



**Ngemu v Kenya Copyrights Board & 3 others; Performers Rights Society of Kenya & 2 others (Interested Parties) (Petition E161 of 2023) [2023] KEHC 24473 (KLR) (Constitutional and Human Rights) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24473 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E161 OF 2023  
HI ONG'UDI, J  
OCTOBER 31, 2023**

**BETWEEN**

**JUSTUS MANTHI NGEMU ..... PETITIONER**

**AND**

**KENYA COPYRIGHTS BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY YOUTH AFFAIRS, SPORTS & THE  
ARTS ..... 2<sup>ND</sup> RESPONDENT**

**THE CLERK OF NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PERFORMERS RIGHTS SOCIETY OF KENYA ..... INTERESTED PARTY**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... INTERESTED PARTY**

**KENYA ASSOCIATION OF MUSIC PRODUCERS ..... INTERESTED PARTY**

**JUDGMENT**

1. The petition dated 17<sup>th</sup> May 2023 was filed under Articles 2, 10, 19, 20, 21, 22, 23, 40, 94, 95, 117, 119, 129, 130 and 152 of *the Constitution* of Kenya for the alleged violation of Sections 2, 3, 6 (1), 7, 46 (1), (2), (3), (3A), (4), & (5) of the *Copyright Act*, 2001. Accordingly, the petitioner seeks the following orders:
  - i. A declaration that the action of the 1<sup>st</sup> respondent, in renewing and issuing the Certificate of Renewal of Registration of a Collective Management Society to the Interested Parties at the



directions and order of the 3<sup>rd</sup> respondent, has offended the doctrine of separation of powers, is illegal, unconstitutional and void.

- ii. A declaration that the action of the 1<sup>st</sup> respondent in renewing and issuing the Certificate of Renewal of Registration of a Collective Management Society to each of the Interested Parties at the directions and order of the 3<sup>rd</sup> respondent, and without a Board of Directors in place, that such action does not have the force of law, is illegal, unconstitutional and void.
- iii. A declaration that the action of the 1<sup>st</sup> respondent in renewing and issuing the Certificate of Renewal of Registration of a Collective Management Society to the Interested Parties at the directions and order of the 3<sup>rd</sup> respondent is ultra vires Section 6 (1), Section, Section 2, Section 3, Section (3A), Section 46 (1), (2), (3), (4), and 5 of the Copyright Act, 2001.
- iv. Writs of certiorari directed at the 1<sup>st</sup> respondent and in particular the Executive Director of the Kenya Copyright Board, to quash the decision to award the Certificates of Renewal of Registration of a Collective Management dated 5<sup>th</sup> May 2023 or any other date provided such certificates were issued in the absence of a Board of Directors.
- v. Writs of certiorari directed at the 3<sup>rd</sup> respondent, to quash the decision to direct issuance of Certificates of Renewal of Registration of a Collective Management to the Interested Parties.
- vi. Writs of prohibition prohibiting the 1<sup>st</sup> respondent from processing or issuing a Certificate of Renewal of Registration of a Collective Management Society to any of the Interested Parties without such decision being made by a legally constituted Board of Directors of the 1<sup>st</sup> respondent.
- vii. A declaration that the 1<sup>st</sup> respondent does not have powers to issue “provisional”, “interim” or partial licences to the Interested Parties.
- viii. Any other further orders, directions, declarations and remedies as this Honourable court may deem fit and just in the circumstances.
- ix. A permanent injunction restraining the 1<sup>st</sup> respondent from issuing any Certificates of Renewal of Collective Management until such time as the 1<sup>st</sup> respondent shall be lawfully constituted under the Copyright Act and any relevant law as well as the constitution.
- x. An order on costs.

### **The Petitioner’s case**

2. The petition was supported by the petitioner’s affidavit of even date and a further affidavit dated 9<sup>th</sup> June 2023. He depones that the 1<sup>st</sup> respondent renewed and issued Certificates of Registration of a Collective Management Organization (CMO) to the 1<sup>st</sup> to 3<sup>rd</sup> interested parties. Further that previously the 1<sup>st</sup> respondent had issued provisional registration to the 1<sup>st</sup> interested party on 25<sup>th</sup> January 2023 and a Certificate of Renewal of Registration to the 3<sup>rd</sup> interested party on 26<sup>th</sup> January 2023. He deposes that the act of renewal of the licenses was unlawful since the 1<sup>st</sup> respondent’s term for the Board of Directors expired in November 2022 and no licenses can be granted without the Board.
3. He as well avers that the 1<sup>st</sup> respondent violated the doctrine of separation of powers by taking a directive from the 3<sup>rd</sup> respondent yet it is a body under the Executive arm under the Cabinet Secretary, Sports and Youth Affairs. That in an attempt to regularize this illegal action the 3<sup>rd</sup> respondent on 12<sup>th</sup> May 2023 instructed the 1<sup>st</sup> respondent to issue a renewal to the interested parties. He notes that the



Certificates had already been issued on 5<sup>th</sup> May 2023 and are valid until 31<sup>st</sup> December 2023. He avers that the 1<sup>st</sup> respondent in issuing these Certificates usurped the powers of the Board.

4. He depones that this renewal is unlawful and ultra vires Section 46 of the Copyright Act, 2001 for the failure to vet the interested parties. Likewise, its unconstitutional in view of Article 10 of the Constitution. He further points out that this illegal act has also been done before as seen in the case of Kisumu Bar Owners Association, Solomon Martins Omutsani v Kenya Copyright Board (2019) eKLR.
5. He deposes that the illegally issued Certificates empower the interested parties to collect money from the public contrary to the Constitution which provides that no person shall be deprived of their property except in accordance with the law. It is for this reason that the petitioner brought this petition against the respondents with a view to stop the unlawful acts and its consequences on the public.

#### **The 1<sup>st</sup> Respondents' case**

6. In reply the 1<sup>st</sup> respondent opposed the petition by filing its grounds of opposition dated 29<sup>th</sup> May 2023 on the premise that:
  - i. The petition does not meet the threshold set out in the Anarita Karimi Njeru v Republic 1979 Case.
  - ii. The 1<sup>st</sup> respondent has statutory power to issue licenses and/or Certificates of Renewal to Collective Management Organizations that meet the set requirements under relevant statutory provisions.
  - iii. The 1<sup>st</sup> respondent in discharge of its mandate, is not under any instruction or directive from other state agencies or stakeholders
  - iv. The issuance of the certificate to the interested parties was not done upon the instructions of the 3<sup>rd</sup> respondent.
  - v. That the Executive Director of the 1<sup>st</sup> respondent has administrative powers to make decisions.
  - vi. The petitioner has not exhausted all available remedies before approaching the court. The petitioner ought to have approached the Copyright Tribunal which has jurisdiction over the issues raised in the petition.
  - vii. The petition does not disclose any breach of rights vested upon the 1<sup>st</sup> respondent.

#### **The 2<sup>nd</sup> Respondent's case**

7. The 2<sup>nd</sup> respondent did not file any responses or written submissions.

#### **The 3<sup>rd</sup> Respondent's case**

8. The 3<sup>rd</sup> respondent in opposition to the petition filed its grounds of opposition dated 26<sup>th</sup> May 2023 and a replying affidavit dated 26<sup>th</sup> June 2023. Additionally the 3<sup>rd</sup> respondent filed a Notice of Motion dated 21<sup>st</sup> June 2023 which the Court ordered would be heard with the petition.
9. The Grounds of opposition are as follows:
  - i. The Petition violates the principle set in Anarita Karimi Njeru Vs Republic (1979) eKLR requiring that Constitutional Petitions be pleaded with reasonable precision.



- ii. *The Constitution* under Article 95 (5) (b) dictates that state organs including Kenya Copy Right Board are subjected to oversight by the National Assembly. Following up on deliberations between the Departmental Committee on Sports and Culture of the National Assembly and the Kenya Copy Right Board is one of the oversight and control mechanisms of the National Assembly over the Kenya Copy Right Board, as an organ of the state.
  - iii. The exercise of the oversight role by the National Assembly forms a crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government.
  - iv. Under Article 95 (2) of *the Constitution* of Kenya, 2010 the National Assembly deliberates on and resolves issues of concern to the people. The National Assembly exercises this statutory mandate on behalf of the people of Kenya. The issue of the economic and commercial welfare of Kenyan artists is an issue of concern to the people and therefore within the ambit of the 3<sup>rd</sup> respondent.
  - v. Further, there is no dispute between the 3<sup>rd</sup> respondent and Kenya Copy Right Board. The Kenya Copy Right Board who is a party to the proceedings did not question the actions of the 3<sup>rd</sup> respondent.
  - vi. The National Assembly did not direct or recommend to the 1<sup>st</sup> respondent how to implement the resolution to renew the interested parties' licenses but only requested the 1<sup>st</sup> respondent to consider issuing the licenses to the parties which had applied for registration and paid the requisite fees.
  - vii. Though the principle of separation of powers is discernible from the structure of Government set out in *the Constitution*, absolute separation does not exist nor was it ever intended.
  - viii. The petition is premised on a misunderstanding of the role of the National Assembly to oversight the executive and public state organs to ensure accountability and service delivery to the people.
  - ix. The petition is an affront to the role of Parliament under Articles 1(1), 92, 94 and 95 of *the Constitution*.
  - x. The granting of the impugned conservatory orders sought by the petitioners is highly prejudicial to the public interest, the economic interest of artists represented by the interested parties, the economic benefits including employment opportunity and revenue benefits derived from licensing of the interested parties to carry out their activities.
  - xi. Further, the petitioner has not identified with a certain degree of precision how the impugned provision infringes on his rights.
  - xiii. The petition and the Application both dated 17<sup>th</sup> May 2023 thus lack merits, it is frivolous, generally argumentative and an outright abuse of the court process and ought to be dismissed with costs.
10. The 3<sup>rd</sup> respondent's replying affidavit was sworn by Samuel Njoroge, the Clerk of the National Assembly. To begin with he disputes the contents and authenticity of the letter dated 12<sup>th</sup> May 2023 said to have originated from the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent. This is because the letter is not signed and does not bear an official receipt stamp.
  11. He deposes that contrary to the petitioner's allegation, renewing of licenses is a preserve of the 1<sup>st</sup> respondent and hence the National Assembly's departmental committee on Sports and Culture only



- requested the 1<sup>st</sup> respondent to renew the licenses to the applicants who had complied with the dictates of the *Copyright Act*. The issue before the committee concerned the loss of Ksh.67,000,000 if the renewals were not done.
12. He avers that this decision was made in view of Article 95(2) of *the Constitution* that allows the National Assembly to deliberate on and resolve issues concerning the people while ensuring accountability through the system of checks and balances. Moreover, Article 37 and 119 of *the Constitution* that allows members of public to petition the Parliament to consider matters in its authority. Similarly, Standing Order 216 (5) allows the National Assembly to investigate and inquire into all matters relating to the mandate of the assigned Ministries and departments.
  13. For context, he deposes that the 3<sup>rd</sup> respondent on 31<sup>st</sup> March 2023 received a Memorandum from Hon. Jane Njeri Maina, MP, County Representative, Kirinyaga County on behalf of Ephantus Wahome Kamau a registered member of Performers Rights Society of Kenya (PRISK), Kenya Association of Music Producers (KAMP) and Music Copyright Society of Kenya (MCSK) under membership number P0335. The Memorandum was a request to the National Assembly to summon PRISK to explain why Case No. HCCC 326 of 2015 was withdrawn leading to the loss of Ksh.67, 000, 000 of members' royalties. He informs that Lady Justice Mumbi Ngugi issued a judgment in February 2017 awarding KAMP – PRISK Ksh.67,000,000 against Royal Media Services.
  14. He deposes that Mr. Kamau informed that the settlement of these monies never materialized and when PRISK sought to have the judgment enforced to recover the money, they were informed that the matter had been withdrawn. It is this withdrawal that would lead to the loss of Ksh.67,000,000 by Kenyan musicians and actors. On this premise Mr. Kamau approached the National Assembly seeking its intervention over the matter.
  15. He deposes that the National Assembly on 14<sup>th</sup> April 2023 wrote letters to the stakeholders being the Principal Secretary State Department for Youth Affairs and the Arts, MCSK, KAMP and PRISK, the interested parties herein inviting them for a meeting on 20<sup>th</sup> April 2023 to deliberate on the issues revolving around the withdrawal of the said case.
  16. He deposes that the first meeting was held by the departmental committee on Sports and Culture on the said date. A follow up meeting was conducted on 5<sup>th</sup> May 2023 vide an invitation made on 26<sup>th</sup> April 2023. The communication also requested the CMOs to invite their members to the meeting.
  17. He deposes that the impugned letter dated 12<sup>th</sup> May 2023 relied upon by the petitioner was not sent by the 3<sup>rd</sup> respondent and he is unaware of its origin. As such the impugned decision was not made by the 3<sup>rd</sup> respondent as alleged. For perspective, he informs that the National Assembly's committees make recommendations through a report which must be tabled before the floor of the House for debate, approval and then implementation.
  18. He further deposes that as at the time of filing this affidavit, the National Assembly's departmental committee was still conducting investigations regarding the issues herein. As such there is no existing final binding decision or recommendation rendered by the National Assembly making this petition premature. In fact he avers that the Certificates were issued on 25<sup>th</sup> January 2023, 26<sup>th</sup> January 2023 and 5<sup>th</sup> May 2023 before the National Assembly invited the 1<sup>st</sup> respondent for the deliberations.
  19. He avers that in light of these averments the petitioner is misleading the Court that the licenses were issued under the directive of the National Assembly yet they were issued by the 1<sup>st</sup> respondent in his own discretion. On this premise, he urges the court to dismiss the petition.



## **The Application**

20. The 3<sup>rd</sup> respondent's Notice of Motion dated 21<sup>st</sup> June, 2023 was filed under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and Rule 5(d) and Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking orders that:
- i. Spent.
  - ii. Spent
  - iii. This honourable Court be pleased to strike out the 3<sup>rd</sup> respondent as a party in this suit.
  - iv. The costs of this application be provided for.
21. The application which was also supported by Samuel Njoroge's supporting affidavit of even date was premised on the summarized grounds that:
- i. The petition offends Article 93 of *the Constitution* that establishes the Parliament which consists of the National Assembly and the Senate as public offices with legal capacity to be sued separate from their Clerks.
  - ii. The claims made in the instant petition constitute allegations against the National Assembly and not its Clerk. Furthermore the petition does not make out a case against the 3<sup>rd</sup> respondent and neither is any relief sought against him.
  - iii. The 3<sup>rd</sup> respondent being the accounting officer of the National Assembly cannot be personally held liable for actions taken by the National Assembly in performance of its constitutional mandate under Article 94 and 95 of *the Constitution*.
  - iv. The suit as framed in light of this application is defective and hence the 3<sup>rd</sup> respondent's name should be struck off from the pleadings.
  - v. The petitioner will not suffer any prejudice if the orders sought in this application are granted.
22. The petitioner in response to this application filed a further affidavit dated 11<sup>th</sup> July 2023. While maintaining his arguments as stated in the petition he opposed the application stating that the 3<sup>rd</sup> respondent was properly enjoined in this suit as the license was issued under his instruction to the 1<sup>st</sup> respondent. He as a result dubbed the application as a tactic employed to delay determination of the instant matter.

## **The 4<sup>th</sup> Respondent's case**

23. The 4<sup>th</sup> respondent did not file a response or written submissions in this matter.

## **The Interested Parties Case**

### **The 1<sup>st</sup> Interested party**

24. The 1<sup>st</sup> interested party through its Chief executive officer filed a replying affidavit dated 5<sup>th</sup> July 2023. He makes known that the 1<sup>st</sup> interested party is a registered and licensed by the 1<sup>st</sup> respondent as a CMO representative enforcing rights of performers (musicians and actors) of sound recording and audio-visual works. He deposes that prior to being licensed the 1<sup>st</sup> interested party had complied with the dictates of Section 46(2) of the *Copyright Act*, 2001.



25. He avers that the instant petition is geared towards illegally abrogating its mandate to collect and distribute royalties under the Copyright Act. Moreover that, the invitation to suspend its 2023 Certificate as granted by the 1<sup>st</sup> respondent is prejudicial to public interest and its members' economic rights in violation of Article 40(5) of the Constitution.
26. He further avers that the petitioner snubbed the Copyright Tribunal that is established to address such grievances of members and hence this Court lacks jurisdiction to entertain the matter. Likewise, he argues that the petition has not met the threshold in the case of Anarita Karimi Njeru V Republic (1979)eKLR and threshold for grant of the sought orders.

### **The 2<sup>nd</sup> Interested party**

27. The 2<sup>nd</sup> interested party opposed the petitioner's case in its replying affidavit dated 23<sup>rd</sup> June 2023 sworn by its Chief executive officer, Dr. Ezekiel Mutua, MBS. He deposes that following the decision in Petition No.435 of 2020, Music Copyright Society of Kenya v Kenya Copyright Board and another, the 2<sup>nd</sup> interested party made an application for registration after complying with the legal requirements. After consideration by the 1<sup>st</sup> respondent the license was granted. He informs that the license is important because they operate on the basis of a joint tariff and hence consumers of copyrighted musical works demand for the Certificate in their interaction with the 3<sup>rd</sup> interested party.
28. He further avers that suspension of this impugned license will render protection of its members rights difficult and inevitably lead to infringement of its members rights in their works as envisaged under Article 40(5) of the Constitution.
29. He also challenges the petitioner's choice of forum in this court as he failed to exhaust the internal mechanisms provided for its members in its Memorandum and Articles of Association. He calls for the dismissal of the Petition.

### **The 3<sup>rd</sup> Interested Party**

30. The 3<sup>rd</sup> interested party in response and opposition to the petition filed a replying affidavit dated 5<sup>th</sup> July 2023 sworn by its Chief executive officer, CS Maurice Okoth who commenced by stating that the petition was a non-starter and not compliant with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He averred that the 3<sup>rd</sup> interested party is registered and licensed by the 1<sup>st</sup> respondent as a CMO representative of producers of sound recording. He deposes that prior to being granted the impugned Certificate of Registration dated 26<sup>th</sup> January 2023, it had complied with the dictates of Section 46 of the Copyright Act, 2001.
31. He states that the application for licensing was not submitted to Parliament but to the 1<sup>st</sup> respondent as the regulator. He as such avers that the 3<sup>rd</sup> interested party's application was considered on its merit without interference by the Parliament as alleged. He nonetheless states that Parliament under Article 95(2) of the Constitution has a mandate to resolve any issues of concern to the public.
32. He deposes that the petitioner's argument that the CMO Certificate of Registration 2023 should be suspended is prejudicial to the 3<sup>rd</sup> interested party, its members and the public at large. He faulted the petitioner as its member for failing to exhaust the internal dispute resolution mechanisms provided under Section 48 of the Copyright Act, 2001. He thus urges the court not to grant the orders sought.



## The Parties Submissions

### The Petitioner's submissions

33. The petitioner through his advocates Gitonga Mureithi and Company Advocates filed written submissions and a list of authorities dated 9<sup>th</sup> June 2023. The issues for determination were identified as follows:
- i. Whether this court has jurisdiction to entertain the petition.
  - ii. Whether it is within the mandate of the Executive Director of the 1<sup>st</sup> respondent to renew the 1<sup>st</sup> to 3<sup>rd</sup> Interested Parties registration as Collective Management Society on behalf of the Board of Directors.
  - iii. Whether Parliament's Department of Sports and Culture Committee has a legal mandate to issue directives to the 1<sup>st</sup> respondent.
34. On the first issue, counsel argued that this is a constitutional petition alleging breach of *the Constitution* and separation of powers and thus outside the purview of the powers vested in the Copyright Tribunal. While relying on the case of Kenya National Chamber of Commerce & Industry- Machakos Branch & another v Music Copyright Society of Kenya (MCSK) & 3 others [2019]eKLR counsel submitted that there was no decision of the Copyright Board to be challenged before the Tribunal. As such the jurisdiction of the Tribunal as captured under Section 48 of the *Copyright Act* could not be expanded to cover the issues raised herein.
35. Turning to the second issue, Counsel submitted that the functions of the 1<sup>st</sup> respondent's board of directors are outlined under Section 5 of the *Copyright Act*. In particular, Section 5(b) of the Act provides that the Board is the only body, authorized to license and supervise the activities of collective management societies. It is noted that the 1<sup>st</sup> respondent's Board of Directors term expired in 2022 as such the 1<sup>st</sup> respondent does not have a Board.
36. Counsel further argued that the 1<sup>st</sup> respondent's executive director has over stepped his mandate and illegally taken over the functions of the Board. It was noted that it was on the premise of this illegal authority that the executive director implementing a directive by the Parliament department of culture renewed the 1<sup>st</sup> to 3<sup>rd</sup> interested party's licenses of registration of a collective management society. Additionally, that the 1<sup>st</sup> respondent has been issuing short term provisional registrations which are not provided for or recognized in any Statute.
37. In support of this argument reliance was placed on the case of Kisumu Bar Owners Association, Solomon Martins Omutsani v Kenya Copyright Board (KECOBO) [2019] eKLR where it was held that when the Executive Director issued a license to MCSK on 1<sup>st</sup> February 2019, at a time when the Copyright Board was not properly constituted, he acted without the requisite legal mandate. It was further argued that by renewing the said licenses, the 1<sup>st</sup> to 3<sup>rd</sup> interested parties had gone ahead and illegally collected royalties from the public without any supervision as required in Section 5(b) of the *Copyright Act*.
38. On the third issue, Counsel submitted that vide the letter dated 12<sup>th</sup> May 2023, Parliament's departmental committee on Sports and Culture issued a directive to the 1<sup>st</sup> respondent directing it to renew the certificates of registration of the collective management society of the 1<sup>st</sup> to 3<sup>rd</sup> interested parties. This is said to be contrary to the law because no government agency should issue directives to any regulatory body as they enjoy independence in carrying out their mandate.



39. To buttress this point reliance was placed on the case of Communication commission of Kenya & 5 Others v Royal Media Services limited & 5 others [2014] eKLR where it was held that independence is a shield against influence or interference from external forces. In this case, he states that such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. Comparable reliance was placed on the cases of Re The matter of Interim Independent Electoral Commission [2011] eKLR and Speaker of National Assembly -vs-Attorney General and 3 Others (2013)eKLR.
40. In closing Counsel submitted that the petitioner having established its case, the respondents ought to pay costs. He referred to the case of Joseph Oduor Anode V Kenya Red Cross Society [2012] EKLK in support.

### **The 1<sup>st</sup> Respondent's submissions**

41. The 1<sup>st</sup> respondent through its Counsel Paul Kaindo filed written submissions dated 14<sup>th</sup> July 2023. He identified the issues for determination as:
  - i. Whether the petition meets the threshold set out in the Anarita Karimi case.
  - ii. Whether the 1<sup>st</sup> respondent has statutory power to issue licenses and/or certificates of renewal to the interested parties.
  - iii. Whether the 1<sup>st</sup> respondent in issuing the certificates of renewal to the interested parties was under the instruction of the 3<sup>rd</sup> respondent.
  - iv. Whether the petitioner has exhausted all available remedies before approaching the court.
  - v. Whether the Executive Director of the 1<sup>st</sup> respondent has administrative powers to make decisions on behalf of the board.
42. Counsel on the first issue submitted that the petitioner in the instant petition made a general and blank allegation about violation of several constitutional provisions. He does not state with precision which provisions were infringed and/or the manner in which these provisions if any were infringed hence failing to meet the threshold set out in the Anarita Karimi case.
43. To buttress this point reliance was placed on the case of David Mathu Kimingi v SMEC International PTY Limited (2021)eKLR where the court held as follows:

“The main issue for determination in the application before me is whether the petition raises any issues on violation of *the Constitution* to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41 (1) of *the Constitution* as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of Anarita

Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR”.



44. On the second issue, Counsel submitted that Section 5 (b) of the *Copyright Act* mandates the 1<sup>st</sup> respondent to license and supervise the activities of the CMO. He further submits that the Act prohibits a person or an association from carrying out the business of a CMO unless issued with a certificate of registration in accordance with the Act. This application for registration procedure is laid out under Section 46 of the *Copyright Act* and the *Copyright Act* (Collective Management) Regulations 2020. He submitted that the 1<sup>st</sup> to 3<sup>rd</sup> interested parties made their applications under the dictates of the Act were and accordingly issued with the impugned Certificates. As such counsel submitted that the 1<sup>st</sup> respondent was right in issuing of the Certificate of licenses in fulfilment of its statutory mandate.
45. Counsel on the third issue stated that Article 95(5)(b) gives the National Assembly the power to exercise oversight authority over state organs including the 1<sup>st</sup> respondent. As such the National Assembly through its departmental committee of Sports and Culture organized the meeting between the interested parties, the 1<sup>st</sup> respondent and representatives of Kenyan artists concerning the issues raised. Nonetheless, it was noted that the 1<sup>st</sup> respondent had already received applications from the interested parties regarding renewal of their licenses.
46. Counsel in light of this argued that it was not true that the 1<sup>st</sup> respondent made the renewals based on the directive of the 3<sup>rd</sup> respondent rather the same was founded on the rightful procedure being followed by the 1<sup>st</sup> respondent in considering the applications made by the interested parties.
47. On the fourth issue, Counsel submitted that the *Copyright Act* establishes the Copyright Tribunal under Section 48 with the jurisdiction to hear and determine appeals related to issuance of certificates of registration to CMOs. The Act also empowers the Tribunal to accord parties that appear before it an opportunity to present their respective cases. In view of this counsel submitted that it is clear that the petitioner failed to exhaust this mechanism before lodging the petition in court.
48. To buttress this point reliance was placed on the case of *Martin Kabubii Mwangi v County Government of Laikipia* (2019)eKLR where it was held that:
- “the exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Another v Hulbhai Gedi Abdille* (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*, The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs”.
- Also referred to was the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR”.
49. Moving on to the fifth issue counsel submitted that the 1<sup>st</sup> respondent’s executive director is a holder of a statutory office established under Section 11 of the *Copyright Act* which provides that the Executive Director is responsible for the day-to-day management of the 1<sup>st</sup> respondent. It is Counsel’s argument that the fundamental principles of administrative law oblige the 1<sup>st</sup> respondent when exercising administrative authority to apply procedural fairness that adopts the strict adherence to the rules of natural justice.
50. Further admitting that the 1<sup>st</sup> respondent does not have a Board and relying on the case of *Keroche Industries Limited v. Kenya Revenue Authority & 5 others* (2007) eKLR counsel submitted that the



Executive Director in discharge of his administrative powers is bound to act in good faith and for the good of the public. On this premise Counsel emphasized that the issuance of the certificate of renewal were issued in good faith after all due process had been followed and in the interest of the public.

### **The 3<sup>rd</sup> Respondent's submissions**

51. The 3<sup>rd</sup> respondent through its Counsel Joshua Kiilu filed written submissions dated 3<sup>rd</sup> July 2023 where Counsel set out the issues for determination as:
  - i. Whether the Clerk is wrongly joined in this matter
  - ii. Whether the National Assembly acted unconstitutionally
  - iii. Whether the licenses were issued under the directive of the National Assembly
  - iv. Whether the matter is before this Court prematurely
52. On the first issue, Counsel submitted that the 3<sup>rd</sup> respondent had been wrongly joined in this suit as the petitioner is aggrieved by the proceedings before the National Assembly's committee of Sports and Art which were informed by the petition submitted to the National Assembly by Ephantus Wahome through Hon. Njeri Maina, MP in line with its mandate under Article 95 of *the Constitution*. He stressed that the 3<sup>rd</sup> respondent does not control the Committee's proceedings and so was wrongly sued. Additionally, that the 3<sup>rd</sup> respondent is shielded from such proceedings under Section 12 (3) of the *Parliamentary Powers and Privileges Act* No. 29 of 2017. To support this point reliance was placed on the case of *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) (2020) eKLR*
53. On the second issue, Counsel submitted that Article 95 (b) of *the Constitution* empowers the National Assembly oversight authority over state organs. To enable the National Assembly discharge its representation duty, Article 125 of *the Constitution* empowers the National Assembly to summon any person to appear before it for the purpose of giving evidence or providing information. Thus when the petition was filed before the Parliament, the National Assembly reviewed the memorandum and ascertained that it raised issues of public interest. Thereafter the matter was referred to the departmental committee on Sports and Culture pursuant to Standing Order 227 of the National Assembly's standing orders.
54. Counsel reiterating the contents of the 3<sup>rd</sup> respondent's affidavit emphasized that to achieve the objectives of Article 95 of *the Constitution* the National Assembly is mandated to perform its functions in a way that promotes the resolution of issues in a manner that promotes justice and fairness. In determining this issue Counsel urged the Court to be guided by the Supreme Court opine in the *Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR* where it was held that the approach of constitutional interpretation ought to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of *the Constitution*. Considering this Counsel argued that the National Assembly cannot achieve the objective of resolving issues of public interest if it is barred from making recommendations on the best way to resolve the issues.
55. Furthermore, Counsel submitted that the National Assembly's departmental committee of Sport and Culture carried out its proceedings with regard to the parties statutory mandate. He as such opposed the allegation that the National Assembly directed the 1<sup>st</sup> respondent in the manner it should carry out its mandate as alleged. It only sought clarification on various issues as raised by the interested



parties herein. Each party was given a chance to ventilate its case, and the Committee's report and recommendation of the proceedings are yet to be tabled before the National Assembly.

56. Counsel further argued that the assertion that the 1<sup>st</sup> respondent is shielded in light of separation of powers from the National Assembly was misplaced as Parliament has the obligation to hold it accountable under the system of checks and balances. Likewise, Article 96 (5)(b) of *the Constitution* gives the National Assembly the exclusive mandate of oversight authority over State organs. In support of this point reference was made to the case of Commission for the Implementation of *the Constitution* v Speaker of the National Assembly [2016] eKLR which held that the function of the National Assembly is to hold the executive organs of the State in the national sphere of government accountable.
57. It is therefore Counsel's submission that the departmental committee on Sports and Culture was legally discharging its mandate when conducting its proceedings. Further that the 1<sup>st</sup> respondent and the various stakeholders were invited to the proceedings to assist the Committee to resolve the issues in a just and fair manner. As such Counsel noted that the Committee cannot be said to have acted unconstitutionally in conducting the hearings.
58. Moving to the next issue, Counsel submitted that this allegation was premised on a falsehood as the National Assembly never directed the 1<sup>st</sup> respondent as alleged. He noted that the petitioner's claim is founded on an unsigned letter which bears no weight as far as Parliamentary procedure and process are concerned. This is since binding decisions of the National Assembly in the performance of its constitutional powers are contained in approved reports which the petitioner did not adduce as evidence. It was however noted that the report is yet to be made upon conclusion of the proceedings.
59. Additionally Counsel submitted that the 1<sup>st</sup> respondent carried out its registration license renewal mandate on its own motion without being directed by anyone and in accordance with CMOs' license renewal procedures. In fact, the licenses were issued before the National Assembly's committee on Sport and Culture commenced its proceedings with the 1<sup>st</sup> respondent and the stakeholders hence the petitioner's allegation is misdirected.
60. Turning to the next issue, Counsel was emphatic that the instant petition had been filed prematurely in violation of the principle of ripeness. To buttress this point reliance was placed on the case of Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR where it was held that the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases and so the court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.
61. In this regard counsel reiterated that it was not in dispute that the National Assembly's Committee on Sports and Culture had received a public petition seeking investigations relating to the circumstances surrounding the withdrawal of Case No. HCCC 326 of 2015 leading to a loss of more than Kshs. 67,000,000 of the CMOs Members' royalties. Likewise that it was apparent that the matter is still pending before the Committee and thus no decision has been made in the matter to allow this court interrogate its constitutionality. Considering these facts, it was stated that this matter is premature and that the jurisdiction of the court has been invoked wrongly.
62. To this end, Counsel submitted that the petitioner had failed to discharge his burden of proving that the National Assembly's Committee of Sports and Culture acted unconstitutionally. To this end, he argued that the petition is unmerited as the petitioner had failed to prove his case to justify grant of the orders sought.



### The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submissions

63. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties through the firm of OMK Advocates LLP filed written submissions dated 18<sup>th</sup> July 2023 where Counsel indicated the issues for determination to be as follows:
- i. Whether this Court has jurisdiction.
  - ii. Whether the public interest militates against grant of the orders sought and whether the petitioner will suffer any loss if the orders are not issued.
  - iii. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were licensed rightfully.
64. Counsel on the first issue submitted that the petitioner failed to exhaust the internal dispute mechanism that establishes a Tribunal to entertain such disputes for the members, who the petitioner is part of. Equally it is noted that the petitioner failed to file an application for exemption from the requirement of exhaustion of available mechanisms by dint of Section 9(4) of the Fair Administrative Act, 2015. In view of this Counsel submitted that this Court lacks jurisdiction to entertain the matter in light of the doctrine of exhaustion.
65. In support of this argument reliance was placed on the case of Geoffrey Muthiga Kabiru and 2 others v Samuel Munga Henry and 1756 others(2015)eKLR where it was held that it is imperative that where a dispute resolution mechanism exists outside courts, the same should be exhausted before jurisdiction of the courts is invoked. Courts ought to be of last resort and not the first port of call. Counsel further referred to the cases of William Odhiambo Ramogi and 3 others v Attorney General and 4 others;Muhuri and 2 others(Interested parties)(2020)eKLR and Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others (2012)eKLR, in support.
66. Discussing the second issue, Counsel submitted that the 1<sup>st</sup> respondent has the statutory power to issue licenses and certificates of renewal of CMO's that meet the set requirement under Section 46 of the [Copyright Act](#). It was noted that the interested parties made their applications in line with this dictate to the 1<sup>st</sup> respondent. After the 1<sup>st</sup> respondent considered the applications the parties were then issued with the licenses without direction from the 3<sup>rd</sup> respondent as alleged. In view of this, Counsel submitted that the Certificates were granted lawfully and rightly.
67. Counsel however, argued that Parliament under Article 95(2) of [the Constitution](#) has authority to resolve issues of concern to the people. He pointed out that the letter relied on by the petitioner to indicate the 3<sup>rd</sup> respondent's directive was unsigned hence its authenticity was questionable. According to Counsel Section 107 (1) and (2) of the [Evidence Act](#) places the burden of proof of the genuineness of the letter on the petitioner which he did not discharge.
68. On the third issue, Counsel submitted that the petitioner's call to have the CMO'S Certificate of Registration cancelled is highly prejudicial to their members who the petitioner is part of and the public. The reason is that its members intellectual property rights will be unprotected and an invitation for their rights under Article 40(5) of [the Constitution](#) to be violated. He informed that the interested parties' members work would be exploited owing to the lack of a prerequisite legal authority to protect against such. Counsel as well submitted that the petitioner had failed to demonstrate how his rights would be infringed as a member if the Certificates of Registration are not suspended.
69. In view of this Counsel argued that the petition lacked merit and costs ought to be awarded to the interested parties. He relied on the case of Republic v Rosemary Wairimu Munene, Ex parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd(2014) eKLR in support.



## Analysis And Determination

70. I have carefully considered the pleadings and submissions of the parties herein and in my considered view the issues that arise for determination are as follows:

A. Preliminary issues

- i. Whether this Court has the jurisdiction to entertain the matter.
- ii. Whether the 3<sup>rd</sup> respondent was wrongly joined in this suit.
- iii. Whether the instant suit was filed prematurely thus affecting its justiciability.

B. Substantive issues

- iv. Whether the Certificates of Registration granted to the Collective Management Organization by the 1<sup>st</sup> respondent were issued under the directive of the 3<sup>rd</sup> respondent.
- v. Whether the 1<sup>st</sup> Respondent's Executive Director has legal authority to make decisions on behalf of the board of Directors.
- vi. Whether the petitioner is entitled to the reliefs sought.

### Issue No. (i) Whether this Court has the jurisdiction to entertain the matter

71. The 1<sup>st</sup> and 3<sup>rd</sup> respondents and the interested parties opposed this Court's jurisdiction on the basis that the petitioner failed to exhaust the dispute resolution mechanisms provided in the [Copyright Act](#). According to them the dispute ought to have been referred to the Copyright Tribunal established under Section 48 of the Act. The petitioner rejected this argument stating that the issues raised herein are not within the scope of the Tribunal's jurisdiction and further that there was no decision made by the 1<sup>st</sup> respondent to constitute a dispute to be heard by the Tribunal. The 2<sup>nd</sup> interested party additionally argued that the petitioner had failed to exhaust the internal dispute mechanisms established in the Society's Memorandum and Articles of Association for its members who the petitioner is part of.

72. It has been established that jurisdiction is everything, without which, a Court has no power to make one more step. (See: Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR). Unmistakably in each matter where the issue is raised the Court must examine its veracity before entertaining the matter. This is because a decision made without legal authority or jurisdiction is void ab initio.

73. A court's jurisdiction was described by the Supreme Court in the case of Samuel Kamau Macharia (supra) as follows:

“(68) A Court's jurisdiction flows from either [the Constitution](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by [the constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where [the Constitution](#) exhaustively provides for the jurisdiction of a Court of law,



the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

74. The law requires a party to exhaust the dispute resolution mechanisms that governs it before filing a matter in Court. To this end the Court of Appeal in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

75. The question that follows this setting is what then invokes the doctrine of exhaustion before invoking the Court process. This was aptly discussed in the case of William Odhiambo Ramogi & 3 others (supra) by the five judge bench as follows:

“52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”

76. The Court went on to outline the exceptions to the rule as follows:

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

77. An answer to this question requires interrogation of the dispute mechanism said to be available to the petitioner in the context of this case. To begin with the [Copyright Act](#) under Section 48(1) establishes the Copyright Tribunal as follows:

There shall be a Copyright Tribunal appointed by the Chief Justice for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such Tribunal.

78. Section 48(4) and (5) goes ahead to outline the functions of the Tribunal as follows:

Subject to subsection (5), the Copyright Tribunal shall have jurisdiction to hear and determine—

- i. a dispute over registration of copyright; and
- ii. an appeal against—
  - (i) The Board's refusal to grant a certificate of registration to a collective management organization;
  - (ii) Imposition of unreasonable terms or conditions by the Board for the grant of a certificate of registration;
  - (iii) Unreasonable refusal by a collective management organization to grant a licence in respect of a copyright work; or
  - (iv) Imposition of unreasonable terms or conditions by a collective management organization for the grant of a licence in respect of a copyright work;

Before determining a matter referred to it under this section, the Copyright Tribunal shall, in accordance with such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives both orally and in writing.

79. Although the 2<sup>nd</sup> interested party's adduced evidence indicates that the petitioner is its member, it does not include the specified internal dispute resolution mechanism for the Society for this court to go through and make a determination. At this juncture it is vital to note that this court is obliged to consider whether the dispute resolution mechanism established by the Act or body is competent in the circumstances of this case in the interest of justice.

80. The key contention in this matter is that the interested parties who are classified as Collective Management Organizations were issued with Certificates of Registration by the 1<sup>st</sup> respondent despite its lack of a properly constituted Board and secondly the Certificates were allegedly issued under the directive of the 3<sup>rd</sup> respondent.



81. Upon reading the dictates of Section 48, I find the dispute before this court not to arise as a result of registration of a copyright or an appeal from the Board's decision which is the scope of the Tribunal's jurisdiction. Unmistakably the issues raised herein as argued by the petitioner cannot be determined by the Tribunal as this would be an expansion of its mandate as ascribed by the law.
82. Ordinarily this Court will not interfere with the Tribunal's mandate as long as a dispute falls within the confines of Section 48(4) of the Act. It is however not lost to this Court as guided by the principles in the case of Geoffrey Muthinja & another (supra) that it is necessary for the court to look carefully at the suitability of the dispute mechanism in the context of each particular case in making its determination. Where the adequacy and availability of the mechanism is deemed wanting this creates an exceptional case that allows the Court to intervene. This was well captured in the case of Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR where it was held that:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile....this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

83. It is my humble finding accordingly that the claim of the doctrine of exhaustion is not applicable in the circumstances of this case. This is since the dictates of Section 48(4) of the Act does not address the issues raised herein. Manifestly there is no appeal from a decision of the Board as the Board of Directors is said to be non-existent at the moment. Accordingly it is my finding that this Court is the suitable forum to entertain this matter.

#### **Issue No. (ii) Whether the 3<sup>rd</sup> Respondent was wrongly joined in this suit**

84. The 3<sup>rd</sup> respondent herein protested his joinder in this matter as the Clerk of the National Assembly yet the petitioner's grievance is premised on an action allegedly taken by the National Assembly. He emphasized that the National Assembly is a legal person capable of being sued and that he as its Clerk is shielded from proceedings instigated against him in his personal capacity whilst carrying out his functions in good faith. Nonetheless he observed that no case had been made out against him personally in this suit. The petitioner on the flipside maintained that he had rightly sued the 3<sup>rd</sup> respondent since the impugned letter dated 12<sup>th</sup> November 2023 originated from him.
85. It is imperative to first underscore that misjoinder of a party is not fatal to a petition. The Court of Appeal in the case of Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others (2019)eKLR made this clear by observing as follows:

“...Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 addresses the issue of non-joinder and misjoinder of parties. It is apt to reproduce the entire provision.

“5. Addition, joinder, substitution and striking out of parties

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—



- b. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
- c. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
- d. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
- e. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
- f. order that the name of any party improperly joined, be struck out; and
- g. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
- h. Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute.”

86. This was equally emphasized by the Court of Appeal in the case of *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 Others* [2016] eKLR where it observed that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder:-

“9 No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

87. Rule 5(a) of the Mutunga Rules makes it clear that a petitioner if in doubt as to the persons from whom redress should be sought, may join two or more respondents in order that the question as to which of the respondent is liable is determined. A reading of the petitioner’s supporting affidavit under paragraph 7 discloses as follows in this regard:

“That on 12<sup>th</sup> May 2023, the 3<sup>rd</sup> respondent communicated the decision of the parliamentary departmental of culture “instructing” the 1st Respondent to issue a “renewal” to the Interested Parties which process was to sanitize the perpetuated illegality by the 1<sup>st</sup>



respondent who had already issued certificates dated 5<sup>th</sup> May 2023. [I annex and mark as Exhibit JMN 4, a copy of the 3<sup>rd</sup> respondent's letter dated 12<sup>th</sup> May 2023.]”

88. A reading of this paragraph makes known that the claim against the 3<sup>rd</sup> respondent herein was based on him carrying out his function as the Clerk of the Assembly. The petitioner in the petition does not make any specific claim against the 3<sup>rd</sup> respondent other than carrying out his function. It is also apparent that the petitioner notes that the 3<sup>rd</sup> respondent was communicating the decision of the National Assembly's departmental committee of Sports and Culture and not his own.
89. The *Parliamentary Powers and Privileges Act*, 2017 under Section 12(3) provides as follows:
- Immunity from legal proceedings
- The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.
90. A reading of this provision makes it clear that the Clerk of the National Assembly is shielded from civil proceedings for acts done in the course of his function. It is discernible that this suit primarily was instigated against the National Assembly for allegedly issuing a directive issued to the 1<sup>st</sup> respondent. Unmistakably the two offices although related are distinct, each with a legal personality of its own and capable of being sued and suing. Bearing this in mind, it is certain that the 3<sup>rd</sup> respondent was wrongly joined in this suit by the petitioner whilst carrying out his function.

**Issue No. (iii) Whether the instant suit was filed prematurely thus affecting its justiciability**

91. The 3<sup>rd</sup> respondent in its response and submissions stressed that the instant suit had been filed prematurely as the proceedings before the National Assembly's departmental committee of Sports and Culture were still ongoing. It was argued hence that the petition was offensive to the doctrine of ripeness which in essence affects the justiciability of this matter. The petitioner did not make any submission on this issue.
92. As correctly submitted by the 3<sup>rd</sup> respondent, the doctrine of ripeness was addressed in the case of *Wanjiru Gikonyo & 2 others*(supra).In essence the basic principle of the doctrine of ripeness is employed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.
93. In the present petition, while the 3<sup>rd</sup> respondent is certain that the petition is premature, I take a different view. I say so because the substratum of this petition is not the petition presently before the National Assembly as presented by Hon.Jane Njeri Maina, on behalf of Ephantus Wahome Kamau a registered member of the interested parties. The facts deposed by the 3<sup>rd</sup> respondent were not raised by the petitioner herein, instead the petitioner focused on the issuance of the Certificates of Registration by the Executive Director while there is no properly constituted Board and secondly an allegation that the Certificates were issued under the directive of the 3<sup>rd</sup> respondent in violation of the doctrine of separation of powers. Taking this into consideration I find that the 3<sup>rd</sup> respondent's allegation that the petition is premature must fail as it is not the substratum of the petition.



**Issue No. (iv) Whether the Certificates of Registration granted to the Collective Management Organization by the 1<sup>st</sup> Respondent were issued under the directive of the 3<sup>rd</sup> Respondent**

94. Turning to the substantive issues, one of the key allegations by the petitioner is that the 3<sup>rd</sup> respondent vide a letter dated 12<sup>th</sup> May 2023 instructed the 1<sup>st</sup> respondent to issue the Certificates of Registration to the interested parties usurping the Board's mandate as outlined in the Copyright Act. The petitioner argued this to be in violation of the doctrine of separation of powers.

95. The 1<sup>st</sup> and 3<sup>rd</sup> respondents disputed this allegation in light of the averments stated in their affidavits. Furthermore, the 3<sup>rd</sup> respondent and interested parties impugned the authenticity of the said letter noting that the same did not bear any signature and official stamp. Additionally it was noted that the proceedings were ongoing and no final decision in form of a Report as is customarily communicated by the National Assembly had been made to make such a conclusion. The petitioner did not respond to the authenticity arguments.

96. The Court in the case of *Edward Akong'o Oyugi & 2 others v Attorney General (2019)eKLR* observed as follows:

“72. Section 107 (1) of the Evidence Act provides that "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." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not)..."

97. The Court went on to state that:

“

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

98. Undoubtedly for the petitioner to rely on this letter he must show that the letter indeed is genuine. In this regard the Court in the case of *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others (2019)eKLR* observed as follows:

“13. ...Section 66 of the Evidence Act provides inter alia that secondary evidence includes certified copies given under the provisions contained in the Act,



copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies; copies made from or compared with the original; counterparts of documents as against the parties who did not execute them; oral accounts of the contents of a document given by some person who has himself seen it.

14. In conclusion I find that an unsigned document has no probative value as the contents genuineness cannot be proved. It is worth noting that documents do not prove themselves; a witness must be examined to prove the documents. The evidence of the contents of the document is hearsay evidence unless the author thereof is known or identifies himself as owning the document...”

99. It is apparent that the petitioner did not endeavor to discharge his burden of proof on this issue. In effect the inevitable conclusion is that the petitioner failed to prove that the 3<sup>rd</sup> respondent directed the 1<sup>st</sup> respondent to issue the Certificates of Registration to the interested parties thus interfering with its mandate.

**Issue No. (v) Whether the 1<sup>st</sup> Respondent’s Executive Director has legal authority to make decisions on behalf of the Board of Directors**

100. The second contention was that the issuance of the Certificates of Registration was unlawfully done by the 1<sup>st</sup> respondent’s Executive Director. This is because at the moment the Board of Directors is not properly constituted. Essentially the petitioner contended that this decision which is a function of the Board could not be purported to be done by the Executive Director and so the decision was null and void.

101. The respondents and interested parties also admitted that the 1<sup>st</sup> respondent’s Board was not properly constituted but they maintained that the Executive Director was charged to run the affairs of the 1<sup>st</sup> respondent on a daily basis and so had the authority to issue the Certificates. The Court was also urged to consider the great public interest involved in the matter as the economic rights of the interested parties members would be in great jeopardy if the Certificates are quashed.

102. The 1<sup>st</sup> respondent is established under Section 3 of the [Copyright Act](#). The functions of the Board are outlined as follows under Section 5 of the Act:

- i. direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and other rights recognized by this Act and ensure the observance thereof;
- ii. license and supervise the activities of collective management societies as provided for under this Act;
- (c) devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national, regional or international organisations concerned with the same subject matter;
- (d) organise the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;
- (e) enlighten and inform the public on matters relating to copyright and related rights;
- (f) maintain an effective data bank on authors and their works; and



- (g) administer and enforce all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.
103. A properly constituted Board under Section 6 comprises of: a Chairperson appointed by the President; the Principal Secretary in the National Treasury or a designated representative; the Principal Secretary in charge of matters relating to culture and heritage or a representative; the principal secretary in the Ministry responsible for matters relating to information and communications technology or a designated representative; the Attorney-General or a representative; three persons each nominated by associations recognised by the Government as representing stakeholders in music, film and publishing respectively; and the Executive Director appointed under Section 11.
104. Furthermore Section 8(1) of the Act informs that the Conduct of business and affairs of the Board is as provided in the Schedule.
105. The relevant parts of the First Schedule provide as follows:
1. Tenure of office  
The chairman or a member of the Board other than an ex officio member shall, subject to the provisions of this Schedule, hold office for a period of three years, on such terms and conditions as may be specified in the instrument of appointment, but shall be eligible for re-appointment.
  3. Meetings
    1. The Board shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.
    2. Notwithstanding subparagraph (1), the chairman may, and upon requisition in writing by at least five members shall, convene a special meeting of the Board at any time for the transaction of the business of the Board.
    3. Unless three quarters of the total members of the Board otherwise agree, at least fourteen days' written notice of every meeting of the Board shall be given to every member of the Board.
    4. The quorum for the conduct of the business of the Board shall be seven members including the chairman or the person presiding.
    5. The chairman shall preside at every meeting of the Board at which he is present but in his absence, the members present shall elect one of their number to preside, who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairman.
    6. Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of the votes of the members present and voting and in the case of an equality of votes, the chairman or the person presiding shall have a second or casting vote.



7. Subject to paragraph (4), no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.
  8. Subject to the provisions of this Schedule, the Board may determine its own procedure and the procedure for any committee of the Board and for the attendance of other persons at its meetings and may make standing orders in respect thereof.
106. It is plain from a reading of the law that the 1<sup>st</sup> respondent in the conduct of its functions, one being licensing and supervising the activities of collective management societies under Section 5(b), requires a quorum of not less than seven members including the chairman or the person presiding. It has been admitted in this matter that there is currently no Board of Directors following the expiry of its term that commenced on 1<sup>st</sup> November 2019. Likewise an examination of the Certificates as annexed indicate that they were issued solely under the hand of the Executive Director in violation of the required quorum of not less than seven.
107. It is also apparent that there is no legal provision that grants the Executive Director the authority to make the Board's decisions as advanced by the respondents and interested parties. In fact Section 11(3) (c) makes known that the Executive Director subject to the directions of the Board, is responsible for the day to day management of the affairs of the Board. In my understanding even in running of the Board's affairs the Executive Director is not to act out of his own but by the direction of the Board.
108. It is therefore discernible from a reading of the law that the Executive Director in issuing the Certificates of Registration to the interested parties did so, unlawfully as this is the exclusive mandate of the Board of Directors. As such I do not find it difficult to find that the Executive Director in the instant matter acted ultra vires contrary to the dictates of Section 5 (b) and Section 8 of the Copy Right Act.
109. That said, I cannot turn a blind eye to the proceedings before Parliament that seek to resolve the interested parties issues in the interest of its members. It would be prudent hence that the matter be resolved urgently including constitution of the Board of Directors to safeguard the interested parties members rights from being violated. This however must not be done on a whim but in accordance with the dictates of the law as discussed herein.
110. The upshot of the foregoing and for the reasons set out above, I come to the humble conclusion that the petition dated 17<sup>th</sup> May 2023 has merit in view of the fourth and fifth (4<sup>th</sup> & 5<sup>th</sup>) issues discussed herein above.
111. I therefore allow the Petition and issue the following orders:
- i. Prayers (i), (ii), (iii), (v) are disallowed.
  - ii. An order of certiorari is hereby issued and directed at the Executive Director of the 1<sup>st</sup> respondent, to quash the decision to award the certificates of renewal of registration of a Collective Management dated 5<sup>th</sup> May 2023 or any other date provided such certificates were not issued by the Board of directors.
  - iii. An order of prohibition to issue prohibiting the 1<sup>st</sup> respondent from processing or issuing a certificate of renewal of registration of a Collective Management society to any of the interested parties or any other party without such decision being made by a legally constituted board of directors of the 1<sup>st</sup> respondent.
  - iv. A declaration that the 1<sup>st</sup> respondent does not have powers to issue "provisional" "Interim" or "partial" licenses to the interested parties.



- v. A permanent injunction to issue restraining the 1<sup>st</sup> respondent from issuing any certificates of renewal of Collective Management until such time as the 1<sup>st</sup> respondent shall be lawfully constituted under the *Copyright Act*.
- vi. Half costs to the Petitioner to be paid by the 1<sup>st</sup> respondent, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

112. Orders accordingly.

**DELIVERED VIRTUALLY SIGNED AND DATED THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023 IN OPEN COURT AT NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**

