



**Music Copyright Society of Kenya v Kenya Copyright Board & 2 others
(Constitutional Application E435 of 2020) [2022] KEHC 13195 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL APPLICATION E435 OF 2020**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

MUSIC COPYRIGHT SOCIETY OF KENYA PETITIONER

AND

KENYA COPYRIGHT BOARD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF ICT, INNOVATION & YOUTH

AFFAIRS 3RD RESPONDENT

Constitutionality of sections 46 and 46A to 46G of the Copyright Act in relation to the right to property by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights under the Copyright Act

Reported by John Ribia

***Constitutional Law** – fundamental rights and freedoms – right to property – intellectual property rights – requirement of artists/ rights holder to seek a license before exercising/exploiting/administering its own rights - whether sections 46 and 46A to 46G of the Copyright Act violated the right to property as the provisions allegedly perpetrated the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights – Constitution of Kenya, article 40; Copyright Act (cap 130), sections 46 and 46A to 46G.*

***Constitutional Law** – fundamental rights and freedoms – right to equality and freedom from discrimination – power of the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs (the Cabinet Secretary) to arbitrarily peg value of music/tariff to a percentage of business permit - whether section 46A of the Copyright Act violated the right to equality and freedom from discrimination of artists to the extent that it allowed the Cabinet Secretary to arbitrarily peg the value of music/tariff to a percentage of business permit and perpetuating*



discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works – Constitution of Kenya article 27; Copyright Act (cap 130), sections 46 and 46A to 46G.

Precedent – binding nature of precedent – value of a precedent from a multi-judge bench to a single-judge bench of concurrent jurisdiction - whether decisions by multi-judge benches of the High Court were binding to a single-judge bench of the High Court.

Judicial Review - doctrine of exhaustion of remedies – applicability – exceptions - where the tribunal to be approached to resolve a dispute lacked the jurisdiction to resolve some aspects of the dispute - whether the doctrine of exhaustion was applicable in circumstances where the matters to be raised in a suit exceeded the jurisdiction of the requisite tribunal - what were the exceptions to the doctrine of exhaustion.

Civil Practice and Procedure – *res judicata* – petition challenging the constitutionality of a statutory provision that had previously been upheld as constitutional by a court of concurrent jurisdiction - whether a petition challenging the constitutionality of a statutory provision that had previously been upheld as constitutional by a court of concurrent jurisdiction was *res judicata* - whether a court was at liberty to consider the constitutionality or otherwise of a statutory provision if a court of concurrent jurisdiction had already declared such a provision as constitutional – Civil Procedure Act (Cap 21) section 7.

Civil Practice and Procedure – contempt – circumstances in which one could be cited for contempt - whether one could be cited for disobeying a court order if the order did not relate to such a party.

Words and Phrases - arbitrariness – definition of - a decision or an action that was based on individual discretion, informed by prejudice or preference, rather than reason or facts - Black's Law Dictionary 8th Edition.

Brief facts

The petitioner (Music Copyright Society of Kenya (MCSK)) contended the infringement of copyright rights and sought various declarations against the respondents. In particular, the petitioner contended that the Kenya Copyright Board (KECOBO), the 1st respondent, was unlawfully interfering with its operations in the guise of exercising oversight and control under the Copyright Act.

The petitioner was aggrieved by the alleged forceful and arbitrary approach of the 1st respondent in appropriating its rights and vesting them in third parties without any contractual or commercial relationship with the petitioner.

To that end, the petitioner challenged the constitutionality of sections 46 and 46A to 46G of the Copyright Act for allegedly violating the right to property as the provisions allegedly perpetrated the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights of the Copyright Act; and for violating the right to equality and freedom from discrimination to the extent that it allegedly allowed the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs to arbitrarily peg value of music/tariff to a percentage of business permit and by further allegedly perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works.

Issues

- i. What principles did the court consider in:
 1. interpreting the Constitution;
 2. interpreting statute; and
 3. interpreting statute *vis-à-vis* the Constitution.
- ii. Whether decisions by multi-judge benches of the High Court were binding to a single-judge bench of the High Court.
- iii. Whether a petition challenging the constitutionality of a statutory provision that had previously been upheld as constitutional by a court of concurrent jurisdiction was *res judicata*.
- iv. Whether a court was at liberty to consider the constitutionality or otherwise of a statutory provision if a court of concurrent jurisdiction had already declared such a provision as constitutional.



- v. Whether the doctrine of exhaustion was applicable in circumstances where the matters to be raised in a suit far exceeded the jurisdiction of the requisite tribunal.
- vi. What were the exceptions to the doctrine of exhaustion?
- vii. Whether the Music Copyright Society of Kenya was a collective management organisation (CMO) within the meaning of the Copyright Act.
- viii. Whether sections 46 and 46A to 46G of the Copyright Act violated the right to property as the provisions perpetrated the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights.
- ix. Whether section 46A of the Copyright Act violated the right to equality and freedom from discrimination of artists to the extent that it allowed the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs to arbitrarily peg the value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works.
- x. Whether one could be cited for disobeying a court order if the order did not relate to such a party.

Held

1. The petition in *Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others (Interested Parties)* [2021] eKLR dealt with the issue of whether a forensic audit called for by KECOBO amounted to retrospective application of the Copyright Act, 2001 (as amended in 2019) and whether KECOBO, in applying the law retrospectively, had violated articles 10, 36 and 47 of the Constitution or any other law. The issues in *Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others* were distinct from those raised in the current proceedings.
2. Whereas *Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others* [2018] eKLR dealt with whether section 46(5) of the Copyright Act violated articles 36(1) and (2) and 40 of the Constitution, the ground for such the challenge was whether section 46(5) was in violation of the Constitution for allowing only one licensed collecting society to operate in a class of rights and category of works. As a result, the *Laban Toto* case interrogated the decision by KECOBO to licence Music Publishers Association of Kenya (MPAKE) to the exclusion of MCSK. The issues in the instant petition dealt with whether sections 46 and 46A to G of the Copyright Act violated articles 27 and 40 of the Constitution on the basis of the allegation that MCSK, was not a collective management organisation (CMO) within the meaning of the Copyright Act; that sections 46 and 46A to G of the Copyright Act were in contravention with article 40 of the Constitution as they perpetrate the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/ exploiting/administering its own rights as well as the contention as to whether section 46A of the Copyright Act violated article 27 of the Constitution to the extent of allowing the respondents to arbitrarily peg the value of music/ tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works. The issues in the instant petition were different from those in the former case.
3. Decisions by multi-judge benches were generally considered to be at par with those of a single-judge bench. However, the input of several judges in coming up with a composite decision remained an important consideration. Although the decisions of multi-judge benches were highly persuasive and presumably jurisprudentially enriched, they were not binding on the single-judge benches of the High Court.
4. The unconstitutionality of a statutory provision could be challenged on several grounds. When a court upheld the constitutionality of a statutory provision, that did not, *per se*, bar another court of concurrent jurisdiction from considering the unconstitutionality or otherwise of the same statutory provision. As long as the grounds challenging the constitutionality of a statutory provision were



- different, courts were at liberty to consider such pleas. The doctrine of *res judicata* was not applicable in the instant matter.
5. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The special procedure provided by any law must be strictly adhered to since there were good reasons for such special procedures.
 6. While exceptions to the exhaustion requirement were not clearly delineated, courts had to undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied.
 7. The High Court could, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. That exception to the exhaustion requirement was particularly likely where a party pleaded issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value was at stake. It was 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 was suitable to determine the issues raised.
 8. The jurisdiction of the courts to consider valid grievances from parties who lacked adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which was proportionate to the interests the party wished to advance in a suit must not be ousted. Statutory provisions ousting the court's jurisdiction had to be construed restrictively.
 9. Section 48 of the Copyright Act dealt with the establishment and duties of Copyright Tribunal. The objection on the strength of the exhaustion doctrine was not a serious one. None of the issues raised in the petition could be resolved before the Copyright Tribunal.
 10. The position of a deputy executive director in the 1st respondent was a creation of the law. The person holding the position was a necessary personnel in enabling the 1st respondent to discharge its duties.
 11. It was not mandatory for the 1st respondent to have annexed a copy of the Board's resolution authorizing the deputy executive director to execute documents on behalf of the 1st respondent. The issue of the authority of the deputy executive officer of the 1st respondent to execute dispositions on behalf of the 1st respondent was only raised in the petitioner's submissions. In such a scenario, the 1st respondent relied on the law to justify its position. Had the petitioner raised the matter in its disposition, the 1st respondent would have had an opportunity of responding to the issue and may have availed the authority. As the 1st respondent opted not to do so and in view of the position of the law, the objection lacked any legal leg to stand on.
 12. The Constitution was a *sui generis* document. It was the ultimate source of law in the land. It commanded superiority and dominance in every aspect and its interpretation as of necessity was to be in a manner that all other laws bowed to.
 13. The rules of constitutional interpretation did not favour formalistic or positivistic approaches. The Constitution had incorporated non-legal considerations which had to be taken into account in exercising the High Court's jurisdiction. Courts, while observing the importance of certainty of the law, had to nurture the development of the law in a manner that eschewed formalism, in favour of the purposive approach. Interpreting the Constitution was a task distinct from interpreting the ordinary law. The Constitution compelled a broad and flexible approach to interpretation.
 14. The Constitution should be interpreted in a holistic manner, within its context, and in its spirit. Holistic interpretation meant interpreting the Constitution in context. It was the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution had to be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation did not mean an



- unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.
15. The Constitution should be interpreted in a manner that promoted its purposes, values and principles; advanced rule of law, human rights and fundamental freedoms and permitted development of the law and contributed to good governance. The spirit and tenor of the Constitution had to preside and permeate the process of judicial interpretation and judicial discretion.
 16. The Constitution was to be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism. The Constitution was to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle). Those principles of interpretation of the Constitution also applied to the construction of statutes.
 17. There were other important principles which applied to the construction of statutes which also applied to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produced an absurd result; the presumption against unworkable or impracticable result. That meant that a court should find against a construction which produced unworkable or impracticable result. Presumption against anomalous or illogical result, meant that a court should find against a construction that created an anomaly or otherwise produced an irrational or illogical result and the presumption against artificial result which in turn meant that a court should find against a construction that produced artificial result. Lastly, the principle that the law should serve public interest meant that the court should strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise. The court as an independent arbiter of the Constitution had fidelity to the Constitution and had to be guided by the letter and spirit of the Constitution.
 18. A CMO was a licensed organisation which acted on behalf of a copyright rights holders in negotiating, collecting and distributing royalties. A CMO in further dealing with the third parties granted permission for the use of the copyright works or related rights. A CMO took the form of an agent of a known principal. A CMO usually undertook such duties either on behalf of its members or on behalf of any copyright rights holder who was not its member.
 19. There was no evidence that the petitioner was a copyright rights holder. What was on record was that the petitioner was acting on behalf of copyright rights holders. As such, the petitioner was an agent and could only be a CMO within the meaning of the Copyright Act.
 20. What the petitioner was attempting to engage in was to approbate and reprobate on whether it was a CMO. Such approach was impermissible and held out the petitioner as a vexatious litigant.
 21. State regulation of intellectual property rights was provided for in article 40(5) of the Constitution. However, in the course of undertaking the regulation, whether through statutory interventions or by policy decisions, the State had to ensure that it acted within the confines of the Constitution and the law more so as specifically cautioned in article 40(2), (3) and (4) of the Constitution. The petitioner was a CMO and was subject to lawful regulation.
 22. Sections 46 and 46A-G of the Copyrights Act were not in contravention of article 40 of the Constitution as they did not provide for any licensing of an intellectual property rights holder before such an owner could exercise/exploit/administer one's own rights. Section 46A of the Copyright Act showed that the law restricted any collection society from otherwise dealing with the imposition or collection of any royalty which was not based on a tariff that had been approved and published in the Gazette by the Cabinet Secretary. Although the provision imposed the duty to gazette the tariff on the Cabinet Secretary, it did not, however, state the manner in which the tariffs would be arrived at.
 23. Arbitrariness was a decision or an action that was based on individual discretion, informed by prejudice or preference, rather than reason or facts. Section 46A of the Copyright Act did not provide for the manner in which a cabinet secretary could come up with a tariff. The position of a cabinet secretary



- was a creation of the Constitution. A cabinet secretary was a State officer under article 260 of the Constitution. Article 10 of the Constitution called upon State officers, among others, to be bound by the national values and principles of governance in the discharge of their duties. Further, article 3 of the Constitution obligated every person to respect, uphold and defend the Constitution.
24. It could not be the case that a cabinet secretary was at liberty to arbitrarily exercise powers as conferred upon by the Constitution or the law. Just like caged animals, cabinet secretaries had to comply with the constitutional and statutory demands while discharging their duties. It was not open for a cabinet secretary to exercise any power whimsically.
 25. The apprehension that the Cabinet Secretary was likely to, albeit, arbitrarily exercise its powers, could not be a basis of a court to determine a matter before it. Courts were called upon to adjudicate upon disputes which were real and had crystallized. The allegations that section 46A of the Copyright Act violated article 27 of the Constitution to the extent of allowing the respondents to arbitrarily peg the value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works were only, but illusionary.
 26. For the petitioner to succeed in such a matter, there was need for proof of the arbitrariness and discrimination on the part of the Cabinet Secretary. The petitioner had not disclosed any single approved tariff by the Cabinet Secretary as a basis of the allegation. There was no gazette notice of any approved tariff on record.
 27. There was no evidence to prove the allegation of arbitrariness on the part of the respondents. The petitioner had, on an equal footing, failed to demonstrate any form of discrimination in imposing an alleged flat rate tariff on broadcasts of musical works. The court was only called upon to decide on an imaginary issue. The petitioner failed to discharge the burden of proof.
 28. Proceeding with the matter further would be an act in futility since a party could only be cited for disobeying a court order if the order, in a defined way, related to such a party. In the instant case, the order did not. As the petitioner had the opportunity to amend the order, but opted not to, it could only be fair that the contempt proceedings should be instituted against Music Copyright Authority and not the petitioner. The application was made against a non-party in the proceedings, and hence, it also lacked any legal leg to stand on.

Petition and applications dismissed.

Orders

Petitioner to bear the costs of the petition.

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
3. *Fleur Investments Limited v Commissioner of Domestic Taxes & Kenya Revenue Authority* Civil Appeal 158 of 2017; [2018] KECA 341 (KLR) - (Explained)
4. *Fursys (Kenya) Limited v Southern Credit Banking Corporation Limited* Civil Appeal 264 of 2003; [2015] KECA 977 (KLR) - (Explained)
5. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Explained)
6. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)



7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinions Application 2 of 2012*; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
8. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
9. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Civil Appeal 42 of 2014; [2015] KECA 472 (KLR) - (Explained)
10. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Applied)
11. *Juma, Laban Toto & 4 others v Kenya Copyright Board & 9 others* Petition 3B of 2017; [2018] KEHC 5729 (KLR) - (Applied)
12. *Kavuu, Francis Nzioki v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others (Interested Parties)* Petition E4 of 2020; [2021] KEHC 9401 (KLR) - (Applied)
13. *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Civil Appeal 166 of 2018; [2019] KECA 305 (KLR) - (Explained)
14. *Law Society of Kenya v Attorney General & another* Constitutional Petition E327 of 2020; [2021] eKLR - (Explained)
15. *Mercy Munee Kingoo & another v Safaricom Limited & another* Constitutional Petition 5 of 2016; [2016] KEHC 2206 (KLR) - (Applied)
16. *Mohamed, Kasimu Sharifu v Timbi Limited* Civil Suit 3 of 2006; [2011] KEHC 2285 (KLR) - (Explained)
17. *Mtana Lewa v Kabindi Ngala Mwangandi* Civil Appeal 56 of 2014; [2015] KECA 532 (KLR) - (Explained)
18. *Mwau, John Harun v Independent Electoral & Boundaries Commission & Attorney General* Civil Appeal 112 of 2014; [2019] KECA 86 (KLR) - (Explained)
19. *Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties)* Petition 33 & 42 of 2018 (Consolidated); [2021] KEHC 464 (KLR) - (Explained)
20. *Paragon Electronics Limited v Njeri Kariuki* Petition 412 of 2019; [2021] KEHC 8742 (KLR) - (Applied)
21. *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* Civil Case 192 of 2015; [2016] KEHC 8119 (KLR) - (Applied)
22. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019; [2020] eKLR (Consolidated) - (Explained)
23. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22; (1990-1994) EA 546 - (Applied)
24. *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition No 317 of 2015; 2016] eKLR - (Explained)

Uganda

Tinyefuza v Attorney General [1997] UGCC 3 - (Applied)

South Africa

S v Zuma & others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568 - (Followed)

United Kingdom

Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319; [1979] 3 All ER 21; [1979] 2 WLR 889 - (Applied)

India

1. *Sharma Transport v Government of AP* (2002) 2 SCC 188 - (Explained)



2. *Shrilekha Vidyarthi v State of Uttar Pradesh* 1991 AIR 537; 1990 SCR Supl (1) 625 - (Explained)

Canada

R v Big M Drug Mart Ltd [1985] 1 SCR 295 - (Explained)

Texts

1. Garner, BA., Black, HC., (2004), *Black's Law Dictionary* St Paul, Minnesota: Thomson West 8th Edn
2. Horby, AS., Wehmeiner, S., (Eds) (2000), *Oxford Advanced Learner's Dictionary* Oxford: Oxford University Press 6th Edn

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Constitution of Kenya articles 3, 10, 27, 36,40,(2)(3)(4)(5); 47; 260 - (Interpreted)
3. Copyright Act (cap 130) sections 2, 12, 46(5); 46A-G; 48 - (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 9 - (Interpreted)

Advocates

Dr Okubasu for the petitioner

Mr Jakech for the 1st respondent

Mr Ogosso for the 2nd and 3rd respondents

JUDGMENT

Introduction

1. The role of the State in supporting, promoting and protecting intellectual property rights in Kenya is anchored in the [Constitution](#).
2. In this matter, Music Copyright Society of Kenya, the petitioner herein, (hereinafter referred to as 'the petitioner' or 'MCSK') variously contended the infringement of copyright rights and sought various declarations against the respondents. In particular, the petitioner contended that the Kenya Copyright Board, the 1st respondent herein, (hereinafter referred to as 'the 1st respondent' or 'KECOBO') was unlawfully interfering with its operations in the guise of exercising oversight and control under the [Copyright Act](#), cap 130 of the Laws of Kenya.
3. To that end, the petitioner *inter alia* challenged the constitutionality of various provisions of the [Copyright Act](#).
4. Taking the opposite cue, the respondents vehemently resisted the Petition, hence, this judgment.

The Petitioner's Case

5. The petitioner filed a petition dated December 24, 2020. It was supported by an affidavit evenly sworn by one Milcah Kulati, the petitioner's Chief Executive Officer. The petitioner also filed written submissions and a Case Digest.
6. The gravamen of the petitioner's case was that whereas the petitioner was not a Collective Management Organisation (hereinafter referred to as 'CMO') within the meaning of section 46 of the [Copyright Act](#), the 1st respondent had continually, unconstitutionally and unlawfully attempted to exercise oversight and control over it by requiring it to obtain a license to administer and enforce its intellectual property rights.



7. The petitioner was aggrieved by the alleged forceful and arbitrary approach of the 1st respondent in appropriating its said rights and vesting them in third parties without any contractual or commercial relationship with the petitioner.
8. In the main, the petition sought the following prayers: -
 - a. A declaration that section 46, 46A-G of the Copyright Act offends article 40 of the Constitution to the extent that it perpetuates infringement/violation of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights;
 - b. A declaration that section 46A of the Copyright Act is unconstitutional and offends article 27 and 40 of the Constitution to the extent that it allows the respondents to arbitrarily peg value of music/tariff to a percentage of business permit/liquor license;
 - c. A declaration that section 46A of the Copyright Act perpetuates discrimination and violates the right to property by imposing a flat rate tariff on broadcasters of musical works;
 - d. A declaration that the Music Copyright Society of Kenya does not require a collecting license to administer/enforce/collect royalties in respect of its resident and non-resident authors, composers, arrangers and publishers of musical works who are its members;
 - e. Costs of this petition be in the cause.
9. Together with the filing of the petition was an application by way of an evenly dated notice of motion. The application sought interim conservatory restraining the 1st respondent from in any way interfering with the affairs and administration of the petitioner.
10. On February 9, 2021, this court issued the said orders pending the hearing and determination of the application.
11. By another notice of motion application dated July 22, 2021, the petitioner sought to cite the 1st respondent's, the Executive Director Mr. Edward Sigei, for disobeying court orders.
12. Resulting from the directions issued by this court, the petition and the two applications dated December 24, 2020 and 22nd July, 2021 respectively were all heard together.
13. The petitioner expounded the foregoing through the written submissions and caselaw.
14. In the end, the petitioner urged this court to allow the petition as prayed.

The 1st Respondent's Case

15. In opposing the petition and the application for conservatory orders, the 1st respondent filed a replying affidavit sworn by one Mr George Nyakweba, its Deputy Executive Director on February 1, 2021. It also filed written submissions which were dated May 17, 2021. Supplementary submissions and an Additional List of Authorities in opposition to the petition and the application were also filed. They were both dated July 31, 2021
16. On the contempt application, Mr. Edward Sigei swore a replying affidavit on July 27, 2021. He also filed written submissions dated July 28, 2021 and Lists of Authorities.
17. The 1st respondent mainly contended that the petitioner was a CMO within the meaning of the Copyright Act and was subject to the said law.



18. It also contended that sections 46, 46A-G are not unconstitutional and that the said Edward Sigei was not in contempt of any court orders.
19. The 1st respondent expounded its position through its written submissions and thereafter sought the dismissal of the petition and the applications.

The 2nd and 3rd Respondents

20. The 2nd and 3rd respondents opposed the petition and the application for conservatory orders by filing grounds of opposition and written submissions both dated November 1, 2021.
21. The respondents hotly contested that the petition was *res judicata*, that the petitioner had not exhausted the available remedies before moving this court and that the petitioner had not demonstrated any unconstitutionality of the impugned provisions.
22. They filed detailed written submissions and referred to several decisions in support of their position that the Petition and the applications be dismissed.

Issues for Determination

23. Having carefully perused the pleadings, the dispositions, the submissions and the various decisions referred to by the parties, this court hereby discerns the following issues for determination: -
 - a. Preliminary matters.
 - b. The principles of constitutional and statutory interpretation.
 - c. Whether the petitioner herein, Music Copyright Society of Kenya, is a Collective Management Organisation (CMO) within the meaning of the *Copyright Act*?
 - d. Whether sections 46 and 46A-G of the *Copyright Act* are in contravention with article 40 of the *Constitution* as they perpetrate the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights?
 - e. Whether section 46A of the *Copyright Act* violates article 27 of the *Constitution* to the extent of allowing the respondents to arbitrarily peg value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works?
 - f. Whether Mr Edward Sigei is guilty of contempt of court?
24. I will deal with the issues *in seriatim*.

Analysis and Determination

(a) Preliminary matters

25. There are three matters which are preliminary in nature and ought to be dealt with in the first instance. They are the following: -
 - i. Whether the petition is *res judicata*.
 - ii. Whether the petition flouts the doctrine of exhaustion.
 - iii. Whether the replying affidavit sworn by George Nyakweba ought to be struck out for being incompetent.



26. A look at each follows.

(i) Whether the petition is *res judicata*.

27. This matter was raised by the 2nd and 3rd respondents. They contended that the constitutionality of section 46 of the [Copyright Act](#) as well as the legality and/or constitutionality of the statutory mandate of KECOBO were judicially settled and affirmed by a three-Judge bench of this honourable court in Kakamega in [Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others](#) [2018] eKLR and by the High Court at Machakos in [Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others \(Interested Parties\)](#) [2021] eKLR.

28. That being the case, there is need to consider the doctrine of *res judicata*.

29. The doctrine of *res judicata* is not novel. Its genesis is in section 7 of the [Civil Procedure Act](#), cap 21 of the Laws of Kenya which provides that: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

30. The Supreme Court in a decision rendered on August 6, 2021 in [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2021] eKLR comprehensively dealt with the different facets making up the doctrine of *res judicata*.

31. In the first instance, the apex court framed the issues for determination as follows: -

- a) Did the High Court procedurally consider the plea of *res judicata*?
- b) Did the finding by the High Court on *res judicata* infringe on the petitioner's right to fair hearing condemning them unheard?
- c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of *res judicata* applied to the current case; was the Paluku case the same as the appellants' herein?
- d) Is this doctrine of *res judicata* applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?
- e) If the doctrine of *res judicata* is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?
- f) What constitutes such "rarest and clearest" of cases?
- g) Who bears the costs of the suit.

32. On the procedure for raising the plea of *res judicata*, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of *res judicata* had been raised by way of grounds of opposition and in the replying affidavit.

33. The court, in dismissing the argument that the issue was improperly raised before court, stated as follows: -



53. Instead, and contrary to the appellants submissions, the plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the appellants application. It is also evident that through the replying affidavits of the 3rd and 4th respondents, evidence by way of the Judgment of JR No 130 of 2011 was introduced through an affidavit to bolster the plea of *res judicata*.
54. It is further evident that the appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the court accorded the appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.
55. This ground of appeal must therefore fail.
34. On whether the doctrine of *res judicata* applies to constitutional petitions, the Supreme Court endeavoured an extensive discussion and comparative analysis in various jurisdictions. It also captured the various opposing schools of thought on the issue.
35. In the end, the court found that the doctrine, rightly so, applies to constitutional petitions. This is what the court partly stated: -
81. We reaffirm our position as in the Muiro Coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.....
82. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of the [Constitution](#) in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other.
36. The apex court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The court stated as follows: -
86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action
37. On the commonality of the parties, the court noted as follows: -



93. The commonality is that the appellants herein and the applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.
38. In dealing with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, the Supreme Court noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional petition. The court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application.
39. The Supreme Court disagreed with the Court of Appeal and found that the doctrine was not applicable in the matter. The court held that: -
97. From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form part of Kenyan law and in failing to do so, the respondents contravened article 2. They further alleged that the respondents herein purported to usurp to the role of Parliament and in doing so contravened articles 94(5) and (6) of *the Constitution*. They further alleged that the FERI and COD certificates threatened to infringe their right to property under articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property. The Court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of res judicata was wrongly invoked on this ground. (emphasis added).
40. On the competency of the court deciding the matters in issue, the Supreme Court noted the close relationship between the issue as to whether the current suit had been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
41. The apex court had a lengthy discussion on the matter. It referred to several decisions and, in the end, rendered itself as follows: -
107. "The court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the court can do when determining a constitutional petition. Further the court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This court in its decision in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.
108. We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be



termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

109. The court in hearing a constitutional petition may very well arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the court will be playing fairly different roles.
 110. We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of *res judicata* applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion."
42. The Supreme Court also discussed two exceptions to the doctrine of *res judicata*. The court stated as follows: -
84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
 85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.
43. The Supreme Court had earlier expressed itself on the doctrine of *res judicata* in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) [Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others](#) [2014] eKLR where it delimited the operation of the doctrine of *res judicata* in the following terms: -
317. "The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? All in the cause of fairness in the settlement of disputes."
 318. "This concept is incorporated in section 7 of the [Civil Procedure Act](#) (cap 21, Laws of Kenya) which prohibits a court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.



319. "There are conditions to the application of the doctrine of *res judicata*:
- (i) the issue in the first suit must have been decided by a competent court;
 - (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
 - (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia & another v Attorney General and others*, [2005] 1 EA 83, 89 [320] So, in the instant case, the argument concerning *res judicata* can only succeed when it is established that the issue brought before a court is essentially the same as another one already satisfactorily decided, before a competent court."

333. "We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (*Workers' Compensation Board v Figliola* [2011] 3 SCR 422, 438 (paragraph 28))."

334. "Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In *Omondi v National Bank of Kenya Ltd & others*, [2001] EA 177 the court held that "parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."

352. The Judicial Committee of the Privy Council, in *Thomas v Attorney-General of Trinidad and Tobago*, [1991] LRC (Const) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, *Daryao & others v The State of UP & others*, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian Court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

But is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of *res judicata*...has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions



pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under article 32."

353. "Kenya's High Court recently pronounced itself on the issue of the applicability of *res judicata* in constitutional claims. In *Okiya Omtatah Okiiti & another v Attorney General & 6 others*, High Court Const and Human Rights Division, Petition No 593 of 2013 [2014] eKLR, Lenaola J (at paragraph 64) thus stated:

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."

354. "On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue."

355. "However, notwithstanding our findings based on the common law principles of estoppel and *res judicata*, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution."

44. The Court of Appeal in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of *res judicata* at length. The court stated in part as follows: -

The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised



as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being *res judicata*. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

- i. The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.
- ii. There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.
- iii. The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

45. Having endeavored an elaborate discussion on the doctrine of *res judicata*, this court will now apply the foregoing to the matter at hand.
46. This court has patiently considered the decisions in *Laban Toto Juma & 4 Others v Kenya Copyright Board & 9 others* [2018] eKLR and by the High Court at Machakos in *Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others (Interested Parties)* [2021] eKLR.
47. The petition in *Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others case (supra)* dealt with the issue of whether a forensic audit called for by KECOBO amounted to retrospective application of the *Copyright Act, 2001* (as amended in 2019)



- and whether KECOBO, in applying the law retrospectively, had violated articles 10, 36 and 47 of the Constitution or any other law.
48. Without much ado, and from the elaborate discussion on the parameters of the applicability of the doctrine of *res judicata*, there is no difficulty in finding that the issues in the Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others case (supra) are quite distinct from those raised in the current proceedings.
 49. In such a case, the doctrine of *res judicata* as far as the decision in Francis Nzioki Kavuu v Kenya Copyright Board & 3 others; Kenya Music Copyright Society of Kenya & 3 others case (supra) is concerned is not applicable.
 50. The court will now consider whether the doctrine of *res judicata* is applicable in respect to the Laban Toto Juma & 4 Others v Kenya Copyright Board & 9 others case (supra).
 51. Three petitions were consolidated in the said matter. They were Kakamega High Court Petition No 38 of 2017, Kisumu High Court Petition No 11 of 2017 and Kisumu High Court Petition No 15 of 2017.
 52. The matter decided the following two issues: -
 - i. Whether section 46(5) of the Copyright Act was unconstitutional for violating rights and fundamental freedoms in prohibiting KECOBO from approving another collecting society in respect of the same class of rights and category of works if there existed another collecting society that is already licensed.
 - ii. Whether the decision by KECOBO to licence Music Publishers Association of Kenya (MPAKE) to the exclusion of MCSK (the petitioner herein) violated the petitioners' rights to property, freedom of association and the right to fair administrative action as protected under articles 36, 40 and 47 of the Constitution.
 53. Whereas the Laban Toto case dealt with whether section 46(5) of the Copyright Act violated articles 36(1) and (2) and 40 of the Constitution, suffice to note that ground for such a challenge was whether section 46(5) of the Copyright Act was in violation of the Constitution for allowing only one licensed collecting society to operate in a class of rights and category of works.
 54. As a result, the Laban Toto case interrogated the decision by KECOBO to licence Music Publishers Association of Kenya (MPAKE) to the exclusion of MCSK (the petitioner herein).
 55. The issues in the current petition deals with whether sections 46 and 46A-G of the Copyright Act violates articles 27 and 40 of the Constitution on the basis of the allegation that the Petitioner herein, Music Copyright Society of Kenya, is not a Collective Management Organisation (CMO) within the meaning of the Copyright Act, that sections 46 and 46A-G of the Copyright Act are in contravention with article 40 of the Constitution as they perpetrate the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/ exploiting/administering its own rights as well as the contention as to whether section 46A of the Copyright Act violates article 27 of the Constitution to the extent of allowing the respondents to arbitrarily peg value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works.
 56. Therefore, the issues in the instant petition are different from those in the former case.
 57. Having said so, there are two other aspects of this matter worth further consideration. They are whether decisions by multi-Judge benches of the High Court are binding to a single-Judge bench of the High



- Court and whether a court is at liberty to consider the constitutionality or otherwise of a statutory provision if a court of concurrent jurisdiction has already declared such a provision as constitutional.
58. The standing position in respect of the issue as to whether decisions by multi-Judge benches of the High Court are binding to a single-Judge bench of the High Court has had mixed positions. However, the most appealing position seems to be that decisions by multi-Judge benches are generally considered to be at par with those of a single-Judge Bench. However, the input of several Judges in coming up with a composite decision always remain an important consideration. Therefore, although the decisions of multi-Judge benches are highly persuasive and presumably jurisprudentially enriched, they are not binding on the single-Judge benches of the High Court.
59. On whether a court is at liberty to consider the constitutionality or otherwise of a statutory provision if a court of concurrent jurisdiction has already declared such a provision as constitutional, I must register concurrence with the general position taken by Chitembwe, J in Malindi High Court Petition No 5 of 2016 *Mercy Munee Kingoo & another v Safaricom and another* [2016] eKLR that the unconstitutionality of a statutory provision may be challenged on several grounds and that when a court upholds the constitutionality of a statutory provision, that does not, per se, bar another court of concurrent jurisdiction from considering the unconstitutionality or otherwise of the same statutory provision.
60. In other words, as long as the grounds challenging the constitutionality of a statutory provision are different, courts are at liberty to consider such pleas.
61. Returning to the matter at hand, by juxtaposing the law on the doctrine of *res judicata* and the peculiar circumstances of this matter, it comes to the fore that the doctrine of *res judicata* falls short of applicability in this matter.
62. This court now finds that it is not barred by the doctrine of *res judicata* from exercising jurisdiction over the issues raised in the instant petition.

(ii) Whether the petition flouts the doctrine of exhaustion

63. The instant objection to this court's jurisdiction was once again raised by the 2nd and 3rd respondents.
64. They contended that the court's jurisdiction was prematurely invoked since pursuant to section 9 of the *Fair Administrative Actions Act, 2015*, the dispute ought to have initially been referred to the Copyright Tribunal established under section 48 of the *Copyright Act*.
65. This court will, at this point in time, discuss the legal parameters of the exhaustion doctrine.
66. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)* (2020) eKLR. The Court stated 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. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v*



Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

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 fora of last resort and not the first port of call the moment a storm brews...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 the courts. The *ex parte* applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

67. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & Others ex parte The National Super Alliance Kenya (NASA) (supra)*, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or



where an important constitutional value is at stake. See also *Moffat Kamau and 9 others vs Aelous (K) Ltd and 9 others.*)

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.
68. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from article 165(3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court



under article 165(5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

69. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR, the learned judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by by-passing the mechanism under Income Tax Tribunal. They observed as follows:

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

70. The High Court has variously reiterated the position that it is only the High Court and courts of equal status which can interpret the Constitution. (See Royal Media Services Ltd v Attorney General & 6 others [2015] eKLR among others).

71. Turning back to the case at hand, I will look at section 48 of the Copyright Act which deals with the establishment and duties of Copyright Tribunal. The section provides as follows: -

48. Appointment and duties of Copyright Tribunal:

- (1) 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.
- (2) The Copyright Tribunal shall consist of not less than three and not more than five persons, one of whom shall be an Advocate of not less than seven years standing or a person who has held judicial office in Kenya as Chairperson, appointed by the Chief Justice where any matters requires to be determined by the Tribunal.
- (3) No person shall be appointed under this section, nor shall any person so appointed act as a member of the Copyright Tribunal, if he, his partner, his employer body (whether statutory or not) of which he is a member has a pecuniary interest in any matter which requires to be determined by the Tribunal.
- (4) Subject to subsection (5), the Copyright Tribunal shall have jurisdiction to hear and determine—
 - (a) a dispute over registration of copyright; and
 - (b) 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
 - iii. imposition of unreasonable terms or conditions by a collective management organization for the grant of a licence in respect of a copyright work;
- (5) 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.
- (6) The Copyright Tribunal may order the grant of a certificate of registration or the grant of a license in respect of a copyright work subject to the payment of the applicable fees

72. Based on the jurisdiction of the Copyright Tribunal and the issues raised in this matter, the objection on the strength of the exhaustion doctrine cannot be said to be a serious one. I say-so since it is apparent that none of the issues raised in the Petition can be resolved before the Copyright Tribunal.

73. The objection is, hence, dismissed.

(iii) Whether the replying affidavit sworn by George Nyakweba ought to be struck out for being incompetent:

74. This objection was raised by the 1st respondent.

75. The contention was that the position of a Deputy Executive Director was unknown to the 1st respondent and as such the replying affidavit sworn by George Nyakweba was so sworn by a stranger and ought to be struck out.

76. The answer to the issue is in section 12 of the [Copyright Act](#) which provides as follows: -

12. Staff of the Board:

The Board may appoint such Deputy Executive Directors, Assistant Executive Directors, and such officers or other staff of the Board as are necessary for the proper discharge of its functions under this Act or any other written law upon such terms and conditions of service as the Board may determine.

77. Since it is settled that the position of a Deputy Executive Director in the 1st respondent is a creation of the law and that the position is currently held by the said George Nyakweba, then the said officer is a necessary personnel in enabling the 1st respondent to discharge its duties.

78. On whether the 1st respondent ought to have annexed a copy of the Board's resolution authorizing the said Deputy Executive Director to execute documents on behalf of the 1st respondent, this court takes the settled position in law that it is not mandatory for such an authority to be exhibited in the dispositions. (See [Paragon Electronics Limited v Njeri Kariuki](#) [2021] eKLR, [Peeraj General Trading & Contracting Company Limited Kenya & another v Mumias Sugar Company Limited](#) [2016] eKLR among others).



79. Further, this court notes that the issue of the authority of the Deputy Executive Officer of the 1st respondent to execute dispositions on behalf of the 1st respondent was only raised in the petitioner's submissions.
80. In such a scenario, the 1st respondent relied on the law to justify its position. Had the petitioner raised the matter in its disposition, the 1st respondent would have had an opportunity of responding to the issue and may have availed the authority.
81. As the 1st respondent opted not to do so and in view of the position of the law, this court finds the objection lacking any legal leg to stand on. It is for rejection.
82. Having dealt with the above preliminary issues, and since the Petition has survived termination, a consideration of the rest of the issues shall now follow.

(b) The principles of constitutional and statutory interpretation

83. A brief look at the principles of constitutional and statutory interpretation will lay a basis for consideration of the rest of the issues herein.
84. The Constitution is a sui generis document. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.
85. In Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okiiti v Public Service Commission & 73 Others [2021] eKLR, this court discussed the principles of constitutional interpretation at length. It observed as follows: -
 54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
 55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
 56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011 in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -
 86. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.



87. In article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
88. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
89. It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.
57. On the principle of holistic interpretation of the Constitution, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:
- This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.
58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -
- ...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.
59. In a Ugandan case in Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -
- the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....



60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) Before the High Court embarked on the interpretation of the contentious provisions of the *Constitution*, it restated the relevant principles of interpretation of the *Constitution* as extracted from case law thus: -that as provided by article 259 the *Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.that the spirit and tenor of the *Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.that the *Constitution* must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the *Constitution* has fidelity to the *Constitution* and has to be guided by the letter and spirit of the *Constitution*.

63. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the *Constitution*. It had the following to say: -

...The approach is 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*.

64. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R v Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or



freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’
 66. The learned judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.
 67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the *Constitution* but also statutes. It observed as follows: -
 - 8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the *Constitution*, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.
 68. The Court of Appeal while dealing with holistic interpretation of the *Constitution* in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.
86. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR remarked as follows: -

In determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G Momanyi v Attorney General and another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows: -

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and



achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court *In re the Matter of the Interim Independent Electoral Commission* Constitutional Application (supra) at para. 51 adopted the words of Mohamed AJ in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and.... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

87. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v The Attorney General and another* [2021] eKLR this court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the respondent brought a motion challenging the constitutional validity of s. 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that



s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.

111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The Court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
112. On the objective test, the Supreme Court stated as follows: -
 67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
113. On the proportionality test, the Supreme Court stated that: -
 70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd, supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd, supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
113. On the third test, that is the effect of the limitation, the Supreme Court stated that: -
 71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is



of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

88. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had the following to say on the constitutionality of statutes: -

27. Here the question we have to answer is whether the learned Judge erred by not declaring section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler*, (*supra*) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the *Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the *Constitution*; and, having done that, its duty ends.

Also in *The Queen v Big M Drug Mart Ltd*, 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the *Constitution* does not make any provisions for political mergers or coalitions, Parliament is mandated under article 92 to make Legislation to provide *inter alia* for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the *Constitution*.....



89. The foregoing general discussion on the manner in which courts ought to deal with the interpretation of the Constitution and the constitutionality of statutes suffices as a basis of the consideration of the next issue.

(c) Whether the petitioner herein, Music Copyright Society of Kenya, is a Collective Management Organisation (CMO) within the meaning of the Copyright Act:

90. Section 2 of the Copyright Act defines a ‘collective management organisation’ as follows: -

“collective management organisation” means an organisation approved and authorized by the Board which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights;”

91. In simple terms, a CMO is a licenced organisation which acts on behalf of a copyright rights holders in negotiating, collecting and distributing royalties. A CMO in further dealing with the third parties grants permission for the use of the copyright works or related rights. A CMO, therefore, takes the form of an agent of a known principal.

92. As established by practise and affirmed in caselaw, a CMO usually undertakes such duties either on behalf of its members or on behalf of any copyright rights holder who is not its member.

93. Given the legal nature and character of a CMO, it is necessary to further unveil the petitioner.

94. The petitioner describes itself in the first paragraph of the petition as an association of authors, composers, arrangers and publishers of musical works.

95. It further annexed a copy of its constituting document. It is a Memorandum and Articles of Association. The petitioner is a duly incorporated company limited by guarantee. It was incorporated on March 4, 1983 and its Memorandum and articles of Association was duly amended on July 5, 2012.

96. The Memorandum of Association provides for the objects of the petitioner. Some of the objects which are relevant to this matter include the following: -

3. The objects for which the Society is established are: -

- a. To exercise and enforce on behalf of members of the Society, being the composers of musical works or the authors to the benefit of or interested in the copyrights in such works (herein after called “the proprietors” all the rights, economic or moral, and remedies of the proprietors by virtue of the Copyright Act, or otherwise in respect of any exploitation of their works and in particular, to administer all the rights relating to the public performance, broadcasting, communication to the public by wire or wireless including transmissions to subscribers to a diffusion and/or any digital service, graphic or mechanical reproduction, translation, adaptation, photocopying or similar reproduction (such as digital copying) and any form of use of such works.
- b. To exercise and enforce on behalf of foreign proprietors of copyright works, by virtue of reciprocity or other agreements, all their rights under the Copyright Act within Kenya.
- c. In the exercise or enforcement of such rights and remedies to make and from time to time to rescind, alter or vary any arrangements with respect to any such exploitation of such works in regard to the mode, periods or extent in for or to which and the



terms of which any such exploitation of such works may be made or employed, and to collect and receive and give effectual discharges for all royalties, fees and other monies payable under any such agreements or arrangements or otherwise in respect of any such exploitation by all necessary actions or other proceedings, and to recover such royalties, fees and any other monies and to restrain and recover damages for the infringement by means of any such exploitation as aforesaid of the copyrights of such works or any other rights of the proprietors or of the Society on their behalf in respect of such works, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relation to the premises.

- d. To obtain from the proprietors such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the Society to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient by the Society of such rights and remedies aforesaid.
- e. To make and from time to time alter or vary any rules for regulating:-
 - i. The mode in which works of proprietors as to be communicated or declared by them to the Society;
 - ii. The mode in which, the periods for which, and the conditions under which the proprietors are to authorize the Society to exercise and enforce the rights and remedies aforesaid of the proprietors in respect of such works as aforesaid;
 - iii. The mode and shares in which and the times at which the net monies received by the Society in respect of any such works as aforesaid are to be divided and apportioned among the proprietors interested therein respectively;
 - iv. The provision either directly or through trusts or associations, of gratuities, donations or pensions or Members or ex-members of the Society or their spouse(s), widows, widowers, immediate families or dependants; and
 - v. The administration of the property or business of the Society and any matters incidental thereto.
 - vi. The procedures for determining complaints of breaches by members of their obligations and of misconduct by members affecting the Society.
- f. To distribute the net monies received by the Society in the exercise of the foregoing powers, after making provisions there out for the expenses and liabilities of the Society incurred in such exercise or in otherwise carrying out the purposes and operations of the Society and for any contributions or payments for any of the purposes specified in the next following sub-clause hereof, amongst the proprietors entitled thereto in accordance with the rules to be for the time being in force with respect to the distribution thereof.
- g. To grant gratuities, donations, pensions, allowances and emoluments to any Member or ex-Member of the Society or any person as any time of employment of the Society, or engaged in any business acquired by the Society, and the spouse(s), widows, widowers, immediate families and dependants or relations or connections or any such persons.



- ee. To sensitize the members of the society on their rights and intellectual property laws in general.
 - ff. To lobby and interact with relevant government bodies that are directly or indirectly related to the objects of the society to ensure that laws enacted are beneficial to the music industry.
97. From the petitioner's objectives, it is apparent that the petitioner is an association of authors, composers, arrangers and publishers of musical works. It is charged with *inter alia* the duty of negotiating, collecting and distributing royalties on behalf of its members and other affiliates. The petitioner further deals with third parties in granting permission for the use of the copyright works or related rights.
98. However, the petitioner contended that it is itself a copyright rights holder as opposed to being an agent of other copyright rights holder. As such, it further contended that the provisions of the [Copyright Act](#) do not apply to it.
99. Having carefully considered the record, this court did not come across any evidence that the petitioner is a copyright rights holder. What is on record is that the petitioner is acting on behalf of copyright rights holders. As such, the petitioner is an agent and can only be a CMO within the meaning of the [Copyright Act](#).
100. Buttrussing the foregoing, this court notes that the petitioner has in previous proceedings acceded to and vehemently defended the position that it is a CMO and why CMOs are essential in the realm of copyright property rights. An example at hand is in [Xperia Management Limited & 4 others vs Attorney General & 5 others](#) (2016) eKLR where the court summed up the instant petitioner's position as follows: -
123. I am satisfied that, as submitted by MCSK, [the petitioner herein] the individual management of rights is virtually impossible with regard to certain types of use for practical reasons. MCSK illustrates this point by submitting that a right-holder is not materially capable of monitoring all uses of his works as he cannot, for instance, contact every single entertainment establishment, radio or television station to negotiate licenses and remuneration for the use of his works. Conversely, it is not practical, as submitted by MCSK, for a user to seek specific permission from every right owner for the use of every copyrighted work. Indeed, as the court observed in the case of [Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd](#) Civil Case No 154 of 2009
- The necessity of a Copyright Collecting Society such as the defendant [MCSK] is imperative on account of the fact that such society has the expertise and means of monitoring copyright users for the purposes of assessing royalties that is required to be paid to individual copyright owners. It would be impossible for an individual artist, like in the instance case relating to music, to monitor the various media that exploit the copyright of such artists to determine the level of royalty that should or ought to be paid” (Emphasis added)
101. What, therefore, the petitioner is attempting to engage in, in this matter, is to approbate and reprobate on whether it is a CMO. Such approach is definitely impermissible and holds out the petitioner as a vexatious litigant.
102. The Court of Appeal in [Fursys \(Kenya\) Limited v Southern Credit Banking Corporation Limited](#) [2015] eKLR had the following to say on the tendency of a party approbating and reprobating: -



21. The approbation and reprobation was clearly improper and at variance with proper pleading. A party who in one proceeding avers one thing and in another proceeding the opposite in a related matter as in this case cannot but be said to be vexatious.
103. As I come to the end of this discussion, I have to address the question as to whether a copyright rights holder ought not to be under any statutory regulation.
104. The general answer to the question is that State regulation of intellectual property rights is provided for in article 40(5) of the Constitution. However, in the course of undertaking the regulation, whether through statutory interventions or by policy decisions, the State must ensure that it acts within the confines of the Constitution and the law more so as specifically cautioned in article 40(2), (3) and (4) of the Constitution.
105. In this matter, the contention as to whether the provisions of the Copyright Act are in tandem with the Constitution will be addressed in the subsequent issues.
106. Flowing from the above, this court finds and hold that the petitioner herein is a CMO and is subject to lawful regulation.
107. The issue is, therefore, answered in the affirmative.
- (d) Whether sections 46 and 46A-G of the Copyright Act are in contravention with article 40 of the Constitution as they perpetrate the infringement of intellectual property rights by requiring a rights holder to seek a license before exercising/ exploiting/administering its own rights:**
108. This issue seems to be fairly settled by the preceding issue as well as previous decisions. The contention is whether requiring an intellectual property rights holder to obtain a license before exercising/ exploiting/administering its own rights contravenes the holders' property rights.
109. This court has already posited that the requirement is within the Constitution unless its immortalization contravenes the very Constitution and the law, the position so remains.
110. The petitioner having affirmed that it was a CMO in *Xperia Management Limited & 4 others v Attorney General & 5 others* case (*supra*) and as so found by this Court in this judgment, goes further to buttress the position that regulation will accord order and decorum in the sector managing the intellectual property rights in Kenya. Allowing every intellectual property rights owner in Kenya to do as it pleases will be a recipe for chaos in the industry and will make it difficult, if not impossible, for resolution of any disputes on infringement of such rights.
111. As stated in the foregoing issue, such regulation must be within the Constitution and the law.
112. Having said so, this court must point out that sections 46 and 46A-G of the Copyrights Act do not provide for the alleged licensing of an intellectual property rights holder before such an owner can exercise/exploit/administer one's own rights. The provisions are part of Part VII of the Copyright Act which provide for Collective Administration of Copyright. The impugned provisions instead deal with CMOs and other collecting societies.
113. The upshot is, therefore, that sections 46 and 46A-G of the Copyrights Act are not in contravention of article 40 of the Constitution as they do not provide for any licensing of an intellectual property rights holder before such an owner can exercise/exploit/administer one's own rights.
114. The issue is, hence, answered in the negative.



(e) Whether section 46A of the Copyright Act violates article 27 of the Constitution to the extent of allowing the respondents to arbitrarily peg value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works:

115. Section 46A of the Copyright Act provides as follows: -

46A. Approval for imposition and collection of levy:

Notwithstanding any other provision of this Act, no collecting society shall—

- (a) impose or collect royalty based on a tariff that has not been approved and published in the Gazette by the Cabinet Secretary in charge of copyright issues in the Gazette from time to time; or
- (b) levy royalty on users exempted by the Cabinet Secretary by notice in the Gazette.

116. It is the petitioner's contention that the above provision violates article 27 of the Constitution on two fronts. First, that it accords the Respondents the luxury to arbitrarily peg value of music/tariff to a percentage of business permit and, second, that it imposes a flat rate tariff on broadcasts of musical works.

117. A reading of the said provision shows that the law restricts any collection society from otherwise dealing with the imposition or collection of any royalty which is not based on a tariff that has been approved and published in the Gazette by the Cabinet Secretary.

118. Although the provision imposes the duty to gazette the tariff on the Cabinet Secretary, it does not, however, state the manner in which the tariffs will be arrived at. Does that, therefore, mean that the respondents will exercise the power to come up with the tariffs arbitrarily?

119. In order to answer the question, there is need to look at what arbitrariness is. The Court of Appeal in Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kabindi Ngala Mwagandi [2015] eKLR referred to the Black's Law Dictionary 8th Edition that defined arbitrariness in the following manner: -

in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

120. The High Court in Civil Suit No 3 of 2006 Kasimu Sharifu Mobamed v Timbi Limited [2011] eKLR referred to Oxford Advanced Learner's Dictionary AS Horby sixth edition edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -

the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

121. The Supreme Court of China in Sharma Transport v Government of A Palso (2002) 2 SCC 188 had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The court observed as follows: -

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things,



non-rational, not done or acting according to reason or judgment, depending on the will alone.

122. The term ‘arbitrariness’ had earlier on been defined by the court (Supreme Court of China) in *Shrilekha Vidyarthi v State of UP* (1991) 1 SCC 212 when it comprehensively observed as follows;

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you’. This is what men in power must remember, always.

123. Whereas section 46A of the *Copyright Act* does not provide for the manner in which a Cabinet Secretary may come up with a tariff, suffice to note that the position of a Cabinet Secretary is a creation of the *Constitution*. Indeed, a Cabinet Secretary is a State officer under Article 260 of the *Constitution*. As such, article 10 of the *Constitution* calls upon State officers, among others, to be bound by the national values and principles of governance in the discharge of their duties. Further article 3 of the *Constitution* obligates every person to respect, uphold and defend the *Constitution*.

124. In light of the foregoing, it cannot be the case that a Cabinet Secretary is at liberty to arbitrarily exercise its powers as conferred upon by the *Constitution* or the law. Just like caged animals, Cabinet Secretaries must comply with the constitutional and statutory demands while discharging their duties.

125. It is, therefore, not open for a Cabinet Secretary to exercise any power conferred upon whimsically. As said, such power must be within the four corners of the *Constitution* and the law.

126. The position taken by the petitioner seems to be both pre-emptive and imaginary. the petitioner is only apprehensive that the Cabinet Secretary is likely to, albeit, arbitrarily exercise its powers. The apprehension cannot be a basis of a Court to determine a matter before it.

127. Courts are called upon to adjudicate upon dispute which are real and have crystallized. In consolidated Petitions NRB Pet No E090 of 2022, NRB Pet No E168 of 2022, NRB Pet No E221 of 2022, NRB Pet E230, NRB Pet E234 of 2022, NRB Pet E249 of 2022, MSA Pet No E017 of 2022, MSA Pet No E019 of 2022 and ELD Pet No E010 of 2022 *Okiya Omtatab Okoiti & 15 others v Attorney General & others* the High Court had the following to say on the ripeness of disputes as it dismissed several Petitions: -

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



75. The aforesaid position is encapsulated in the principles of mootness, ripeness and justiciability as explained by Onguto J, in *Wanjiru Gikonyo and others v National Assembly of Kenya and 4 others* Petition No 453 of 2015 [2016] eKLR as follows:
27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time.
76. The application of the aforementioned principles depends on the facts of each case. In the *Wanjiru Gikonyo* case (*supra*), the learned Judge, again stated:
- (34) There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.
- (35) It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.
128. In this case, the allegation that section 46A of the *Copyright Act* violates article 27 of *the Constitution* to the extent of allowing the respondents to arbitrarily peg value of music/tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works is only, but illusionary.
129. For the petitioner to succeed in such a matter, there is need for proof of the arbitrariness and discrimination on the part of the Cabinet Secretary. The Petitioner has not even disclosed any single approved tariff by the Cabinet Secretary as a basis of the allegation. There is no Gazette Notice of any approved tariff on record.
130. The upshot is, hence, that there is no evidence to prove the allegation of arbitrariness on the part of the respondents. The petitioner has, on an equal footing, failed to demonstrate any form of discrimination in imposing an alleged flat rate tariff on broadcasts of musical works. The court is only called upon to decide on an imaginary issue.
131. The petitioner, therefore, failed to discharge the burden of proof to the standard set by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where 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.

132. In such a case, this court can only decline the invitation by the petitioner. The issue is thereby answered in the negative.

(e) Whether Mr. Edward Sigei is guilty of contempt of Court

133. The basis of moving a court to find that a party is guilty of contempt of court is always an order of the court. In this case, the order was issued on February 9, 2021.

134. The instant order was made pursuant to prayer 2 of the petitioner's Notice of Motion dated December 24, 2020. The order stated as follows: -

1. That so as to preserve the subject matter and to avert infringement of rights, pending the hearing and determination of this application inter-partes, a conservatory order be and is hereby issued restraining the 1st respondent from interfering with the Music Copyright Authority's administration/enforcement/collection and distribution of royalties in respect of assigned/owned performing and reproduction rights.
2. That orders accordingly.

135. By a letter dated March 29, 2021, the petitioner's counsel wrote to the Deputy Registrar of this court seeking the amendment of the extracted order. The letter partly stated as follows: -

We write requesting your good offices to slightly rectify part of Order 1 referring to the petitioner as 'Music Copyright Authority' instead of 'Music Copyright Society of Kenya'.....

136. In response to the said letter, the Deputy Registrar informed the petitioner that the order was issued in terms of prayer 2 of the notice of motion, and as such, the request for amendment could not be acceded to by the Deputy Registrar but by the court. The petitioner was directed to take up the matter with the Judge, but it seems that did not happen.

137. Resulting from the above, and admittedly, the order in issue did not relate the petitioner but referred to an entity known as Music Copyright Authority.

138. In such circumstances, proceeding with the matter further will be an act in futility since a party can only be cited for disobeying a court order if the order, in a defined way, related to such a party. In this case the order did not.

139. As the petitioner had the opportunity to amend the order, but opted not to, it can only be fair that the contempt proceedings are instituted against Music Copyright Authority and not the petitioner.

140. The upshot is that the notice of motion dated July 22, 2021 was made against a non-party in these proceedings, and hence, it also lacks any legal leg to stand on.

Disposition

141. As I come to the end of this judgment, I must profusely apologize for its late delivery. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional



and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest, hence, the delay.

142. On the basis of the above discussion, it is apparent that the petition together with the applications are not successful.

143. Consequently, the following orders do hereby issue: -

- a. The petition and the notices of motion dated December 24, 2020 and July 22, 2021 respectively be and are dismissed.
- b. The petitioner shall bear the costs of the petition.

144. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Dr. Okubasu, Learned Counsel for the Petitioner.

Mr. Jakech, Learned Counsel for the 1st Respondent.

Mr. Ogosso, Learned Counsel for the 2nd and 3rd Respondents.

Kirong/Benard – Court Assistants.

