



**Kimuhu v Kariithi t/a the Humming Bird Hotels Bar & Restaurant & another
(Petition 1 of 2019) [2024] KEELC 26 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 26 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
PETITION 1 OF 2019
JO OLOLA, J
JANUARY 19, 2024**

BETWEEN

ANTONY KIMUHU PETITIONER

AND

**ALEX KARIITHI T/A THE HUMMING BIRD HOTELS BAR &
RESTAURANT 1ST RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

RULING

1. By the Notice of Motion dated and filed herein on 18th April 2019, Antony Kimuhu (the Petitioner) prays for a temporary order of injunction to issue restraining the 1st Respondent, its agents and/or servants from playing extremely loud music pending the hearing and determination of the Petition.
2. The application which is supported by an affidavit sworn by the Petitioner is premised on the grounds that:
 - a). The 1st Respondent has been breaching the Petitioner`s Constitutional rights and that any such breach and/or threat to fundamental freedom and Constitutional right should be remedied and discontinued with immediate effect;
 - b). The Petitioner has been suffering due to the excessively loud music played especially at night in the 1st Respondent`s establishment and he feels his constitutional rights and the requests to the establishment to keep the sound of the music low have been completely ignored;
 - c). The establishment operates a night club within a residential area and the loud music can have a negative impact on the lives of the community and the Petitioner in particular; and



- d). The Petitioner is afraid that if the 1st and 2nd Respondents are not restrained from playing loud music and/or controlling the level of noise from the premises, his mental health and that of his family is at risk and they stand to suffer irreparable loss and damages.
3. Alex Kariithi “The Humming Bird Hotels Bar & Restaurant” (the 1st Respondent) is opposed to the application. In his Replying Affidavit sworn and filed herein on 2nd August 2019, the 1st Respondent avers that the allegation that the establishment he runs plays extremely loud music and or that loud music emanates from the same is a complete fabrication.
 4. The 1st Respondent asserts that an environmental audit was conducted by a lead expert from the 2nd Respondent and an Initial Report was prepared which established that the premises have low noise levels fully complying with the National Environment Management Authority (the 2nd Respondent’s) conditions.
 5. The 1st Respondent avers further that the Petitioner has not placed any material before the court to demonstrate that the noise complained about exceeds the permissible noise levels and or that other residents around have complained about noise pollution emanating from the establishment.
 6. I have carefully perused and considered the application as well as the response thereto by the 1st Respondent. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
 7. By his application before the court, the Petitioner prays for a temporary order of injunction to restrain the 1st Respondent from playing what he terms as extremely loud music at the 1st Respondent’s establishment known as the Humming Bird Hotel, Bar and Restaurant, pending the hearing and determination of the Petition.
 8. It is the Petitioner’s case that the said establishment operates a night club within a residential area in which the Petitioner resides and that it plays excessively loud music to the extreme discomfort of the Petitioner and other neighbors. It is further his case that despite protests made both to the 1st and 2nd Respondents, none of them have taken any action to control the levels of music and noise emanating from the establishment.
 9. On his part, the 1st Respondent holds that the accusation that the establishment plays extremely loud music was nothing but a complete fabrication. It is his case that an environmental audit was done by the National Environment Management Authority (the 2nd Respondent) and that in their Report arising from the audit the levels of music emanating from the establishment was fully compliant with the conditions set by the 2nd Respondent.
 10. Section 3(1) of the *Environmental Management and Coordination Act* No. 8 of 1999 (herein after EMCA) provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the *Constitution* and relevant laws and has the duty to safeguard and enhance the environment. In order to safeguard this entitlement, Section 3 (3) of *EMCA* stipulates that:

“(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the Public interest apply to the Environment and Land Court for redress and the Environment



and Land 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 environmental audit in accordance with the provisions of the 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 damages; and
- e). Provide compensation for any victim of pollution and the costs of beneficial issues lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

11. From the material placed before me, it is apparent that the Petitioner is a neighbor of the establishment run by the 1st Respondent at Skuta area in Nyeri Town. It is apparent that sometime in 2019, the Petitioner wrote demand letters to the 1st Respondent and copied to the 2nd Respondent, complaining of excessive noise pollution and nuisance emanating from the establishment. It would also appear to me that it was as a result of the Petitioner's demands that the 2nd Respondent visited the premises and prepared a Report titled "Initial Environment Report for the Humming Bird Hotels, which Report is attached in reply.
12. As it were, the 2nd Respondent did not file a response to the application. They did however file written submissions in opposition to the application which submissions I have considered. Under Section 7 and 9 of the *EMCA*, the 2nd Respondent is created as a body corporate charged with the functions to supervise and coordinate all matters relating to the environment and is the principal instrument of Government in the implementation of policies relating to the environment.
13. Section 147 of the *Act* vests the 2nd Respondent with powers to make such regulations as it may find relevant in the discharge of its duties. In exercise of the said powers, the 2nd Respondent enacted the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009*. The said Regulations define the words "noise pollution" to mean:-

"The emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment."
14. On the other hand "excessive vibration" is defined to mean the presence of vibration which:-
 - a). Is of such intensity, duration, frequency or character as to annoy, disturb, or cause or tend to cause adverse psychological or physiological effects on 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.



15. In that respect, Section 3 (1) of the Regulations outlaws the making of or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. Section 4 of the Regulations similarly prohibits the making and or causing of excessive vibrations.
16. Under Section 6 of the Regulations however, measurements to determine whether or not noise or vibration levels exceed the permissible levels shall be taken by the relevant lead agency. A “lead agency” is defined under the Regulations as follows:
- “Lead agency” means any Government Ministry, department, Parastatal, State Corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resources.”
17. In the absence of such a lead agency, Section 6(3) and (4) of the said Regulations provides that:-
- “(3) In any case where there is no relevant lead agency to take the measurements, or where the lead agency has failed to take action after being given reasonable notice by the authority, the measurements shall be taken by a person duly authorized by the Authority, who is knowledgeable in the proper use of the measuring equipment.
- (4). The Authority in consultation with the relevant lead agency may issue guidelines for the measurement of noise and excessive vibrations.”
18. In the application before me, while the Petitioner contends that the establishment was emitting excessively loud noise, they have not exhibited any guidelines issued by the 2nd Respondent for the measurement of such noise and /or vibrations. Indeed the Petitioner has not made any attempt to exhibit before the court how as an individual he came to the conclusion that the noise levels were excessive.
19. A perusal of the so-called “Initial Environmental Report for the Humming Bird Hotels 2019-2020 prepared by the 2nd Respondent as a lead agency appears to confirm that the business has low noise decibels and that it complied with the 2nd Respondent’s conditions for sound proof working. That being the case, and in the absence of any other report suggesting the contrary from the Petitioner, I was not persuaded that he had made out a *prima facie case* to warrant the grant of an injunction at this stage.
20. It follows that I did not find any merit in the Motion dated and filed herein, on 19th April 2019. The same is hereby dismissed.
21. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JANUARY, 2024.

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J. O. OLOLA

JUDGE

In the presence of:-

Mrs. Machira for the Applicant.

No appearance for the 1st Respondent.



No appearance for the 2nd Respondent.

Court Assistant: Kendi

