

REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)
PETITION NO. E276 OF 2021

BETWEEN

KENYA COPYRIGHT BOARD PETITIONER

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK) 1ST RESPONDENT
KENYA ASSOCIATION OF MUSIC
PRODUCERS (KAMP) 2ND RESPONDENT
PERFORMERS RIGHTS SOCIETY OF
KENYA (PRISK) 3RD RESPONDENT

AND

ATTORNEY GENERAL 1ST INTERESTED PARTY
ABSA BANK KENYA PLC 2ND INTERESTED PARTY
NCBA BANK KENYA PLC 3RD INTERESTED PARTY

RULING NO. 1

Introduction:

1. This matter stems from a Petition dated 14th July, 2021 filed by the *Kenya Copyright Board*, the Petitioner herein.
2. The Petitioner is a body corporate established under the **Copyright Act**, Cap. 130 of the Laws of Kenya. The purpose of the Copyright Act is to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes.
3. On the basis of its mandate in law, the Petitioner decried the manner in which the Respondents were carrying out their respective duties in the copyright sector and sought several prayers in the Petition.
4. Together with the Petition, the Petitioner filed an undated application by way of a Notice of Motion seeking several

conservatory orders relating to some of the Respondents' Bank accounts. No such interim orders were issued by the Court.

5. In a response to the Petition and the application, the 1st Respondent herein, the *Music Copyright Society of Kenya (MCSK)* filed a Notice of Preliminary Objection. It is dated 27th July, 2021.
6. The 3rd Respondent herein, *Performers Rights Society of Kenya (PRISK)* also raised a Notice of Preliminary Objection. It is dated 16th August, 2021.
7. The twin objections were mainly on the jurisdiction of this Court.
8. On this Court's directions, the two objections as well as the undated Notice of Motion were heard together.
9. This ruling is, hence, a consolidated ruling on the two objections and the undated Notice of Motion.
10. For purposes of order, this Court will, in the first instance, consider the objections. In the event the objections are unsuccessful, the Court will then deal with the application.

The Preliminary objections:

11. The Preliminary Objection dated 27th July, 2021 was based on the following grounds: -
 - i. *The state is a duty bearer of human rights and cannot institute a petition citing human rights violations towards itself.*
 - ii. *There is no law firm by the name of Kaindo & Jaketch Advocate capable of taking instructions from the Petitioner, KECOBO, to prosecute this suit.*
 - iii. *The firm of Kaindo & Jaketch Advocate does not have instructions to act for the Petitioner, KECOBO.*
 - iv. *The Kenya Copyright Board is not a person within the meaning of Article 3, 21 and 22 of the Constitution, capable of instituting a Petition claiming an infringement or threatened infringement of the Constitution or the Bill of Rights.*
 - v. *This Court lacks jurisdiction to hear and determine the instant Petition and Application.*

12. The Preliminary Objection dated 16th August, 2021 was on the following ground: -

- a. *The Petition is incompetent and a clear abuse of the Court process as it does not disclose with reasonable precision, or at all, any provision of the Constitution which is alleged to have been contravened or the manner in which such provision(s) have been infringed and/or threatened.*
- b. *The Petition is incompetent and an abuse of court process as it does not seek for any interpretation of the Constitution or Statute and/or a declaration of unconstitutionality of any Act, Regulation and/or any provision thereunder as may be.*
- c. *In acknowledging that there is no constitutional or legislative provision underpinning and/or supporting the prayers sought in the Petition and the Application, the Petitioner seeks the Honourable Court to usurp, subvert and encroach on the mandate and powers of Parliament and to arrogate itself the legislative mandate, a function solely reserved for the Legislative arm of Government. This is contrary to the doctrine of separation of powers.*
- d. *The Petitioner, being the body established under Section 3 of the Copyright Act, 2001 (hereinafter "the Act") with the mandate of regulating the copyright industry including the Collective Management Organizations (hereinafter "the CMOs") as provided for under Section 5 of the Act, is by the present Petition and Application seeking/ attempting to use a back door approach to be allowed to collect royalties in contravention of the Act and the Regulations thereunder. The prayers sought in the Petition and the Application, if allowed would lead to the Petitioner usurping the mandate of the CMOs as provided for under Section 46 of the Act.*
- e. *In seeking to collect royalties, the Petition is a blatant abuse of the Court process as it attempts to sanitize and/or sanction an illegality as the Petitioner is not an entity contemplated under Section 46 of the Act to collect royalties on behalf of the Artistes.*
- f. *The Petitioner, being a State Office established under the Act and as defined and contemplated under Article 260 of the Constitution, is not a person capable of instituting proceedings for enforcement and/or violation of rights as contemplated under Articles 22 and 260 of the Constitution. The Bill of Rights are construed to protect and apply against state intrusion to the person(s) defined under Article 260 of the Constitution.*

g. The Petition and Application before this Honourable Court are thus not only misconceived, but also vexatious for seeking prayers which are contrary to express constitutional and statutory provisions and should be struck out with costs to the 3rd Respondent.

13. The 1st Respondent filed written submissions to its Preliminary objections. The 3rd Respondent elected not to file any written submissions on their Preliminary Objection, but instead adopted the submissions as filed by the 1st Respondent.
14. The Petitioner filed its written submissions to the two objections.
15. The 2nd Respondent indicated that it was not interested with the objections, but focused on the undated application for conservatory orders instead.
16. The 3rd Interested Party stated that it was not interested in taking part in the proceedings, but undertook to adhere to any orders of the Court.

The Submissions:

The 1st Respondent's:

17. The 1st Respondent filed written submissions dated 27th July, 2021.
18. Initially, the 1st Respondent raised five grounds, but collapsed them to three main points in the course of the discussion.
19. The first ground was that the State is a duty bearer of human rights and cannot institute a Petition citing violation of human rights towards itself. The 1st Respondent submitted that constitutional litigation is usually against the Government and a claim for rights violation cannot be against private individual. Additionally, that the State cannot claim that a private individual's actions violated rights and infringed on fundamental freedoms as guaranteed in the Constitution.
20. The 1st Respondent further submitted that the State has no rights that are enforceable on its behalf, through the Court process. Also, it was argued that in ensuring the allegedly violated rights are secured, there are no orders that can issue against the Respondents, being private individuals.

21. The 1st Respondent maintained that there are no possible orders against them as was evidenced by the reliefs sought in the Petition. That there would only be an indirect passive effect on the Respondents, since the Petitioners would only be taking the role of Collective Management Organizations.
22. As per the 1st Respondent, those reliefs are not the ordinary orders granted in constitutional matters, as under Article 23(2) of the Constitution. That the correct avenue for such orders would be through private law pursue, as opposed to the forum of public law.
23. The 1st Respondent relied on *Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR* which cited in approval the case of *Teitwinnang Ariong & Others 1987 LRC Const. 577; Kenya Bus Services Ltd. V Attorney General & 2 Others [2005] eKLR; and Richard Nduati Kariuki V Hon Leonard Nduati Kariuki & Another [2006] eKLR* in buttressing its case.
24. The second ground was that the law firm of *Kaindo & Jaketch Advocates* which was on record for the Petitioner had no capacity to receive instructions to represent the Petitioner. It was argued that the Counsel who appeared for the Petitioner through the law firm of *Kaindo & Jaketch Advocates* was indeed employed by the Petitioner as its in-house Counsel, hence, the incapacity to appear through an alleged and doubtful law firm.
25. The 1st Respondent asserted that such an Advocate, as employed, and the employer being a State corporation, can neither take lawful instructions from such employer, nor represent his employer in Court through a law firm where the Counsel is either the owner or a Partner. Reliance was placed on *Stephen Muriuki Chiuri V Alice Mwaniki 2 others [2008] eKLR*.
26. The third ground was that the matter was *sub judice* since there was an on-going matter before another competent Court. The matter is *Nairobi High Court Constitutional Petition E435 of 2020; Music Copyright Society of Kenya vs Kenya Copyright Board Others*.
27. Placing reliance on the Supreme Court case of *Kenya National Commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*

[2020] eKLR, the 1st Respondent sought to invoke the doctrine of *sub-judice* in this instant case.

28. In the end, the 1st Respondent asked this Court to uphold the objection and to strike out the Petition and the application.

The Petitioner's:

29. The Petitioner raised the following issues in its written submissions:

- i. *Whether the court has jurisdiction to hear and determine the matter?*
- ii. *Whether the Petitioner, the Kenya Copyright Board, can file a Petition to safeguard the intellectual property rights of the members of the collective management Organisations (CMOs) from violations or imminent threat?*
- iii. *Whether Paul Kaindo & Wycliffe Jaketch can represent the Petitioner in the matter?*

30. On the first issue, the Petitioner submitted that the Court was vested with the jurisdiction to hear and determine the instant Petition. Reliance was placed on Article 165(3) of the Constitution and the Supreme Court cases of *R v. Karisa Chengo [2017] eKLR* and that of *Samuel Kamau Macharia v. Kenya Commercial Bank & 2 others (2012) eKLR*.

31. Moreover, the Petitioner submitted that the Petition is on intellectual property rights violations or/and threatened violations thereof. That the rights are of the holders of the copyrights, who are also members of the lawfully deregistered collective management organization. It was argued that the main issue was what happens where there is a non-legally registered/established Collective Management Organisation to handle registration and collection of royalties to benefit the artists.

32. That in particular, the Petition interrogates the interpretation of Article 11(b) and Article 40(5) of the Constitution, with regard to the collective management of copyright and in relation to Section 5 and 46 of the Copyright Act especially given the current lack of any licenced collective management organization in the country. The Petitioner maintained that given the above issue, the instant Petition is within the jurisdiction of this Court.

33. The Petitioner posited that there is serious lacuna, with regards to the mandate of the Petitioner, under the Copyright Act in collective management of copyright in Kenya. The Petitioner averred that collective management organizations are to apply for licensing, registration and supervision by the Petitioner, all for the benefit of the members who are the copyright holders. That, the contemplation in law was for each of the particular class of rights, there be a minimum of one collective management organization.
34. The Petitioner intimated that the collective management organizations in the country tended to disadvantage the copyright holders/artists, in total disregard to the Petitioner's directives. In such disregard, the Petitioner who is also their regulator, may necessitate their deregistration. In such a scenario, there would be a vacuum in royalties' collection and distribution to the artists, prior to creation of a new competent and compliant collective management organization.
35. That such a gap is a treat to the rights of the copyright holders who on one hand, would lose out on royalties; and on the other hand, the content users may lack a structure and framework to remit royalties to the artists. The Petitioner conceded that in such a vacuum situation, the Copyright Act does not directly authorize the Petitioner to take over collective management of copyright.
36. It was however submitted that under Articles 11(2) b and 40(5) of the Constitution, the State is mandated to promote, protect and support intellectual property rights of copyrights holders. To overcome the vacuum challenges, the State constituted the Petitioner herein to, on a temporary basis, take over the role of collective management of copyrights in Kenya. The Petitioner asserted that the Courts have powers to declare the same. The Petitioner reiterated that the Respondents, who are collective management organizations, violated the Constitution, hence, as the Petitioner asserted that the precision principle, as stated in the case of *Anarita Karimi Njeru v Republic (1976-1980) KLR 1272*, is satisfied.
37. Relying on the case of *Apollo Mboya v Attorney General & 2 others [2018] eKLR*, the Petitioner posited that Courts can bridge lacunas in the statutes for the interest of the general good. The Petitioner

submitted that this Court has jurisdiction to hear and determine the instant Petition.

38. On the second issue, the Petitioner submitted that the Petition is on the rights of the members of the collective management organizations and not of the Petitioners. That the Petitioner can/and has instituted a Petition to protect the intellectual property rights of the collective management organizations members, from infringement and/or violations.
39. The Petitioner asserted that it is their mandate to safeguard the interest of copyright holders in Kenya and this stipulated under Section 5 of the Copyright Act. Further, that the Petitioner is a body corporate with capacity to sue and being sued as stipulated under Section 3 of the Copyright Act.
40. The Petitioner stated that as a corporate personality/legal person, it can file a Petition on behalf of another and/or in public interest, as under the meaning of Article 22 of the Constitution. That was especially where it pursued the copyright holders' interests, who constituted the membership of collective management organizations. The Petitioner further asserted that State agencies/bodies/corporations are not limited by the Constitution from filing such a Petition, and are required to defend the Constitution.
41. The Petitioner conceded that the State is a duty bearer in Bill of rights matters. However, that the duty is not to grant the rights but it's to ensure they are enforced, implemented and fulfilled; which may extend to seeking appropriate reliefs in Courts for any violations/infringements.
42. The Petitioners claimed that where a State body is formed so as to protect specific rights, like intellectual property/copyright, through supervision and regulations of private sector players - which may be abusive to the public - it then becomes the duty of the State entity to ensure that the public interest in the specific sector is protected and to prevent any abuse.
43. The Petitioner argued that such a duty may include instituting proceedings in Court for necessary remedies on behalf the public. Moreover, it was contended that the Petitioner being a semi-autonomous Government Agency (SAGA), enjoys autonomy from

the mainstream Government and that gives it more action power to champion the interest of the public from the public point of view.

44. Responding to the third issue, the Petitioner submitted that it could be represented by its In-House employed Counsel: Mr. Paul Kaindo and Mr. Wycliffe Jaketch. The Petitioner argued that Kaindo & Jaketch Advocates as indicated in the pleadings is not a law firm but rather short form of the full names of these qualified Advocates.
45. The Petitioner posited that a party to a suit has freedom to act either by itself, through a recognized agent or through an Advocate of own choice and that where it is a Government entity, an officer in public service may be instructed to represent the entity. Reliance was placed on Order 9 Rule 11 of the Civil Procedure Rules 2010.
46. It was further argued that Mr. Paul Kaindo and Mr. Wycliffe Jaketch being qualified Advocates and Petitioner's employees, had received instructions in full to represent the Petitioner as evidenced from extracts of the meetings.
47. Notably, the Petitioner averred that such an objection is not purely on a point of law, as established by the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696*.
48. The Petitioner also argued that no express claim in the pleadings have been made to Kaindo and Jaketch being a law firm; and that from the Law Society of Kenya Advocates online search engine database, the two Counsel are indicated as employed by the Petitioner herein.
49. The Petitioner contended that in these proceedings, the Counsel are using the same postal and email address of service as the Petitioner's address. The distinction was only on the address of service which was given as Kaindo & Jaketch Advocates, and that was not a sufficient ground to striking out the Petition. That, it only amounted to a technicality which is curable by Article 159(2)(d) of the Constitution.
50. The Petitioner submitted that the Court had discretion to accord the counsel opportunity to rectify any misconception created that

they operated as a law firm, especially in further pleadings in this matter.

51. To the Petitioner, the preliminary objections were a mere strategy by the 1st Respondent to delay justice and to divert the Court's attention from granting the interim orders prayed by the Petitioner.
52. The Petitioner prayed that the two Preliminary Objections be dismissed with costs to the Petitioner.

Whether the objections are merited:

53. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.
54. To that end, the *locus classicus* decision in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*** (1969) E.A 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

55. The Supreme Court weighed in on the issue in ***Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others*** [2015] eKLR and stated thus: -

.... Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

56. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in Civil Suit No. 85 of 1992, **Oraro -vs- Mbaja** [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

57. In **John Musakali -vs- Speaker County of Bungoma & 4 others** (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

58. Finally, in **Omondi -vs- National Bank of Kenya Ltd & Others** {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....

59. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that ‘*jurisdiction is a pure question of law*’ and should be resolved on priority basis.
60. Focusing back on the case at hand, one of the rival grounds raised in the objections is whether the dispute before this Court is ripe for this Court’s determination. The Respondents took issue with the manner in which the Petition was tailored and to the orders sought.
61. This Court has carefully considered the rival arguments and the Petition.
62. In the main, the Petition sought the following prayers: -
- a) *A declaration that Section 46, 46A-G of the Copyright Act offends Article 40 of the Constitution to the extent that it perpetuates infringement/violation of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights;*
 - b) *A declaration that Section 46A of the Copyright Act is unconstitutional and offends Article 27 and 40 of the Constitution to the extent that it allows the Respondents to arbitrarily peg value of music/tariff to a percentage of business permit/liquor license;*
 - c) *A declaration that Section 46A of the Copyright Act perpetuates discrimination and violates the right to property by imposing a flat rate tariff on broadcasters of musical works;*
 - d) *A declaration that the Music Copyright Society of Kenya does not require a collecting license to administer/enforce/collect royalties in respect of its resident and non-resident authors, composers, arrangers and publishers of musical works who are its members;*
 - e) *Costs of this Petition be in the cause.*
63. In arriving at the above prayers, the Petitioner admitted that, as the sector regulator, it was intent in deregistering the Respondents as a result of various complaints it had received from copy right holders and that it moved this Court to forestall a lacuna likely to arise when it eventually effects the deregistration.

64. The purpose of the Petition is that clear. It is an attempt to preempt a situation which is likely to happen depending on some contemplated actions by the Petitioner.
65. Courts have expressed their unanimity in such instances. The prevailing position is that Court will only engage in resolving actual disputes.
66. In consolidated Petitions NRB Pet. No. E090 of 2022, NRB Pet. No. E168 of 2022, NRB Pet. No. E221 of 2022, NRB Pet. E230, NRB Pet. E234 of 2022, NRB Pet. E249 of 2022, MSA Pet. No. E017 of 2022, MSA Pet. No. E019 of 2022 and ELD Pet. No. E010 of 2022 **Okiya Omtatah Okoiti & 15 Others vs. The Hon Attorney General & Others** the High Court recently had the following to say on the issue as it dismissed several Petitions: -

74. *Courts exist to resolve actual disputes. They are not in the business of engaging in academic or abstract discourse that is not anchored in disputed facts. That is why the Constitution does not confer upon this court the jurisdiction to issue advisory opinions. The Court in **John Harun Mwau and 3 others v Attorney General [2012] eKLR**, held that it could not deal with hypothetical issues and that the jurisdiction to interpret the Constitution under **Article 165(3)(d)** does not exist in a vacuum and is not exercised independently in the absence of a real dispute. The court explained that the jurisdiction is exercised in the context of a controversy.*

75. *The aforesaid position is encapsulated in the principles of mootness, ripeness and justiciability as explained by Onguto J., in **Wanjiru Gikonyo and Others v National Assembly of Kenya and 4 Others Petition No. 453 of 2015 [2016] eKLR** as follows:*

[27] *Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.*

[28] *Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live*

controversy, then it is said to be moot and not worthy of taking the much sought judicial time.

76. *The application of the aforementioned principles depends on the facts of each case. In the **Wanjiru Gikonyo Case (Supra)**, the learned Judge, again stated:*

[34] There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

[35] It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.

67. In this case, the situation sought to be arrested is the effect of the deregistration of the Respondents. That is yet to occur.

68. The Petitioner's intention to deregister the Respondents can only be regulated by the Constitution and the law. According to the record, the process is yet to be put into motion. Likewise, the outcome of the said process is unknown despite the intention of the regulator.

69. The Petitioner, therefore, through the Petition is in fact preempting the process it intends to initiate. To that end, there is no dispute which has crystallized for determination before this Court.

70. The Petition is premature and cannot stand.

71. Having so found, there is no need of considering the other aspects of the objections raised as well as the application as that will not aid the Petitioner in any manner.

72. Consequently, the following final orders do hereby issue: -

(a) The Petition and the Notice of Motion are hereby struck out.

(b) The Petitioner shall shoulder the costs thereof.

Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 30th day of September, 2022.

A. C. MRIMA
JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Jaketch, Learned Counsel for the Petitioner.

Dr. Okubasu, Learned Counsel for the 1st Respondent.

Mr. Nzaku, Learned Counsel for the 2nd Respondent.

Mr. Kamau Muturi, Learned Counsel for the 3rd Respondent.

Miss. Mwangi, Learned Counsel for the 1st Interested Party.

Mr. Nyanjwa, Learned Counsel for the 3rd Interested Party.

Kirong/Benard – Court Assistants.