



Amani Residents Welfare Association/Mirema) (Suing on behalf of the Resident of Mirema Estate, Nairobi) v Senteu t/a Cocorico Wines & 5 others (Environment and Land Petition E031 of 2022) [2024] KEELC 5172 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 5172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E031 OF 2022**

J OMANGE, J

APRIL 11, 2024

BETWEEN

AMANI RESIDENTS WELFARE ASSOCIATION/MIREMA) (SUIING ON BEHALF OF THE RESIDENT OF MIREMA ESTATE, NAIROBI) .. PETITIONER

AND

MARK SENTEU T/A COCORICO WINES 1ST RESPONDENT

**DANIEL WAWERU KIBE DANIEL WAWERU MUGO DEDAN KIIRU
KAGUNYA T/A PARIS LOUNGE & GRILL 2ND RESPONDENT**

**ALEX KIPROTICH NDIEMA STEPHEN ANTHONY O OTIENO ERIC
KIRIMI MURURU JOHN PARSAOTI KARASHA T/A LA TESSARA
ENTERTAINMENT 3RD RESPONDENT**

**THE REGISTERED TRUSTEES MINISTER IN CHARGE TRINITY HOUSE
INTERNATIONAL MINISTRY 4TH RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT**

NAIROBI CITY COUNTY 6TH RESPONDENT

Kenyans could only realize the promise of the Constitution if public servants were responsive to the concerns of citizens

Reported by Robai Nasike

Constitutional Law – fundamental rights and freedoms – right to a clean and healthy environment – right to peacefully enjoy one’s property – right to dignity – where entertainment and religious establishments made an unusually loud noise – where entertainment establishments discharged raw sewage that passed through residential houses – whether the residents’ rights to peacefully enjoy their property and live in a clean and healthy environment



were violated by the actions and inactions of a religious institution and entertainment venues – whether the inaction of the National Environment and Management Authority and Nairobi City County, when addressing the issues raised regarding noise pollution and licensing of bars and restaurants in a residential area, resulted in the violation of the rights of residents – Constitution of Kenya, articles 40 and 42.

Constitutional Law – values and principles of public service – responsive, prompt, effective, impartial and equitable provision of service – provision of service by the National Environment Management Authority (NEMA) and Nairobi City County – claims that NEMA failed to address letters of residents complaining of noise pollution and discharge of raw sewage by various establishments within a residential area – claim that the decision of Nairobi City County to issue licenses for the sale of alcoholic drinks by bars and restaurants whose operations were within a residential estate was illegal - whether the inaction of NEMA and Nairobi City County in addressing the issues raised regarding noise pollution and licensing of bars and restaurants in a residential area, resulted in the violation of the rights of residents – Constitution of Kenya, article 232; Environmental Management and Coordination Act (cap 387), section 7.

Environmental Law – noise pollution – excessive noise – determination that noise emitted by an entity was excessive – the manner of determining that noise emitted was excessive – whether it was only scientific empirical evidence that could be used to prove that noise level from an establishment was excessive – Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, regulation 3 (2).

Brief facts

Amani Residents Welfare Association filed a petition on behalf of the residents of Mirema Estate Nairobi, a low-density residential area, on the grounds that the respondents had violated various rights of the petitioners including; article 40 on the right to property; the right to a clean and healthy environment provided by article 42; the right to live in reasonable sanitation and to access clean and safe water as provided by; article 43(1) (b) and (d). The petitioners' case was that they had always resided in Mirema Estate which, under the Guide of Nairobi City Development Ordinances and Zones, was zoned as a low-density residential dwelling estate. That the sewer system, drainage, water, roads and other infrastructural services were planned with the intention that it would be a low-density residential zone.

According to the petitioners, for decades, the residents had enjoyed a quiet, serene and peaceful environment until the 1st to 3rd respondents and the 4th respondent set up entertainment and alcoholic-selling establishments and a place of worship, respectively. The petitioners complained that the 1st to 3rd respondents' actions of playing excessively loud music at night and the 4th respondent's Sunday services and overnight Friday services which contributed to the excessive noise resonating throughout the neighbourhood violated the petitioners' right to property contrary to article 40 of the Constitution of Kenya. That the actions of the 1st respondent of remitting waste to the neighbourhood was a health hazard to the petitioner's residents violating their rights to a clean and healthy environment contrary to article 42 of the Constitution.

The petitioners stated that the 5th and 6th respondents had failed in their statutory obligation to ensure that the rights of the petitioners were not violated in the manner the petitioners alleged they had been. More so, the 6th respondent had unlawfully, unprocedurally and illegally approved liquor-selling licenses to the 1st and 3rd respondents to operate their alcohol-selling business in a residential area contrary to the Nairobi City County Alcoholic Drinks Control Licensing Act.

Issues

- i. Whether residents' right to peacefully enjoy their property and live in a clean and healthy environment was violated by the actions and inactions of a religious institution and entertainment venues as follows:
 1. Noise emissions from the bars and restaurants;
 2. Noise emissions from the religious facilities on Fridays and Sundays; and
 3. Discharge of raw sewage that passed through resident houses.



- ii. Whether it was only scientific empirical evidence that could be used to prove that noise level from an establishment was excessive.
- iii. Whether the inaction of the National Environment and Management Agency and Nairobi City County, in addressing the issues raised regarding noise pollution and licensing of bars and restaurants in a residential area, resulted in the violation of the rights of the affected residents.

Held

1. If a person sought redress from the High Court on a matter which involved a reference to the Constitution, it was important (if only to ensure that justice was done to his case) that he should set out with a reasonable degree of precision what he complained about, the provision said to be infringed and the manner in which they were alleged to be infringed. The petitioners, as residents of residential properties next to the 1st to 4th respondents' establishments, had set out specific rights violated namely; violation of their right to a clean and healthy environment and right to own property peacefully without interference from their neighbours. The particulars of the violations were clearly set out. The petition met the threshold required of a constitutional petition.
2. Article 40 of the Constitution protected the right to property which included the right to use, occupy and enjoy property while article 42 of the Constitution safeguarded the right to a clean and healthy environment. The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 defined the words noise pollution to mean, the emission of uncontrolled noise that was likely to cause danger to human health or damage to the environment. Hence, if a person raised the issue of noise interfering with his right to a clean healthy environment then article 42 would have been infringed.
3. The court could consider the other factors outlined in the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 to determine whether the noise was unreasonable. Regulation 3(2) set out other factors to include; time of the day, proximity to residential area, whether the noise was recurrent, intermittent or persistent or constant, the level of intensity and whether the noise had been enhanced in level or range by any type of electronic or mechanical means.
4. An inspection report confirmed that the 1st, 2nd and 3rd respondents who operated bars and restaurants in Mirema Drive, a predominantly residential area had all installed sound-amplifying equipment. Bars and restaurants operated daily hence the noise was recurrent. The noise by the 1st, 2nd and 3rd respondents met the additional test in regulation 3(2) as noise that was loud, unreasonable and unusual. Even though the 5th respondent recommended mitigation measures, the 1st and 2nd respondents had not complied with the measures. The 3rd respondent had however put in place absorbent materials but their effectiveness could not be established. None of the three respondents had carried out an environmental audit.
5. As against the 4th respondent, the report by the 5th respondent confirmed that the residents held a meeting with the 4th respondent and addressed the concerns of the petitioners. The order that had been sought against the 4th respondent was of permanent injunction and was merited.
6. On waste management, none of the three respondents had an Effluent Discharge System. As such the averment by the petitioner that the 1st respondent was releasing raw sewer from the establishment to the neighboring houses was valid. That was a health hazard to the petitioner's residents in contravention of the Environmental Management and Coordination Act, specifically in section 87.
7. The petitioner proved an infringement of its residents' rights as enshrined in articles 40 and 42 of the Constitution. The petitioner was therefore in order to seek refuge from the High Court to protect the rights of its residents to a clean and healthy environment and also ensure that the children of Mirema Drive grew up in an environment that guaranteed their right to life, survival, wellbeing, protection and development as provided by the Children Act.



8. The 5th respondent which was a creation of section 7 of the Environmental Management and Coordination Act was the lead agency which had a wide mandate to exercise general supervision and coordination of all matters environment. Complaint letters were issued to both the 5th and 6th respondents who did not take any action. The transgressions of the 6th respondent were even worse as it had issued liquor licenses to the 1st to 3rd respondents to operate in residential areas, in contravention of clear provisions of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014.
9. The people of Kenya could only realize the promise of the Constitution of Kenya if public servants were responsive to the concerns of citizens. While it was appreciated that Government and county agencies were hampered in their work by financial challenges, the least that citizens could expect was that when they wrote a letter of complaint, it would be responded to if not addressed immediately. Indeed, article 232 of the Constitution required that one of the values and principles of public service was that there would be responsive, prompt, effective, impartial and equitable provision of services. The 5th and 6th respondents failed that test as they did not take any action in the matter until the matter was in court. In the case of the 6th respondent, not only was there negligence but also a clear violation of the law.
10. The petitioners were entitled to compensation. Considering the circumstances of the case the petitioners were awarded an amount of Kshs 5,000,000. Liability was apportioned as follows; 1st and 2nd respondents, 15%, the 3rd and 4th respondents who had taken mitigation measures would bear a liability of 10%; the 5th respondent 20%, and the 6th respondent would bear a liability of 30%.

Petition allowed.

Orders

- i. *A declaration was issued that the petitioner's members' rights to peacefully enjoy their property and live in a clean and healthy environment had been violated by the actions and inactions of the respondents as outlined in the petition.*
- ii. *A declaration was issued that the 1st, 2nd and 3rd respondents continued operations within Mirema Estate was a violation of the petitioner members' right to use and enjoy their property under article 40 of the Constitution and a violation of their right to a clean and healthy environment as contemplated in article 42 of the Constitution.*
- iii. *A declaration was issued that the decision of the 6th respondent to issue licenses for the sale of alcoholic drinks to the 1st to 3rd respondents whose operations were within Mirema Residential Estate were illegal as the same contravened section 11(I)(a) of the Nairobi City County Alcoholic Drinks Control Licensing Act.*
- iv. *A declaration was issued that the 5th and 6th respondents abdicated their constitutional and statutory duties to ensure the implementation of all policies relating to the environment to control noise pollution and public nuisance and regulate the sale of alcoholic drinks respectively, within Mirema Estate, Roysambu, in Nairobi County.*
- v. *An order was issued under article 70 of the Constitution cancelling the licenses issued by the 6th respondent to the 1st to 3rd respondents for the sale of alcoholic drinks within a residential estate.*
- vi. *A permanent injunction was issued restraining the 4th respondent from emitting noise beyond its precincts which interfered with Mirema residents' quiet use and enjoyment of their properties and to live in a clean and healthy environment.*
- vii. *An order that the Officer Commanding Station Kasarani Police Station and/or the Roysambu Assistant County Commissioner was to assist in the implementation of the orders of the court.*
- viii. *An order for compensation of Kshs 5,000,000 was awarded for the violation of fundamental rights and freedoms of the petitioner.*
- ix. *Costs of the Petition.*

Citations

Cases



Kenya

1. *Gakui, Phoebe Wangui v Lucy Wambui & 2 others* Environment & Land Case 139 of 2017; [2021] KEELC 1451 (KLR) - (Applied)
2. *Kurer, Elisabeth Heier & another v County government of Kilifi & 4 others* Civil Appeal 67 of 2018; [2020] KECA 645 (KLR) - (Mentioned)
3. *Papa, Chrispinus Munyane & another v National Environment Authority & another* Environment & Land Case 1 of 2019; [2020] KEELC 1825 (KLR) - (Mentioned)
4. *Seventh Day Adventist Church (East Africa) Ltd v Minister of Education & 3 others* Civil Appeal 172 of 2014; [2017] KECA 751 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 32, 40, 42, 43(1)(b)(d); 70- (Interpreted)
2. Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 (cap 387 Sub Leg) regulations 3(2); 5- (Interpreted)
3. Environmental Management and Coordination Act (cap 387) sections 7, 9(1) - (Interpreted)
4. Evidence Act (cap 80) section 107(1) - (Interpreted)

Advocates

Mr. Muchoki for the petitioner

Mr. Nyoike for the 1st respondent

Ms Kareithi for the 4th respondent

Ms. Kiai for the 5th respondent

JUDGMENT

... This petition filed by Amani Residents Welfare Association is brought on behalf of the residents of Mirema Estate Nairobi, a low density residential area on the grounds that the respondents have violated various rights of the petitioners including; article 40 on the right to property; the right to a clean and healthy environment provided by article 42; the right to live in reasonable sanitation and to access clean and safe water as provided by; article 43(1)(b) and (d).

1. The petitioners aver that; the actions of the respondents have led to violation of their rights which are safeguarded by the *Constitution*. They seek the following orders;
 - a. A declaration that the petitioner's members' rights to peacefully enjoy their property and live in a clean and healthy environment has been violated by the actions and inactions of the respondents as outlined in the petition.
 - b. A declaration that the 1st 2nd ,3rd and 4th respondents continued operations within Mirema Estate is a violation of the petitioner members' right to use and enjoy their property under article 40 of the *Constitution* and a violation of their right to clean and healthy environment as contemplated in article 42 of the Constitution.
 - c. A declaration that the decision of the 6th respondent to issue licenses for the sale of alcoholic drinks to the 1st -3rd respondents whose operations are within Mirema Residential estate is illegal as the same contravenes section 11(I)(a) of the *Nairobi City County Alcoholic Drinks Control Licensing Act*.



- d. A declaration that the 5th and 6th respondents have abdicated their constitutional and statutory duties to ensure the implementation of all policies relating to the environment to control noise pollution and public nuisance and regulate the sale of alcoholic drinks respectively, within Mirema Estate, Roysambu, in Nairobi County.
- e. An order by the honourable court under article 70 of the constitution cancelling the licenses issued by the 6th respondent to the 1st -3rd respondents for the sale of alcoholic drinks within a residential estate.
- f. A permanent injunction restraining the 4th respondent from emitting noise beyond its precincts which interferes with Mirema residents' quiet use and enjoyment of their properties and to live in a clean and healthy environment.
- g. An order that the OCS Kasarani Police Station and/ or the Roysambu Assistant County Commissioner does assist in the implementation of the orders of this honourable court.
- h. An order for compensation for violation of fundamental rights and freedoms
- i. Costs of the petition

2. The petitioners case is that they have always resided in Mirema Estate which under the Guide of Nairobi City Development Ordinances and Zones is Zoned as a low density residential dwelling estate.

That the sewer system, drainage, water, roads and other infrastructural services were planned with the intention that it would be a low density residential zone. It is the petitioners case that for decades the residents had enjoyed quiet, serene and peaceful environment until the 1st -3rd respondents and the 4th respondents set up entertainment and alcoholic selling establishments and place of worship respectively.

In the affidavits deponed by Dominic Mbigi, Chairman of the Association and John Koogi a Resident of the Estate, the petitioners highlight the challenges they have faced as a result of the respondents actions.

3. Dominc Mbigi depones that the 1st-3rd respondents which are entertainment and alcoholic selling establishments play loud music that has interrupted the sleep of residents of the estate. The complaint against the 4th respondent is that on Sunday and Friday night, they use sound system to preach and for ministration of songs which sounds resonate through the neighborhood with deafening levels. He describes the noise levels as unpleasant and obnoxious. The noise emanating from the respondents has interfered with learning at the schools which are situated in the estate.
4. Further the petitioners contend that the children in the estate are exposed to vile and obscene music content and also indecent behavior by the patrons and revelers who visit the establishments. Further complaints are levelled against the 1st Respondent who it is alleged discharges raw sewer in an open drainage which passes by the Residents houses. This has caused a stench and is in violation of the residents' rights to live in dignity.

Against the 5th and 6th respondent it is the petitioners case that the two have failed in their statutory obligation to ensure that the rights of the petitioners are not violated in the manner the petitioners allege they have been.

More so, the 6th respondent who has unlawfully, un procedurally and illegally approved liquor selling licenses to the 1st and 3rd respondents to operate their alcohol selling business in a residential area contrary to the Nairobi City County Alcoholic Drinks Control Licensing Act.



5. In response to the petition, the respondents filed various documents. The 1st respondent filed a replying affidavit sworn by Mark Senteu in which he deponed that the 1st respondent is duly licensed to carry out its business of operating as a night club and selling alcoholic beverages. He further argued that the area is no longer a single dwelling zone residential area as there was a gazette notice to effect change of user. In any event it was his contention that he had installed sound proof equipment to regulate the amount of noise emanating from the establishment and had a septic tank that collects waste from the establishment. It was his averments that the petitioner had failed to prove his allegations of the establishment causing a nuisance and being an environmental hazard and how his rights had been infringed on and a such not warranted to the prayers as sought in the petition.
6. The 2nd respondent averred that they are duly licensed by the Nairobi City Council to operate as a night club and sell alcoholic drinks hence have not broken any law. That further, there premises are sound proofed hence they have not caused any noise pollution.
7. The 3rd respondent on their part the 3rd respondent filed a preliminary objection which was dispensed with.
8. The 4th respondent filed a replying affidavit sworn by Wilfred Macharia Wajje and James Muiruri Kamande the lead pastor to the 4th respondent and a registered associate EIA Expert respectively. Wilfred Macharia deponed that based on the happenings and complains by the petitioners they held a meeting with the petitioner's residents and resorted to adjust their volume by 40%, conduct an Environment Impact Assessment and remove their public address systems from facing the street to facing the sanctuary- away from the Estate which they did and as per the assessment by James Muiruri Kamande it established that they were operating within the required noise- levels being 80.9 decibels. Further, they averred that they conducted most of their services during the weekend and not during the weekdays and as such they do not interfere with learning.
9. The 5th respondent in response filed an affidavit sworn by David On'gare where he deponed that based on complaints by the petitioner's residents, they undertook a site visit to inspect the mentioned establishments where they noted that the 1st to 4th respondents were operating without an Environmental Impact Assessment (EIA) license and that the 1st to 3rd respondents had no sound proof equipment. He further deponed that the businesses and activities being carried out by the 1st to 4th respondents required the EIA license and failure to which made them in contravention of the EMCA. It was further deponed that based on this assessment they instructed the 1st -4th defendants to comply with the requisite requirements for them to keep on operating.

It was their averment that in no way had it failed to perform its duties as illustrated in the follow up activities as highlighted.
10. The 6th respondent responded vide replying affidavit sworn by Abwao Erick Odhiambo averred that as per the time of issuance of liquor licenses to the 1st and 3rd respondents, they were following the law. That however after learning of complaints from residents, they drafted a memo dated 3 October 2022 instructing the relevant officials to cancel, revoke and ensure closure of the 1st -4th respondents.
11. The 1st respondent filed submissions dated 27 October 2023 and reiterated the contents in their response. Further they submitted that the petitioner had not provided any empirical evidence of the noise that it alleges to have been made by the 1st respondent and that in rebuttal to their allegations they had submitted evidence of operating within that is the Environmental Management and Coordination Act, regulation 5 of the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations*, 2009. In support of this argument they relied on the case of *Phoebe*



Wangui Gakui v Lucy Wambui & 2 others [2021] eKLR, where the court emphasized the role of empirical evidence in adjudication of issues related to noise and/or nuisance.

12. Further, the 1st respondent urged the court not to rely on the assessment report by the 5th respondent as it indicated that the noise from the speakers could cause noise pollution which was a probability and not an actual act of noise pollution that could be said to infringe on the petitioners' rights as alluded and based on this it was their submission that in the absence of empirical, technical or scientific proof of noise, the petitioner is not entitled to any one of the prayers sought in the petition and be asked to pay costs for dragging the respondents to an unnecessary litigation.
13. Submissions by the 2nd respondent are dated 24 November 2023. It was their submission that the petitioner had not discharged its burden of proof as required by section 107(1) of the Evidence Act. That the allegations of noise had not been proved and as such they remain mere allegations not warranting orders sought. This they relied on what was stated in the decision as in the case of Chrispinus Munyane Papa & another Vs National Environment Authority & Another (2020) eKLR.
14. Further they submitted that the court should balance the rights of both parties being that they had acquired their trading licenses legally, they had a right to transact business while the petitioners claim rights to a clean and healthy environment.

It was their contention that they had played their role in ensuring that the noise emanating from their establishment was not a nuisance to the public and this honourable court should ensure that the petitioner's claims to right to a clean environment does not infringe on their own having proved that the allegations of noise and waste pollution are baseless.
15. The 4th respondent filed submissions dated 25 September 2023 which mirrors the submissions of the 1st respondent herein as they have basically submitted on the same issues. The gist of the submissions is that the petition has no factual or legal basis because the 4th respondent is compliant with the statutory thresholds for noise, in this case noise being an empirical, technical and scientific question, not an opinion, mere speculation or abstract. It was their case that that the petitioner is not entitled to the prayers sought or any other relief from this court and the petition should be dismissed.

Further, it was their assertion that Freedom of conscience, religion, belief and opinion which the 4th respondent helps manifest, is protected under article 32 of the Constitution can only be limited to the extent permitted by law and only where such limitation is reasonable and justified and that people's right to manifest a religion under article 32 of the Constitution is equally as important as their right to quiet possession and a clean environment under article 40 and 42 of the Constitution respectively and relied in the case of Seventh Day Adventist Church (East Africa) Limited vs. Minister of Education & 3 others (2017) eKLR.
16. The 5th respondent reiterated contents of their replying affidavit dated 5 October 2022 and stated that they had given restoration orders to the 1st -3rd respondents based on their site visit and further went ahead to carry an inspection on the 28 April 2023 and found out that the orders had not been complied with.
17. It was their submission that their role was supervisory as noise pollution was mandated to the 6th respondent herein, and their role was supervisory as per section 9(1) of the EMCA which was to step in when a body tasked with ensuring there is no environmental pollution has neglected to do so and such neglect has been brought to their attention with evidence. They quoted the court of appeal decision in Elizabeth Kurer Heier & Another Vs County government of Kilifi & 4 others (2020).



18. From the foregoing, having looked at the petition, the supporting affidavit, the annexures, the responses to the petition, as well as the parties' submissions. I find the following issues for this court's determination. Whether the petitioners members right to peacefully enjoy their property and to live in a clean and healthy environment has been violated by the actions and inactions of the respondents Whether the 5th and 6th respondents have abdicated their constitutional and statutory mandate leading to a violation of the petitioner members' rights.

19. Before delving into the above issues, I will consider whether the petition meets the threshold for a constitutional petition noting that at this stage the court is not called upon to consider the merits of the petitioners' claims but ascertain the common denominator as to the specificity of the claim. The oft quoted case of *Anarita Karimi Njeru* case set the benchmark for constitutional petitions. The Court of Appeal posited;

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

20. The petitioners complain the 1st-3rd respondents' actions of playing excessively loud music at night and the 4th respondents Sunday services and overnight Friday Services which contribute to the excessive noise resonating throughout the neighborhood violating the petitioners' right to property contrary to article 40 of the Constitution of Kenya. That the actions of the 1st respondent of remitting waste to the neighborhood is a health hazard to the petitioner's residents violating their rights to a clean and healthy environment contrary to article 42 of the constitution. As residents of residential properties next to the 1st - 4th respondents' establishments have set out specific rights violated namely; violation of their right to a clean and healthy environment and right to own property peacefully without interference from their neighbors. The particulars of the violations are clearly set out. I find that the petition has met the threshold required of a constitutional petition.

21. On the question whether the petitioner had discharged the burden of proof that its members' proprietary rights and right to a clean and healthy environment under articles 40 and 42 of the Constitution have been violated, It is the petitioner's case that the operations of the 1st to 4th respondents' businesses create unreasonable noise and vibrations emanating from the speakers in the residential neighborhood thus causing a nuisance and pollution to the Environment and depriving them of their rights under articles 40 and 42 of the Constitution.

The 1st to 4th respondents argue that their establishments have been fitted with sound proof equipment and contend that some officials of the petitioner are motivated by malice.

22. Article 40 provides: -

“Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—

- a. Of any description
 - b. Of any part in Kenya
- 2) Parliament shall not enact a law that permits the State or any person



- a) arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description or
- b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in article 27(4)

Article 42(1) 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”.

24. From the foregoing it is clear that article 40 protects the right to property which includes the right to use, occupy and enjoy property while article 42 safeguard the rights to a clean and healthy environment.

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009* 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.

25. It therefore goes without saying that if a person raises the issue of noise interfering with his right to a clean healthy environment then article 42 of the Constitution has been infringed.

The petitioner avers that the noise from the 1st to 3rd respondents interferes with their sleep in the night while the noise from the 4th respondent interferes with school learning activities in the learning institutions nearby and on some nights interferes with their sleep as well.

The petitioners further contend that some landlords have been occasioned losses as tenants have been forced to move out of the properties due to the incessant noise by the respondents.

25. The respondents on their part aver that the petitioner has failed to establish the noise levels as no measurements have been availed by the petitioners to prove that the noise and vibration levels emanating from the 1st to 4th respondents are excessive and there is no way to tell whether the noises meet the definition of excessive noise as in the EMCA. This brings to the fore the question of whether it is only scientific empirical evidence that can prove that the noise levels are excessive.

26. The Court of Appeal in the case of *Elisabeth Kurer Heier & another v County Government of Kilifi & 4 others MBSA CA 67 of 2018* [2020] eKLR stated that the court can consider the other factors outlined in the regulations to determine whether the noise is unreasonable. The court held; A further consideration of the regulations discloses that the learned judge also failed to take cognizance 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.

27. Regulation 3(2) sets out other factors to include; time of the day; proximity to residential area; whether the noise is recurrent; intermittent or persistent or constant; the level of intensity; whether the noise has been enhanced in level or range by any type of electronic or mechanical means. An inspection



report confirms that the 1st, 2nd and 3rd respondents who operate bars and restaurants in Mirema Drive, a predominantly residential area have all installed sound amplifying equipment. Bars and restaurants operate daily hence the noise is recurrent. It is my view that the noise by the 1st, 2nd, 3rd respondent meet the additional test in regulation 3(2) as to be loud, unreasonable and unusual. In spite of the fact that the 5th respondent recommended mitigation measures, the 1st and 2nd respondents had not complied as at the date of the further affidavit filed on 8 September 2023. The 3rd respondent had however put in place absorbent materials but their effectiveness could not be established. None of the three respondents had carried out an Environmental audit.

28. As against the 4th respondent, the report by the 5th respondent confirms that the residents held a meeting with the 4th respondent and addressed the concerns of the petitioners. Clearly there was an issue before. While the freedom of religion is one which The order that had been sought against the 4th respondent was of permanent injunction which I find is merited.
29. On waste management, none of the three respondents had an Effluent Discharge System. As such the averment by the petitioner as in paragraph 22 of the petition that the 1st respondent is releasing raw sewer from the establishment to the neighboring houses is valid. This is a health hazard to the petitioner's residents in contravention to the EMCA and specifically at sections 87 which provide as follows: -

“87.

- (1) No person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.”

25. In light of the above, I find that the petitioner has proved infringement of its residents' rights as enshrined in article 40 and 42 of the Constitution. The petitioner is therefore in order to seek refuge from this court to protect the Right of its residents to a clean and healthy Environment and also ensure that the Children of Mirema Drive grow up in an Environment that guarantees their right to life, survival, wellbeing, protection and development as provided by the Children Act.
26. On the second issue of Whether the 5th and 6th respondents have abdicated their constitutional and statutory mandate leading to a violation of the petitioner members' rights both the 5th and 6th respondent deny that they have failed in performance of their statutory obligations under the constitution and EMCA. The 5th respondent which is a creation of section 7 of the Environmental Management and Coordination Act is the lead agency which has a wide mandate to exercise general supervision and coordination of all matters Environment. Complaint letters were issued to both the 5th and 6th respondent who did not take any action.

The transgressions of the 6th respondent are even worse as it had issued liquor licenses to the 1st to 3rd respondents to operate in residential areas, in contravention of clear provisions of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014.

25. The people of Kenya can only realize the promise of the Constitution of Kenya if public servants are responsive to the concerns of citizens. While it is appreciated that government and county agencies are hampered in their work by financial challenges, the least that citizens can expect is that when they write a letter of complaint, it will be responded to if not addressed immediately. Indeed, article 232 of the Constitution requires that one of the values and principles of public service is that there will be responsive, prompt, effective, impartial and equitable provision of services.



I find that, the 5th and 6th respondent failed this test as they did not take any action in the matter until the matter was in court. In the case of the 6th Respondent not only was there negligence but also a clear violation of the law.

25. On the question of compensation, the petitioners are entitled to compensation. Considering the circumstances of this case I award the petitioners an amount of Kshs 5,000,000. Liability is apportioned as follows; 1st and 2nd respondent, 15%. The 3rd and 4th respondent who have taken mitigation measures will bear liability of 10%; the 5th respondent 20%, 6th respondent will bear liability of 30%.
26. In the end, judgement is entered for the petitioners as follows;
 - a. A declaration is hereby issued that the petitioner's members' rights to peacefully enjoy their property and live in a clean and healthy environment has been violated by the actions and inactions of the respondents as outlined in the petition.
 - b. A declaration is hereby issued that the 1st 2nd and 3rd respondents continued operations within Mirema Estate is a violation of the petitioner members' right to use and enjoy their property under article 40 of the Constitution and a violation of their right to clean and healthy environment as contemplated in article 42 of the Constitution.
 - c. A declaration is hereby issued that the decision of the 6th respondent to issue licenses for the sale of alcoholic drinks to the 1st - 3rd respondents whose operations are within Mirema Residential estate is illegal as the same contravenes section 11(I)(a) of the Nairobi City County Alcoholic Drinks Control Licensing Act.
 - d. A declaration is hereby issued that the 5th and 6th respondents have abdicated their Constitutional and statutory duties to ensure the implementation of all policies relating to the environment to control noise pollution and public nuisance and regulate the sale of alcoholic drinks respectively, within Mirema Estate, Roysambu, in Nairobi County.
 - e. An order is hereby issued under article 70 of the constitution cancelling the licenses issued by the 6th respondent to the 1st - 3rd respondents for the sale of alcoholic drinks within a residential estate.
 - f. A permanent injunction is hereby issued restraining the 4th respondent from emitting noise beyond its precincts which interferes with Mirema residents' quiet use and enjoyment of their properties and to live in a clean and healthy environment.
 - g. An order that the Officer Commanding Station Kasarani Police Station and/ or the Roysambu Assistant County Commissioner does assist in the implementation of the orders of this honourable court.
 - h. An order for compensation of Kshs 5,000,000 is awarded for violation of fundamental rights and freedoms of the Petitioners
 - i. Costs of the petition

JUDGEMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 11TH OF APRIL, 2024.

JUDY OMANGE

JUDGE

In the Presence of: -



Mr. Muchoki for the Petitioner

Mr. Nyoike for the 1st Respondent

Ms Kareithi for 4th Respondent

Ms. Kiai for the 5th Respondent

Court Clerk: Steve

