



**Green Lake Investment v Gerald Onyango t/a Alleways Bar and
Restaurant & 5 others (Environment and Land Constitutional Petition
E001 of 2022) [2022] KEELC 14627 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2022**

E ASATI, J

NOVEMBER 3, 2022

**IN THE MATTER OF ARTICLES 2(1), 3(1), 6, 10(1) AND (2), 12(1), 19, 20,
21, 22(1), 23, 24, 25, 26, 27(1), 28, 29(F), 35, 40(1) AND (2), 42, 43(1)(A), 69(1)
(D)(F), (H) AND (2), 47 AND 70 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLE 26(1), 28, 29(F), 35, 42 AND 47 OF CONSTITUTION**

AND

**IN THE MATTER OF SECTIONS 3, 3A, 9, 12, 29, 30, 58, 59, 60, 63,
64, 67, 68, 69, 101, 102, 102, 109, 110, 111, 112, 121, 122, 123 OF THE
ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT**

AND

**IN THE MATTER OF REGULATIONS 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17,
18, 19, 20, 21, 22, 23, 24, 28, 29, 31, 40, 42, 43 AND 47 OF THE ENVIRONMENT
(IMPACT ASSESSMENT AND AUDIT REGULATIONS) 2003 AND IN THE MATTER
OF REGULATIONS 1, 2, 3, 4, 5, 6, 8, 9, 11, 16, 17, 18, 22, 23, 24, 25 AND 26 OF
THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION (NOISE AND
EXCESSIVE VIBRATION POLLUTION) (CONTROL) REGULATIONS, 2009**

AND

**IN THE MATTER OF SECTIONS 1, 2, 3, 4, 5, 6 (3), 7, 8
AND 9 OF THE ACCESS TO INFORMATION ACT, 2016**

BETWEEN

GREEN LAKE INVESTMENT PETITIONER

AND



**GERALD ONYANGO T/A ALLEWAYS BAR AND RESTAURANT 1ST
RESPONDENT**

SAMSON AUMA 2ND RESPONDENT

OLGA AKINYI AUMA 3RD RESPONDENT

SAMUEL CAREY FRANCIST AUMA 4TH RESPONDENT

COUNTY GOVERNMENT OF KISUMU 5TH RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT 6TH RESPONDENT

RULING

1. The ruling is in respect of the Petitioner/Applicant's Notice of Motion Application dated January 28, 2022 brought under certificate of urgency and stated to be pursuant to the provisions of Articles 40, 42, 69 and 70 of the Constitution of Kenya as read with articles 22 and 23 thereof, sections 13 and 18 of the Environment and Land Court act, Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules. The substantive prayers are prayers 3 and 4. Prayer 1 and 2 are spent while prayer 5 is a prayer for costs.
2. Prayer 3 seeks an interim order of temporary injunction restraining the 1st Respondent, together with his employees, servant or agents from continuing to undertake his current bar and restaurant business, on the property known as Kisumu/municipality Block 7/356 or any other nearby properties in that locality, in circumstances in which the nature of the business involves excessively loud music played thereon every day of the week pending the hearing and determination of the petition, and/or the determination sought for under prayer 4 of the instant application.
3. Prayer 4 seeks for an order that pending the hearing and determination of the application and petition, the court issues an order, directing the 5th and 6th Respondents to initiate the process of an appropriate Environment Impact Assessment study and report to be undertaken by the 1st Respondent, in accordance with the mandatory provisions of the Environmental Management & Coordination Act and all the other mandatory processes, undertaken thereon, including the involvement of the petitioner and other neighbours in the mandatory public participation process, as contemplated under the said statute and constitution of Kenya before a decision is made by the 3rd and 4th Respondent, whether to allow the 1st Respondent to continue his business in that state of affairs complained of herein or impose, supervise and enforce the conditions of such conduct of the business as required by law for the protection of the Petitioner's fundamental rights and those of the neighbours thereon.
4. The grounds upon which the Application is brought are contained in the Notice of Motion and the Supporting Affidavit sworn by the Applicant on January 28, 2022 and the annexures thereto and the Further Affidavit sworn by one Caroline Anyango on June 28, 2022 and the annexures thereto.
5. The 1st Respondent opposed the Application vide Grounds of Opposition dated February 9, 2022 and the averments in his Replying Affidavit sworn on February 21, 2022- and the annexure thereto both filed on behalf of the 1st Respondent by the firm of Ogejo, Omboto & Kijala Advocates LLP.
6. Directions were given on July 21, 2022 that the application be canvassed by way of written submissions. Written submissions dated June 27, 2022 were filed on behalf of the Petitioner by the firm of Owiti, Otieno and Ragot Advocates. The 1st Respondent filed written submissions dated August 3, 2022 through the firm of Ogejo, Omboto & Kijala Advocates. Written submissions dated May 18, 2022 were



filed by the firm of DOE Anyul & Company Advocates on behalf of the 2nd, 3rd and 4th Respondents. The 5th and 6th Respondents did not respond to the application.

7. I have considered the Application, the responses thereto and the submissions made. I find the following to be the issues that emerge for determination:
 - i. Whether or not the court has jurisdiction to entertain the matter;
 - ii. Whether or not the Petitioner as described in the Petition has capacity to bring the Petition and the application.
 - iii. Whether or not the 1st Respondent was misjoined in this matter;
 - iv. Whether the Petitioner is entitled to the relief sought;
 - v. What order to make on costs.
8. On the issue of jurisdiction, the 2nd, 3rd and 4th Respondents opposed the application on the grounds, inter alia, that the application affronts the express provisions of section 125 of the National Environmental Management Authority (NEMA) Act and thus the court lacks jurisdiction to entertain the matter.
9. The Petitioner's response was that the court has jurisdiction because the petition relates to enforcement of the Petitioner's constitutional right to a clean and healthy environment under Article 42 of the Constitution of Kenya. That the petition is not about grant or refusal to grant a licence which would then be a matter for the Tribunal.
10. As stated in the case of Owners of the Motor Vessel MV Lillian S v Caltex Oil (K) Limited [1989] KLR, 'jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.' Being such a serious and fundamental matter, a party alleging lack of jurisdiction ought to substantiate and demonstrate it to the required degree and standard of proof. I have read the Application and the Petition. I have also read section 125 of the Environmental Management Coordination Act. The section establishes the National Environmental Tribunal (NET), the membership of the Tribunal, qualifications and mode of appointment of the members. I am satisfied that the Petition, on the face of it, seeks to enforce constitutional rights. This court has jurisdiction to handle Petitions seeking to enforce constitutional rights. No material has been placed before me that divests the court of the jurisdiction. Whether the petition is merited or not will be a matter to be canvassed in the Petition.
11. On the issue of capacity of the Petitioner to sue, the Petitioner as named in the Application is Green Lake Investments. It is described in paragraph 1 of the Petition as 'a partnership registered as such under the Registration of Business Names Act.' The 1st Respondent opposed the Application on the grounds that the Petitioner being a Business Name duly registered under the Business Names Act Cap 499 of the Laws of Kenya can only sue or be sued through the proprietors as it is neither a legal nor juristic person and therefore can not sue or be sued. He submitted that the Petitioner runs the business described as Green Lake Investments and certificate of registration evidently confirms that the name Green Lake Investments is a business name under the Registration Business Act cap 499 laws of Kenya under certificate No BN-GVCL3K7. Thus, the petitioner instituted the Petition under a business name. He submitted that the law confers the capacity to sue and be sued only to natural and juridical persons respectively and a partnership is capable of suing in its own name pursuant to section 7(2) of the Partnership Act of 2022. Thus the proper course as is the case with partnerships is to sue through



the registered partnership but not a business name as is the case herein. Counsel submitted further that the proper petitioner ought to have been the partners in partnership suing under the registered name of business as Owiti, Otieno and Ragot Co Advocates t/a Green Lake Investments. They relied in the case of *David Kamau Njoroge(deceased) v Savings and Loan(k)Ltd*[2006] eKLR as was cited by Justice Mabeya in *Civil appeal No 91 of 2019 National Bank of Kenya Ltd v Christian Community Life Church* where it was held that a suit filed by a person without capacity is a non-suit and is null and void from the beginning.

12. Counsel further relied on the decision in *Civil Case No 534 of 2011 Ruga Distribution Limited versus Nairobi Bottlers*[2015] eKLR citing the decision in the case of *Appex international Ltd & Anglo leasing & finance international Ltd vs Kenya Anti-corruption commission* [2012]eKLR citing with approval *Goodwill & trust investment Ltd & another v will & Bush Ltd (supreme court of Nigeria)* to demonstrate that the court lacks jurisdiction to hear and determine the matter having been filed by a person without capacity to do so.
13. On the provisions of Order 30 of the Civil Procedure Rules the 1st Respondent submitted that in case where a business is owned by partners and/or a firm and the proprietors bring an action on their own behalf their names must be established on the face of it since the business name is not shielded by the legal capacity and neither is it a juristic person. Reliance was placed on the decisions in High Court *Civil appeal No 36 of 2010 Juliana Akinyi Owino v Kiarie Shoe Stores* [2014]eKLR and *Fort Hall Bakery Supply Co vs Fredrick Muigai Wangoi* [1959] EA 474.
14. The Petitioner's response was that a firm has capacity to sue and be sued in its name. Counsel for the Petitioner relied on articles 42, 69 and 70 of the *Constitution* of Kenya, Order 30 of the Civil Procedure Rules and the cases of *Donny v Belyon Investments & 3others* [2015] eKLR and *Joseph Leboo & 2others v Director Kenya Forest Services & Another* [2013] eKLR to support the submission that a partnership registered under the *Registration of Business Names Act* can sue and be sued in its firm name.
15. Indeed, a certificate of registration of business was attached to the application and marked KOO-1. It shows the names of the partners trading as Green Lake Investments. I have read Order 30 Civil Procedure Rules and particularly Rules 1 and 9 thereof. They provide as follow:

Rule 1

' Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.'

Rule 9

' Any person carrying on business in a name or style other than his own name may be sued in such name or style; and, so far as the nature of the case will permit, all rules under this Order shall apply.'

Clearly from the above-quoted provisions, a suit can be filed in the business name.

16. On the issue of misjoinder of the 1st Respondent, the 1st Respondent stated in his Replying Affidavit that he is not the proprietor of the Alleyways Bar and Restaurant as the business is registered in the names of Melanie Atieno Onyango & Brenda Otieno. It was submitted on his behalf that the present



Court lacks jurisdiction to hear and determine the instant Petition on grounds that the proper parties have not been properly established. It was submitted further that the 1st Respondent is not an agent of the business nor is he an official of the said business. He has no interest, legal or equitable in the said establishment as alleged. That hence, he is wrongly joined in the Petition. That the net effect of misjoinder is that it renders the main suit incurably defective and bad in law.

17. The petitioner's response as contained in the Further Affidavit sworn by Caroline Anyango, is that the 1st Respondent is the owner of Alleyways Bar and Restaurant and the noise is emitted from the premise as per his direction and for his benefit. That the 1st Respondent has taken up the role of advertising the business in his social media. To the Affidavit were attached photographs of the 1st Respondent and copies of screenshots from his social media accounts.
18. It is true that the certificate of registration of the business known as Alleyways Bar & Restaurant shows that the business is registered in the names of people other than the 1st Respondent. The 1st Respondent denies ownership of the establishment. He denies involvement in the running of the business. He states that he has no interest whatsoever in the business. But in the same breath he makes the following submissions:
 - i. That no relevant lead agency has ever visited the premises and produced a report on the assessment of noise levels produced by the premises,
 - ii. That on November 26, 2022 on deliberations of noise levels it was resolved that the affected business to operate as usual but to limit and/or regulate the sound levels emitted to the required decibels as would be recommended by the city director of Environment.
 - iii. That the owners of the various establishments were given six months grace period.
 - iv. That he has been sound proofing the establishment, playing reasonable sound as he awaits the 5th Respondent to evaluate and confirm the noise is well within permitted limits.
19. These submissions coupled with the averments in the Affidavit of Caroline Anyango and annexures thereto do not portray the 1st Respondent as a person who is a stranger to the business hence misjoined in the Petition. My finding is that the 1st Respondent is a person involved in the business known as Alleyways Bar and Restaurant, if not the owner thereof hence properly sued in the Petition. In any event any misjoinders or non joinder can always be cured by way of amendment pursuant to the provisions of Order 1 Rule 9 and 10 of the Civil Procedure Rules and cannot form the basis for striking out of the matter.
20. On whether the Petitioner is entitled to the orders sought, the conditions for grant of temporary injunction were set in the case of *Giella vs Cassman Brown & Co Ltd [1973] EA 358* that
 - a. An applicant must show a 'prima-facie' case with a probability of success.
 - b. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
 - c. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
21. The Applicant's case is that the 1st Respondent is the owner of Alleyways Bar and Restaurant which operates every day of the week and plays extremely loud music which emits noise that is intrusive as it interferes with operations of the petitioner together with tenants and adjacent neighbours. The petitioner states that the 1st Respondent establishment emits vibration of such high intensity and



frequency whose effect is to annoy, disturb, injure, and endangers the comfort, repose, health and safety of the petitioner's guests, staff and other general members of the public.

As a result, the 1st Respondent actions, the Petitioner is unable to engage in any gainful business and has made loses over the past 20 months.

The petitioner submitted that the 1st Respondent failed to provide any proof that he followed the procedure provided in Environment Impact Assessment licence in the manner envisaged in section 58 of the Act. The 5th Respondent has failed to provide information sought. Petitioner submitted that the 1st Respondent set up project without following the due process of section 58, 59 and 60 of the environment impact assessment licence.

22. In response the 1st Respondent submitted that no relevant lead agency has ever visited the premise and made a report on the assessment of noise levels produced by the 1st Respondents premise. That on November 26, 2022 on deliberations of noise levels it was resolved that the affected business to operate as usual but to limit and/or regulate the sound levels emitted to the required decibels as would be recommended by the city Director of Environment. They were given six months grace period. That he has been sound proofing the establishment, playing reasonable sound and awaits the 5th Respondent to evaluate and confirm the noise is well within permitted limits.
23. There is no evidence placed before the court as to the acceptable or limit of noise levels for the area where the Petitioner's premises is situate or that the noise from the 1st Respondent's premises have exceeded the acceptable or limit of noise levels. The applicant has not demonstrated by way a noise survey report under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations was enacted in 2009 or otherwise that the noise or sound complained of is pollutant.
24. On the basis of the material placed before the court, I am unable to find that the applicant has demonstrated a prima facie case with a probability of success. The upshot is that I find that the application lacks merit. The application is dismissed. Costs of the application to abide in the Petition.

Orders accordingly.

conclusions

RULING DELIVERED, DATED AND SIGNED AT KISUMU VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Okoth Odero Advocate for the Applicant/Petitioner.

No Appearance for the Respondents.

E. ASATI

JUDGE.

