



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 67 OF 2018**

**BETWEEN**

ELISABETH KURER HEIER.....1<sup>ST</sup> APPELLANT

DETLEF HEIER.....2<sup>ND</sup> APPELLANT

**AND**

1. COUNTY GOVERNMENT OF KILIFI.....1<sup>ST</sup> RESPONDENT

2. OFFICER COMMANDING

POLICE DIVISION, KILIFI.....2<sup>ND</sup> RESPONDENT

3. THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

4. KIOKO ENTERPRISES LIMITED.....4<sup>TH</sup> RESPONDENT

5. MARVAL LIMITED T/A COMEBACK

RESTAURANT, LOUNGE & DISCO WATAMU.....5<sup>TH</sup> RESPONDENT

*(Being an appeal from the judgment and decree of the Environment and Land Court at Malindi (J.O. Olola, J.) dated 19<sup>th</sup> April 2018*

**in**

**ELC No. 23 OF 2016)**

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**JUDGMENT OF THE COURT**

In this appeal, **the appellants, Elisabeth Kurer Heier and Detlef Heier** are aggrieved by the decision of the trial court which dismissed their amended petition wherein they claimed that despite their complaints made to **the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the County Government Of Kilifi** and the **Officer Commanding Police Division, Kilifi**, of noise emissions from the **Comeback Lounge and Disco (the Comeback discotheque)** situated on a parcel of land registered in the name of **the 4<sup>th</sup> respondent, Kioko Enterprises Limited** and later leased to the **5<sup>th</sup> respondent, Marval Limited**, no remedial action was taken which had led to a violation of their right to a clean and healthy environment as guaranteed by **Article 42** of the Constitution.

By way of an amended petition the appellants sought for;

**“a) A declaration that the petitioners’ right to a clean and healthy environment has been violated by the actions and inactions of the respondents as outlined in the petition;**

**b) A conservatory order in the nature of an injunction be issued against the 4<sup>th</sup> and 5<sup>th</sup> respondents their servants, agents, employees, tenants and any other persons acting on their behalf prohibiting them from further operations of the Comeback Restaurant, Lounge and Disco situated in Watamu and any further playing of live music, streamed music and any other music within the Comeback Restaurant, Lounge, and Disco...**”

The orders sought were for reasons that since 1998, the appellants and the people of Watamu, in the County of Kilifi had complained to the 1<sup>st</sup> and 2<sup>nd</sup> respondents of noise pollution generated by the Comeback discotheque, which noise had greatly interfered with their peace and quiet and violated their right to a clean and healthy environment. They further complained that the 1<sup>st</sup> respondent had failed to stop the illegal and unconstitutional activities of the Comeback discotheque operated by the 4<sup>th</sup> and 5<sup>th</sup> respondent despite repeated reports, and the subsequent acknowledgement by the 1<sup>st</sup> respondent of the violations of the appellants’ rights. It was their complaint that by so doing, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had abdicated their constitutional mandates to protect the environment as required under **Article 70** of the Constitution, and that unless the noise was stopped the appellants’ right to a clean and healthy environment would continue to be violated.

Further, that the 4<sup>th</sup> respondent’s land from which the Comeback discotheque operated was situated in a residential area, and was less than 300 meters from four (4) learning institutions for persons under the age of eighteen which interfered with the institutions’ learning activities.

The application was supported by the 1<sup>st</sup> appellant’s affidavit, wherein it was deponed that, since 1998, and when their complaints had failed to yield any relief, they filed *Malindi Judicial Review No. 31 of 2011* which was later withdrawn and *Judicial Review No. 4 of 2013* that was dismissed as an abuse of the court process. But, the noise pollution from the Comeback discotheque persisted, forcing, the appellants and residents of Watamu to complain to the 1<sup>st</sup> respondent through the County Governor Amason Jeffah Kingi on 20<sup>th</sup> November 2013. This prompted the 1<sup>st</sup> respondent’s officers to visit the 4<sup>th</sup> respondent’s land where the Comeback discotheque was located, and following an inspection, the discotheque was issued with an Improvement Notice dated 22<sup>nd</sup> May, 2014 that ordered the playing of any kind of music to be stopped until the corrective measures contained in the notice were carried out; that the order of the 1<sup>st</sup> respondent went unheeded, and thereafter the 1<sup>st</sup> respondent refused to enforce its own closure order against the 4<sup>th</sup> respondent, and later the 5<sup>th</sup> respondent after it leased the land.

It was further averred that the noise pollution also interfered with learning institutions causing the Watamu Education Association Movement and the Kilifi North Liquor Regulation Committee to also register complaints, which similarly went unanswered; that when no effort from the 1<sup>st</sup> respondent to resolve the problem was forthcoming, the appellants wrote several letters to the office of the Ombudsman, and a further letter to 1<sup>st</sup> respondent through the office of the Governor. They also lodged complaint number 27/26/7/2016 concerning the noise pollution in the 2<sup>nd</sup> respondent’s Occurrence Book, all of which complaints did not yield any results. Finally it was averred that the Comeback discotheque operated in a premises without walls where music was played through an amplified system that did not have a sound proofing mechanism.

In their grounds of opposition, the 1<sup>st</sup> respondent contended that the amended Petition made no allegations of any infringement or violation of the appellants’ or the aggrieved residents rights by the 1<sup>st</sup> respondent; that the appellants has also failed to plead any particulars of infringement by the 1<sup>st</sup> respondent and therefore the constitutional threshold had not been met; that the appellants had not placed any material before the court to demonstrate that the noise complained about exceeded the permissible noise levels provided by the National Environment (Noise Standards and Control Regulations, 2003), and that the appellants had not complied with **regulation 15 (2) and (4) National Environment (Noise Standards and Control) Regulations, 2003** which provides an elaborate procedure to be followed for prevention or control of noise emission.

In response to the allegations, the 4<sup>th</sup> respondent admitted that it is the registered proprietor of the land parcel where the discotheque is situated and that since 1<sup>st</sup> July 2015, it had leased it to the 5<sup>th</sup> respondent. But it denied that loud music was played at the Comeback discotheque; that the appellants had failed to sufficiently demonstrate how the respondents had violated their rights to clean and healthy environment. It was deponed that the mandate to inspect the discotheque’s licence now fell within the 1<sup>st</sup> respondent’s responsibilities and that the 5<sup>th</sup> respondent was issued with a permit and licence to operate the Comeback discotheque.

It was further contended that the appellants’ failure to join the National Environmental Management Authority (NEMA) which is the regulatory body in matters concerning the environment was fatal as, NEMA and not the 1<sup>st</sup> and 2<sup>nd</sup> respondents was the correct body to enforce allegations of environmental pollution including inspection of premises and issuance of closure notices; that they had also failed to provide sufficient evidence that the music being played at the discotheque was in excessive of the permissible noise levels as specified by **regulation 6 of the Environment and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009**.

The 4<sup>th</sup> respondent stated that at no time was it issued with a closure notice, and nor was it aware that the 5<sup>th</sup> respondent was issued with a notice under **regulation 26 of the Environmental and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009**; that the order seeking to completely shut down the 4<sup>th</sup> and 5<sup>th</sup> respondents’ business was draconian and untenable as it would curtail their economic right to carry on their business.

In determining the petition, the learned judge (Olola, J.) of the Environment and Land Court declined to grant the orders sought on the basis that the appellants did not adhere to the procedure stipulated by the **Environment Management and Co-ordination Act and the Environment Management and Coordination (Noise and Excessive Vibration and Pollution) (Control) Regulations, 2009**, since they had not sought NEMA’s authorization to measure the intensity, duration, frequency of the noise emissions from the Comeback discotheque, and that they did not have the relevant expertise to compile and adduce such evidence.

The learned judge also found that the 4<sup>th</sup> respondent was wrongly included in the suit for merely leasing the parcel of land to the 5<sup>th</sup>

respondent.

In so concluding, the court dismissed the appellants' petition with costs to the 4<sup>th</sup> respondent.

The decision provoked this appeal on grounds that;

1. *The learned judge erred in law and in fact in dismissing the appellants' petition despite the overwhelming evidence.*
2. *The learned judge erred in law and in fact by failing to consider and analyse the evidence provided by the appellants.*
3. *The learned judge erred in law and fact in dismissing the petition by relying on regulation 6 of the Environmental and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulation 2009 and ignoring other evidence.*
4. *The learned judge erred in law by ordering the appellants to pay costs to the 4<sup>th</sup> respondent.*

The appellant and the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed written submissions that were highlighted before us. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not appear or file written submissions.

Highlighting their submissions, **Mr. Nyongesa**, learned counsel for the appellants stated that the learned judge wrongly dismissed the petition, yet there was sufficient evidence showing that the appellants' rights were violated; that the court wrongly relied on the lack of noise level measurements conducted by NEMA to conclude that loud noise emissions were not proved without taking into account the other compelling evidence, which comprised of numerous letters and emails from the appellants to the 1<sup>st</sup> respondent, and a Notification from the 1<sup>st</sup> respondent to the 4<sup>th</sup> respondent to stop the discotheque operations because of the loud music; that the court failed to appreciate that the 1<sup>st</sup> respondent had failed to enforce its notice against 4<sup>th</sup> and 5<sup>th</sup> respondents, and that under **Part 2 Clause 3** of the **6<sup>th</sup> Schedule** of the **Constitution**, the 1<sup>st</sup> respondent has a duty to control air and noise pollution as well as other public nuisance. It also failed to appreciate that the appellants were seeking reliefs from the court owing to failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to control the loud noise emitted by the 4<sup>th</sup> and 5<sup>th</sup> respondents' discotheque.

Relying on the written submissions **Mr. Bwire**, on behalf of the 1<sup>st</sup> respondent, stated that, the issue for consideration was whether the appellants had discharged the burden of proof that their right to a clean and healthy environment had been violated. It was argued that, nothing in the evidence demonstrated that loud noise was being emitted from the Comeback discotheque, or that the 1<sup>st</sup> respondent had refused to stop the loud music, or indeed, that it had abdicated its responsibilities. It was asserted that whereas, the 1<sup>st</sup> respondent could employ enforcement mechanisms, compliance was a party's prerogative, since the 4<sup>th</sup> and 5<sup>th</sup> respondents' refusal to comply with the Improvement Notice, did not mean that the 1<sup>st</sup> respondent had failed to enforce its notice.

It was further argued that, NEMA and not the 1<sup>st</sup> respondent was the body responsible for enforcing the provisions of the Environment Management and Coordination Act, and that the appellants had by passed NEMA which was better equip to address their complaints. It was finally asserted that neither the 1<sup>st</sup> respondent nor the court had jurisdiction to address the appellants' complaint.

**Mr. Mbura** learned counsel for the 4<sup>th</sup> respondent submitted that the appellants had not demonstrated anything to warrant interference with the learned judge's exercise of discretion; that the trial court determine that the appellants had not demonstrated that the music levels emitted from the 4<sup>th</sup> and 5<sup>th</sup> respondents' premises was beyond the permissible levels specified under **regulation 6** of the **Environment Management and Coordination (Noise and Excessive Vibration and Pollution) (Control) Regulations, 2009**; and there was no evidence to show that it was excessive; that furthermore, no notice was imposed and no action was taken to enforce the stop notice issued to the 5<sup>th</sup> respondent.

On costs, it was submitted that the 4<sup>th</sup> respondent was sued unnecessarily and was therefore entitled to costs.

This being a first appeal, we must consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. We must bear in mind and allow for the fact that we did not have an opportunity to see or hear the witnesses who testified. See ***Selle & Another vs Associated Motor Boat Company & Others (1968) EA 123, Ramjiratna and Company Limited vs Wood Products Kenya Limited, CA No. 117 Of 2001*** and ***Hahn vs Singh (1985) KLR 716***. We must also remind ourselves that this Court is not minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See ***Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278***.

Based on the above, the issues for our consideration are whether the learned judge properly exercised his discretion to decline to grant the orders sought for the reasons that firstly, the appellants failed to prove on a balance of probabilities that noise pollution emanated from the Comeback discotheque violated their rights and secondly, whether the 1<sup>st</sup> respondent abdicated its responsibilities by failing to take remedial steps to address the loud noise from the Comeback discotheque, and whether the 4<sup>th</sup> respondent was entitled to the costs of the petition.

Before addressing the highlighted issues we will consider whether the suit satisfied the basic tenets of a constitutional petition.

**Article 22 (1)** of the **Constitution** provides:-

***“Every person has 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 is threatened.”***

There is also the proposition under the retired constitution as set out in *Anarita Karimi Njeru vs The Republic (1976-1980) KLR*, which remains a necessary requirement, that where a person is alleging a contravention or a threat of a contravention of a constitutional right, he or she must set out the specific right infringed and the particulars of such infringement or threat.

In *Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] eKLR*, this Court stated;

***“... the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.”***

The court went on to state that;

***“The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”***

In the petition which is premised on **Article 42** of the **Constitution**, the 1<sup>st</sup> respondent is the County Government of Kilifi which covers the Watamu area where the Comeback discotheque is located. The discotheque operated on the 4<sup>th</sup> respondent’s land parcel prior to 2015, after which, the 5<sup>th</sup> respondent took over its operations. The appellants’ claim is that the 4<sup>th</sup> and 5<sup>th</sup> respondents have operated and continue to operate the Comeback discotheque for many years, and that despite complaints made, the 1<sup>st</sup> and 2<sup>nd</sup> respondent violated their right to a clean and healthy environment when they failed to take any steps against the 4<sup>th</sup> and 5<sup>th</sup> respondents to address the noise pollution emanating from the Comeback discotheque. As is evident from the pleadings set out above, the petition specified the provision of the Constitution that was violated, the particulars of the rights infringed, and by whom, and the remedies sought. Consequently, the necessary elements for a constitutional petition having been set out, we are satisfied that it was properly before the trial court for determination.

Returning to issues for determination, **Article 42 of the Constitution** specifies that every person has the right to a clean and healthy environment, and **Article 70** empowers any person who alleges that a right to clean and healthy environment has been or is likely to be denied, breached or violated to apply to a court for redress. It further provides that such person need not demonstrate that they had suffered loss or damage.

Additionally, **Part 2 Clause 3** of the **6<sup>th</sup> Schedule** of the **Constitution** places the responsibility for control of air and noise pollution other public nuisances and outdoor advertising on County Governments, in this case the 1<sup>st</sup> respondent.

Pursuant to the above constitutional provisions, Parliament enacted the Environment Management and Coordination Act (EMCA). **Section 3 (3)** of the EMCA stipulates that;

***“If a person alleges that the right to 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 to apply to the Environment and Land Court for the redress and the Environment and Land Court may make such orders, issue such writ or give such directions as it may deem appropriate to-***

- a) Prevent, stop or discontinue any act or omission deleterious of the environment***
- b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious of the environment***
- c) Require that any on-going activity be subjected to an environmental audit in accordance with the provisions of tis 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.”***

Sub-section 4 goes further to provide that;

***“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 loss or personal injury provided that such action:-***

- a) Is not frivolous or vexatious;***

***b) Is not an abuse of the Court Process.”***

Without doubt, the above provisions provide far-reaching powers of management and control of the environment. Not only were such powers conferred on the Environment and Land Court to provide reliefs to injured parties for acts of commission or omission, other ‘lead agencies’, defined by the EMCA as, Government Ministry, department, parastatal, State Corporation, or local authority empowered by any law, were also vested with functions of control or management of any element of the environment or natural resources.

**Section 9 (2)** of the EMCA further provides that, NEMA shall;

***“co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya...”***

In other words, the 1<sup>st</sup> respondent, was duly empowered by the Constitution and the EMCA, as the lead agency to control, in conjunction with NEMA, all public nuisance, including noise pollution in the environment within the Watamu area.

To further support the imposition of environmental controls the Environmental Management and Coordination (Noise and Excessive Vibration Pollution)(Control) Regulations was enacted in 2009. It defines “noise” as any undesirable sound that is objectionable or that may cause adverse effects on human health or the environment, and “noise pollution” is defined as the emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment.

**Regulation 3 (1)** of the same regulations sets out general prohibitions against the making or causing of loud unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose or health or safety of others and the environment. **Regulation 3 (2)** further provided several factors for determination of loud and unreasonable noise. These factors include;

***“(i) the time of the day;***

***(ii) the proximity to a residential area;***

***(iii) whether the noise is recurrent, intermittent or constant;***

***(iv) the level and intensity of the noise;***

***(v) whether the noise has been enhanced by any electronic or mechanical means; and***

***(vi) whether the noise can be controlled without effort or expense to the person making the noise.”***

The regulation also clearly stipulated that a violation of the general prohibitions is an offence which attracts a penalty under the Act and the regulations.

**Regulation 5** prohibits anyone from making noise exceeding the levels set out in the First Schedule of the regulations, unless the noise is reasonably necessary for the preservation of life, health, safety and property, and **regulation 6** makes it the responsibility of the lead agency to measure the noise levels.

The relevant provisions of law having been set out above, could it be said that on a balance of probabilities that, the appellants had proved their rights had been violated by loud noise emissions from the Comeback discotheque? The learned judge found that owing to the appellants’ failure to comply with the requirements of **regulation 6** which specified that the measurements of noise levels were to be compiled by the lead agency and not by the appellants, as was the case here, it was not proved that the Comeback discotheque was emitting loud noise.

The appellants’ complaint was that their right to clean and healthy environment continued to be violated by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, from loud noise emitted by the Comeback discotheque situated on the 4<sup>th</sup> respondent’s land and operated by the 5<sup>th</sup> respondent. As a result, they sought redress first from the 1<sup>st</sup> respondent and thereafter from the Environment and Land Court under **section 3 (3)** of the **EMCA**. But instead of considering the available evidence to ascertain whether or not the appellants had sufficiently proved that their rights were indeed violated, the learned judge limited his determination to the failure by the appellants to prove the levels of noise from the Comeback discotheque for reasons that they did not show that they were “...authorized by NEMA to carry out the measurements...” as required under **regulation 6**, with the result that he did not determine whether the appellants’ rights were violated. By so doing, the appellants were deprived of their entitlement to redress as by law prescribed.

As a consequence, it is incumbent upon this Court to reevaluate the evidence to establish whether in exercising his discretion in the manner he did, the learned judge took into account matters he ought to have taken into account. In the case of ***Mbogo & Another vs Shah [1968] EA, p.15***, it was emphasised that;

***“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result***

*there has been misjustice.”*

So was there evidence or other factors that would led to the conclusion that the appellants’ rights were violated? In the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (supra) this Court emphasized that;

***“It is a fundamental tenet of the rule of law that evidence, whether real, documentary, circumstantial or presumptive, is the basis of any judicial decision. This is why judicial decisions are not founded on a toss of the coin”.***

The appellants’ complaint is that from as far back as 1998, the Comeback discotheque situated on the 4<sup>th</sup> respondent’s parcel of land, and later operated by the 5<sup>th</sup> respondent was responsible for emission of loud noise pollution. Due to the persistent noise, the appellants, and the residents of Watamu complained to the 1<sup>st</sup> respondent through the County Governor Amason Jeffah Kingi on 20<sup>th</sup> November 2013 which prompted the 1<sup>st</sup> respondent’s officers to visit the Comeback discotheque. Following the visit, the discotheque was issued with an Improvement Notice in respect of the noise pollution dated 22<sup>nd</sup> May, 2014. Needless to say, the 1<sup>st</sup> respondent declined to take steps to enforce the improvement conditionalities, and the loud music continued unabated.

Other members of the community such as the Watamu Education Association Movement and the Watamu Village Elders also registered complaints regarding the noise pollution from the discotheque, but their complaints also went unattended.

Undeterred, the appellants wrote several letters to the Commission on Administrative Justice, Office of the Ombudsman complaining of the increased noise levels and the 1<sup>st</sup> respondent’s failure to institute control measures. They also lodged complaint number 27/26/7/2016, in the 2<sup>nd</sup> respondent’s Occurrence Book, all of which efforts failed to yield any results.

Additionally, there were uncontested acknowledgments from the 1<sup>st</sup> respondent conceding to the loud noise emissions came from the Comeback discotheque. For instance, the Improvement Notice issued by the County Government of Kilifi, Department of Water, Environment, Forestry, and Natural Resources on 22<sup>nd</sup> May 2014 that was addressed to ‘*the Proprietor Manager Comeback Restaurant*’ is self explanatory, and stated in substantial part;

**“IMPROVEMENT NOTICE ON NOISE POLLUTION**

*Following the complaints registered to this office and verifications carried out by a team of inspectors from the County Office the department of Water, Environment, Forestry and Natural Resources, the County Government of Kilifi hereby shares the following observations and consequently issues improvement orders as below;*

**Observations**

- *The club is situated in the area where residential buildings also exist*
- *The loud music played by the club is nuisance to the residents of the area.*
- *The club is discharging noise from the sound amplification system without sound proofing mechanisms.*

*Pursuant to section 25 of the Environment Management and Coordination (Noise and Excessive Vibration and Pollution) (Control) Regulations of 2009 and Regulation 37 of the Environmental (Impact Assessment and Audit) Regulations 2003, you are hereby issued with an improvement order to carry out corrective measures for mitigating the environmental concerns revealed during the verification inspection.*

*All discos are hereby STOPPED until clearance is obtained from this office;*

*Undertake sound proofing/engineering to ensure the sounds are retained within the building to prevent subsequent noise pollution;*

*Put measures that will reduce levels of noise emanating from your music systems, Carry out an Environmental Audit and submit the report to NEMA;*

*You are therefore required to submit a letter of commitment to this office to the effect that you will comply with the improvement orders with a clear action plan specifying appropriate fines (sic) on each of the aspects highlighted above within seven (7) days from the date of this order.*

*Failure to comply with this lawful order constitutes an environmental offence which will result to prosecution. It may also compel the department to designate the area a silent zone upon which no music will be allowed in your facility.” (emphasis ours)*

Another was a letter from the County Government of Kilifi, Department of Water, Environment, Forestry, and Natural Resources letter dated 27<sup>th</sup> May 2015, addressed to Saadia A. Mohamed, Commissioner of Administrative Justice, Office of the Ombudsman read as follows;

***“This report follows a series of initiatives the County Government has taken to address the problem of noise pollution by***

*comeback restaurant. On 22<sup>nd</sup> May 2014, the County Government through a letter Ref. CG/KLF/CO/1/1/VOL1/27 gave an improvement notice to the proprietor of Comeback Restaurant to ensure that they reduce the noise pollution to the Watamu community. To this effect, the OCPD, Watamu was also asked to ensure follow up to the restaurant owner to comply with these regulations. A communication was done TO the complainant vide REF CG/KLF/CO/1/1/VOL.1/48 to assure them of the support of the County Government in addressing the noise pollution issue.”*

Despite these admissions, the loud noise continued unabated, culminating in the proceedings before the trial court.

When the evidence is reanalyzed in its totality, we find that it overwhelmingly demonstrated that for a number of years loud noise continued to be emitted from the Comeback discotheque operated on the 4<sup>th</sup> respondent's land, which noise continued even after the 4<sup>th</sup> respondent leased the land parcel and the same discotheque to the 5<sup>th</sup> respondent in 2015. Despite receiving complaints through numerous letters and emails from the appellants and members of the Watamu community, no remedial action was taken by the 1<sup>st</sup> respondent, against the 4<sup>th</sup> and 5<sup>th</sup> respondents to address the loud noise. Of significance are the appellants' letter of 20<sup>th</sup> November 2013, the 1<sup>st</sup> respondent's Improvement Notice of 22<sup>nd</sup> May 2014, as well as the letters from the Office of the Ombudsman and the 1<sup>st</sup> respondent's reply of 27<sup>th</sup> May 2015 and which specifically highlighted the problem of noise pollution from the Comeback discotheque and the nuisance to the residence of Watamu. Clearly, when ascertaining whether there were loud noise emissions for which complaints had been raised, the learned judge wholly disregarded this evidence.

A further consideration of the regulations discloses that the learned judge also failed to take cognisance of **regulation 3 (2)** which set out various other factors, besides noise level measurements, to determine whether the noise in question was loud, unreasonable and unnecessary. The factors included, the time of the day of the noise, the proximity to residential area, whether the noise is recurrent, intermittent or constant, the level and intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making it.

An analysis of the evidence against the factors discloses that the appellants wrote numerous letters and emails to whomsoever cared to listen. Their consistent and persistent complaint was that the Comeback discotheque operating in the 4<sup>th</sup> respondent's premises situated in a residential area and leased to the 5<sup>th</sup> respondent played loud music into the night; that the noise emitted was recurrent and predominantly played during the peak tourist season. It emanated from premises without walls and from an electronic amplified system without sound proofing all of which permitted loud noise to be discharged into the general environment, and into the appellants' residence in particular. Invariably, it cannot be overlooked that the 1<sup>st</sup> respondent's letter of 22<sup>nd</sup> May 2014 is corroborative of these facts.

In effect, the evidence produced was sufficient to satisfy the factors specified by the general prohibition that conclusively pointed to loud and unreasonable noise from the Comeback discotheque the consequence of which, annoyed and disturbed the appellants' comfort and peaceful repose.

But the shortcomings do not end there. The learned judge also failed to appreciate that the appellants' complaints were further compounded by the 1<sup>st</sup> and 2<sup>nd</sup> respondent's intransigence in failing to carry out their constitutionally donated responsibilities to control the loud noise emissions dispensed by the Comeback discotheque, or to enforce remedial measures to safeguard their a right to a clean and healthy environment.

We say this because, as seen above, it is not in dispute that the appellants registered several complaints concerning the loud noise from the Comeback discotheque with the 1<sup>st</sup> respondent. It is also not in dispute that contrary to its mandate, besides visiting the Comeback discotheque and issuing a Notification of Improvements, the 1<sup>st</sup> respondent failed to take steps to prevent the loud noise emissions. There is also no evidence to show that the 2<sup>nd</sup> respondent responded to the complaint the appellant's had registered in the Occurrence Book.

Worse still, the 1<sup>st</sup> respondent left the responsibility of compiling the noise level measurements to the appellants, which measurements the learned judge rejected. Yet despite the incessant complaints against noise, and knowing the clear stipulations of **regulation 6** which placed the responsibility on the lead agency, the 1<sup>st</sup> respondent neglected to undertake the noise level measurements. Given these considerations, our view is that, the 1<sup>st</sup> respondent cannot be permitted to rely on its own deficiencies to argue that the noise level requirements were not met, and, having been faced with sufficient evidence of the loud noise emissions, the learned judge, ought not to have relied solely on the lack of measurements to decline to grant the orders sought.

In summary, had the learned judge not disregarded the uncontroverted evidence of loud noise emissions from the Comeback discotheque, which evidence was supported by regulatory factors that proved overwhelmingly that music played resulted in loud and unreasonable noise pollution, he would have come to the conclusion that the appellants had proved on a balance of probabilities that unchecked loud noise emanated from the Comeback discotheque that violated the appellants' rights. The learned judge would also have recognised that despite the incessant complaints of loud noise, made against the 4<sup>th</sup> and 5<sup>th</sup> respondents' discotheque, the 1<sup>st</sup> and 2<sup>nd</sup> respondent had failed to comply with their constitutional mandate to control the noise emissions which was also a violation of the appellants' rights. As a consequence, we are enjoined to interfere with the trial court's decision.

In the premises, the appeal is allowed with costs to the appellants, and having determined the appeal in the manner that we have, it becomes unnecessary to go into the issue of costs against the 4<sup>th</sup> respondent.

Consequently, we set aside the judgment of the Environment and Land Court of 19<sup>th</sup> April 2018 and substitute it therefor with judgment in favour of the appellants and make the following orders;

1. It is declared that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' actions that have resulted in loud noise emissions from the Comeback

Restaurant, Lounge and Disco situated in the Watamu area have violated the appellants' right to a clean and healthy environment;

2. The 4<sup>th</sup> and 5<sup>th</sup> respondents, whether by themselves their servants or agents or otherwise howsoever be and are hereby restrained by an order of injunction from playing live music, streamed music and or any other music within Comeback Restaurant, Lounge and Disco situated in the Watamu area until such time as the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have undertaken such measures as will ensure full compliance with the Environment and Management Coordination Act and the Environment and Management Coordination (Noise and Excessive Vibration Pollution)(Control) Regulations for the elimination of all loud noise emissions from the Comeback Restaurant, Lounge and Disco.

3. The appellants shall have the costs in the Environment and Land Court and in this Court.

***And it is so ordered.***

***Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.***

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**