



REPUBLIC OF KENYA



Kangwana & 5 others v Temple Point Resort Limited & 6 others; Athman (Chair of the Watamu Association) (Interested Party) (Environment & Land Petition E010 of 2024) [2024] KEELC 13909 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13909 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E010 OF 2024

EK MAKORI, J

DECEMBER 18, 2024

**IN THE MATTER OF ARTICLES 10, 19, 28, 29, 35, 40, 42,
69, 70, AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ENVIRONMENT AND COORDINATION (NOISE
AND EXCESSIVE VIBRATION POLLUTION) (CONTROL) REGULATION, 2009**

AND

**IN THE MATTER OF SECTION 7,9,87,101,102,103,142,144 & 147 OF THE
ENVIRONMENTAL MANAGEMENT & COORDINATION ACT (EMCA)**

AND

**IN THE MATTER OF KILIFI COUNTY LIQUOR CONTROL
ACT, SECTION 8, 11, 14, 31 AND SECTION 47(1) (C)**

AND

**IN THE MATTER OF PART IV & V OF KILIFI COUNTY
ENVIRONMENTAL (REGULATION AND CONTROL) NO. 17 OF 2016**

AND

**IN THE MATTER OF SECTION 36,79.80,87, &102 OF THE WILDLIFE
CONSERVATION AND MANAGEMENT ACT 2013, CAP 376, LAWS OF KENYA**

AND

**IN THE MATTER OF WATAMU MARINE PROTECTED
AREA (WMPA) MANAGEMENT PLAN 2016-2026**

AND

**IN THE MATTER OF SECTIONS 98, 100, 101, 102, 104,111, 112, 117, 119, 9TH
SCHEDULE, PART II & PART III OF THE TOURISM ACT, CAP 381 OF 2011**



AND

IN THE MATTER OF RULE 16 (2), TOURISM REGULATORY AUTHORITY REGULATIONS

BETWEEN

MR. JARED B. KANGWANA 1ST PETITIONER
MRS. TABITHA KANWANA 2ND PETITIONER
MR. RICHARD BRADLEY 3RD PETITIONER
MRS. DEBORAH BRADLEY 4TH PETITIONER
MR. MAURO SAIO 5TH PETITIONER
MRS. MAURO SAIO 6TH PETITIONER

AND

TEMPLE POINT RESORT LIMITED 1ST RESPONDENT
LICHTHAUS BAR & RESTAURANT LIMITED 2ND RESPONDENT
THE COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT
**KILIFI COUNTY DIRECTORATE OF BETTING & LIQUOR
CONTROL 4TH RESPONDENT**
THE KENYA WILDLIFE SERVICE 5TH RESPONDENT
THE TOURISM REGULATORY AUTHORITY 6TH RESPONDENT
**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ... 7TH
RESPONDENT**

AND

**SHARIFF ATHMAN (CHAIR OF THE WATAMU
ASSOCIATION) INTERESTED PARTY**

RULING

1. Notice of Motion Application before this Court for determination is the one dated 1st July 2024 and seeks, inter alia, the following prayers:
 - a. Spent.
 - b. Pending the disposition of the Application, an injunction be issued against the 1st and 2nd Respondent, their servants, agents, or employees from contravening the First Schedule of the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 and in particular from exceeding the following sound levels:

Day dB(A) Night dB(A)

Indoor 45 35



- c. Pending the disposition of the Application, an injunction be issued against the 2nd Respondent for light and flashes at night from its lighthouse.
- d. Pending the disposition of the Application, an injunction be issued against the 2nd Respondent from degrading the environment.
- e. A Mandatory Injunction should be issued against the 3rd, 4th, and 7th Respondents, compelling them to cancel liquor licenses and permits for Kaleidoscope Festival events to the 2nd Respondent that contravene the law.
- f. A Mandatory Injunction be issued compelling the 3rd & 4th Respondent to investigate the 2nd Respondent's business of selling alcohol within a residential area and submit a report in court.
- g. A Mandatory Order is issued to the 7th Respondent to forthwith stop the degradation of the environment by the 2nd Respondent and Order for the production of documents.
- h. A Mandatory Order is issued compelling the 2nd Respondent to produce under oath a copy of all the documentation as directed by the Court vide the Order dated 31st July 2024.
- i. A mandatory injunction should be issued against the 3rd to 7th Respondents, compelling them to issue and enforce closure notices against the 2nd Respondent for contravention of the law and regulations on noise.
- j. A Mandatory Injunction be issued against the 5th Respondent compelling it to prevent further degradation of the environment by the 2nd Respondent and to produce documents and public participation details at its disposal, allowing its establishment of the 2nd Respondent within a protected Marine National Reserve.
- k. A Mandatory Injunction should be issued against the 6th Respondent, compelling them to produce all public participation details, documentation, licenses, and approvals to issue licenses to the 2nd Respondent. Also, suspend the activities of the 2nd Respondent for carrying out activities that contravene *the Constitution* and the law.
- l. A Mandatory Order is issued to the 3rd Respondent to convene its Technical Committee to prepare a report to be filed in court within 14 days of the order of the court or such lesser time as may be ordered for the process of change of use undertaken by the 2nd Respondent's.
- m. A Mandatory Order directing the 3rd Respondent to convene its Technical Committee to investigate if the directors of the 2nd Respondent are criminally liable for breach of any land planning laws.
- n. Restoration order under Section 57(3) of the Physical & Land Use Planning Act, 2019, to restore the suit properties to their original condition.
- o. In the alternative, the 3rd Respondent be directed and ordered to restore the land and recover the restoration cost from the 2nd Respondent.
- p. Any other relief that the court may deem in the interests of justice, inclusive of a court-sanctioned site visit.
- q. Costs be awarded to the Petitioner.



2. The Applicants, through affidavits deposed on behalf of the Petitioners by Jared B. Kangwana, stress that the 1st and 2nd Respondents operate entertainment joints that sell alcohol and host social events in a residential area in Mida Creek, Watamu, Kilifi County. They have repeatedly violated the noise regulations under the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009, necessitating immediate action.
3. The 2nd Respondent's entertainment joint is situated within a low-density residential area without planning permission or change of user.
4. That Despite numerous requests, neither the Petitioners nor the area residents have been provided with any evidence of a change of user or planning permission obtained.
5. The 3rd to 7th Respondents have consistently failed/refused to assist the Petitioners and the residents, who have made numerous requests for intervention. This has caused significant frustration and hindrance in the resolution of the issue, a situation that the Petitioners and residents find deeply distressing.
6. The Applicants argue that due to the relentless nuisance caused by the 2nd Respondents, six residents of Watamu living in close proximity to the 1st and 2nd Respondents' properties felt compelled to sign a petition for the institution of legal proceedings. This petition underscores the severity of the situation and the urgent need for resolution.
 - a. The 1st Respondent on account of noise pollution;
 - b. The 2nd Respondents on account of noise, waste, and light pollution;
 - c. The 3rd and 4th Respondent, on account of abdicating their constitutional and statutory mandate leading to violation of the Petitioners' rights through issuance of liquor licenses to the 2nd Respondent in contravention of Kilifi County Liquor Control Act and *Alcoholic Drinks Control Act* 2010; allowing the operation of the 2nd Respondent in a residential area; breach of Article 35 of *the Constitution* for failure to respond to the Petitioners' requests/demands to provide documents relating to the County approvals and licensing of the 2nd Respondents.
 - d. The 5th & 6th Respondents for abdicating on their statutory duty and failing to control noise and waste pollution within a Marine National Reserve and failure to provide documents relating to the licensing of the 2nd Respondent in breach of Article 35 of *the Constitution*.
 - e. The 7th Respondent for failure to provide details relating to Environmental Impact Assessment regarding the activities of the 1st and 2nd Respondents and details of public participation, if any; failure to exercise general supervision and coordination of all environmental matter and regulate the 1st and 2nd Respondents; and failure to respond to the complaint raised by the Petitioners to them.
7. The 1st and 2nd Respondents continually assailed and breached the Applicants'/Residents' constitutional right to a clean and healthy environment, as encapsulated under Article 42 of *the Constitution*.
8. The 2nd Respondent has profited immensely from the nuisance on the suit property over the years, subjecting tens of residents to pain and suffering and general inconvenience. This has been on account of noise, light and waste pollution, and environmental degradation within a delicate protected marine ecosystem consisting of mangrove trees within the Watamu Marine National Reserve, a situation that the residents find deeply unjust.



9. Over the years, the 2nd Respondent's directors have brazenly refused to listen to the pleas of the residents who persistently raised complaints about the nuisance in the form of noise and waste pollution. The residents' pleas for tranquility have been met with retaliatory attacks, a response that has left them feeling desperate for a peaceful living environment.
10. The Applicants contend that they have thus approached the haven of this Court and brought the Application dated 1st July 2024 for determination on its merits and issuance of orders to further protect their fundamental rights and freedoms under *the Constitution*.
11. The 1st and 2nd Respondents have denied and disputed the allegations by the Petitioners. To this end, they have filed a Replying Affidavit sworn on 26th July 2024 by Jan Langer, supported by comprehensive evidence that rebuts the allegations by the Petitioners
12. In response to the allegations of operating without requisite licenses, the 1st and 2nd Respondents have denied the claims and have attached to their response - trade Licenses, Liquor Licenses, and Licenses to operate as a hotel issued by the Statutorily mandated bodies. They aver said Licenses are genuine and authentic, and the parties responsible for the issuance of the said Licenses have not denied their validity - exhibits "JL-1", "JL-2," and "JL-3" of the Replying Affidavit by Jan Langer.
13. In response to the allegation of waste dumping in the Mida Creek, the 1st and 2nd Respondents have denied the said allegations in toto and exhibited in evidence Environmental Audit Reports for the years 2023 and 2024, all of which concluded that the 1st Respondent, is compliant - exhibit "JL-4" of the Replying Affidavit.
14. Conversely, the 1st and 2nd Respondent alleges that the Petitioners have not adduced any material or evidence to support the allegations. The allegations of waste dumping remain just allegations.
15. As far as the allegations of noise pollution are concerned, the 1st and 2nd Respondents have - admitted in good faith that they have in the past received complaints from the Petitioners claiming that the noise from its premises was loud. However, the 1st and 2nd Respondents have contested and disputed the decibel readings exhibited by the Petitioners as inaccurate, unverifiable, and unreliable. The 1st and 2nd Respondents have exhibited Acoustic Assessment Reports by the Malindi Sub-County Office on 24th July 2024, showing that the 1st and 2nd Respondents are largely compliant. A copy of the Report is exhibited as "JL-9A". Unlike the Acoustic Report exhibited by the 1st and 2nd Respondents, the bare alleged noise levels stated by the Petitioners do not show how or when measurements were taken or the instrument used.
16. The 1st and 2nd Respondents have also introduced natural and climatic factors, which likely impact the sound produced. To this end, the 1st and 2nd Respondents have exhibited a Scientific Article by Lindsay Hannah - "Wind and Temperature Effects on Sound Propagation," Vol 20/2, New Zealand Acoustics Journal, supporting their arguments. The article posits that wind and temperature influence changes in sound levels.
17. The 1st and 2nd Respondents rely on the Acoustic Assessment Report and the Academic Articles exhibited as "JL-10" to argue that the Petitioners may well be experiencing high sounds due to the strong winds and high temperatures at the Coast when, in fact, the 1st and 2nd Respondents' activities are well within the standard and permissible levels.
18. That it is based on the allegations made by the Petitioners and the Replying Affidavit by the 1st and 2nd Respondents that this Court has been invited to grant the orders listed in the Application.



19. On July 31, 2024, the Petitioners successfully moved this Court, and orders 2, 3, and 4 of the Application were issued. Though the 1st and 2nd Respondents disputed the allegations, the Court issued the said orders, and the 1st and 2nd Respondents continue to comply fully with the law.
20. The 3rd and 4th Respondents, through the Chairman of the Kilifi North liquor licensing Committee, Jacob Sirya, aver that no liquor license has been issued to the 1st and 2nd Respondents because, despite payment for the year in review, an assessment by the liquor licensing court has not been conducted.
21. Regarding noise levels, there has been partial compliance with them. During the day, the levels are okay, but they surpass the recommended levels at night. The 3rd Respondent believes mediation between the parties can be done for an amicable solution.
22. The 3rd Respondent contends that the 2nd Respondent made basic Public Health requirements.
23. The 6th Respondent states that it issued licenses to the 1st and 2nd Respondents in line with the 9th Schedule of the *Tourism Act* after being satisfied that the 1st and 2nd Respondents had necessary permits, Environment Audit Reports, and Environment Impact Assessment Reports from NEMA. A complaint on the issue of noise pollution was made, and compliance was found.
24. In a rejoinder, the Petitioner believes the Respondents have not addressed the issue of public participation regarding the location and approval of the activities of the 1st and 2nd Respondents in residential and ecologically sensitive areas.
25. The 3rd Respondent admits that no liquor license has been issued to the 1st and 2nd Respondents to operate a bar in that area. Hence, a mandatory injunction should be issued directed at the 1st and 2nd Respondents to desist from activities that violate the Petitioners' rights to a clean and healthy environment.
26. From the materials and submissions placed before me, I frame the issues for this Court's decision regarding whether a mandatory injunction should be issued to compel the 1st and 2nd Respondents to cease acts that negate the Petitioners' rights to a clean and healthy environment. I also consider whether the consequential orders in the nature of mandatory injunction sought by the Petitioner will be germane to grant at this trial stage. And who should bear the costs of this application?
27. The Petitioners and Respondents presented arguments based on various constitutional provisions, laws, rules, regulations, and judicial precedents. It must be reckoned that at this stage, the Court's concern is to preserve the suit's substratum pending the disposal of the main petition itself.
28. Regarding the issuance of mandatory injunctions, the petitioners generally cited the decision in *Maher Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, *Kenya Power & Lighting Co. v Samwel Mandere Ogeto* [2017] eKLR and *Locabail International Finance Ltd v Agro - Export & another* [1986] 1 ALL 901. The 1st and 2nd Respondent cited the decisions in *Kenya Breweries Ltd & Another v Washinton Okeyo & 4 others* [2002] EA 109, *Bandari Investment & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR, while the 6th Respondent, on the same topic, relied on the decision in *Kindiki v Christian Foundation Fellowship Church on Mpakone Through its Registered Trustee & 5 others* [2024] eKLR.
29. I further reckon that the orders sought tend to mirror the main petition at an interlocutory stage. As a constitutional petition, the parameters of originating constitutional petitions must be adhered to. That is to say, not all violations can be considered constitutional violations and must be dealt with by



the doctrine of constitutional avoidance. See Trevelyan & Hancox JJ in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272:

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

30. Hand in hand with what I have stated, I further, in my view, opine that the petition and the application as drawn adopts a department that it is brought under the aegis of violation of Articles 42 and 70 of *the Constitution* on the right to a clean and healthy environment, and its enforcement but goes with a trajectory of a multifaceted claim insofar as the Petitioners seek to impugn processes leading to the issuance of various licenses and permits to the 1st and 2nd Respondents to operate for example a tourist hotel, a bar, a festival carnival site, and other activities in The Watamu Marine Reserve ecosystem and within a residential area. The application and the petition seek to inquire how these licenses and permits were issued, whether the same considered the existing land use planning laws or licensing regime for hotels, bars, or the audit impact assessment reports on the disputed site, et al.
31. This then being a multifaceted claim, I take solace in the decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment), where the Supreme Court has recently pronounced itself that parties should not be limited in access to justice whenever they seek to ventilate their matters - the only catch is - that the forum in which they seek redress is efficacious and adequate and that the doctrine of abstention/exhaustion is applied by the Courts where there exists such primary forum:

“It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant’s petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing, while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal’s attention.

120. In addition to the above findings, since the appellant’s claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC, which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts, therefore, clearly fell into an error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so



because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.”

73. Article 23(3) of *the Constitution* prescribes the orders the Court can issue when fundamental rights have been alleged to have been violated:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation and
- (f) an order of judicial review.”

32. At this stage, the orders sought by the Petitioners seem quite expansive and final (mandatory) in nature, including structural interdict orders geared to the closure of the operations of the 1st and 2nd Respondents et al., which can be available in other forums within the licensing and regulatory bodies joined as Respondents in these proceedings. Those forums exist, such as the County Liaison Committee on Planning and Land Use, County Liquor Licensing Courts, NEMA, KWS, and the County Government of Kilifi. Those are the primary forums the Petitioners should have approached first. In any event, they are the enforcement bodies and cannot be bypassed.

33. The 1st and 2nd Respondents have exhibited various licensing and compliance certificates from those bodies; at this stage, I cannot tell how they were acquired, the due processes followed, and whether they adhere to the relevant legal regimes applicable. At the hearing of the main petition, it will be discovered whether the processes leading to the issuance of the licenses and permits were adhered to within the law and with public participation. This exploration, in my view, will await the main petition.

34. At this point, the main issue in the application concerns noise pollution in contravention of Article 42 of *the Constitution* on the right to a clean and healthy environment, which needs to be checked in the interim. The orders that are commended for issuance at this stage will be:

- a. Pending the disposition of the petition, an injunction be and is hereby issued directed at the 1st and 2nd Respondent, their servants, agents, or employees from contravening the First Schedule of the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 and in particular from exceeding the following sound levels:

Day dB(A) Night dB(A)

Indoor 45 35

Outdoor 50 35



- b. The 3rd Respondent is hereby directed to ensure compliance with the orders in (a) above and file a report at the next mention date.
- c. The rest of the orders sought in the application will abide by the petition's outcome.
- d. To fast-track this matter, the Petitioners must file supplementary statements, averments, documents, or affidavits supporting the petition within 21 days of hereof, if need be. A corresponding leave is granted to the Respondents, who must file a rejoinder within 21 days after service incorporating various Reports showing processes leading to the issuance of licenses and permits to the 1st and 2nd Respondents falling within their respective domains.
- e. After that, the Petitioners are to file written submissions within 14 days; a similar period is granted to the Respondents.
- f. After that, a date will be provided for judgment.
- g. Costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 18TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mutugi, for the Petitioners

Mr. Makambo for the 1st and 2nd Respondents

Ms. Mwabaya for the 3rd & 4th

Ms. Feksi for the 5th Respondents

Mr. Wakhungu for the 6th Respondents

Happy: Court Assistant

