations. It has all the requisite licences and permits to operate in the area which is not residential. The 4<sup>th</sup> respondent in the year 2016 independently commissioned a noise audit and the resultant noise survey report established that the noise levels are within the permitted levels. In order not to have excessive noise levels beyond the statutory limits the 4<sup>th</sup> respondent terminated and stopped using brands on its precincts, discontinued Karaoke nights, removed all big speakers and installed those that are acoustic, sound proofed the lounge with gypsum panels and employed a sound engineer who ensures that the noise level is within the permitted levels. The 4<sup>th</sup> respondent operates within the licensed hours and has always observed the terms and conditions upon which the licences were issued. It has its own ample parking where its patrons park and not in access roads and residents' compound. Further that it has employed parking attendants who help in organizing traffic and parking to and from its establishment. Its locality is enclosed in its own compound and it observes high standards of cleanliness. It has not violated article 42(1) of the Constitution and that all regulatory agencies have found it has complied with the law.

### **The 8<sup>th</sup> Respondent's Response**

16. Susan Nyambura an Assistant Director Environment with Nairobi City County Government has sworn an affidavit dated 24/11/2017 and filed in court on the same date. In paragraph 4 of the affidavit she admitted that the 8<sup>th</sup> respondent has received numerous complaints from different entities and persons in respect to the perceived noise and disruptions occasioned by the clubs situated in Kilimani area. That the 8<sup>th</sup> respondent, through the county officer in charge of environment Dagoretti North sub county convened several meetings between residents and club owners to address the issue of noise pollution. That compliance notices were issued to the said establishments to lower amplified sound to the required decibel levels, sound proofing of the club and making arrests of noise pollution regulation offenders within Kilimani. Further that the 8<sup>th</sup> respondent through its department of environmental energy and water section is committed to working with all stakeholders to intensify surveillance and crackdown on all persons/establishments causing noise pollution in the county especially residential areas.

### **The Petitioner's submissions**

17. The petitioner's submissions are dated 20<sup>th</sup> November 2017 and filed in court on 22<sup>nd</sup> November 2007. It is their submissions that the various annexures to the affidavits in support of the petition show various causes of action taken by the petitioner in a bid to ensure operations of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's businesses is within acceptable limits and/or enforcement of their rights to quiet enjoyment of their respective properties. The subject of the various courses of action were the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents. However, it is evident that their efforts were not acted upon to the desired extent as the night clubs have continued operating in the manner complained of.

18. The petitioner outlined five issues for determination. First issue is that of jurisdiction of which the petitioner relied on Article 21 and 23 of the Constitution. The second issue is whether the petitioner has locus standi to bring the instant Petition and they have relied on Article 22 of the Constitution. The third and fourth issue were whether the petitioner's rights are recognized in the constitution of Kenya 2010 and whether the respondent's action amount to infringement of the rights of the petitioners. It is the petitioner's submissions that the 1<sup>st</sup> to 4<sup>th</sup> respondent's businesses create high levels of noise in an area that is largely residential. The petitioner urges the court to take judicial notice of the fact that night clubs in their very nature are known to play loud music particularly at night time. They relied on Article 26(1) and 42(1) of the Constitution. They also put forward the case of **Pastor James Jesse Gitahi & 202 Others vs Attorney General, Constitutional and Human Rights Division Petition No. 683 of 2009**. Where the EMCA regulation within which the 5<sup>th</sup> and 6<sup>th</sup> respondents are required to regulate the activities of the 1<sup>st</sup> to 4<sup>th</sup> respondents are cited. They also relied on **Sections 101, 102 and 103 of EMCA** which deals with the issue of noise pollution. They also cited the case of in the **Matter of Space lounge Bar & Grill & Another vs The republic Misc JR Application No. 613 of 2016** in which Justice G V Odunga in his obiter recognized that indeed the applicant in the case (Space Lounge Bar & Grill) had been operating its business in the manner infringing the residents' rights. In the case the court directed the 3<sup>rd</sup> respondent herein to ensure that its standards of operation meet the legislative requirements; the applicant to within 45 days seek and obtain a certification from NEMA to the effect that their business meets the standard prescribed by the relevant laws and in default the 8<sup>th</sup> respondent would be at liberty to take any legal remedial steps necessary to protect the rights of the residents within the area. The fifth issue, was that of remedies available to the petitioner and whether the court can grant such orders. In this regard they relied on Articles 23 and 70 of the Constitution. The petitioner urged the court to find that the right to a clean and healthy environment have been violated upon by the respondents' actions and that the court do grant the orders sought.

### **The 1<sup>st</sup> and 4<sup>th</sup> respondent's submissions**

19. The submissions are dated 13<sup>th</sup> December 2017 and filed in court on the same date. They have outlined four issues for determination. They have relied on the case of **Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others Civil Appeal No. 2 of 2011, Kenya Association of Manufacturers & 2 Others vs Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others [2017] eKLR**. They also relied on Article 16(5), 162(2), 3 of the Constitution and Section 13(3) of the Environment and Land Court Act. They submitted that this matter is in the jurisdiction of the Environment and Land Court. The second issue is whether the 1<sup>st</sup> and 4<sup>th</sup> respondents have violated the petitioners rights under Article 42 (1) of the Constitution. The petitioners have not tendered any evidence to show that the permitted noise levels have been exceeded. They have put forward the case of **Isaiah Ondiba Bitange vs 3 Others vs Institute of Engineers of Kenya & Another [2014] eKLR** on the issue of burden of proof. They further submitted that they carried out environmental audit reports shown in pages 27-65 of the 1<sup>st</sup> respondent's affidavit and pages 30-64 of the 4<sup>th</sup> respondent's affidavit. They further submitted that they have sound proofed their premises with the latest technology as evidenced in pages 68 and 69 of the 1<sup>st</sup> respondent's affidavit and pages 66 and 67 of the 1<sup>st</sup> respondent's affidavit. They carried out noise survey report as shown on pages 4-25 of the 1<sup>st</sup> respondent's affidavit and paragraphs 9-29 of the 4<sup>th</sup> respondents affidavit and that NEMA and the Nairobi City County government certified that they have complied with the applicable environmental laws. They also put forward the case of **Republic vs Nairobi city alcoholic Drinks Control and Licensing Board & Another Exparte space Lounge Bar & Grill Ltd [2017] Eklr**.

20. They submit that since they were certified, the petitioner has not shown any evidence to disapprove their compliance. The premises in which they are situated have ample Parking and that they have encouraged patrons to use mobile taxi cabs, an idea which has been embraced by 70% of their patrons. Their patrons are mature and upstanding members of the society. On the third issue as to what reliefs can be granted they have cited Article 70(2) of the constitution and submitted that it does not come to play because the petitioner has not tendered any proof of evidence of the 1<sup>st</sup> and 4<sup>th</sup> respondents' actions or omissions that are harmful to the environment.

They further submitted that should the court grant the petitioner's prayers it will violate their constitutional rights under Article 27(1), 43, 20 (4) (a) and 24(1) (d) of the Constitution. They have put forward the case of **Charles Muturi Macharia vs Standard group & 4 Others [2017] eKLR**. The 1<sup>st</sup> and 4<sup>th</sup> respondents urge the court to dismiss the petition with costs.

### **The 2<sup>nd</sup> Respondent's Submissions**

21. The 2<sup>nd</sup> respondent's submissions are dated 15<sup>th</sup> December 2017 and filed in court on the same date. It submits that prior to beginning its operations it applied for and was granted all the necessary approvals and licenses required to engage in the business. The licences have never been revoked neither has its equipment ever been confiscated by any agency. Like the 1<sup>st</sup> and 4<sup>th</sup> respondents, it submitted on jurisdiction citing Article 162(2) of the constitution and Environment and Land Court Act No. 19 of 2011. The second issue is whether the 2<sup>nd</sup> respondent has infringed on fundamental rights as alleged and whether the petition is merited.

22. The 2<sup>nd</sup> respondent has complied with all requirements and regulations regarding noise emission and installed speakers using the latest technology and sound proofed walls and windows. As soon as the noise complaint came to its attention the 2<sup>nd</sup> respondent put in place mechanisms to ensure its compliance and invited Nairobi City County Officials to assess compliance. That after the improvements made and its showed that its sound emissions are within the permissible standards. Any noise that could be above permissible levels is produced by other establishments within the same buildings that houses the 2<sup>nd</sup> respondent hence the 2<sup>nd</sup> respondent has been dragged into these proceedings.

23. The 2<sup>nd</sup> respondent, submits that this petition is without evidence in support and that its legitimate economic activities are affected yet it employs a large number of people. It cited Article 24 of the Constitution as regards to limitation of its rights and relied on **R vs Nairobi City County Alcoholic Drinks Control and Licensing Board & Another exparte Space Lounge Bar and Grill [2017] eKLR** where the court held that it is open to the operators of leisure and social places to ensure that they conduct their businesses in a manner that does not violate the rights of others. The 2<sup>nd</sup> respondent prays that this petition be dismissed with costs

### **The 3<sup>rd</sup> Respondent's Submissions**

24. The 3<sup>rd</sup> respondent's submissions are dated 29<sup>th</sup> January 2018 and filed in court on the same date. It also raises the issue of jurisdiction and cited the case of **Michael Moragia Nyachae & Another vs Buddtes Kisu Ltd & 2 others [2006] eKLR**. It also submits that it does not operate within a residential area but in a commercial zone along Ngong road near other businesses such as motor vehicle sale yard and music shops.

It does not play loud music. It refers to paragraph 4 of their replying affidavit where it states that it has carried out extensive sound proofing to the required standard. That it has fully complied with the Nairobi County Government's regulations as well as NEMA in a self audit report which is annexed to the said affidavit.

25. The petitioner's allegation on noise pollution is not supported by any evidence on record and that the noise assessment conducted by the petitioner was not conducted by an expert recognised by law. The orders sought cannot be granted and under regulation 25(1) and 26 no improvement notice had been served on the 3<sup>rd</sup> respondent as contemplated by the regulations. The cancellation and/or revocation of the liquor licenses cannot be effected within the framework of the petition. It relied on section 25 and 26 of the Alcoholic Drinks Control Act No. 4 of 2010 and submitted that the procedure provided therein had not been complied with in the current case. It prays that the petition be dismissed with costs.

26. I have carefully considered the petition, their responses, the written submissions on behalf of all parties and the authorities cited. There is no doubt that this area was initially a residential area as it is admitted by all parties. Section 2 of the Physical Planning Act (building and development) control rules 1998 describes **"a residential area" "or residential zone" to mean any area on zone restricted for use exclusively for residential purposes and includes land reserved for open spaces, sports grounds or land reserved for public purposes"**.

The 1<sup>st</sup> to 4<sup>th</sup> Respondents submitted that they have obtained all the necessary approvals from the 5<sup>th</sup> – 8<sup>th</sup> Respondents.

27. **Section 11(1)** of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 provides that-

***“The sub county committee shall not grant a new licence for the sale of alcoholic drinks to be consumed on the premises unless the sub 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 of 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 licenses have already been granted is insufficient for the requirement of the locality given the population density per square kilometer 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 institution including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws:-***

***(b) that the premises in respect of which the application is made are in good repair and are in a clean and whole some condition and are provided with adequate and proper sanitary arrangements;***

***(c) that the premises in respect of which the application is made are located at least three hundred meters from any nursery, primary, secondary, or other learning institutions for persons under the age of eighteen years”.***

28. It is the petitioner's case that this being a residential area the occupiers of the properties are families typically comprised of children and the elderly. The petitioner further submitted that the patrons of the 1<sup>st</sup> - 4<sup>th</sup> respondents engage in immoral and indecent behavior inside their cars and outside the premises which activities are witnessed by the children and the elderly residents of the surrounding area. In the case of **Mumara Estate Residents Association vs Nairobi County & 2 Others [2015] Eklr**, Mwita J observed thus:-

***“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”.***

29. I am guided by the above authority in finding that this is a residential area and the 7<sup>th</sup>, 8<sup>th</sup> respondents did not give due consideration to the law while granting the said liquor licences to the 1<sup>st</sup> - 4<sup>th</sup> respondents.

30. The other issue for determination are:-

***(i) Whether the petitioner's right are recognised in the constitution of Kenya 2010.***

***(ii) Whether the petitioner's rights to a clean and healthy environment have been infringed by the 1<sup>st</sup> - 4<sup>th</sup> respondents?***

***(iii) Is the petitioner entitle to the reliefs sought?***

31. Article 23 of the Constitution of Kenya 2010 vests authority in this court to hear and determine applications for redress of denial, violation or infringement, or threat to a right or fundamental freedom of the Bill of Rights and provides reliefs which may be granted including a declaration of rights, an injunction, a conservatory order, an order for compensation or judicial review.

32. Article 21 of the constitution provides that it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms as in the Bill of Rights.

33. This court has jurisdiction to hear and determine the matter as the petitioners have raised matters of infringement of specific rights enshrined in the constitution. Article 22(1) grants every person 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 threatened.

34. The petitioner's core objective is to safeguard the welfare of residents of Kilimani area in Nairobi, and it is in this area that 1<sup>st</sup> to 4<sup>th</sup> respondents activities are infringing upon the residents rights to a clean and healthy environment.

35. It is the petitioner's case that the operations of the 1<sup>st</sup> to 4<sup>th</sup> respondents businesses create unreasonable amount of noise in the area that is largely residential. Night clubs in their very nature are known to play loud music particularly at night time hours.

36. During these hours is when the residents retire to their houses and expect some comfort and repose. However the noise emanating from the premises deprive them of this environment. Article 26(1) of the constitution guarantees every person a right to life which right includes a right to a clean and healthy environment.

37. In the case of **Pastor James Jessee Gitahi & 202 Others vs Attorney General, Pet No 683 of 2009**, D S Majanja J observed as

follows:-

**“.....prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibrations transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the levels of noise through the regulations.....which have a general prohibition against 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 day, the proximity to a residential neighbourhood, whether the noise is recurrent, intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanized means or whether the noise can be controlled without effort or expense to the person making the noise”.**

38. Article 42 (1) of the Constitution provides that:-

**“Every person has a right to a clean and healthy environment, which includes the right-**

**(a) To have the environment protected for the benefit of the present and future generations through legislative and other measures particularly contemplated in Article 69 and**

**(b) to have obligations relating to the environment fulfilled under Article 70”.**

39. If a person is of the view that his right to a clean and healthy environment has or is being violated he has a recourse to apply to the court for redress.

40. 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 in court for redress in addition to any other legal remedies that are available in respect to the same matter.**

**(2) an 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;**

**(c) it provides compensation for any victim of violation of the rights 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”.**

41. It should be noted that under article 70(3) of the constitution the petitioner's need not prove any damage, or injury suffered. The petitioner in any case has stated that the activities of the 1<sup>st</sup> to 4<sup>th</sup> respondents have infringed on their respective property rights. That in some instances some residents have moved out of their homes, and property prices have been driven down, loss of income due to loss of tenants and inability to acquire new tenants. 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. The prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment.

42. The petitioner has availed to the court annexed to the submissions the decibel readings from the 3<sup>rd</sup> respondent's establishment. They were taken from a resident compound on the night of 16<sup>th</sup> April 2016. It was noted that the noise levels read between 68 to 84 db which was way above the permitted levels. The report was not challenged by the respondents specifically the 3<sup>rd</sup> respondent. Section 104 of EMCA maintains that any person who emits noise in excess of noise emission standards as established under the same Act is committing an offence.

43. The 1<sup>st</sup> to 4<sup>th</sup> respondents allege that they have carried out sound proofing of the premises which was approved by the 5<sup>th</sup> respondent (NEMA). The reports do not touch on the noise pollution but on the solid waste management, resource use, liquid waste. In paragraph 9 of their response to the petition, the 1<sup>st</sup> respondent states the measures they have undertaken not to have excessive noise levels beyond the statutory limits. This is in itself an admission that excessive noise emanates from its premises.

44. In paragraph 32 of the replying affidavit, the 1<sup>st</sup> respondents', suggestion is that the relevant regulatory agencies which have the expertise as per the new mandate should be left to the independence they handled the issue of noise pollution.

45. It is however the petitioner's contention that the regulatory agencies had been reluctant in exercising their mandate, the rights and freedoms of the 1<sup>st</sup> to 4<sup>th</sup> respondents must be balanced with those of the residents of the area. The petitioner's claims that the noise emanating from the 1<sup>st</sup> to 4<sup>th</sup> respondents premises is loud amounting offensive and interferes with the comfort, repose, health and safety of the residents. It amounts to offence under the EMCA (noise and excessive vibration pollution) (control) regulatory 2019.

46. Under these regulations, “**noise pollution**” mean the “**emission of the uncontrolled noise that is likely to cause danger to human health and damage to the environment**”

47. While “**excessive vibration**” means 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”.**

48. J Odunga in **JR Misc Application No 613 of 2016, Republic vs Nairobi City County Alcoholoc Drinks Control and Licensing Board & Another Exparte Space Lounge Bar & Grill Limited** stated thus:-

**“I however appreciate that the Constitution of Kenya at Article 42 guarantees to all persons the right to a clean and healthy environment. This includes the right to peaceful environment devoid of noise and the right not to be pollute the morality of the area residents and their children.**

**.....it is upon the operators of leisure and social places to ensure that they conduct their businesses in a manner that does not violate the rights of others.....”**

49. Similarly in **Mumara Estate Residents vs Nairobi City County & 2 others [2018]eKLR** Mwitia J observed thus:-

**“The constitution in Article 42 gives everyone the right to a clean and healthy environment. A clean and healthy environment should be free from pollution. Such as noise etc. That would explain why the Nairobi City County Alcoholic Drinks Control and Licencing Act, 2014 prohibits sale of liquor in a residential area to ensure not only the safety of residents but also moral uprightness of children and their growth. Allowing bars and liquor selling businesses within residential areas will thus violate the residents right to live in dignity and clean and healthy environment, fundamental rights enshrined in the Bill of Rights”.**

50. I am persuaded by the petitioner that the residents’ right to a clean and healthy environment has been infringed by the activities of the 1<sup>st</sup> to 4<sup>th</sup> respondents. The 5<sup>th</sup> to 8<sup>th</sup> respondents have been reluctant to exercise their mandate under the constitution and EMCA. It is the petitioner’s case that numerous complaints to the 5<sup>th</sup> to 8<sup>th</sup> respondents to have the 1<sup>st</sup> -4<sup>th</sup> respondents curb the nuisance have not elicited any action.

51. In conclusion. I find that this petition succeeds. I grant the orders sought namely:-

(a) **A declaration is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents continued operation of business within the petitioner’s area of residence is a violation of the petitioner’s rights to life and right to a clean and healthy environment as contemplated by Article 26(1) and Article 42(1) of the Constitution of Kenya.**

(b) **A declaration is hereby issued that the business permits and liquor licenses to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents by the 7<sup>th</sup> and 8<sup>th</sup> respondents thereby allowing them to operate their businesses in the manner complained of by the petitioner is unlawful and/or illegal.**

(c) **A declaration is hereby issued that issuance of licenses and permits to businesses on establishment of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents within residential areas by the 4<sup>th</sup> and 5<sup>th</sup> respondents is a violation to the petitioner’s right to a clean and healthy environment.**

(d) **A mandatory injunction is hereby issued against the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents compelling them to issue and enforce closure notices against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents for being in contravention of the EMCA (Noise and excessive vibration pollution) (Control) Regulation 2009, LN NO. 61 of 2009.**

(e) **A mandatory injunction is hereby issued against the 8<sup>th</sup> respondent compelling it to revoke all liquor licenses issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.**

**However, I decline to grant the order of permanent injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents from carrying on their business as they already have the necessary licences duly issued by the 5<sup>th</sup> – 8<sup>th</sup> respondents. They are operating the businesses due to the licenses issued (albeit unlawfully).**

(f) **I do order each party to bear own costs.**

It is so ordered.

Dated, signed and delivered in Nairobi on this 17<sup>th</sup> day of October 2019.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Chege for Ms Darr for the Petitioner

Mr. Malebe for the 1<sup>st</sup> and 4<sup>th</sup> Respondents and holding brief for Mr.Rono for the 2<sup>nd</sup> Respondent

Mr. Njoroge for Kabue for the 3<sup>rd</sup> Respondent

**Kajuju - Court Assistant**