



REPUBLIC OF KENYA



KENYA LAW
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Aggarwal v Mint Shack Limited t/a Barrels and Stools Lounge (Environment & Land Case 193 of 2023) [2024] KEELC 336 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 336 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 193 OF 2023
JA MOGENI, J
JANUARY 30, 2024

BETWEEN

NISHANT AGGARWAL PLAINTIFF

AND

**MINT SHACK LIMITED T/A BARRELS AND STOOLS
LOUNGE RESPONDENT**

RULING

1. Before me is the application dated 26/05/2023 brought by the plaintiff/applicant seeking an order of injunction to restrain the defendant respondents from emitting noise pollution in any way and exceeding the maximum permissible noise level for Zone D as provided for by the [Environmental Management and Co-ordination Regulations](#) thus interfering with the applicant's right to a healthy and clean environment pending the hearing and determination of this suit. The applicant has also sought orders that the Officer Commanding Parklands Police Station do ensure compliance with the order sought if granted.
2. The application is supported by 14 grounds *inter alia*; since its inception, the respondent has engaged in incessantly playing loud music from 1:00 pm to 12:00 am six days in a week. The applicant has stated that the noise has reached intolerable levels depriving him and his household peace, tranquility, and the ability to enjoy a good night sleep adversely affecting their quality of life.
3. The applicant avers that he has reported to the police at Parklands Police Station, lodged an official complaint with relevant institutions like the Governor's office, National Environmental Management Authority (NEMA), National Environmental Complaints Committee (NECC) among others. He avers that to date there has been nor response, action or resolution made to protect the applicant's constitutional right to a clean and healthy environment. It is his contention that this honorable court has jurisdiction to grant the orders sought as provided in section 13 of the [Environment and Land Court Act](#) (No.19 of 2011) and the authority anchored in article 162(2) (b) of the [Constitution](#).



4. The application is also supported by an affidavit of Nishant Aggarwal in which he deposed that his brother in law lodged a complaint to the Head of Environment Department, Nairobi City County on 30/03/2023 regarding the noise pollution emanating from the premises of the respondent. That since the inception of the Respondent it has been playing very loud music that is beyond the maximum decibels that are permitted by law.
5. This prompted the applicant to make reports to various institutions including the Kenya Police where the report was made at Parklands Police Station, NEMA, NECC and even to the County Executive Committee for Environment (CEC). The institutions did not take any action.
6. The application is opposed by the respondent by a replying affidavit deposed to by Binai Shah director of the defendant company sworn on 3/11/2023 and grounds of opposition dated 3/11/2023. The respondent deposed that it has all the certificates and licenses and that it was operating legally. That the plaintiff/applicant has rushed to court without exhausting the alternative justice mechanisms provide for by law. Therefore, this suit is premature since the plaintiff had not lodged a complaint with the Public Complaints Committee.
7. He also deposed that the application before the court is speculative and fails to disclose material facts and that it does not meet the threshold for grant of injunctive orders.
8. At paragraph 7 of the replying affidavit the deponent argued that this court lacks jurisdiction although this is an issue that was determined in the ruling dated 2/11/2023. Therefore, I will not address it in this application.
9. The Respondent also filed Grounds of Opposition where he avers that the case is misconceived and ill-advised having not exhausted the conflict resolution mechanisms provided in sections 32, 125 and 129 of the *Environmental Management Coordination Act*. Further that the suit is premature and therefore the court lacks jurisdiction. The Respondent in his averments reiterated the issues averred in the replying affidavit.
10. The parties then filed their rival submissions which they relied on in arguing the application. The applicant outlayed the facts and gave a definition of who a neighbor is in relation to noise emission. It is their case that the respondent should play music within the required decibel i.e not exceeding the allowable 55 decibels during the day and 35 decibels at night. The applicant submits that in line with the neighbor principle as was established in the case of *Donoghue v Stevenson* [1932]AC 562 HL all those living along Lower Kabete Road Westlands are experiencing sleepless nights and making their life a nightmare.
11. The plaintiff identified two issues to be determined and these are whether the applicant has satisfied grounds of getting injunctive relief and whether the court has jurisdiction. The plaintiff/applicant referred to among others the cases of *Peter Maina Waweru v Extropica Food Limited & 6 others* [2016] eKLR, *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others* Nyeri HCC No. 28 of 2015, *Pastor James Jessie Gitabi & 2 others v Attorney General* [2013] eKLR.
12. The plaintiff submitted that the issue of noise pollution impacts on a clean and healthy environment and this cannot be ignored in considering noise pollution is considered as a component that must be looked into when one is talking about a clean and healthy environment.
13. The plaintiff also referred to the cases of *Kilimani Project Foundation v B Concept Limited t/a B Club Nairobi & 7 others* [2019] eKLR, in emphasizing the importance of having a clean and healthy environment which is devoid of noise pollution and also the issue of jurisdiction.



14. The defendant submitted that without an independent assessment by NEMA or an expert appointed by NEMA on the alleged noise complaint and authorization by NEMA of the plaintiff's expert as required in section 6 (3) of the Regulations, it would be prejudicial to admit the evidence presented by the plaintiff/applicant at this stage.
15. In his submissions the defendant alleges that they run a business known as Barrels and Stools Lounge which is duly licensed and running within relevant laws, rule and regulations. That the plaintiff's suit offends the doctrine of exhaustion in view of section 32, 125 and 129 of EMCA. The defendant identified three issues in their submissions which touched on whether the applicant is deserving of the injunctive orders and also the jurisdiction of the court.
16. The defendant in their submissions referred to the cases of Giella v Cassman Brown (1973) EA 358, Nguruman Ltd v Jan Bonde Nielsen & 2 others (2014) eKLR, Mrao Ltd v First American Bank of Kenya Ltd & others (2003) KLR 125. It is there their submission that the application lacks merit since the requirements to grant injunctive reliefs have not been met.
17. On the issue of jurisdiction and doctrine of exhaustion the defendant referred to the case Paul Githonga Wanjau v Gatbuti Tea Factory Company Limited & 2 others (2016) eKLR. It was his submission that that this Honorable Court lacks jurisdiction to entertain the application because the suit is about a complaint on noise pollution and the Public Complaints Committee set up under the EMCA is the proper forum to hear the case. The defendant urged the application be dismissed.
18. From my reading of the submissions, I do appreciate that both parties presented detailed submissions supported by relevant Statutory provisions and case law. The orders sought by the applicant is for grant of temporary injunctions pending determination of the suit.
19. The issue for determination by this court is whether the Applicant has established a prima facie case to enable the court grant the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the Giella v Cassman Brown [1973] EA 358 where the court held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries v Trufoods*, [1972] E.A. 420).”
20. Has the applicant made out a *prima facie* case with a probability of success? In the case of Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
21. Looking at the facts of this case, the court has been moved under a certificate of urgency, by the Applicant, to issue temporary injunctive orders against the Respondent. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.



22. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the *Giella v. Cassman Brown* herein *supra*.
23. I have considered all the material facts placed before me. I will start by addressing the issue of jurisdiction because without jurisdiction I need to down my tools. Jurisdiction is everything.
24. Whereas the defendant submitted on the issue of jurisdiction it is important that an objection to the court's jurisdiction needs to be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from the [Constitution](#) or statute. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. This position was stated by the Supreme Court in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) (2012)eKLR.
25. The defendant's contention is that the matter before this court falls within the jurisdiction of the Complaints Committee as provided under section 125 of the [EMCA](#). The plaintiff's position on the other hand is that the dispute in this case is that they wrote and sought intervention of all the bodies responsible of managing a clean and healthy environment but there was no help.
26. The Supreme Court decision in Petition No. 7 of 2003 the Supreme Court noted that section 13(2) of the ELC expresses original jurisdiction to the ELC and amongst them is determining redress of denial, violation, infringement or threat to constitutional rights relating to environment and land under articles 42,69 and 70 of the [Constitution](#) of Kenya. The Court further analysed the provision of [EMCA](#) and especially section 125 and confirmed that redress for constitutional violations is not part of the mandate of NET. In essence this Court has jurisdiction as provided under section 13 of the Environment and [Land Act](#) as derived from the [Constitution](#).
27. This decision of the Supreme Court has put to rest the issue of doctrine of exhaustion in matters of violation of rights as they relate to a clean and healthy environment.
28. The applicant herein submitted that his brother in-law and himself lodged a complaint through a letter to the Head of Environment Department, Nairobi City County raising concern about the noise pollution emanating from the respondent's premise which violated his constitutional right to a clean and healthy environment.
29. It was their complaint that the respondent between 1:00 pm and 12:00 am for six days in a week played loud music depriving his household and himself of peace, tranquility and the ability to enjoy a good night sleep adversely affecting the quality of life. The noise exceeds the maximum permissible noise level for Zone D which is a mixed residential area with some commercial and places of entertainment. It was thus their prayer that the Respondents herein be enjoined pending the hearing and determination of the suit.
30. The defendant's submission on the other hand was that the applicant's application was based on allegations that had not been substantiated by expert evidence, reports and research. That indeed the Respondent was operating within the law having obtained all the necessary and relevant licenses from the relevant government bodies. Further that the Applicant brought this matter prematurely to court having not exhausted the mechanisms provided in the [EMCA](#) and NEMA Acts. The defendant also chose to submit that the court lacks jurisdiction to determine the application in view of the doctrine of exhaustion and provisions of section 125 of [EMCA](#).



31. The defendant did also file a supplementary affidavit dated 24/11/2023 in response to the applicant's further affidavit dated 6/11/2023 and sought the court's intervention to have the plaintiff's/ applicant's further affidavit including the attachment to be expunged from the court record. The defendant argued that the applicant did not seek leave of court before filing the said further affidavit and that the annexure did not comply with section 106 B of the Evidence Act. In fact he contends that the defendant will be prejudiced if the same is admitted since they will not have had a chance to respond to the said new information.
32. On the first condition as to whether the applicant has proved that they have a *prima facie* case, section 3 of the Environmental Management and Co-ordination Act, (EMCA), cap 387 Laws of Kenya stipulates as follows;
1. Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.
 2. The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.
 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
 4. A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—
 - (a) is not frivolous or vexatious; or
 - (b) is not an abuse of the court process.
 5. In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development—
 - (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;



- (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
- (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
- (d) the principles of intergenerational and intragenerational equity;
- (e) the polluter-pays principle; and
- (f) the pre-cautionary principle.

33. While section 58 of the *EMCA* states that

- 1 Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
- 2 The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.
- 3 The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee
- 4 The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.
- 5 Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.
- 6 The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.
- 7 Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
8. The Director-General shall respond to the applications for environmental impact assessment license within three months.



9. Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.
34. Section 59 of EMCA states as follows;
- (1) 1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—
- (a) a summary description of the project;
 - (b) the place where the project is to be carried out;
 - (c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and
 - (d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.
- (2) The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.
35. And section 60 of the EMCA stipulates as follows;
- “A lead agency shall, upon the written request of the Director-General, submit written comments on an environmental impact assessment study, evaluation and review report within thirty days from the date of the written request”.
36. In the case of Nguruman Ltd v Jan Bonde Nielsen & others C.A civil Appeal No. 77 of 2012, the Court of Appeal while addressing the issue of a *prima facie* case stated thus:
- “The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed”.
37. The Court then went to state as follows:
- “We reiterate that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.
38. The Applicant has complained of noise and air pollution. They have also complained of interference with the Applicant’s right to a healthy and clean environment. The Applicant has presented letters of complaint written to the institutions charged with the responsibility of managing the noise and enforcing the required standards. It seems none of the institutions were ready to do the work they have been set up to do because from the evidence and information before the court, there seems to be no single institution that responded to the applicants’ complaints.



39. In the absence of any evidence that the institutions took any remedial measures or better still visited the ground to establish the efficacy and authenticity of the complaints made I am inclined to accept the applicants' contention that the respondents are violating their right to clean and healthy environment. I am of the view that in the circumstances of this case, it would be appropriate to apply the precautionary principle. The principle is also referred to as "In dubio pro natura" which means, if in doubt, favour nature. It provides that, in cases of doubt, matters should be resolved in a way most likely to favour the protection and conservation of the environment.
40. In the case of *Broder v Sailland* (1876) LR Zch D 467 which held that noise which prevents people from sleeping is calculated to prevent their ordinary comfort and enjoyment of their dwelling houses and such constitutes actionable nuisance.
41. RA Buckley on the law of Nuisance at page 25 which stated that the Courts have shown a willingness to restrain noise at night. I am therefore persuaded at this stage that the applicant's application has been brought to the right forum since article 70 and 42 of the [Constitution](#) addresses these rights which have been infringed. This court has power to issue an order to prevent, stop or discontinue the act/ omission complained of.
42. The applicant has submitted that they have established a *prima facie* case with probability of success. In March 2023 the World Health Organization (WHO) reported that environmental noise features among the top environmental risks to health, with an estimated 1 million healthy years of life lost every year from environmental noise effects, including annoyance, sleep disturbance, and ischaemic heart disease. These are scientific institutions whose research and reports guide global decision-making. Kenya is a signatory to many international, regional and continental conventions that touch on matters of a clean and healthy environment and our own constitution bears witness to the commitment of Kenya to ensure its citizens live in a clean, healthy environment devoid of pollution of any kind including noise pollution.
43. Due to the foregoing, I am satisfied that the applicants have established a *prima facie* case against the respondents. It is the duty of everyone to protect the environment. Clean and healthy environment is for the benefit of all humanity. I am not satisfied that there is any public interest in the circumstances of this case that would justify limitation of the applicants' right to healthy and clean environment.
44. For the foregoing reasons, it is my finding that the applicants' application dated 26/05/2023 has merit. The same is allowed on the following terms;
1. Pending the hearing and determination of the main suit, a temporary injunction is issued restraining the respondent either by themselves, their servants and/or agents from emitting noise pollution in any way interfering with the Applicants right to a healthy and clean environment.
 2. Pending the hearing and determination of the main suit, a temporary injunction is issued restraining the Respondent either by themselves, their servants and/or agents from exceeding the maximum permissible noise level for Zone D (Mixed residential areas with some commercial and places of entertainment) being 55 decibels during the day and 35 decibels at night as provided for by the [Environmental Management and Co-ordination \(Noise and Excessive Vibrations Pollution\) \(Control\) Regulations](#)
 3. Pending the hearing and determination of the main suit, a temporary injunction is issued restraining the Respondent either by themselves, their servants and/or agents from exceeding the excessive vibrations of he set 30 meters' distance from the source of sound in which they



extend beyond the source of sound as stipulated in the *Environmental Management and Co-ordination (Noise and Excessive Vibrations Pollution) (Control) Regulations*

4. The OCS, Parklands Police Station be ordered to implement the Order restraining the Respondent and their agents, assigns or servants from emitting noise pollution in any way interfering with the Applicants right to a health and clean environment.
5. The cost of the application shall be in the cause.

Orders accordingly. File Closed

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

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MOGENI J.

JUDGE

In the virtual presence of :-

Mr. Simiyu for the Plaintiff/Applicant

Mr. Ngaira together with Mr. Ambala and Mr. Koech for the Defendant/Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J.

JUDGE

