



**Sunlodges Kenya Limited (Suing on its own behalf and on behalf of the residents of Diani area Kwale County) v Alliance Development Limited t/a Safari Beach Hotel & 2 others (Environment & Land Petition E001 of 2023) [2024] KEELC 4530 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4530 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND PETITION E001 OF 2023**

**AE DENA, J**

**MAY 28, 2024**

**BETWEEN**

**SUNLODGES KENYA LIMITED (SUING ON ITS OWN BEHALF AND ON BEHALF OF THE RESIDENTS OF DIANI AREA KWALE COUNTY) ..... PETITIONER**

**AND**

**ALLIANCE DEVELOPMENT LIMITED T/A SAFARI BEACH HOTEL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KWALE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant herein Sunlodges Kenya Limited, vide a Notice of Motion dated 11/9/2023 seeks the following orders before this court; -
  1. Spent
  2. Spent
  3. Pending hearing and determination of this application and/or petition, this honourable court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> Respondent, its agents, assigns, employees, representatives and or persons claiming through it from further operating live music and or streaming music and or emitting high levels of noise and vibrations in its premises known as Safari Beach Hotel, within Diani Township in contravention of the



4. Costs
- 2 The application is supported by an affidavit sworn by Ali MaawiyA the director of the Applicant. It is averred that the Applicant is in the business of accommodation operated on property Kwale/Diani Beach/87 leased from Thornhill holdings and is adjacent to Safari Beach Hotel. At paragraph 6 of the affidavit, it is stated that the Petitioner business model assures its customers of peace and tranquillity and further that customers do not bring their children along for silence and peace of mind which is a major factor in attracting their clients.
- 3
- That the 1<sup>st</sup> Respondent has of recent times started the habit of operating loud live and streaming music through amplified artificial sound systems and which action has resulted in noise pollution. The deponent states that as advised by a NEMA licensed expert, the noise emanating from the 1<sup>st</sup> Respondent's premises amount to violation of Part 2 Regulation 3[1] of the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009.
- 4 It is further stated that the 1<sup>st</sup> Respondent has constructed illegal structures next to the ocean village without the requisite permission under the *Physical and Land Use Planning Act* and approval from NEMA. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have on their part failed to discharge their obligation of ensuring the 1<sup>st</sup> Respondent complies with the provisions of the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009. At paragraph 17 of the affidavit, it is averred that due to this noise, the Petitioners clientele have begun giving negative reviews to their business while some have declined to settle bills. At paragraph 18 the Applicant outlines the anticipated irreparable harm as follows;
- a. The Applicant, its clientele and residents within the vicinity of the 1<sup>st</sup> Respondent are entitled to a peaceful and noise free environment within the standards and levels prescribed by the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009.
- b. The 1<sup>st</sup> Respondent will continue to operate loud live and streamed music within its premises beyond levels which the expert advises that are contrary to the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009.
- c. The Applicant's goodwill will be adversely affected due to the fact that its clientele is very sensitive to disruptions and will imminently in the circumstances terminate all future business transactions with the Applicant.
- SUBPARA The Applicant will lose a peaceful, comfortable, serene and a noise free environment which characteristics are very vital in the Applicant's accommodation business the absence of which will automatically cripple its business.
- 5 The Petitioner/Applicant states that it is in the interest of justice that the application be allowed as prayed.
- 6 The petition is opposed by a replying affidavit dated 9/2/2024 sworn by Raymond Matiba a director of the 1<sup>st</sup> Respondent company duly authorised to swear the affidavit for and on behalf of the 1<sup>st</sup> Respondent. The deponent states that the 1<sup>st</sup> Respondent is the registered proprietor of Alliance Safari Beach Hotel which has been operational since 1986 with the approval and permits of all the respective



authorities including the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It is stated that Section 102 of the Environment Management and Coordination [Noise and Excessive Pollution Control] Regulations 2009 makes it an offence for any person to emit excessive noise while Rule 6 of the Environment Management and Coordination [Noise Excessive Vibrations Pollution] [control] regulations 2006 provides that it is the 2<sup>nd</sup> Respondent to take control and measurements in respect to whether a person is causing any noise which exceeds the sound level set out in the first schedule of the regulations. That it is after the 2<sup>nd</sup> Respondent has failed to act that a party may instruct a qualified person duly authorised by the 2<sup>nd</sup> Respondent to take the measurements.

- 7 The 1<sup>st</sup> Respondent avers that the Petitioner had never lodged any complaint with the 2<sup>nd</sup> Respondent. That it was therefore premature to instruct an expert to take the measurements. It is stated that the complaints and bad reviews alluded to have not been affiliated to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denies breaching any of the conditions outlined in the licences issued to them. It is further stated that the structures referred to by the Petitioner have the necessary permits and approvals by the relevant authorities and are therefore not illegal.
- 8 The 1<sup>st</sup> Respondents further states that the petitioner has failed to meet the threshold set in the case of *Giella Versus Cassman Brown & Co Ltd [1973]* for failure to present a prima facie case, failure to prove the possibility of suffering irreparable injury that cannot be compensated by damages and that the balance of convenience was in fact in its favour.
- 9 In response to the replying affidavit, the Petitioner filed a supplementary affidavit in support of its application. The same is still sworn by ALI MAAWIYA. It is averred that a letter of complaint by the Petitioner over the emission of high levels of noise and vibrations was made but the same was not responded to. That the role of the 2<sup>nd</sup> Respondent to undertake measurements is as per Rule 6[3] of the Environment Management and Coordination [Noise Excessive Vibrations Pollution] [control] regulations 2009 and the said role has been disregarded by the 2<sup>nd</sup> Respondent. That the Petitioner is not required to give any notice before asking for an expert to measure the excessive noise as alluded to by the 1<sup>st</sup> Respondent.
- 10 The Petitioner refers to the environment noise survey report for a survey undertaken between 29/12/2023 and 31/12/2023. That the negative reviews from the customers is informed by the loud music from the 1<sup>st</sup> Respondent's premises. According to the Petitioner, it has proved a prima facie case and met the threshold for grant of the orders sought. That the court's intervention is necessary in grant of the orders sought.

### **Analysis and Determination**

- 11 I have read the application, affidavit in support of the application, replying affidavit, supplementary affidavit and their accompanying annexures. I have also considered the rival submissions in this application as regards the grant of orders of temporary injunction and also taken into consideration the judicial decisions cited and attached. The issue for determination is whether the Petitioner has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this petition.
- 12 The right to a clean and healthy environment has been declared a universal human right. See the United Nations General Assembly Declaration (UNGA declaration of 28/7/2022). The seriousness as to the protection of this right has not only been taken up by Kenya but by several other countries within the African continent. Section 24 of the South African Constitution provides for the protection of the environment towards ensuring the health and wellbeing of individuals. Section 20 of the Nigerian



Constitution states that the state shall protect and improve the environment and safeguard Nigeria's water, air, land forest and wildlife.

13 In Kenya, Article 42 (1) of *the Constitution* provides that: -

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

- (a) To have the environment protected for the benefit of the present and future generations through legislative and other measures particularly contemplated in Article 69 and
- (b) to have obligations relating to the environment fulfilled under Article 70”.

14 Article 70 (1) of *the Constitution* provides that: -

“(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be denied, violated, infringed, or threatened, the person may apply in court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) an application under clause (1) the court may make any order or give any directions it considers appropriate: -

- (a) to prevent, stop, or discontinue any act or omission that is harmful to the environment;
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
- (c) it provides compensation for any victim of violation of the rights to a clean and healthy environment.

(3) For the purposes of this Article an applicant does not have to demonstrate that any person has incurred loss or suffered injury”.

15 The Petitioner seeks for temporary orders of injunction restraining the 1<sup>st</sup> Respondent, or persons claiming through it from further operating live music and or streaming music and or emitting high levels of noise and vibrations in its premises known as Safari Beach Hotel, within Diani Township in contravention of the Environmental Management and Coordination [Noise and Excessive Vibration Pollution] Regulations 2009. The prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment and a violation of the same amounts to an offence under the EMCA (noise and excessive vibration pollution) (control) regulations 2019.

16 Any person whose right to a clean and healthy environment has or is being violated, has a recourse to apply to the court for redress. This court is enabled to handle such disputes as stipulated under Section 13(3) of the *Environment and Land Court Act*, 2011, which provides as hereunder;

“(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.”



17 The guiding principles for the grant of orders of temporary injunction are well settled and are set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010 and in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358 as follows:

- a. Prima facie with a probability of success,
- b. The Applicant might otherwise might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and
- c. If the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.

18 This position has been reiterated in a myriad of decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at [a] prima facie level, [b], demonstrates irreparable injury if a temporary injunction is not granted and [c], ally any doubts as to [b], by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

19 On whether the Petitioner has established a prima facie case. The term Prima facie case was defined by the Court of Appeal in *Mrao Limited – Versus - First American Bank of Kenya Limited & 2 others* (2003) eKLR thus; -

“So what is “a prima facie case” I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly 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.”

20 It is the Petitioner’s case that they are the owners of the parcel of land having leased the same for purposes of carrying out accommodation business. This fact is confirmed by the agreement between them and Thornhill holdings which the court has perused and confirmed. It is further confirmed that the Petitioner’s premise is adjacent to Safari Beach Hotel. The Petitioner’s states that the 1<sup>st</sup> Respondent is indulging in noise pollution by playing loud music using artificial sound systems. That this action is causing discomfort to its clientele who are mainly attracted to the Petitioner’s business by its serene and silent environment. This allegation has been confirmed by a copy of an environmental noise survey report over a survey undertaken between 29/12/2023 and 31/12/2023. From the observations at the end of the report, the court gathers that the noise generated by the 1<sup>st</sup> Respondent is way above the allowed limit of 55 decibels. Section 101, 102 and 103 of the Environmental Management & Coordination Act addresses the issue of noise pollution by setting out a regulatory framework that establishes noise standards and prohibits excessive noise.

21 Under the EMCA (noise and excessive vibration pollution) (control) regulations 2019, “noise pollution” mean the “emission of the uncontrolled noise that is likely to cause danger to human health and damage to the environment”

“While “excessive vibration” means the presence of vibration which-



- (a) Is of such intensity, duration, frequency or character as to annoy disturb or cause or tend to cause adverse psychological or physiological effects to persons or to damage or tend to damage personal or real property; and
- (b) Exceeds 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source”.

- 22 From the expert report before court, a prima facie case has been established as to the intensity of the noise emitted from the 1<sup>st</sup> Respondent’s property. A finding is to be made as to whether the same is in excess and amounts to pollution. In reference to the objection made as to the report not emanating from the 2<sup>nd</sup> Respondent, I note that there is no provision of the law barring an expert report as to the nature and extend of noise pollution, in the event that the 2<sup>nd</sup> Respondent has upon receiving a complaint failed to act on the same, then it is imperative of a complainant to find an expert duly certified by the 2<sup>nd</sup> Respondent to carry out the exercise of determining whether the noise amounts and results to pollution.
- 23 On irreparable harm that is beyond compensation by way of damages, Article 70(3) of *the Constitution* stipulates that the Petitioner’s need not prove any damage, or injury suffered. The Petitioner in the instant case has stated that the 1<sup>st</sup> Respondent’s activities are costing them business. That there has been negative reviews over noise and this will cost them financially as the business cannot thrive in a noisy environment. A copy of the negative review made has been attached to the affidavit in support of the application. The Petitioner in a nutshell has stated the danger that is posed by the loud noise, even if not for the business, the court opines that the same amounts to violation of the petitioners right to a healthy environment.
- 24 The veracity of protection of the environment against any form of pollution is not to be underestimated under any given circumstances. As earlier stated, the same is now an issue under universal human rights. Courts in other jurisdictions are engaging issues of protection of the environment with much vigour than before. The High Court in South Africa in the case of Trustees for The Time Being of Groundwork Trust & Another Versus Minister of Environmental Affairs & Others Case No 39724/2019 opined that if air quality fails to meet the national Air quality standard [national standards] it is prima facie violation of the right and a threat to constitutional rights envisaged under section 24 of *the constitution*.
- 25 I further refer to the persuasive holding in University of Pretoria Versus Roger and Others [61693] [2019] [2023] ZAGPPHC 1203 where complaints from students at the university residence about noise from bars and nightclubs led to interdiction of the Respondents by the South African High Court from conducting business in violation of permissible land use rights contained in Pretoria town planning scheme. The Respondents were further interdicted from creating noise nuisance and any noise in excess of noise levels permitted by land use rights.
- 26 It is this court’s finding that the injury anticipated has been proved. The argument that the same can be compensated by an award of damages does not suffice in the instant suit. The nature of accommodation business is based majorly on referrals; this is an issue of common knowledge just like the coming of dawn. In the event that one bad review is made, the possibility that it might turn away the rest of the customers is high. I will therefore not dwell on any notion of the loss being that which can be



compensated. The court is guided by the holding in the case of Said Almed vs. Mannasseh Benga & Another [2019] eKLR the court held that:

“Where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of Aikman vs Muchoki (1984) KLR 353.’ See the case of Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005) eKLR.

27 The balance of convenience automatically tilts towards the Petitioner. I refer to the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, where the court dealing with the issue of balance of convenience expressed itself thus:

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

28 I’m further emboldened and persuaded by the dictum of D.S Majanja J. on the effects of noise and vibration pollution in the case of Pastor James Jesses Gitahi & 202 Others vs Attorney General, Pet No 683 of 2009, observed as follows: -

“Prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibrations transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the levels of noise through the regulations.....which have a general prohibition against loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort repose, health or safety of others and the environment. In determining whether the noise is loud several factors are considered including the time of day, the proximity to a residential neighbourhood, whether the noise is recurrent, intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanized means or whether the noise can be controlled without effort or expense to the person making the noise”.

29 The upshot of the foregoing is that the application has merit and is allowed in terms of order No. 3. Costs will abide the outcome of the Petition.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF MAY 2024.**

.....



**A.E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Kago Holding brief for Mr. Mbuya Petitioner/Applicant

Ms. Wamuyu for the 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Mr. Daniel Disii – Court Assistant

