



**Kindiki v Christian Foundation Fellowship Church Mpakone through  
its Registered Trustees & 5 others (Environment & Land Petition  
E012 of 2023) [2024] KEELC 6063 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6063 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT & LAND PETITION E012 OF 2023**

**CK NZILI, J**

**SEPTEMBER 18, 2024**

**IN THE MATTER OF ARTICLES 42, 69 AND 70 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHT TO A CLEAN AND  
HEALTHY ENVIRONMENT UNDER ARTICLE 42 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 3 OF THE ENVIRONMENTAL  
MANAGEMENT & COORDINATION ACT**

**BETWEEN**

**PROF JONAH N KINDIKI ..... PETITIONER**

**AND**

**CHRISTIAN FOUNDATION FELLOWSHIP CHURCH MPAKONE THROUGH  
ITS REGISTERED TRUSTEES ..... 1<sup>ST</sup> RESPONDENT**

**GODFREY KARUMBA ALIAS MUTWIRI ..... 2<sup>ND</sup> RESPONDENT**

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

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**

**OFFICER COMMANDING STATION MERU ..... 5<sup>TH</sup> RESPONDENT**

**OFFICE OF THE ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. What is before the court is a constitutional petition dated 30.5.2023 brought by the petitioner, a resident of Kaaga, Meru County. The petitioner avers that he has peacefully been a resident of Kaaga village for over twenty-three years until 2021, when the 1<sup>st</sup> & 2<sup>nd</sup> respondents leased property from his immediate neighbor and erected church premises in a residential area. The petitioner avers that after erecting the church premises, the 1<sup>st</sup> & 2<sup>nd</sup> respondents started daily church fellowships within the area, making unbearable noise from as early as 3.00 am daily until late in the night.
2. The petitioner avers that an electronic amplifying system mounted on the perimeter fence separating his homestead and that of the church compound enhances the noise without any soundproofing equipment, hence causing excessive vibrations in his residence.
3. Further the petitioner avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondents run high voltage peaching, loud music, and loud intercessory sessions that emit excessive loud noise during evening and early morning hours and also on weekends and which is at its peak on Sundays when the church is in session the whole day. The petitioner avers that during the peak period, the noise measurement averaged 82.0 decibels, contrary to the statutory recommended noise limits during the day and at night.
4. Similarly, the petitioner avers that the excessive noise has generally interfered with his life schedule among other residents in the vicinity. In particular, the petitioner avers that being a professor of education at Moi University, he is no longer peacefully and quietly enjoying his time reading or attending both national and international webinars, including lecturing his students virtually. Therefore, the petitioner avers that the 1<sup>st</sup> & 2<sup>nd</sup> respondents have infringed on his constitutional right to a clean and healthy environment, devoid of excessive or loud noise as enshrined in Article 42 of *the Constitution*.
5. The petitioner also avers that attempts to address the issue or concerns by talking to the respondents orally and through demand letters were not treated with the seriousness it deserved, hence is petition. Again, the petitioner avers that the 3<sup>rd</sup> and 4<sup>th</sup> respondents gave the requisite approvals to the 1<sup>st</sup> & 2<sup>nd</sup> respondents towards the construction of the church of the 1<sup>st</sup> respondent, whose registration with the registrar of societies remains unclear, which has and shall continue to expose him to continue suffering great inconvenience, unless the respondents are ordered to adhere to their constitutional and legal obligations.
6. As a result, the petitioner prays for:
  - a. A declaration that the respondents have violated his right to a clean and healthy environment under Article 42 of *the Constitution*.
  - b. A declaration that the respondents have violated his right under Article 69 of *the Constitution* to eliminate processes and activities that are likely to endanger the environment.
  - c. A declaration that the respondents are in breach of or in violation of Section 3 of the Environmental Management & Coordination Act.
  - d. A permanent injunction prohibiting the 1<sup>st</sup> & 2<sup>nd</sup> respondent from conducting its activities within an area designated for residence.
  - e. Compensatory damages for violation of Articles 42, 69, and 70 of *the Constitution*.



7. In support of the petition, Professor Jonah W. Kindiki, the petitioner, swore an affidavit on 30.5.2023, reiterating the contents of the petition and attaching copies of letters to the chief officer of the County Government of Meru, the County Commissioner of Meru and a demand letters to the respondents dated 3.11.2022, 7.12.2022 and 18.4.2023, respectively. Additionally, the petition was supported by a list of witness statements and a further list of documents dated 11.2.2024.
8. The 1<sup>st</sup> & 2<sup>nd</sup> respondents opposed the petition through a replying affidavit of Godfrey Mutwiri Karumba sworn on 12.7.2023, a list of witnesses, and a witness statement dated 23.2.2024. Godfrey Karumba, the deponent, averred that he is an ordained and licensed pastor in charge of the 1<sup>st</sup> respondent operating in Kaaga, which began its operations in September 2019, with a membership majority being residents of the locality. The 1<sup>st</sup> & 2<sup>nd</sup> respondents termed the allegations in the petition as malicious, false and actuated by hate out of the vigorous growth of the 2<sup>nd</sup> respondent within a short period.
9. The 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the petitioner was a member and a leader of the Methodist Church of Kenya Kaaga, located a few meters from the 1<sup>st</sup> respondent, who felt threatened by the 1<sup>st</sup> respondent's growth and likelihood of affecting its membership.
10. Again, the 1<sup>st</sup> & 2<sup>nd</sup> respondents admitted that the petitioner was a resident lecturer and Professor at Moi University Eldoret, where he resides and occasionally visits his home in Kaaga locality, where there are many churches, including MCK, Full Gospel Churches of Kenya, Redeemed Gospel Church, the respondent Catholic Church, Jesus Crown Confirmation Church and Good Samaritan Church to name but a few, most of which the 1<sup>st</sup> respondent found operating therein.
11. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that given the foregoing, it beats logic why their church was unique not to operate in the locality just like the rest of the churches in Mpakone – Kaaga market, which has so many other churches and commercial activities.
12. The 1<sup>st</sup> & 2<sup>nd</sup> respondents admitted that the petitioner had complained about them to the area chief, deputy county commissioner, and the county commissioner Meru, who all found that they had not violated any of the rights to a clean and healthy environment of the area residents, least of all those of the petitioner.
13. Further, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that an officer from NEMA and the county had visited the area and established that there were no violations of the law or infringement of the petitioner's rights, for there were so many other churches in the area going by a letter dated 8.12.2022.
14. In view of the preceding, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that it was astonishing for a person of the caliber of the petitioner to peddle lies against them over their operations, yet it was humanly impossible to run church services daily as alleged, for they only conduct two church services per week.
15. The 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the petitioner was bitter after he pursued in vain the lessor of their property to sell the land to him, who instead leased it out the land to the church.
16. In addition, the 1<sup>st</sup> & 2<sup>nd</sup> respondents denied the alleged noise pollution since they were mindful of the residents, the majority of whom were their members, and that they conducted their prayers and church activities, including the sound system, to a bear minimum. They denied any sound equipment was mounted on the petitioner's perimeter fence. Additionally, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the relevant government agencies had authorized them to operate in the area, including being a registered church.



17. Contrary to the averments by the petitioner, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that it was the petitioner who had been harassing and insulting them, dumping waste in the church compound, and threatening to use his power, influence, and clout to get rid of the church from the vicinity. It was averred that there was no law that had designated the area as a residential one and that there were no particulars provided to show the sound or noise decibels allocated or designated for the area.
18. Further, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that there was no scientific or expert report attached to the petition to show that their church activities were emitting sound at 82.0 decibels or were injurious or dangerous under Article 69 of *the Constitution*.
19. The 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that just like the petitioner, they were equally entitled to their constitutional and statutory rights to use the environment for recreational, educational, health, spiritual, and cultural purposes; otherwise, the petitioner was defining his rights to the environment beyond those known to the public authorities driven by vendetta and ill-will against the church.
20. The 3<sup>rd</sup> respondent opposed the petition by a preliminary objection and grounds of opposition dated 15.11.2023 and 10.1.2024, respectively.
21. The 3<sup>rd</sup> respondent averred that:
  - i. The petition was premature and offended the doctrine of exhaustion given the internal dispute mechanism, set out under Regulations 6 (3), 25 & 26 of the EMCA (Noise and Excessive Vibrations Pollution Control Regulation 2009 and for failure to attach lead agency noise/vibration level measurements to demonstrate that the noise complained about exceeds the permissible noise levels.
  - ii. The petition does not meet the prerequisites and requirements of a constitutional petition.
  - iii. The petition is incompetent, premature, bad in law, speculative, incurably defective, an abuse of the court process, and discloses no justifiable cause against the 3<sup>rd</sup> respondent.
  - iv. It undertook all necessary measures within its mandate and issued recommendations to redress the alleged violation, hence denying any wrongful acts.
22. Following pre-trial directions, this petition was heard through viva voce evidence. Professor Jonah Kindiki, the petitioner, testified as PW 1 and relied on his witness statement and an affidavit dated 11.1.2024 and 30.5.2023, as his evidence in chief. PW 1 relied further on a letter to the chief officer of the 3<sup>rd</sup> respondent dated 3.11.2022, a letter to the county commissioner Meru dated 7.12.2022 demand letter dated 18.4.2023, a letter from National Environment Management Authority (NEMA) dated 8.12.2022 and search results from the registrar of societies all produced as P. Exh No's. 1-6 respectively. He reiterated the contents of the petition and urged the court to find that the 1<sup>st</sup> & 2<sup>nd</sup> respondents had infringed his right to a clean and healthy environment.
23. In cross-examination, PW 1 told the court that as a resident professor at Moi University, he was in charge of approximately six or seven units every week on top of undertaking research work. He stated that he has residences in Nairobi, Eldoret and Meru Kaaga, the latter occupied permanently by his family, though he travels a lot for research, teaching and other engagements for the government.
24. Even though PW 1 produced no ownership documents for the suit premises in Kaaga, PW 1 told the court he had been a genuine owner of the premises since 1999 when he acquired the land from Alice Munene. PW 1 confirmed that the locality had many churches, including his church, MCK. Additionally, PW 1 told the court that even though he was not an expert in sound or noise, the petition was about excessive noise or sound emitted by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. He admitted that he had no



- expert report to that effect. Similarly, PW1 said that he had no gazette notice or report showing that the locality was a designated residential area.
25. PW 1 told the court that he did not engage any expert to assess the noise or sound pollution or levels before filing the suit, nor did he bring before the court any audio or video recordings of the alleged noise or sound pollution by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. Asked about the letter from NEMA dated 8.12.2023, PW 1 confirmed that there were several churches in the area apart from the 1<sup>st</sup> respondent. PW 1 denied that he was neither interested in the land occupied by the 1<sup>st</sup> & 2<sup>nd</sup> respondents, nor had he threatened or intimidated them with a view of driving them out of the area.
  26. PW 1 told the court that the only reason he had complained about the 1<sup>st</sup> & 2<sup>nd</sup> respondents was after they threatened or infringed his right to privacy and jeopardized his livelihood with effect from 2021, after it became unbearable to tolerate the excessive noise or sound emanating from the church premises.
  27. Similarly, PW 1 denied using political, family, or administrative power or influence to threaten the 1<sup>st</sup> & 2<sup>nd</sup> respondents or intimidate the 3<sup>rd</sup> – and 5<sup>th</sup> respondents to harass the 1<sup>st</sup> & 2<sup>nd</sup> respondents. While admitting that the 1<sup>st</sup> & 2<sup>nd</sup> respondents were licensed to worship, PW 1 told the court that the rights to worship and expression of the 1<sup>st</sup> and 2<sup>nd</sup> respondents had to be exercised within the parameters of the law, without interfering with his right to a clean and healthy environment, more so when his house doubles up as a library and an office for academic work. PW 1 confirmed that all his demand letters were delivered to the respective offices even if they did not bear receipt stamps or dates. He also stated that the 3<sup>rd</sup> respondent should not have approved development plans for the 1<sup>st</sup> & 2<sup>nd</sup> respondents to operate a church in the vicinity.
  28. Cross-examined by Miss Muyai, advocate for the 4<sup>th</sup> respondent, PW 1 told the court that he used his cellphone to measure the noise or sound levels though he was aware of the laid down procedures on instruments to measure noise. PW 1 insisted that there was nothing wrong with using his cellphone to measure the noise or sound decibels. As to whether the 4<sup>th</sup> respondent approved the 1<sup>st</sup> & 2<sup>nd</sup> respondents to emit noise or sound, PW 1 told the court that he had not come across such approvals by the 4<sup>th</sup> respondent.
  29. PW 1 told the court that he mistakenly thought the 4<sup>th</sup> respondent was the same as the ministry in charge of the environment for the 3<sup>rd</sup> respondent. However, PW 1 insisted that some officer from the NEMA office, Meru, had called him and visited the locality after he complained. However, he said that he was not present during the site visit by NEMA officers. PW 1 told the court that he equally visited the NEMA regional offices in Meru to complain.
  30. Cross-examined by Miss Mbaikyatta, learned litigation counsel for the state, why he had sued the 5<sup>th</sup> & 6<sup>th</sup> respondents, PW 1 told the court that he did so because his constitutional rights and freedoms had been violated or threatened with violations by the 1<sup>st</sup> & 2<sup>nd</sup> respondents and due to the failure to act on his concerns by the state officers after receiving the demand letters.
  31. In re-examination, PW 1 told the court that the 3<sup>rd</sup> respondent officers visited his land to assess the complaints and made several recommendations given the proximity of the 1<sup>st</sup> – 2<sup>nd</sup> respondent's church to his matrimonial or residential home. PW 1 said that other than the expert report by the 3<sup>rd</sup> respondent, no action was taken against the 1<sup>st</sup> & 2<sup>nd</sup> respondents by the 3<sup>rd</sup> - 6<sup>th</sup> respondents.
  32. George Koome M'Ikiara testified as PW 2. Relying on his witness statement filed on 20.12.2023 as his evidence in --chief, PW 2 told the court that he was a senior chief 1 Kaaga location with effect from 2007 and had known the petitioner for over 15 years, while the 1<sup>st</sup> & 2<sup>nd</sup> respondents were known to him for four years.



33. PW 2 confirmed that the 2<sup>nd</sup> respondent came to establish a church in the area in 2020, initially at the chief's camp, extending his church fellowship sessions to late at night; the community started raising complaints to his senior officers, one of which was to the assistant county commissioner on 30.10.2020.
34. Due to the complaints, PW 2 told the court that the 1<sup>st</sup> & 2<sup>nd</sup> respondents relocated from the chief's camp to a land next to the petitioner's home, only for them to start emitting excessive sounds or noises to which the petitioner complained severally to him. PW 2 told the court that after the complaint was raised, he informed the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who refused to heed to his warnings, leading to a demand letter in late 2021 to the assistant county commissioner, who verbally ordered the 1<sup>st</sup> & 2<sup>nd</sup> respondents to minimize the noise and not to fellowship late in the night.
35. Further, PW 2 confirmed to the court that some officers of the 4<sup>th</sup> respondent had called him enquiring about the excessive noise or sound, who also warned the 1<sup>st</sup> & 2<sup>nd</sup> respondents to desist, all in vain.
36. PW 2 confirmed that the 1<sup>st</sup> & 2<sup>nd</sup> respondents had become a nuisance to the local community because of excessive noise from their sound instruments and had failed to heed the warnings given to them by the relevant government agencies. PW 2 also confirmed that it was out of the excessive noise or sound that he had to order the 1<sup>st</sup> & 2<sup>nd</sup> respondents to vacate the chief's camp after operating from there for two years.
37. PW 2 confirmed that the 1<sup>st</sup> & 2<sup>nd</sup> respondents and the petitioner were neighbors who acquired land from the same person, Alice Munene, who was also a fellowship member with the 1<sup>st</sup> respondent. PW 2 denied being threatened by the petitioner to help him drive out the 1<sup>st</sup> & 2<sup>nd</sup> respondents from the locality.
38. Similarly, PW 2 told the court that though he had not recorded the noise or sound levels from the 1<sup>st</sup> & 2<sup>nd</sup> respondents' premises, the issues had been raised severally by the local community and that he had also witnessed the excessive noise or sound that was disturbing the local's way of life, unlike other churches in the vicinity.
39. PW 2 stated that the intensity of the 1<sup>st</sup> & 2<sup>nd</sup> respondents' fellowship activities and the levels of noise or sound from the church premises were different or unique from that arising from other churches in the locality, hence the complaints by the local community. As an area chief, PW 2 clarified that he was privy to all that takes place within his jurisdiction; hence, the reason that he was confident that the noise or sound from the 1<sup>st</sup> & 2<sup>nd</sup> respondents' church was excessive or unbearable including reports made to him by one Mr. Mwenda a neighbor in the area who is a county commissioner.
40. In addition, PW 2 denied being used by PW 1 to intimidate one Alice Muko Munene to sell the land occupied by the church to him. PW 2 told the court that he was not aware if the area where the church is situated was a designated residential area or had been zoned as such by the county physical planning department through a public participation exercise involving the locals.
41. Further, PW 2 confirmed that apart from the complaints by the petitioner, many more complaints had been raised against the 1<sup>st</sup> & 2<sup>nd</sup> respondents by the local community. Despite efforts to amicably resolve the issue, PW 2 told the court that the 1<sup>st</sup> & 2<sup>nd</sup> respondents became adamant even after a meeting at the assistant county commissioner's offices, hence the petition.
42. Geoffrey Mutwiri testified as DW 1 and relied on his affidavits dated 11.6.2023 as his evidence in chief. He also relied entirely on his replying affidavit sworn on 12.7.2023 as his evidence in chief. DW 1 told the court that he had authority from the 1<sup>st</sup> respondent to represent them as an ordained and licensed pastor of a registered church with a membership of about 200 people majority drawn from the



- Kaaga locality. He produced annexures to the affidavit, namely an authority to swear dated 11.6.2023, certificate of operation dated 15.5.2023, a certificate of registration of church dated 17.12.2012, and a letter dated 8.12.2022 from the 3<sup>rd</sup> respondent as D. Exh No's. (1), (2) (a) (b), (3) and (4) respectively.
43. DW 1 stated that D. Exh No. (4) was written after county environment officers visited the suit premises, which confirmed the presence of other churches within the locality. He said that despite wild allegations against them by the petitioner, no stop order was issued to them by the 3<sup>rd</sup> – 6<sup>th</sup> respondents.
44. Further, DW 1 told the court that it was the petitioner who had been threatening and or throwing waste to their land as per photographs produced as D. Exh No. (5). DW 1 also relied on a pin certificate for the church produced as D. Exh No. (6). Additionally, DW 1 produced a witness statement dated 22.2.2024 for Stephen Kiambi, a church elder as D. Exh No. (7).
45. Regarding the evidence of PW 2, DW 1 told the court that he used to have a cordial relationship with the area chief until 2023. He denied that the church had been running fellowship daily to the detriment of the local community as alleged by the area chief. While admitting that a report was made against the church to both the county commissioner and the assistant county commissioner, DW 1 told the court that the issue was discussed at length, but the petitioner's demand for the church to relocate was unrealistic.
46. DW 1 told the court that the county commissioner was unable to resolve the issue, given that it also touched on land ownership. He maintained that PW 2 had been sent by PW 1 to request that the said land be sold to him instead of the church in order to resolve the complaints.
47. DW 1 denied that NEMA officers ever visited the church and made any recommendations on the church sound systems as operating beyond the permitted levels. DW 1 denied receiving any noise sound expert report to show that the church was operating beyond the designated noise levels, nor were any audio or video reports before the court to verify the petitioner's complaints.
48. According to DW 1, ninety percent of the 1<sup>st</sup> respondent's followers were from the local community, to which the church had played a significant role as a rehabilitation center for petty offenders and drunkards over and above other social charitable activities. He also said that he had no personal grudge against the petitioner and was of the considered view that they should reconcile and continue with peaceful co-existence.
49. DW 1 told the court that the petitioner was a member of MCK church and was not aware if any county physical planner had complained of an unapproved development plans or construction of the church. DW 1 denied that the sound equipment had been erected on the petitioner's perimeter fence.
50. DW 1 told the court that he was not aware of any reports by the 3<sup>rd</sup> – 6<sup>th</sup> respondents for non-compliance with any developments, laws, guidelines, regulations, and directives. DW 1 denied that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were liable for any alleged breach of the petitioner's right as set out in Articles 42 and 70 of *the Constitution*.
51. Additionally, DW 1 admitted that D. Exh No. (4) had made some recommendations that the church restrict its activities and stop attaching sound-amplifying devices on the petitioner's perimeter fence or compound. Further, DW 1 admitted that going by observation number (2) of the report, it was clear that there was a possibility of excessive noise for the church which is made up of iron sheets with no soundproof apparatus.
52. DW 1 admitted that though the church was using sound amplifiers, some clothing sheets or curtains had been erected to minimize the sound. He clarified that the dispute was initially handled at the local administration level before it came to court. DW 1 told the court that before putting up the church, he



- sought and obtained all the requisite approvals, permits, and authorizations from NEMA, the county government of Meru, and the physical planning department. Therefore, DW1 insisted that none of the 3<sup>rd</sup> – 6<sup>th</sup> respondents stopped the construction of the church structure in the locality.
53. DW 1 told the court that he had learned from the area chief and Alice Mukomunene that the petitioner had initially expressed interest in the land before the church acquired it. DW 1 insisted that there were other point sources of noise pollution, yet the petitioner had singled out the church as the primary contributor. DW 1 acknowledged that the petitioner lived in the neighborhood, though he could not confirm whether he was living there full-time.
54. Nevertheless, DW 1 denied that the church relocated from the chiefs' camp out of noise pollution; otherwise, the space was too small to accommodate the growing number of church faithfuls. He also denied being aware of any threats to the petitioner MCK by the growth or competition out of the 1<sup>st</sup> respondent popularity. DW 1 denied receiving any threats from the petitioner's brother who is in charge of the internal security docket at the national level either directly or through the local provincial administration officers.
55. Again, DW 1 stated that the 1<sup>st</sup> respondent was in the process of erecting a modern church facility in the disputed area by procuring the necessary building permits, approvals, and licenses and was not, therefore, against effecting the necessary sound or noise-proof measures to minimize or reduce the noise or sound. DW 1 told the court that the church used four speakers, a sound mixture, and a power amplifier to run the base speaker.
56. In cross-examination by the counsel for the 3<sup>rd</sup> respondent, D.W. 1 confirmed that no building permits or approvals were sought and obtained from the county government before the church structure was erected. Similarly, during cross-examination by counsel for the 4<sup>th</sup> respondent, DW 1 admitted that the church did not seek or obtain approvals from NEMA before it commenced operations of the church in 2019. DW 1 said that he was not aware of any environmental impact assessment report or audit license carried out or issued to the church by NEMA.
57. Further, DW 1 confirmed that D. Exh No. (4) was not from NEMA but the county environment office and was therefore not aware there are set noise or sound limits for places of worship in Kenya. He clarified that paragraphs 16 and 23 of the replying affidavit as far as it referred to NEMA officers as opposed to county environment officers was erroneous.
58. Nevertheless, DW 1 was emphatic that NEMA officers eventually visited the church premises during the pendency of this petition to investigate the claim, where they interviewed him and the local community, who returned a positive response in favor of the church.
59. DW 2 was Alice Mukomunene. She relied on a witness statement dated 23.2.2024 as her evidence in chief. She told the court that she was the one who allowed the 1<sup>st</sup> & 2<sup>nd</sup> respondents to erect a mabati church structure on part of her land, separate and distinct from what the petitioner acquired from her many years ago. DW 2 admitted that the church structure had no soundproof apparatus save for cloth/curtains all around it. She however denied that late-night fellowship sessions were running for a whole week.
60. D.W. 2 said that the petitioner had issued threats to her, given that he had some interest in the land leased out to the church. Though a neighbor and a friend, DW 2, said her relationship with the petitioner had deteriorated after the presence of the church in her compound. She denied that the church was emitting excessive noise or sound.



61. Cross-examined by counsel for the county government of Meru, DW 2 told the court that she had no lease agreement for the agricultural land occupied by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. Similarly, Mr. Mwirigi told the court that she never applied for a change of user from the county government while allowing the church to be erected or operated on her agricultural land since it was a temporary structure.
62. On selling the land, DW 2 stated that she had no intention of disposing of the church land to the petitioner, even if that was recommended to her as a solution when the parties appeared before the county commissioner before the suit was filed. DW 2 said that she was not disturbed by the alleged noise or sound, yet she lives within the church compound, unlike the petitioner, who is some meters away.
63. After the defense testimony, parties were directed to file and exchange written submissions. The petitioner relied on written submissions dated 15.8.2024 and isolated five issues for the court's determination. On the jurisdiction; the petitioner submitted that under Articles 21, 23(1), and 23 of the Constitution, read together with Sections 101, 102, and 103 of EMCA this court has jurisdiction to entertain a petition against anyone who has breached the duty to observe, respect, protect, promote and fulfill rights under the Bill of Rights and Freedoms.
64. In this case, the petitioner submitted that the legal framework for noise pollution is set out under Sections 101-103 of EMCA, which is a component of a right to a clean and healthy environment. The petitioner submitted that after the complaints, the 1<sup>st</sup> & 2<sup>nd</sup> respondents despite notice, refused to stop the loud music subsequent to which the 3<sup>rd</sup> to 6<sup>th</sup> respondents indeed abdicated their responsibilities to address his concerns and stop the pollution.
65. The petitioner submitted that the petition meets the criteria set out in Annarita Karimi Njeru vs Republic (1976 – 1980) KLR and in the Trusted Society of Human Rights alliance vs. A.G. & others (2012) eKLR by setting out the specific right infringed, manner of infringement and the loss or damage caused. Relying on Articles 42 & 70 and Part II of Clause 3 of the 6<sup>th</sup> schedule to the Constitution, the petitioner submitted that he has a right to a clean and healthy environment and to apply for redress without demonstrating the loss or damage suffered.
66. Further, the petitioner submitted the responsibility to control air and noise pollution as well as other public nuisance vested with the 3<sup>rd</sup> respondent, and therefore, under Section 3 (3) of EMCA, he had a right to move to court without prejudice to any action, lawfully available to stop the nuisance. The petitioner submitted that the court, under Sections (3) (3) and 9 (2) of EMCA, has broad powers to deal with the petition and issue appropriate reliefs to him.
67. Again, the petitioner submitted that lead agencies' acts of commission or omission on controlling or managing the environment under Section 9 (2) EMCA, notably the 4<sup>th</sup> respondent, had the mandate to coordinate environment management activities and promote the integration of environmental consideration into development policies, plans, programs and projects for improvement of the quality of human life in Kenya.
68. The petitioner submitted that the 3<sup>rd</sup> & 4<sup>th</sup> respondents had the mandate as both lead agencies to work in unison to control all public nuisances, including noise pollution in the environment within Meru County.
69. Similarly, the petitioner submitted that noise under EMCA (Noise and Excessive Vibrations) Pollution Control Regulations 2009 is defined as any undesirable sound that is objectionable or that may cause adverse effects on human health or the environment, while noise pollution is defined as the emissions of uncontrolled noise that is likely to cause danger to human, health or the environment.



70. The petitioner submitted that Regulation 3 (1) thereof sets out the general prohibitions against the making or causing of loud, unreasonable, unnecessary, or unusual noise that annoys, disturbs, injures, or endangers the comfort, repose, health, or safety of others and the environment.
71. As to the determination of loud or unreasonable noise, the petitioner submitted that Regulation 3 (2) thereof set out the factors to consider, including time of the day, proximity to a residential area if it is recurrent, intermittent or constant, level and intensity whether enhanced by any electronic or mechanical means and whether the noise can be controlled without effort or expense to the person making the noise.
72. The petitioner submitted that Regulations 5 & 6 thereof set out the levels as per the 1<sup>st</sup> schedule unless the noise was reasonably necessary for the preservation of life, health, safety, or property with the responsibility to measure it to the lead agencies.
73. Given the preceding legal framework, the petitioner submitted that on a balance of probability, he has proved that he made a complaint to the 3<sup>rd</sup> – 6<sup>th</sup> respondents who, instead of considering the available evidence to ascertain proof or breach, did absolutely nothing to help solve his claims. Reliance was placed on *Elizabeth Kurer Heier & another vs County Government of Kilifi & others (2020) eKLR*.
74. The petitioner submitted that he had proven violation of his rights through evidence, whether actual, documentary, circumstantial, or presumptive, as held in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR* especially the evidence of PW 2, the confirmation report produced as D. Exh No. (4), demand letters, written with no response or remedial action.
75. Similarly, the petitioner submitted that the acts of the 1<sup>st</sup> & 2<sup>nd</sup> respondents annoyed or disturbed his comfort and peaceful repose. Yet, the 3<sup>rd</sup> – 6<sup>th</sup> respondents were intransigent in failing to carry out their constitutionally donated responsibilities to control the loud noise emission or enforce remedial measures to safeguard his right to a clean and healthy environment.
76. Other than visiting the church and issuing a report contrary to their mandate, the petitioner submitted that the 3<sup>rd</sup> & 4<sup>th</sup> respondents failed to take any steps to prevent the noise and instead allowed the 1<sup>st</sup> & 2<sup>nd</sup> respondents to continue their operations even after establishing that they were not permitted or approved to do so.
77. On noise levels, the petitioner submitted that the 3<sup>rd</sup> -6<sup>th</sup> respondents left the responsibility to compile the noise level measurement to him, yet it was their mandate to do so after complaints were raised under Regulation 6 above, hence neglecting to undertake a statutory obligation.
78. Furthermore, the petitioner submitted after the 3<sup>rd</sup> respondent neglected to measure the noise level and therefore cannot be heard to say that the noise level requirements were not met.
79. Under Article 42 of *the Constitution*, the peittioenr submitted that he had a right to a healthy and clean environment, which has been violated. Reliance was placed on *Adrian Kamotho Njenga vs Council of Governors and others (2020) eKLR*, more so when the 1<sup>st</sup> & 2<sup>nd</sup> respondents were his immediate neighbors. The petitioner urged the court to grant the orders sought, for he has been deprived of the right to life under Article 26 of *the Constitution* of Kenya. Reliance was placed on *Pastor Jesse vs A.G. & Petition No. 683 of 2009*.
80. The 1<sup>st</sup> & 2<sup>nd</sup> respondents relied on written submissions dated 13.8.2024. They submitted that the petitioner lacks the specificity of the alleged rights, its violation, and the particulars of the breach, and it is in general terms and was not supported by any tangible evidence to substantiate its contents that



the locality is a designated residential area and that the noise or sound emitted exceeded the stipulated levels in line with Sections 107 – 109 of the *Evidence Act*.

81. Again, the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the petitioner failed to adduce evidence that he lives or owns any property within the locality in line with the law.
82. The 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that P. Exh No's. (1) & (2) were not duly served or acknowledged receipt of the respondents and therefore were unreliable or unauthentic. Concerning P. Exh No. (3), the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that it contradicted the petition and the evidence produced by PW 1 & PW 2.
83. Further, the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the petitioner was driven by malice and used undue influence, being a brother to the C.S internal security, to drive a personal vendetta against Alice Mukomunene, the landlord of the 1<sup>st</sup> & 2<sup>nd</sup> respondents and also intimidated PW 2.
84. The 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the law does not prohibit noise but only regulates noise from one place to another, which the petitioner had failed to adduce evidence to demonstrate a violation of the factors set out under Regulation 3 (2) of EMCA (Noise and Excessive Vibrations) Pollution Rules 2009) by ascertaining the levels of the said noise through an expert opinion.
85. In addition the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the issue before the court demanded a serious balance and consideration of constitutional and legal rights for each of the central compatriots in the dispute, given that the 1<sup>st</sup> & 2<sup>nd</sup> respondents' fundamental right to freedom of conscience, religious, worship and expression, which rank in priority and should not be limited under the guise of environmental pollution. In the absence of a substantive cause shown to limit them for being pollutants level as contemplated by Section 101 of EMCA.
86. They 1<sup>st</sup> & 2<sup>nd</sup> respondents urged the court to consider the concept of sustainable development; otherwise, the alleged noise was not objectionable as contemplated under Sections 2 & 3 of EMCA, more so when the 1<sup>st</sup> and 2<sup>nd</sup> respondents are equally entitled to constitutional rights to environmental access for purposes of spiritual or worship purposes.
87. They submitted that the law contemplates noise that is harmful to health and the environment, and therefore, without expert report, the court should not grant the reliefs sought.
88. The 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that he who alleges must proof, and in this case, the burden of proof was on the petitioner to substantiate all the allegations in the petition, including entitlement to general damages.
89. Given that the petitioner did not raise the issues with NEMA or lodge a claim with the National Environment Tribunal (NET), the 1<sup>st</sup> & 2<sup>nd</sup> respondents urged the court to find the petition contravening the law.
90. The 3<sup>rd</sup> respondent relied on written submissions dated 14.8.2024. It isolated three issues for determination. On disclosure of a cause of action against the 3<sup>rd</sup> respondent, it was submitted that the gravamen against the county government of Meru was on paragraphs 14 & 16 of the petition, yet P. Exh No. 3 was not copied to or received by it.
91. On the approvals, the 3<sup>rd</sup> respondent submitted that no evidence was produced showing that the petitioner sought for the cancellation of any approvals of the construction of the church or lodged a complaint with the relevant department of the county seeking redress, hence given the admission by DW 1 & DW 2 for no application for any building permits, the 3<sup>rd</sup> respondent was being faulted for an action it never undertook in the first instance.



92. Additionally, the 3<sup>rd</sup> respondent submitted that the petition was both premature and offended the doctrine of exhaustion, given that in the site visit report, it was clear that the petitioner had not exhausted the alternative mechanism under the physical planning and development department before moving to court. Reliance was placed on *Kibos Distillers Ltd & 4 others vs Benson Ambuti Adegga & others* (2020) eKLR.
93. The 3<sup>rd</sup> respondent also submitted that the petitioner failed to discharge the evidential burden that the noise complained of was above the permissible noise levels pursuant to regulations 6 (3) & (4) of the EMCA Regulations 2009. Reliance was placed on *Sohail Regency Management Ltd vs Dejavu Coco Glam Nail & Topsy Corner & others* (2022) eKLR.
94. In the absence of the petitioner seeking noise measurements by an authorized person, the 3<sup>rd</sup> respondent submitted that the court had no expertise to determine whether the noise was above the prescribed limits in order to find that there was an infringement of the petitioner's right to a clean and healthy environment.
95. The 3<sup>rd</sup> respondent submitted that the petitioner had merely made a generalized statement against it and, hence, had discharged no evidential burden against it. Reliance was placed on *Isaiah Ondiba Bitange & others vs. Institute of Engineers of Kenya & another* (2017) eKLR.
96. Finally, the 3<sup>rd</sup> respondent submitted that the petition was defective; its advice to the petitioner was appropriate and in order, considering that the zoning policy of the region was ideal for church establishment.
97. The 4<sup>th</sup> respondent relied on a list of authorities dated 9.8.2024, namely *Kilimani Project Foundation vs. B Concept Ltd t/a B Club NRB & others* (2018) eKLR, *Elizabeth Karer Heier & another vs County Government of Kilifi & others* (supra) *Pastor James Jessie Gitahi & others vs AG* (supra) *Odongo & others* (suing on his personal behalf and as Members of Kiembeni Hillside Resident Associations vs Mndugu t/a Holistic Mission for All Nations Kiembeni Worship Sanctuary & others) (2022) KEELC 137 06 KLR, *Gichu vs Obuya Otieno Ritzau t/a Bamburi Community High School & others* (2023) KELC 1922 KLR, *Kalu vs Mudzombya & others* E & L Petition KLR and KEELC and *Castly Boniface S. Katana & 119 others vs DG NEMA & others* (2020) eKLR.
98. The issues calling for the court's determination are:
  - i. If the petition meets the constitutional threshold.
  - ii. If the petitioner should have exhausted any existing internal dispute mechanism before filing the petition.
  - iii. If the petitioner has disclosed a cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
  - iv. If the petitioner has pleaded and proved a breach of his right to a clean and healthy environment by each of the respondents.
  - v. If the petitioner is entitled to any constitutional reliefs.
  - vi. What is the order as to costs?
99. A party seeking relief on account of a breach of constitutional rights and freedoms must comply with both the legal framework relating to a constitutional petition that is contained in Articles 22, 23, 159 & 258 of *the Constitution* as read together with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice & Procedure Rules (2013) Mutunga Rules).



100. The long-standing principles as distilled from *Anarita Karimi Njeru vs Republic* (supra), *Mumo Matemu vs. Trusted Society of Human Rights Alliance* (supra) *CCK vs Royal Media Services Ltd & another* (2014) eKLR, *David Ndii & others vs AG & others* (2021) eKLR, are that the pleadings have to be specific, and precise in framing issues in a constitutional petition so that the opposite party may know what the real point to be discussed is, the infringement, the basis of the grievance, the link between the right and the aggrieved party, the provisions of *the Constitution* alleged to have been violated and the manifestation of the infringement, the evidence to sustain it and the reliefs sought.
101. The 1<sup>st</sup> – 4<sup>th</sup> respondents have attacked the petition for failing to specify with precision, the provisions of the constitutional rights violated and the manner of the violation. Pleadings are aimed at bringing the parties to an issue to prevent trial by ambush and to diminish expense and delay in trial.
102. In *Mumo Matemu* (supra), the court observed that the test inquire whether the complaints against the respondent in a constitutional petition is fashioned in a way that gave proper notice to the respondents about the nature of the claims being made so that they could adequately prepare their case and to warrant a proper judicial determination on merits.
103. As to locus standi, the court observed that under Article 258 of *the Constitution* lays the parameters. Rule 10 of the Mutunga Rules provides that the petition must disclose the name and address of the petitioner, the facts relied upon the constitutional provisions violated, the nature of injury caused or likely to be caused to the petitioner, details regarding civil or criminal proceedings related to the matters in issue, signature and the reliefs sought.
104. Having perused the petition before the court, I think it substantially complies with both the procedural and substantial law. The respondents were able to respond to it without seeking for better particulars. Therefore, there is no doubt that the petition raises constitutional issues or questions whose answers flows from *the Constitution* and not a statute.
105. The constitutional questions framed is whether or not the 1<sup>st</sup> and 2<sup>nd</sup> respondents infringed the petitioner's rights to a clean and healthy environment by setting up, operating, and running a church, conducting its church activities with loud noise or sound, hence infringing on the petitioner's rights as set out in Articles 42, 69 & 70 of *the Constitution*.
106. Additionally, the second limb of the constitutional question is whether the 3<sup>rd</sup> to 6<sup>th</sup> respondents abdicated their constitutional duties to enforce and or prevent the alleged violation of the petitioner's right through dereliction of duty or failure in undertaking a fair, efficient, and effective administrative action against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. See *Geoffrey Muthinja & another vs Samuel Mbugua Henry & others* (2015) eKLR.
107. The second attack on the petition is that the petitioner failed to invoke or exhaust alternative dispute resolution mechanisms before the institution of the present proceedings. In the *Speaker of National Assembly vs Karume* (Civil Application 92 of (1992) (1993) KECA 42 (KLR) 29<sup>th</sup> May (1992) (Ruling), the court observed that where there is a straightforward procedure for redress of any particular grievance prescribed by *the Constitution* or an act of parliament, that procedure must be strictly followed.
108. In *Kenya Ports Authority vs William Odhiambo Ramogi & others* (2019) eKLR, the court observed that a high court has unlimited jurisdiction, including the determination of a question of enforcement of the Bill of Rights and that constitutional violations seeking to be enforced are not mere boot traps.
109. The court observed that the non-exhaustion doctrine arises when a litigant aggrieved by an agency's action seeks redress from a court of law on an action without pursuing available remedies before the



- agency itself. The court said that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that all parties are diligent in the protection of their interest within the mechanism in place for the resolution outside the courts.
110. In *Nzomo (suing on his behalf and behalf of Kunde Road Residents Welfare Association vs Ontine Real Estate Ltd & others E & L Petition E004 of 2023* (2024) KEELC 1522 (KLR) (14<sup>th</sup> March 2024) Ruling, at issue was a breach of the obligations under the Physical Land Use and Planning Act (PLUPA) or the EMCA. The court cited *Abidha Nicholus vs The AG & others* (2023) eKLR and *Kibos Distillers Ltd vs Benson Adegea Ambuti* that question of violating of constitutional right lie with the Environment and Land Court (ELC) Under Article 22, 23 (3) & 162 2 (b) of *the Constitution* as read with Sections 4 (1) & 13 of the ELC Act and that neither NET, Energy & Petroleum Regulatory Authority (EPRA) and or Energy & Petroleum Tribunal (EPT) had jurisdiction to determine the alleged violations of *the Constitution*.
  111. The court observed that the right to access the court for redress of alleged constitutional violations should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.
  112. In *Nicholas vs AG & others National Environment Complaints Committee & others Petition E007 of (2023)* (2023) KESC 113 KLR (28<sup>th</sup> December (2023) Judgment, the court cited *John Florence Maritime Service Ltd & another vs C.S for Transport & Infrastructure & others* (2019) eKLR that a court should not have a narrow mind when evaluating whether a matter raises a constitutional issue and that the search for constitutional issues should extend beyond specific constitutional provisions and should not start or stop with a determination of whether or not there is a specific provision of *the Constitution* that is at issue.
  113. The court said that there was a need for a holistic inquiry of all the various facets of the law as pleaded by the parties if they do indeed raise a constitutional question. As to administrative silence of and the failure by NEMA to enforce its stop order impacting the appellant and the residents of the area, as well as the jurisdiction law limits by EPRA and EPT and the filing of the petition before ELC, the court reviewed the law schools of thought as captured in the caselaw of *Orata International Ltd vs D.G NEMA* (2019) Eklr, *Ochieng Christine J Borbor & others vs NEMA* (2022) KEELCC 3947 (KLR) (28.7.2022) (Ruling) of *Angote Oscar J and NEMA vs. Overlook Management Ltd & others* (2019) eKLR, *Kibos Distillers, Ltd & others vs Benson Ambuti Adegea & others* (2020) eKLR, *KCN Kasinga vs David Kiplagat Kirui & others* (2015) eKLR, *West Kenya Sugar Co. Ltd vs Busia Sugar Industries Ltd & others* (2017) eKLR, *NGOs Coordination Board vs E.G & others, Katiba Institute (Amicus Curiae) Petition 16 of (2019)* (2023) KESC 17 (KLR) *Constitutional & Human Rights* (24<sup>th</sup> February 2023) (Judgment) and *Albert Chaurembo Mumbo & others vs Maurice Munyao & others S.C Petition No. 3 of 2016* (2019) eKLR.
  114. The court emphasized that where there exists an alternative method of dispute resolution established by law, courts must exercise restraint in exercising their jurisdiction and must give deference to the dispute resolution bodies established by statute with the mandates to deal with such specific disputes in the first instance, unless there are exceptional circumstances.
  115. The court regarding the High Court's jurisdiction under Articles 163 (2) (b) & 165 (1) (b) (c) 2 (b) *the Constitution* Section (4) of the *Land Act* and Section 13 (1) of the ELC Act vis a vis Section 125 of the EMCA & Sections 10 and 36 of the *Energy Act*, said that the latter laws do not oust the jurisdiction of the ELC Court.



116. The court clarified that ELC, in respect of the procedure for the determination of disputes that involve the management of the environment or the issues of petroleum and energy the ELC has original jurisdiction on matters that NEMA handles unless such jurisdiction is expressly and ousted explicitly in a constitutional compliant manner. The court guided by Kenya Revenue Authority & others vs Darasa Investments Ltd (2018) eKLR held that the availability of an alternative remedy was not a bar.
117. Further, the court fortified by Cortec Mining (K) Ltd vs. C.S Ministry of Mining and others (2017) eKLR & KRA & others vs Keroche Industries Ltd C.A No. 2 of 2018 held that under Section 9 (4) of the *Fair Administrative Action Act*, where there are exceptional circumstances, a party may be exempted in the interest of justice from the non-exhaustion doctrine.
118. The court said that nothing precluded a court from adopting a nuanced approach that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that the established alternative dispute resolutions can offer.
119. In this petition, whereas the 3<sup>rd</sup> – 4<sup>th</sup> respondents were given an opportunity to respond to the petition substantively, they did not offer any factual response as to whether they acted on the complaints by the petitioner and initiated any of the internal dispute resolution mechanisms on time or at all. Further, the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not, on oath or through viva voce evidence, state factually whether any remedial action or parallel proceedings or findings were undertaken, completed, and or were pending in any forum established under the law.
120. There can be no right in law without a remedy. A right gives a person, a right holder, a claim the respect of duty by another person, the duty bearer whose duty is directed to the right holder. As such, a right is a normative relation between a right holder and a duty bearer pertaining to a protected object. A duty holder has to meet both positive and negative obligations. See James Kanyitta Nderitu vs A.G. & another (2019) eKLR. Musembi & 10 others vs Moi Educational Centre Co. Ltd and others *Petition 2 of 2018* (2021) KESC 50 KLR 16<sup>th</sup> July 2021 (Judgment).
121. The petition before the court questions both the breach and the inaction or complicity of the 3<sup>rd</sup> & 4<sup>th</sup> respondents in perpetuating or tolerating the breach after it was reported to them by the petitioner. Article 21 of *the Constitution* mandates the state and state organs to observe, respect, protect, promote, and fulfill the Bill of Rights. Public and state officers who man these state organs, therefore, have a cardinal duty to safeguard the rights of all citizens. A duty bearer who has dereliction of its constitutional duties, especially a state organ under Articles 19, 20, and 21(1), (2), (3) & (4) of *the Constitution*, is estopped in law from invoking the non-exhaustion doctrine when an aggrieved party invokes Articles 22 & 24 of *the Constitution* to enforce those rights and freedoms. The state is a duty bearer on matters of human rights
122. As much as the 3<sup>rd</sup> & 4<sup>th</sup> respondents are invoking the non-exhaustion doctrine, they do not state when and how the alleged internal mechanisms were initiated and undertaken and the remedial action delivered and implemented. Similarly, the 3<sup>rd</sup> & 4<sup>th</sup> respondents have not pleaded whether the said available internal dispute resolution mechanisms are adequate, specific, efficacious and capable of handling the dispute, especially in granting constitutional reliefs as provided under Article 23 of *the Constitution*. See Nicholas Abitha (supra). Shifting or impeding the petitioner's right to access the court for redress in the manner suggested by the 3<sup>rd</sup> & 4<sup>th</sup> respondents would merely frustrate the enforcement of fundamental rights & freedoms.
123. The right to a clean and healthy environment as held in William Odhiambo Ramogi & others (supra) in the absence by the 3<sup>rd</sup> – 4<sup>th</sup> respondents aims to find an answer to their petition and demonstrate that the claimed constitutional violations are mere boot traps and merely platitudes to gain access to



- court when they investigated the claims and found it non-existent, frivolous and or ridiculous, cannot oust the jurisdiction of this court under the pretext of non-exhaustion doctrine.
124. Section 3 (3) of EMCA grants the petitioner the right to a clean and healthy environment and the right to apply to this court for redress without prejudice to any other action with respect to the same matter that is lawfully available for the court to make such writs or give such directions as it may deem appropriate to prevent, stop, discontinue, compel a public officer to take action or require an ongoing activity to be subjected to an environmental audit or to restore the degraded environment or to provide compensation.
  125. In absence of material disclosure by the 3<sup>rd</sup> & 4<sup>th</sup> respondents on the efforts that they took to investigate, enforce, stop, or discontinue the alleged breach, I find the obligations of this court to interrogate the claim by the petitioner on merit and render a determination one way or the other is appropriately invoked. The 3<sup>rd</sup> respondent brought nothing by way of evidence to show that the 3<sup>rd</sup> respondent's liaison committee under *Physical and Land Use Planning Act* (PLUPA) is in place and was capable of enforcing its recommendations as per D. Exh No. (4), let alone granting the reliefs sought in this petition. Similarly, the 4<sup>th</sup> respondent brought no evidence of any intervention they made toward enforcing, investigating, and or implementing the rights of the petitioner.
  126. Article 70 (1) of *the Constitution* grants the petitioner the right to apply to the court for redress in addition to any other legal remedies that are available in respect of the same matter. There is no evidence from the respondents that other available alternative dispute resolution mechanisms to the petitioner would be efficacious or adequate.
  127. Matters falling under PLUPA and EMCA do not include constitutional violations. In the absence of an efficacious or an appropriate forum to address the constitutional grievance raised by the petitioner, this court would be failing in its mandate in exercising restraint, refraining or declining from entertaining the petition.
  128. The respondents have submitted that the petition lacks specificity or precision, is not ripe for determination, and, therefore, is unmerited. There is no evidence that the respondents struggled to identify the facets of the petitioner's claim or that their right to a fair hearing was denied. None of the respondents sought better particulars of the claim. The issues raised in the petition are not moot, hypothetical, abstract, or academic. The issues raised are justiciable. See *Wanjiru Gikonyo and others vs National Assembly of Kenya and others* (2016) eKLR,
  129. The next issue is whether the petition raises a cause of action against the 3<sup>rd</sup> & 4<sup>th</sup> respondents. Articles 22 (1), 42, 69 & 70 of *the Constitution*, as read together with Section 4 of the EMCA, give every person a right to institute court proceedings and claims that a right to a clean and healthy environment, which is alleged to have been denied, violated or infringed or is threatened with infringement. Articles 23 (2) and 258 (2) provide that such a person may act in his name in the interest of a group or class of persons or in the public interest.
  130. A cause of action refers to a combination of facts to obtain a remedy in court from another and includes a right of a person violated or threatened with violation. See *Karl Wehner Claasen vs Commissioner of Land & others* (2019) eKLR. In *AG & another vs Andrew Miano Githinji & another* (2016) eKLR, the court observed that a cause of action was an act on the part of the defendant that gave the plaintiff his cause of complaint.
  131. The complaints against the 3<sup>rd</sup> & 4<sup>th</sup> respondents were pleaded in paragraphs 4 & 8 – 17 of the petition. The 3<sup>rd</sup> respondent mandate, functions and duties are set out under Articles 176, 185(2), 186(1), and 187 (2) as read together with the Fourth Schedule of *the Constitution*. Among the functions set out



- in part 2 of the Fourth Schedule is the control of air and noise pollution and other public nuisances. County planning and development also fall under the 3<sup>rd</sup> respondent.
132. *The constitution* on the Fourth Schedule has placed pollution, physical planning and designated land use, including change of user at the doorsteps of county governments. Pursuant to this the obligation is upon the 3<sup>rd</sup> respondent to ensure that the zoning regulations are in place, observed and complied with by all. The enforcement mechanism rests on the shoulders of the 3<sup>rd</sup> respondent by virtue of the Physical and Land Use Act 2019.
  133. The 3<sup>rd</sup> respondent has urged the court to find no cause of action disclosed against it by the petitioner and by extension to find the petition lacking evidence to sustain it.
  134. Other than grounds of opposition and written submissions the 3<sup>rd</sup> respondent led no facts on how it discharged its constitutional and statutory duties as set out in the fourth schedule, the EMCA Act and the physical planning and land use Act as pertains to the dispute or complaint that was lodged with it by the petitioner.
  135. In *Avenue Car Hire & another vs Slipha Wanjiru Muthengu C.A No. 302 of 1997*, the court observed that no judgment can be based on written submissions since written submissions are not a mode of receiving evidence set under Order 18 Rule 2 of the Civil Procedure Rules. See also *Muchami Mugeni vs Elizabeth Wanjugu Mungara & another C.A no. 141 of 1998*, *DT Moi vs Mwangi Stephen Murithi & another (2014) eKLR*.
  136. In *Chebii & others vs SBI International Holdings AG K & another (2024) KEELC 3294 (KLR) 11<sup>th</sup> April 2024 (Judgment)*, the court observed that a project proponent cannot be relieved of its duty to take steps for the safety of its neighbors and another person who may be affected by the project.
  137. The 3<sup>rd</sup> and 4<sup>th</sup> respondents are the regulatory and licensing authorities obligated to investigate and deal with complaints on environmental pollution and if need be conduct some forms of monitoring and auditing apart from visiting the site.
  138. The 3<sup>rd</sup> respondent in this matter sent officers to the site who came up with a report on top of the report the 3<sup>rd</sup> and the 4<sup>th</sup> respondents had a primary duty of ensuring the adverse effects were mitigated by the 1<sup>st</sup> & 2<sup>nd</sup> respondents regarding the environmental pollution. The court is not convinced at all that the 3<sup>rd</sup> and 4<sup>th</sup> respondents exercised their constitutional role of prevention or precautionary principle.
  139. The nuisance continued till the petition had to invoke the jurisdiction of this court under Section 13 of the ELC Act.
  140. The Bill of Rights applies to all laws and binds all state organs and all persons. Article 21 (1) of *the Constitution* provides that it is the fundamental duty of the state and its organs and public officers to observe, respect, protect, promote, and fulfill the rights of fundamental freedoms in the Bill of Rights. The enforcement of the Bill of Rights is both horizontal and vertical. The objects of devolution include the powers of self-governance to the people to protect and promote the interests and rights of the people. One of the national values and principles in human rights is the rule of law and sustainable development. See *Thuku Kirori & others vs County Government of Murang'a (2014) eKLR*.
  141. From the reading of *the Constitution*, it leaves no doubt in me that the 3<sup>rd</sup> & 4<sup>th</sup> respondents cannot run away from its constitutional mandate to control air and noise pollution within its jurisdiction. See *Elizabeth Kurer Heir and another v County Government of Kilifi and others (supra) and NEMA versus K.M. (2023) KECA775(KLR) (23<sup>rd</sup> June 2023) (Judgment)*.



142. In *Odando & another (supra)*, the court observed that EMCA defines pollution as any direct or indirect alteration of the physical thermal, chemical, biological, or radioactive properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely to cause a condition that is hazardous or potentially hazardous to public health safety.
143. Article 69 (1) of *the Constitution* obligates the state to eliminate processes or activities that are likely to endanger the environment. The environment includes people. The duty to safeguard the environment binds the 1<sup>st</sup> – 6<sup>th</sup> respondents.
144. The 4<sup>th</sup> respondent under Section 9 (1) of EMCA is the principal instrument of government in the implementation of all policies relating to the environment. It has a primary role to play in preventing air and noise pollution. It is not only an investigator but also a prosecutor of those who infringe on the environment. It offers coordination, advisory and technical support. See *Martin Osano Rabera & another vs Municipal Council Nakuru & others (2018) eKLR*, air quality regulations are to be enforced by NEMA. As part of government, the 3<sup>rd</sup> – 6<sup>th</sup> respondents have broad statutory obligations in relation to the environment as set out in Articles 69 (1) (a) (h) of *the Constitution*. The 1<sup>st</sup> & 2<sup>nd</sup> respondents are obligated under Article 69 (2) of *the Constitution* and Section 3 (2) EMCA to cooperate with state organs to protect and preserve the environment and eliminate processes and activities that pollute the environment.
145. The 3<sup>rd</sup> & 4<sup>th</sup> respondents have a constitutional duty to protect the environment under the Fourth Schedule of *the Constitution* as read together with Sections 3, 9 & 71 of EMCA. Section 142 of EMCA creates offenses relating to pollution. Section 5 of EMCA makes the cabinet secretary responsible for environmental matters to promote cooperation among public departments and county government departments as they engage in environmental protection programme through policy formulation and directives. The principles of sustainable development set out under Section 5 of EMCA include among other things, polluter pay and precautionary principles.
146. In view of the constitutional and statutory framework alluded to above, the petition raises a cause of action against all the respondents herein and is, therefore, not an abuse of the court process.
147. The next issue is whether the petitioner has proved a breach of his constitutional right to a clean and healthy environment. In *Leonard Otieno vs Airtel (K) Ltd (2018) eKLR*, the court observed that the decision on violating constitutional rights should not and must not be made in a factual vacuum and that there must be clear evidence to support the violation. In *Kibos Distillers Ltd (supra)*, the court observed that pollution is primarily proved by empirical, technical, and scientific evidence and not by layman's opinion, testimony or depositions.
148. In *Gichu (supra)* the court cited *Isaya Luyari Odando & another Registered official of Ufanisi Centre vs NEMA & others (2021) KEELC 2235 (KLR) (15<sup>th</sup> July 2021)* on the specific duty/roles of NEMA in preventing air and water pollution. The court cited *John Chamia Nganga vs A.G. & another (2019) eKLR* that a nuisance is an act or omission that interferes or disturbs or annoys persons right in connection with land, caused when the consequences of the person's actions on his land are not confirmed to the land but escape to his land causing encroachment of physical damage or unduly interfering with the neighbors use or enjoyment of his land.
149. Under Regulation 9 (3) of the EMCA Coordination of Noise and Excessive Vibrations) Pollution Control Regulations, no person shall make or cause to be made any loud, unreasonable, unnecessary, or unusual noise which annoys, disturbs, injures, or endangers the comfort, repose, health or safety of others and the environment.



150. After 2010, NEMA ceased to issue noise permits in compliance with Schedule 4 of *the Constitution*. That function went to the 3<sup>rd</sup> respondent following the gazette in 2013. It is the one which issues and enforces the noise regulations. Some counties have also promulgated their noise laws in tandem with the national standards set by the 4<sup>th</sup> respondent.
151. Following the complaint by the petitioner to the 3<sup>rd</sup> respondent, P. Exh No's. (1), (2), (3) & (4) were produced. From the observations in P. Exh No. (4) it is clear that there was a possibility of noise pollution since the 1<sup>st</sup> – 2<sup>nd</sup> respondents' structure was made of iron sheets with no soundproof equipment or walls. The report conducted after the petition wrote to it P. Exh No. (1) & (2) and a site visit by the 3<sup>rd</sup> respondent where recommendations were also made on the way forward. The 1<sup>st</sup> & 2<sup>nd</sup> respondents, in paragraph 17 of the replying affidavit, admitted that there was a site visit and a report made by the 3<sup>rd</sup> respondent as well as the 4<sup>th</sup> respondent. The report was also produced as D. Exh No. (4) by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. Section 100 of the *Evidence Act* comes into play. The 1<sup>st</sup> – 3<sup>rd</sup> respondents cannot contradict a document in clear and plain language.
152. None of the parties disputed the contents of the report or objected to its production without calling the maker, J. Kagwiria Joyce, an environmental officer with the 3<sup>rd</sup> respondent. It also included a picture of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' church. The 1<sup>st</sup>–3<sup>rd</sup> respondents did not dispute the findings and recommendations in the report.
153. Section 97 (1) of the *Evidence Act* stipulates that when the terms of a document are clear, extrinsic evidence may not contradict it. The burden of proof under Sections 107 – 111 of the *Evidence Act* is on he who wants the court to find the existence of specific facts. The letter or report makes admission to the facts in issue that the petitioner complained with the 3<sup>rd</sup> respondent.
154. Secondary or parole evidence from either the 1<sup>st</sup> and 2<sup>nd</sup> respondents and written submissions from the bar by the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot challenge, contradict or vitiate an expert report. In the absence of an answer to the petition, the 3<sup>rd</sup> respondent is estopped in law from submitting from the bar on non-receipt or stamping of the demand letters by the petitioner or trying to discredit a valid report from its officers, who not only received the complaint but also visited the site, made observations and findings and came up with recommendations on the way forward.
155. Admission of facts can be through pleading or exhibits. The 3<sup>rd</sup> respondent cannot, therefore, renege on its report dated 8.12.2022. See *Boniface S. Katana & others vs D.G NEMA & others (2020) eKLR*. In this petition, the 1<sup>st</sup> & 2<sup>nd</sup> respondents, in paragraph 12 of the replying affidavit, admitted that they are neighbors with the petitioner, who had complained with the 3<sup>rd</sup> – 6<sup>th</sup> respondents over noise pollution.
156. In paragraph 7 thereof, the 1<sup>st</sup> & 2<sup>nd</sup> respondents did not dispute the findings and recommendations of the 3<sup>rd</sup> respondents and or tell the court what remedial measures they undertook as recommended in the letter with effect from 8.12.2022 to the filing of the petition on 5.6.2023.
157. The nexus between the petitioner to the 1<sup>st</sup> & 2<sup>nd</sup> respondents' church has been established. The 1<sup>st</sup> and 2<sup>nd</sup> respondents admit such facts Under Article 70 (3) of *the Constitution*, the petitioner need not prove any damage or injury suffered. The report by the 3<sup>rd</sup> respondent confirms that the 1<sup>st</sup> & 2<sup>nd</sup> respondents made no soundproofing or measures to minimize, reduce, avoid, or eradicate any excessive noise or sound. DW 1 admitted that the church premises have no permanent walls or soundproof or noise-reducing equipment in line with the framework on noise pollution/standard set out under Sections 101 – 103 of the EMCA and EMCA Regulations 2009 as read together with Articles 42 & 69 of *the Constitution*.



158. Section 58 of EMCA requires a project proponent, before commencing, executing, or proceeding with activities set in the Second Schedule, to submit a project report and an environmental impact assessment study to the authority before being issued with any license. In this petition, the 1<sup>st</sup> & 2<sup>nd</sup> respondents did not produce anything to back the contents of paragraph 27 of the replying affidavit that they were authorized to emit noise or operate their activities by the relevant government agencies.
159. It is the 1<sup>st</sup> & 2<sup>nd</sup> respondents who are alleging authority to operate by the lead agencies. The legal burden on compliance with the law alluded to above on an environmental impact assessment license under Section 58 of EMCA, ruling out emission of excessive noise or sound in general and, by extension, the concerns of the petitioner was on the 1<sup>st</sup> & 2<sup>nd</sup> respondents particularly in view of D. Exh No. (4) also produced as P. Exh No. (3).
160. In *John Mutunga Waititu vs China Wuyi (K) Co. Ltd* (2018) eKLR, the court cited Section 3 (3) (d) & Section III of EMCA that it is not necessary for a plaintiff under the Act to show a right or interested in the property environment or land alleged to have been or likely to be harmed.
161. In my view, therefore, the petition did not require to plead or produce a title deed for the suit land where the neighbors that is the 1<sup>st</sup> & 2<sup>nd</sup> respondents have admitted he is their neighbour. In any event, the fact of the neighborhood and its proximity to the 1<sup>st</sup> & 2<sup>nd</sup> respondents is admitted both in the replying affidavit, and the 3<sup>rd</sup> respondent report produced as P. Exh No. (4).
162. Therefore, the nexus between the complaint and the petitioner is not disputed at all. See also *Africa Centre for Rights and Governance & others vs Municipal Council of Naivasha* (2017) eKLR.
163. As to whether the 3<sup>rd</sup> respondent discharged its constitutional mandate to control the noise pollution, other than preparing D. Exh No, (4), there is no evidence that the 3<sup>rd</sup> respondent ensured total compliance with its report to the satisfaction of the petitioner between 8.12.2022 to the filing of the petition in 2023. In *Charles Lekuyen Nabori & others vs A.G. & others* (2008) eKLR, the court said that under Section 3 (1) of the EMCA, the right to life includes the right to a clean and healthy environment.
164. The liaison committee under the *Physical and Land Use Planning Act* 2019 and the NEMA Tribunal under EMCA have no jurisdiction on determining issues regarding violation of the right to a clean and healthy environment and the fact that the petitioner under Article 70 (3) of *the Constitution* need not prove any injury, loss or damage. The site visit and a report by the 3<sup>rd</sup> respondent are not disputed. There is no evidence that the 3<sup>rd</sup> & 4<sup>th</sup> respondents exercised their constitutional and statutory mandate to demand compliance with *the Constitution* and the law on pollution by the 1<sup>st</sup> & 2<sup>nd</sup> respondents to remedy the complaints or loss or damage on time or at all since the nuisance was a continuing one, even after establishing that the 1<sup>st</sup> & 2<sup>nd</sup> respondents had no noise permit or license.
165. The dereliction or abdication of constitutional and statutory responsibilities by the 3<sup>rd</sup> – 6<sup>th</sup> respondents is apparent in this petition. Despite a report and a complaint, the 3<sup>rd</sup> and 4<sup>th</sup> respondents continued or condoned the 1<sup>st</sup> & 2<sup>nd</sup> respondents' acts of infringing on the constitutional right of the petitioner to a clean and healthy environment for at least six months before the petition was filed. In *Pastor James Jesse Gitahi & others vs A.G.* (supra), the court observed that prevention of noise and vibration pollution was a recognized component of the right to a clean and healthy environment and that excessive noise and vibrations were capable of causing bodily injury, hence the need to regulate it.
166. The 1<sup>st</sup> & 2<sup>nd</sup> respondents were given a chance to voluntarily comply with D. Exh No (4), to ensure that the petitioner enjoys a peaceful environment as a resident, husband, lecturer and family man so that the 1<sup>st</sup> & 2<sup>nd</sup> respondents may enjoy their right of worship in a manner that does not violate the rights



of others. See *Republic vs Nairobi City county Alcoholic Drinks Control and Licensing Board exparte Space House Bar & Grill Ltd J.R. Misc Application No. 613 of 2016.*

167. The 4<sup>th</sup> respondent had a duty to issue a stop or restoration order, while the 3<sup>rd</sup> respondent could have issued an enforcement order for its report. There is no evidence that there was such action by the 3<sup>rd</sup> and 4<sup>th</sup> respondents until the demand letter dated 23.4.2023 was issued to the 1<sup>st</sup> & 2<sup>nd</sup> respondents.
168. At the hearing of the petition, the 1<sup>st</sup> & 2<sup>nd</sup> respondents tabled nothing to show compliance with D. Exh No. (4) by way of soundproofing measures as demanded by the 3<sup>rd</sup> respondent and the petitioner in the alternative to relocating.
169. Section 108 4(a) – (d) of EMCA mandated the 4<sup>th</sup> respondent to issue an environmental restoration order to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to cease or prevent the continuation or cause of the noise pollution as an environmental hazard. A restoration order would have, under Section 109 thereof, stated the activity person's effective date of action to be taken to remedy the situation, powers to visit, penalties, and the rights of the addressee to appeal against the order before the NET.
170. Under Article 47 of *the Constitution*, the petition had a right to a fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. The 3<sup>rd</sup> – 6<sup>th</sup> respondents before the court appeared to feign ignorance of their constitutional and statutory functions, powers, and duties on matters of pollution & planning. There is a presumption that administrative power, once invoked, would be exercised reasonably. See *Republic vs A.G. & another exparte Waswa & others* (2005) KLR 280.
171. In the absence of evidence of the exercise of the said constitutional and statutory powers & done I find the 3<sup>rd</sup> – 4<sup>th</sup> respondent party to or liable for the continuing breach of the petitioner's rights.
172. On whether or not the 3<sup>rd</sup> and 4<sup>th</sup> respondents exercised their constitutional duties regarding noise or sound regulation the 3<sup>rd</sup> and 4<sup>th</sup> respondents took the risks of leaving the petitioner's evidence unchallenged. In *CMC Aviation Ltd vs Crusair Ltd* (1987) KLR 103, the court said that pleadings in a suit are generally not evidence that ordinarily is given on oath and, therefore, averment depends on evidence for proof of its contents. Even where rebuttal evidence is not adduced, still a court can only conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities if there is credible and believable evidence standing in the absence of rebuttable evidence as held in *Charterhouse Bank Ltd (under Statutory Management vs Frank N. Kamau* (2018) eKLR.
173. In *Daniel Kibet Mutai & others vs AG* (2016) eKLR, the court cited *Phillip Tirop Kitui vs AG* (2018) eKLR and *Peter O Nyakundi & others vs Principal Secretary State Department of Planning, Ministry of Devolution & Planning & another* (2016) eKLR, that grounds of opposition are only deemed to address issues of law. The court said affidavit evidence occupies a higher pedestal than the ground of opposition which issues of law intended to be argued. It went on to say that affidavit evidence was legally admissible in a court of law. As such, the court held that affidavits by the petitioners was essentially admitted in the absence of a replying affidavit to challenge the facts. The court observed that what the petitioners swore in the affidavits was direct evidence of what transferred, and therefore, by not filing a replying affidavit to rebut the factual evidence, the court could not become the respondents' advocates by questioning evidence that had not been challenged.
174. The question as to whether the 3<sup>rd</sup> & 4<sup>th</sup> respondents have offered any justification for not undertaking their constitutional and statutory obligations to honor and enforce the petitioners' right to a clean and healthy environment can quickly be answered by this court. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not offer any affidavits or oral evidence to counter the factual issues raised in the petition. The 3<sup>rd</sup> – 6<sup>th</sup>



- respondents did not file any response to the petition or call any evidence. Counsels for the 3<sup>rd</sup> – 6<sup>th</sup> respondents merely cross-examined the petitioner and his witnesses as well as the 1<sup>st</sup> & 2<sup>nd</sup> respondents witnesses.
175. Cross-examination serves several purposes, among them to elicit evidence in support of the party. Cross-examining casts doubts on or undermines the witness's evidence to weaken the opponent's case, undermine the witness's credibility, and lastly, put the party's case and challenge the disputed evidence.
  176. After cross-examination, the only way a party can rebut the issues raised during cross-examination is by calling witnesses, attaining evidentiary standards and the burden of proof.
  177. As to whether the petitioner is entitled to constitutional reliefs, the petitioner in paragraph 17 of the petition pleaded that unless the respondents are ordered to adhere to the constitutional and legal obligations, he will continue to suffer injury, loss, and damage. The contents of loss, damage, and injury were pleaded in paragraphs 8 -15 of the petition.
  178. As indicated above, the 3<sup>rd</sup> and 4<sup>th</sup> respondents offered no justification for inaction or dereliction of constitutional duties. By opting not to adduce expert evidence to rebut the petitioner's complaint, 1<sup>st</sup> & 2<sup>nd</sup> respondents did not attach anything to show that they were permitted to and have adhered to the law on noise pollution such that what is emitted from their church is reasonable, normal, regular, usual, conducive and incapable of causing environmental damage.
  179. It is unfortunate that instead of addressing the core issue before the court, the 1<sup>st</sup> and 2<sup>nd</sup> respondents descended to personalized attacks on the person of the petitioner and the alleged use of undue influence to malicious or unfounded constitutional claims. Parties are bound by their pleadings. The 3<sup>rd</sup> respondent, as a regulator and enforcer of the law, abdicated their responsibility and became a player in the dispute, yet it had a duty to regulate the pollution.
  180. The 3<sup>rd</sup> respondent, in its written submissions, terms its own document D. Exh No. (4) or P. Exh No. (3) as contradicting the petition. Similarly, it terms P. Exh No's. 1 & 2 as unreliable or authentic, yet D. Exh No. (4) acknowledges receipt of the petitioner's complaint. EMCA Regulations 2009 were gazetted before the 2010 Constitution. They cannot, therefore, override Articles 42, 69, and 70 of *the Constitution* and the law on devolution.
  181. There is no cross-petition by the 1<sup>st</sup> & 2<sup>nd</sup> respondents that the upholding of the right to a clean and healthy environment for the petitioner would amount to a breach of their freedom of worship, conscience, religion, and expression as submitted by the 3<sup>rd</sup> respondents. D. Exh No. (4) was issued by the 3<sup>rd</sup> respondent while aware of the 1<sup>st</sup> & 2<sup>nd</sup> respondents rights and freedoms.
  182. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged the court through written submissions to find and hold that such freedom of worship, conscience, religion, and expression should not be limited under the guise of environmental pollution, for they rank in priority in the absence of substantive cause to the contrary through a report under Section 101 of EMCA.
  183. Further, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the noise level pleaded, which is not objectionable as contemplated under Sections 2 & 3 of EMCA, should be considered as regards the 1<sup>st</sup> & 2<sup>nd</sup> respondent's equal right to environmental access for purposes of religion, spirituality, or worship. In this petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged the court not to imagine sound levels and grant the reliefs sought in the absence of expert reports to substantiate the petition. P. Exh No. (3) and D. Exh No. (4) was produced without objection by the 3<sup>rd</sup> respondent as required under Rule 28 (9) of the Mutunga Rules 2013.



184. Sections 35 & 65 of the *Evidence Act* define that documentary evidence could be either primary or secondary. Primary evidence is the document itself. D. Exh No. (4) was authored by the 3<sup>rd</sup> respondent's environmental officer, who visited the site after receiving the pollution complaints from the petitioner. The document was made by an officer of the 3<sup>rd</sup> respondent in the discharge of a professional and statutory duty. The document amounts to admissible evidence. It was made in its ordinary course of professional duty by the maker as provided under Section 33 (2) of the Evidence. It was not attacked during its production by PW 1 and DW 1 on account of admissibility, relevancy, and proof under Section 136 of the *Evidence Act*.
185. The 3<sup>rd</sup> respondent, as indicated above, did not deny the existence of the report in the grounds of the opposition to the petition dated 10.1.2024. Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not deny the existence of the report. They went ahead to produce the same as part of their exhibits. Parties are bound by their pleadings and cannot depart from such as held in *Raila Amolo Odinga & another vs IEBC & others* (2017) eKLR. Rule 20 (4) & (5) of the Mutunga Rules provides the summoning and examination of witnesses. Section 2 of the *Evidence Act* applies to affidavits presented to any court. In *CCK & others vs Royal Media Services* (supra), the court observed the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of the contravention or infringement.
186. Looking at the exhibits produced by the petitioner in general and in particular, P. Exh No. (3) or D. Exh No. (4), I find no merits in the contention that the petition lacks evidence to sustain it. The report by an environmental officer of the 3<sup>rd</sup> respondent was clear on the findings and recommendations.
187. The failure by the 3<sup>rd</sup> – 4<sup>th</sup> respondents as lead agencies on matters environment to file a replying affidavit to challenge and or controvert the sworn averments by the petitioners on dereliction or neglect of constitutional and statutory obligations cannot amount to a proper or valid denial of allegations made on oath. See *Peter O. Nyakundi & others* (supra), *Prof. Olaka Onyango & others vs Hon. AG Petition 8 of 2014* and *Eliud Nyauma Omwoyo & others vs Kenyatta University & others* (2016) eKLR.
188. The case of *Sohail Regency Management Co. Ltd* (supra) relied on by the 3<sup>rd</sup> respondent is distinguishable for mitigating measures had been pleaded and undertaken. A replying affidavit by the 4<sup>th</sup> respondent was in place to show the readiness to enforce noise compliance regulations in 2009. There were conflicting expert reports prepared by the parties to enable the court to make an informed decision based on the most current situation in the suit premises. The court nevertheless gave appropriate orders in favor of the petitioner.
189. In *Isaiah Ondiba Botange* (supra) is also distinguishable from the instant case for the petition raises a constitutional question or issues and is backed by a report made by the 3<sup>rd</sup> respondent admitting the possibility of pollution and taking of no remedial action on the part of the 1<sup>st</sup> & 2<sup>nd</sup> defendants.
190. In response to the petition, the 1<sup>st</sup> & 2<sup>nd</sup> respondents did not dispute the veracity, legality, authenticity and the probative value of D. Exh No. (4) or rely on another expert's opinion to show that the noise arising out of their premises was permissive or within accepted limits. Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did plead or have not indicated what remedial action or measures, if any they undertook after D. Exh No. (4) was issued to them by the 3<sup>rd</sup> respondent.
191. In *Odongo & others vs Mdugu t/a* (supra), an inspection enforcement or improvement order had been availed before the court, showing the sound as a pollutant under Regulation (3) 2009. The court observed that although the area was semi-planned with no social amenities and parcels of land designated in a high-density residential area, the church was proximate and had no soundproof equipment. The court termed the report made under Section 117 of EMCA as requiring a noise



- survey by the County Government of Mombasa for purposes of proper physical planning to avoid social amenities springing up in residential areas. The court found that the lead agency, the county government of Mombasa, had failed to take action after being notified by NEMA. The court found that inaction on the part of the 1<sup>st</sup> respondent resulted in excessive noise emission from the churches, hence violating the petitioner's right.
192. In *Kalu vs. Mudsomba* (supra), the respondent had taken the attitude such as that of the 1<sup>st</sup> & 2<sup>nd</sup> respondents, terming the petitioner as an enemy of the church and ignoring resolutions of the area chief and an environmental officer resolution. The petitioners were alleging exposure to psychological stress and trauma out of excessive noise from a makeshift mabati church playing loud music during praise and worship services using loudspeakers. The court declined to issue an interim permanent injunction; unlike the present petition, there was no conclusive investigation report.
  193. Regarding the appropriate prayers as sought by the petitioner, the constitutional court has the power to issue constitutional reliefs. In *KPA vs Mitubell Welfare Society & others* (2016) eKLR cited *Satrose Ayuma & 11 others vs Registered Trustees of Kenya Railways Staff Retirement Pension Scheme & others HC NRB Petition 65 of 2010* and *Kepha Omondi Onjaro & others vs A.G. & others NRB HCC Petition 239 of 2014* and *CCK* (supra), the court dwelt on post-judgment directives or reservations, orders, pleadings, reports or affidavits as per Article 23 (3) of *the Constitution* and Rules 23 & 29 of the Mutunga Rules.
  194. In *Mitubell Welfare Society vs KPA* (2021) KESC 34 (KLR) (11<sup>th</sup> January 2021) (judgment), the question was inter alia on post-judgment supervision, otherwise known as structural interdicts. The court observed that Article 23 (3) of *the Constitution* was not an exhaustive list of appropriate remedies on what constitutional court can grant as held in *CCK vs Royal Media Services* (supra) and *Muruatetu & Another vs Republic* (2017) KESC 2 (KLR) (14<sup>th</sup> December 2017) Judgment.
  195. The court said that structural edicts must be specific, appropriate, clear, effective, and directed to the parties to the suit or any other state agency vested with the constitutional or statutory mandate to enforce the order.
  196. In *Gitobu Imanyara & others vs AG* (2016) eKLR, the court observed that the primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or defer any future infringements which determination is based on rationality and proportionality, a declaration aimed at meeting the justice of the case as a powerful statement in effecting separation for the breach, damages being a secondary remedy only made in the most appropriate cases.
  197. Having found that the 1<sup>st</sup> & 2<sup>nd</sup> respondents breached the petitioner's rights to a clean and healthy environment, and guided by the caselaw cited, I find that the petitioner deserves constitutional remedies. His complaint before the 3<sup>rd</sup> & 4<sup>th</sup> respondents was met with only a site visit and a report produced as P. Exh No. (3) or D. Exh No. (4). The intervention by the 3<sup>rd</sup> & 4<sup>th</sup> respondents was to say the least not lackluster.
  198. The petitioner was not questioning a development control or planning within the county under Sections 61 (3) & (4), 76 & 78 PLUPA. The jurisdiction and the county physical and land use planning liaison committee is only invoked when there exists an application for permission or decision relating to development permission. His claim was specific to noise pollution. Further, the petitioner was not questioning the environmental impacts of a proposed development under sections 31, 32 & 33 of the EMCA. The complaint was about noise pollution arising out of daily church services. There was no Environment Impact Assessment (EIA) license in existence issued to the 1<sup>st</sup> & 2<sup>nd</sup> respondents for



section 129 of EMCA to be invoked. The petition is not multifaceted as was in *Kibos Distillers Ltd (supra)* for this court to exercise judicial restraint or absenteeism and defer the dispute to the established statutory authorities.

199. Therefore, the court finds and holds that the petitioner's rights to a clean and healthy environment were, are, and risk breach, infringement, and violation with the continued unregulated development, operations, management, carrying out, and running of church services or activities by the 1<sup>st</sup> and 2<sup>nd</sup> respondents oblivious or in complete ignorance or exercise of the right to worship, conscience or religion in utter disregard to the petitioner's right to privacy, a clean and healthy environment.
200. A permanent injunction shall be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents through their officials, agents, servants, or faithfuls from interfering with the petitioner's right to a clean and healthy environment, in the exercise of their freedom of worship, conscience, and religion in the absence of any noise permits by the lead agencies in the parcel of land next to the petitioner's homestead. An order shall be issued compelling the chief officer in charge of the Department of Environment Natural Resources and Climate Change of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to investigate, regulate, measure, and permit noise or sound arising out of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' church premises, issue and enforce any stop or discontinuance of nuisance orders regarding sound and noise pollution within three weeks from the date hereof and to furnish the report before the court for post-judgment directives. The court declined to issue any compensatory damages since the petitioner did not provide any evidence to justify such damages. There will be no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**In presence of**

C.A Kananu

Mutungu for the plaintiff

Mavere for the 5<sup>th</sup> defendant

6<sup>th</sup> defendant

**HON. C K NZILI**

**JUDGE**

