



REPUBLIC OF KENYA



**Kioko v Sigei & 4 others (Constitutional Petition E387 of 2020) [2023] KEHC 1088 (KLR)
(Constitutional and Human Rights) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E387 OF 2020
AC MRIMA, J
FEBRUARY 23, 2023**

BETWEEN

VINCENT MWANTHI KIOKO PETITIONER

AND

EDWARD SIGEI 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

KENYA COPYRIGHT BOARD 3RD RESPONDENT

**CABINET SECRETARY FOR ICT, INNOVATIONS AND YOUTH
AFFAIRS 4TH RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Background:

1. Initially, the dispute before this Court concerned among other accusations, abuse of office by Edward Sigei (1st Respondent herein) the Executive Director of Kenya Copyright Board (hereinafter ‘KECOBO’ or ‘3rd Respondent’) that resulted in claimed violation of intellectual property rights of musicians.
2. However, through its Ruling No. 1 delivered on 23rd September, 2021, this Court declined jurisdiction regarding the challenge on the 1st Respondent’s failure to meet leadership and integrity test on account of the exhaustion doctrine.
3. The said dispute was live before the Ethics and Anti-Corruption Commission, 2nd Respondent herein.



4. The remainder of the dispute, subject of this judgment, is in respect of the alleged delay on the part of the Respondents to hear and determine the complaint raised before the 3rd Respondent regarding the 1st Respondent's conduct in meddling with the affairs of artists thereby violating their intellectual property rights.
5. Despite the narrow nature of the dispute, it is imperative to comb through the Petition to comprehensively to appreciate the genesis of the dispute.

The Petition:

6. Through the Petition dated 3rd November, 2020, supported by the Petitioner's Affidavit deposed to on a similar date, the Petitioner, Vincent Mwanthi Kioko, a musician with copyrighted musical works, approached this Honourable Court seeking redress for various illegalities by the 1st Respondent.
7. The Petitioner posited that the 1st Respondent, by virtue of the position he holds, acted in conflict of interest and in breach of public trust, financial integrity and code of conduct expected of for public officers.
8. It is the Petitioner's case that sometimes in October 2016, the 1st Respondent, entered into negotiations with Safaricom Limited regarding the amount of money that would be paid to licenced Collective Management Organizations (hereinafter referred to as 'the CMOs') comprising, Music Copyright Society of Kenya (MCSK), Performers Right Society of Kenya (PRISK) and Kenya Association of Music Producers ('KAMP') as administration costs from the monies collected as royalties by Safaricom through its Skiza Tune Platform, without approval and or consent of said CMOs.
9. The Petitioner pleaded that, through the letter dated 24th October, 2016, the CMOs raised concern with the 1st Respondent for acting ultra-vires.
10. In response, it is the Petitioner's case that the 1st Respondent notified the CMOs that the administration costs would instead be reviewed upwards from 5% to 8.5% and that their grievances would not be considered any further.
11. The Petitioner pleaded further that on 26th October, 2016, two days after the foregoing, the 1st Respondent informed the CMOs that they needed to apply for renewal of their licences for the year 2017.
12. In addition, the Petitioner pleaded that the 1st Respondent directed the CMOs to use Digital Rights Management (DRM) system in generating royalty statements when distributing royalties collected from Safaricom Limited, a directive the Petitioner asserted, was in blatant disregard of the law.
13. The Petitioner claimed that MCSK, raised issue with the 1st Respondent on grounds that the 3rd Respondent being the regulator lacked the legal mandate to direct the CMOs on how to run their daily operations.
14. The Petitioner contended that the issue as raised by MCSK was not well received by the 1st Respondent and to that end, through a letter dated 17th February 2017, the 1st Respondent informed MCSK that the 3rd Respondent had not renewed its CMO license for the year 2017.
15. It is the Petitioner's position that the administrative action by the 3rd Respondent was taken without any notice or engaging MCSK or its members.



16. The Petitioner pleaded that MCSK's license was not renewed despite the fact that the Regulations in force at the time did not provide for deadlines for applications. He claimed further that its attempt to seek 3rd Respondent's indulgence to submit its statement of audited accounts was ignored.
17. The Petitioner asserted that on 27th March 2017, the 1st Respondent, through a press statement issued on behalf of the 3rd Respondent stated that Music Publishers Association of Kenya (MPAKE) had been issued with a CMO licence in place of MCSK.
18. The Petitioner claimed that the MPAKE was issued with license despite not having in its Article of Association a provision that it was incorporated to collect and distribute royalties.
19. The Petitioner further took issue with the fact that MPAKE did not have any assignments from copyright owners mandating it to collect royalties of their behalf; did not have structure and system to collect royalties and did not have an agreement with MCSK which was the only society that had exclusive deeds of assignment and reciprocal agreements for it (MPAKE) to work on its behalf.
20. In highlighting the illegality of issuing MPAKE with CMO license, the Petitioner pleaded that the chair of MPAKE, one Mr. Bernard Kioko Maweu who is also the Chairman of Intellectual Property Owners Association of Kenya (IPOAK), was conniving with the 1st Respondent to exploit the rights of musicians to their own benefit.
21. To that end, he pleaded that in January 2018, the 1st Respondent issued a directive that required MPAKE, PRISK and KAMP to work together under a joint licensing agency agreement and under that agreement, to use SUAVE Group Limited, a company which Mr. Maweu was a shareholder and Director, and DRM.
22. The Petitioner pleaded that SUAVE Group Limited and DRM systems are owned and or associated with Mr. Maweu.
23. To that end, KAMP raised a complaint with the 3rd Respondent regarding imminent case of conflict of interest with regards to the 1st Respondent and MPAKE.
24. It was his case that KAMP went further to notify MPAKE, PRISK and KECOBO of the intention to terminate the joint licensing agency agreement and in letter of response dated 5th April 2018, to which the 1st Respondent issued stern warning to KAMP that there would be dire consequences if it failed to abide by the directive of the 1st Respondent that required them to work under a joint licensing agreement.
25. He pleaded that a forensic audit was sanctioned discriminatorily against MCSK, KAMP ad PRISK between June 2017 and July 2019 leaving out MPAKE albeit being issued with a license in clear contravention of the law.
26. The Petitioner was aggrieved by the actions of the 1st Respondent on the basis that they were unlawful.
27. It was his case that granting the CMO license under *Copyright Act* to MPAKE, the 1st 3rd and 5th Respondents violated Article 40(5) of the *Constitution* which requires State to protect the intellectual property rights of the people of Kenya.
28. It was further its case that granting the CMO to an entity without capacity was a further violating of Article 40(5) of the *Constitution*.



29. The Petitioner further pleaded that the 1st Respondent violated Article 73(1)(a) of the Constitution and Section 8 of the Leadership and Integrity Act by seeking to interfere with independent operations of CMOs in the country.
30. It was also his case that by failing to disclose his personal interests during the process of granting license, the 1st Respondent violated Article 75(1)(a), 2(b), (c) and (e) of the Constitution and section 16 of the Leadership and Integrity Act.
31. On the foregoing factual and legal backdrop, the Petitioner prayed for the following reliefs: -
- a. A declaration that the conduct of the 1st Respondent in violation of Article 73(1)(a), 75(1)(a), 2(b), 2(b), 2(e) of the Constitution of Kenya read together with section 3,8,10,11,12 and 16 of leadership and Integrity Act.
 - b. A declaration that the 1st Respondent is not fit to hold office as public officer and or state officer.
 - c. An order directing the 2nd, 3rd and 5th Respondent to enforce the Leadership and Integrity Act against the 1st Respondent through an appropriate disciplinary action.
 - d. Any other order that this Honourable Court shall deem fit to grant.
 - e. Costs of this Petition.

The Submissions:

32. In its submissions dated 1st November 2021, the Petitioner narrowed down to the issue of failure by the Respondents to act on its complaint.
33. It was his submission that the issues raised were governed by Chapter 6 of the Constitution as read with Section 42 of the Leadership and Integrity Act which require in mandatory terms that a person to register a complaint with a public entity for alleged breach of conduct by a State Officer.
34. It was submitted that the Petitioner's claim related to a public officer, the 1st Respondent, a member of Kenya Copyright Board and was well within the law under Section 42 of the Leadership and Integrity Act to register and inquire into a complaint.
35. It was his case that by virtue of Section 11 of the Ethics and Anti-Corruption Commission Act, the 2nd Respondent was joined to receive complaints on the breach of Code of Ethics by public officers and recommend appropriate action and oversee enforcement of Codes of Ethics prescribed for public officers.
36. On the foregoing, the Petitioner submitted that the 2nd and 3rd Respondent, despite the legal responsibility, failed to inquire into the complaint lodged against the 1st Respondent.
37. It was his case that no evidence was tendered by the Respondents to show that they ever took any action upon the complaint being made.
38. The Petitioner referred to his letter of 15th January 2018 and the one of 23rd January 2018 where KAMP complained to the 3rd Respondent about conflict of interest and the intention to terminate licensing agreement respectively, but nothing was done.
39. The Petitioner submitted that over the years, the 1st Respondent has been using his position as the Executive Director of the 3rd Respondent to frustrate licensed CMOs for his own personal gains and those of his cronies.



40. In reference to the decision in *Benson Riitbo Mureithi v J.W Wakbungu & 2 others* (2014) eKLR, the Petitioner submitted that Court has the power to order inquiry and the failure and or delay by the Respondent to act on the complaints was taken by Court to amount to breach of duty imposed by law.
41. Further support was drawn from the decision in *Thomson Kerongo & 2 others v James Omariba Njoga & 3 others* (2017) eKLR where it was observed;
- The Courts can order the 2nd Respondent (EACC), the County Assembly Service Board and the County Assembly, all of whom have the obligation to supervise and or investigate the 1st Respondent to perform their role of investigation.
42. It was his case that it would be in public interest to safeguard the intellectual property rights a fundamental by granting the prayers as sought.
43. In conclusion, the Petitioner urged the Court to make a declaration that the Respondents have breached their duty by failing to act on the complaints lodged against the 1st Respondent and to order the 2nd 3rd and 5th Respondents to enforce the *Leadership and Integrity Act* against the 1st Respondent.

The 2nd Respondent's case:

44. Ethics and Anti-Corruption Commission responded to the Petition through Grounds of Opposition dated 10th December 2020.
45. It was its case that in performance of its duties, it is not under the direction of any person or authority and as such cannot be compelled to institute disciplinary action against the 1st Respondent as it would be against Section 7(2) and 25 of the *Anti-Corruption and Economic Crimes Act* 2003 and Section 13(2) of *Ethics and Anti-Corruption Commissions Act*.

The Submissions:

46. In the written submissions dated 1st February 2022, the 2nd Respondent rejected the issue of delay in processing the complaint by stating that the issue was raised for the first time by the Petitioners in the submissions.
47. It was its case that no issue can be brought forth for the first time in the submissions. Reference to that end was made to the decision in *Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* [2020] eKLR.
48. In a bid to justify the delay, the Court of Appeal case of *Julius Kamau Mbugua v Republic* [2010] eKLR was relied upon where it was remarked: -
- the standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable....
49. The 2nd Respondent submitted further that there was no proof of delay and to that end urged the Court to dismiss the Petition for lacking a basis. The decision in *Kariithi & another v Attorney General & another* was relied upon where it was observed: -
- ... As was held in *Anarita Karimi Njeru v Republic*, a person who alleges breach of fundamental rights must prove the violation. He must demonstrate the provisions of the *Constitution* which were alleged violated and the rights. The onus on the Petitioners to



establish violation of alleged rights is not a mere formality; it is important. Differently put, this includes sufficient facts to justify a finding that their rights were violated.....

50. In the end, the 2nd Respondent urged the Court to dismiss the Petition.
51. The 1st, 3rd, 4th and 5th Respondents did not participate in the dispute after the Ruling of 23rd September 2021.

Analysis:

52. As clearly captured above, the Ruling No. 1 rendered on 23rd September, 2021 delineated the issues to be handled by this Court going forward. The issue was only one. It was whether the 2nd Respondent, the Ethics and Anti-Corruption Commission, had failed to act on the Petitioner's complaint.
53. The parties' positions on the issue are, as well, reiterated above.
54. This Court has carefully considered the Petition, the responses the submissions and the decisions referred to and which are on the record.
55. Apart from the descriptive part in the Petition relating to the 2nd Respondent, there is no any other reference to the 2nd Respondent thereafter save one of the prayers seeking an order to be directed to the 2nd, 3rd and 5th Respondents to enforce the [Leadership and Integrity Act](#).
56. The foregoing scenario resonates with the discussion which was undertaken by the Supreme Court of Kenya in [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR, where the Court expressed itself in the manner in which constitutional Petitions ought to be drafted, violations clearly pleaded and proof of the alleged violation tendered. The Court stated as follows: -

Although Article 22(1) of the [Constitution](#) gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the [Constitution](#) alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

57. The practice and procedure in constitutional Petitions is further provided for under the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 (hereinafter referred to as 'the Mutunga Rules').
58. Rule 20(1) of the [Mutunga Rules](#) is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the [Mutunga Rules](#) provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the [Mutunga Rules](#) provide for the summoning and examination of witnesses.



59. The conduct of constitutional Petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

60. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

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- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

61. Returning to the case at hand, it is apparent that the Petition as presented fails to not only attain the basis elements by not demonstrating the link between the Petitioner, the provisions of the *Constitution* alleged to have been contravened by the 2nd Respondent, but further fails to prove the manifestation of contravention or infringement.

62. This Court, therefore, agrees with the 2nd Respondent that the issue of delay was instead raised for the first time in the Petitioner's submissions.

63. The prevailing legal principle on the above issue is that in an adversarial system of litigation like in Kenya, any matter or issue allegedly in controversy ought to be specifically pleaded and evidence tendered in proof thereof. Any evidence which does not support the pleadings is for rejection.

64. The position was reiterated by the Court of Appeal in *Independent Electoral and Boundaries Commission & Anor. v Stephen Mutinda Mule & 3 others* (2014) eKLR which decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Sylvester Umaru Onu, JSC stated that: -

It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.

65. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

66. The Supreme Court of Kenya as well agreed with the above legal position in a ruling in [Raila Amolo Odinga & another v IEBC & 2 others](#) (2017) eKLR.
67. Deriving from the foregoing, it comes to the fore that the claim against the 2nd Respondent suffers a false start.

Disposition:

68. As the Petitioner has failed to prove its claim against the 2nd Respondent and given that this Court declined jurisdiction over the rest of the issues pleaded in the Petition, the upshot is that the Petition cannot stand.
69. Consequently, the following final orders do hereby issue: -
 - a. The Petition is hereby dismissed.
 - b. Each party shall bear its own costs since the dispute between the parties still subsists and the parties are likely to engage further.
70. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD DAY OF FEBRUARY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Munyoka for Dr. Okubasu, Learned Counsel for the Petitioner.

Mr. Kando, Learned Counsel for the 1st – 3rd Respondents.

Regina/Chemutai – Court Assistants

