REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 251 OF 2019

REPUBLIC.....APPLICANT

VERSUS

KENYA COPYRIGHT BOARD.....1ST RESPONDENT

KENYA ASSOCIATION OF MUSIC PRODUCERS.....2ND RESPONDENT

MUSIC COPYRIGHT SOCIETY OF KENYA.....3RD RESPONDENT

PERFORMERS RIGHTS SOCIETY OF KENYA.....4TH RESPONDENT

AND

DIANA INTERNATIONAL LTD T/A

ANDREW APARTMENTS.....*EX PARTE* APPLICANT

JUDGMENT

The parties

1. The applicant, Diana International Ltd T/A Andrew Apartments is a limited liability company incorporated and registered in Kenya.

2. The first Respondent, the Kenya Copyright Board, is a body corporate with perpetual succession and a common seal established under section 3(1) of the Copyright Act[1] (hereinafter referred to as the act). In its name, it is capable of— (a) suing and being sued; (b) purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) borrowing and lending money; and (d) doing or performing all such other things or acts as may be necessary for the proper performance of its functions under the Act which may lawfully be done by a body corporate.

3. The second Respondent, the Kenya Association of Music Producers (KAMP) is a nonprofit making company incorporated in 2003. It is licensed by the Kenya Copyright Board (KECOBO) to represent the rights and interests of producers of sound recordings through collection of license fees and distribution of royalties in accordance with the Act.

4. The third Respondent is the Music Copyright Society of Kenya is a company limited by guarantee registered under the provisions of the companies Act.[2]

5. The fourth Respondent, Performers Rights Society of Kenya (PRISK) is a Collective Management Organization (CMO), licensed by the Kenya Copyright Board to represent performers in musical and dramatic works.

Grounds relied upon

6. The applicant's case is that the Respondents acting jointly have issued it with an illegal, unreasonable and unfair demand for payment of a sum of Ksh. 192,616.50 vide invoice dated 23rd July 2019 and demand notice dated 19th August 2019 for monies allegedly payable by the applicant as royalties for purported public performance of copyrighted musical and related rights for the period ending 2019.

7. The applicant states that the demand has been made by the second to the fourth Respondent purportedly upon being licensed by the first Respondent yet there is no proof of such licensing. It also states that on 7th August 2019, it requested the Respondents to provide it with proof of such licensing but to date the Respondent has failed to provide it with copies of the licenses allegedly issued by the first Respondent to them, thus acting contrary to the principles of transparency, accountability and responsiveness.

8. The applicant states that the second to the fourth Respondents acted without legal powers to levy the said sums and that it failed to provide reasons, basis and breakdown for the said sum. It also states that the threats of prosecution and surcharge of 5% it has been subjected to have no basis in law. Further, it states that the amount claimed was arrived at arbitrarily, without taking into account factors such as the nature, scope and the applicant's size of operations. Lastly, it states that by failing to provide proof of authority to levy the said sum, it acted *ultra vires* and in breach of Article 47 of the Constitution.

Reliefs sought

9. The applicant prays for the following orders:-

> *a. An order of certiorari to remove into this honourable court and quash the decision of the Respondents contained in the invoice dated 23rd July 2019 and demand Notice dated 19th August 2019 issued to the applicant in the name of the second, third and fourth Respondents levying Ksh. 192,616.50 as monies payable by the applicant as royalties for public performance of copyright musical and related rights for the period ending 2019.*
>
> *b. An order of prohibition do issues to prohibit the Respondents jointly or otherwise from demanding or otherwise levying or otherwise levying royalties from the applicant for public performance of copyright musical and related rights for the period ending 2019 as sought in the invoice dated 23rd July 2019 and demand Notice dated 19th August 2019 in the name of the second, third and fourth Respondents.*
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> *c. Costs of this application be provided for.*

First Respondent's Replying Affidavit

10. Mr. George Nyakweba, the first Respondent's Assistant Executive Director swore the Replying Affidavit dated 2nd December 2019 in opposition to the application. He deposed that the first Respondent, a statutory corporation established under the Copyright Act is responsible for licensing and supervising the activities of Collective Management Organizations (CMO's) established in accordance with the act which are responsible for collecting royalties on behalf of artistes and distribution of royalties to the artistes. He also deposed that the second, third and fourth Respondents are CMO's duly licensed by the first Respondent to collect such royalties jointly on behalf of artists, but not on behalf of the first Respondent nor are they its agents.

11. Mr. Nyakweba deposed that the first Respondent is neither a CMO nor is it involved in collecting royalties or distributing them in any manner whatsoever. He averred that the first Respondent has never interacted with the applicant or its agents nor has it ever collected royalties from the applicant, hence, the allegations against the first Respondent are unfounded.

The second Respondent's Replying Affidavit

12. Jane Achieng Wandigah swore the Replying Affidavit dated 2nd December 2019 in opposition to the application. She deposed that her duties entail identifying users of audio visual works, sound recording and musical, dramatic and literary works for commercial gain as envisaged by the act. She deposed that the duty entails going out into the field either in person or through a team visiting business premises identifying the users and educating them why they need to take the license and the charges. She deposed that the assessment is done based on the category of the tariff applicable and once the assessment is done, they issue an invoice to the user for payment within 30 days, in default, it attracts 5% penalty charge cumulatively.

13. M/S Wandigah deposed that the failure to settle the invoice entitles them to report to the police to enforce the law which includes criminal sanctions. She also averred that the second, third and fourth Respondents commonly referred to as CMO's are licensed by the first Respondent to identify users of audio visual works, sound recording, musical, dramatic and literary works for commercial gain within the purview of the Act.

14. She deposed that after identifying the users, the second, third and fourth Respondents are annually licensed to collect and distribute royalties to the right holders who are the artists. She averred that once the second, third and fourth Respondents identify users, they also annually jointly license them to make use of the audio visual works, sound recording, musical, dramatic and literary works for the period of the validity of the licence. Additionally, she deposed that the applicant was identified as the user of audio visual works and sound recording for the years 2015, 2016 and 2017 assessed and invoiced for the three years and duly paid up the tariff. Further, she deposed that the applicant obtained the users licenses for the years 2015, 2016 and 2017 from the second and fourth Respondents and in the year 2018, the applicant was required to obtain the users license, hence, they invoiced it but it did not comply.

15. M/s Wandigah deposed that the Elijah Ongeri who invoiced the applicant was a duly appointed licensing officer for the second, third and fourth Respondents and that the licensing was done in accordance with the duly gazetted tariff for the use applicable to the applicant. Lastly, she averred that having obtained the license for the above years, the applicant cannot be heard to say that the tariff does not apply to them.

Respondent's supplementary affidavit

16. Elijah Ongeri, a duly appointed licensing officer of the second, third and fourth Respondent swore the supplementary Affidavits 2nd December 2019. He averred that on 22nd July 2019, in the performance of his official duties, he visited Andrew Apartments along Rapter Road, Westlands to assess the same for purpose of the second, third and fourth Respondents issuing the applicant with joint copyright and related rights license for the year 2019.

17. He deposed that he was already aware that the applicant were users of Audio-Visual Works, Sound recording and musical, dramatic and literary works for commercial purposes as envisaged by the act. He also deposed that he was also aware that the applicant had been licensed for the years 2015, 2016 and 2017, and, that the applicant's premises are furnished apartments comprising of a health club, a bar and restaurant, furnished living rooms, swimming pool and a conference room.

18. Mr. Ongeri deposed that in the bar, the restaurant and the furnished living rooms, clients are provided with television sets which display audio-visual works, sound recording, and musical, dramatic and literary works services for commercial gain since 2015. He further averred that a licensing officer, a one Judith Buyaki informed him that he visited the premises in 2018 and noted that the applicant had not obtained the license for 2018 which she assessed and invoiced for Ksh. 167,921 for the year 2018 which invoice was not honoured. He further averred that he assessed and invoiced the applicant as enumerated in paragraph 7 of his affidavit.

19. Additionally, Mr. Ongeri averred that prior to the review of the 2018 tariff, the first Respondent engaged the public in a participation process after which it issued a press statement confirming that it had licensed the second, third and fourth Respondents to collect royalties on behalf of artists for the year 2019. He deposed that he raised an invoice for Ksh. 192,616.50 on 23rd July 2019 based on the tarrif gazetted vide legal Notice Number 107 of 2019 published on 17th June 2019 which invoice was not honoured within 30 days of issue. He further averred that when he visited the premises on 22nd July 2019, he was able to access the hotel areas but even though he was not allowed access to the rooms, he was able to see from the hotel that the applicant is a user of sound recording and pipped music whose connection to the furnished rooms was visible from the hotel area.

20. He also averred that he has been able to access the applicant's website where they advertise the services they offer being basically furnished apartments where through the use of television they exploit copyrighted works for commercial gain. He deposed that other similar establishments who are users of copyright works such as the applicant have obtained joint copyright and related rights license. He deposed that the second, third and fourth Respondents collectively referred to as Collective Management Organizations are licensed by the first Respondent under the Copyright Law to collect royalties from users of copyright works and distribute it to the right holders. Lastly, he averred that the applicant has an obligation to obtain the necessary license and to pay royalties payable to the second, third and fourth Respondents.

Applicant's advocates submissions

21. The applicant's counsel cited section 46 (1) (2) of the act and submitted that the provision requires a CMO to be gazetted. He argued that there was no proof that the second to fourth Respondents were gazetted as required hence the purported appointment is of no effect. Additionally, he argued that the appointment as a CMO is a statutory undertaking as provided under the Statutory Instruments Act,[3] hence, it must be published in the Kenya Gazette. He relied on *Kisumu Bar Association v Kenya Copyright Board*[4] which held that the first Respondent's board was not properly constituted hence it could not validate the certificates dated 1st February 2019. He argued that in view of the foregoing, the second to the fourth Respondents do not hold valid authorization under the above section to levy or demand any royalties from the applicant. To buttress his position he cited *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Rongo University*[5] in support of his argument that the impugned decision is illegal. He added that in absence of a valid certificate, the second to fourth Respondents cannot claim to have acted legally.

22. The applicant's counsel also argued that the impugned decision was arbitrary and contra statute. He cited the Respondents' failure to respond to the applicant's letter dated 7th August 2019 questioning their mandate and argued that the failure to respond was a breach of section 6 of the Fair Administrative Action Act [6](herein after referred to as the FAA Act). He submitted that by dint of section 6(3) of the FAA Act, the decision is deemed to have been taken in bad faith. He argued that the belated attempt to provide reasons within these proceedings does not cure the illegality. He relied on *Priscillah Wanjiku Kihara v Kenya National Examinations Council*[7] for the proposition that where an administrator fails to give reasons, the court can infer absence of good reasons.

23. Further, counsel argued that the Respondents failed to consider relevant factors such as the fact that Andrews Apartments does not operate on the basis of a hotel or multi-room accommodation licence. He argued they also failed to consider that Andrews Apartment is a residential apartment property, and that, the developer offers shared amenities on optional basis. Additionally, he argued that it failed to consider that the Apartments do not offer piped music or common point television decoding to its residents. Further, he submitted that there is no public performance of copyright material at the apartments.

24. The applicant's counsel further argued that the alleged previous payments have no bearing on the impugned decision which is founded on a claim of the validity of the second to fourth Respondents authority. He argued that the previous payments were made under a mistaken fact that the second to fourth Respondents had the mandate. He relied on *Republic v Complaints Commission, Media Council for Kenya & 2 Others*[8] for the holding that the doctrine of estoppel does not apply to a statutory obligation or operate against the law or an act of Parliament. He urged the court in the event it finds that the second to fourth Respondent had no mandate, then it orders the refund of monies previously falsely obtained from the applicant. To fortify his argument, he relied on section 11 (1) of the FAA Act which permits the court to grant any order.

25. Lastly, the applicant's counsel submitted that the amount claimed is arbitrary. He relied on *Republic v Kenya Revenue Authority ex parte Mujtab Muhamed*[9] for the holding that the authority must exercise its powers fairly and that there ought to be basis for the exercise of such power.

The first Respondent's Advocates submissions

26. The first Respondent's counsel argued that the second, third and fourth Respondent are agents of the first Respondent. He relied on *Expedia Limited & Another v The Attorney General & 4 others*[10] for the holding that CMOs are required to obtain licenses from the first Respondent in order to perform their work. He further argued that the impugned invoice is not an administrative decision amenable to judicial review. He referred to the definition of an administrative action in the FAA Act and argued that the invoice does not fall within the said definition, hence, it is not amenable to judicial review.

27. Additionally, counsel cited section 9(2) of the FAA Act and argued that section 48 of the Act establishes the Competent Authority which is akin to an administrative Tribunal. He submitted that under section 48(2) (d) of the act, the Competent Authority has jurisdiction to hear and determine disputes relating to the imposition of terms or conditions on a license by CMOs. He submitted that the applicant has not exhausted all the available mechanisms as provided under section 9(2) of the Act.

28. Additionally, counsel submitted that under section 46 of the act, the second, third and fourth Respondents have the mandate to collect royalties from the applicant. He dismissed the applicant's counsel's argument that a CMO license is a statutory instrument within the meaning of section 2 of the Statutory Instruments Act[11] and argued that statutory instruments are forms of legislation.

29. In response to the submission that the Boards decision had been stayed by a court, counsel pointed out that it was stayed on 20th September 2018, and, that, the second, third and fourth Respondents licenses were issued on 1st February 2019, hence the licenses were not affected by the judgment cited and added that, the court in the said case ordered that the joint collection of the royalties to continue for 60 days from 5th November 2019.

Second, third and fourth Advocates' submissions

30. The second to fourth counsels' advocate argued that the application does not disclose illegality, irrationality or procedural impropriety, hence judicial review orders cannot issue. He argued that the first Respondent is empowered to collect royalties on behalf of artists from the commercial users as provided under section 46 of the act. He also argued that the law empowers the first Respondent to license CMO''s to collect the royalties on behalf of artists.

31. He submitted that the first Respondent licensed the second to the fourth Respondents and argued that the applicant has not demonstrated bad faith, illegality irrationality of procedural impropriety or *ultra vires*. Counsel submitted that the tariffs were gazetted as required, hence the invoice was lawfully claimed. He submitted that there is nothing to show that the second to fourth Respondents acted outside their powers. He submitted that judicial review does not deal with merits of a decision.

Determination

32. First, I will address the issue whether this suit offends the doctrine of exhaustion of remedies. The second to fourth Respondents counsel cited section 9(2) of the FAA Act and argued that section 48 of the Copyright Act establishes the Competent Authority which is akin to an administrative Tribunal. It was his submission that under section 48(2) (d) of the act, the Competent Authority has jurisdiction to entertain the dispute raised in this case.

33. The applicant's counsel and counsel for the second to the fourth Respondents did not address this issue.

34. Section 48 of the act provides for the appointment of the Copyright Tribunal in the following words:-

> ***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.*

35. The jurisdiction of the Tribunal is provided for under sub-section (4) in the following words:-

> *(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

(iv) 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

36. A reading of the above provision leaves me with no doubt that its jurisdiction is specific and deals with ***(****a) a dispute over registration of copyright; and (b) an appeal against— the decisions listed in subsection 4 (b) (i) to (v) listed above.* The section does not cover the issues presented in this case, namely disputes relating to collection of royalties. Accordingly, the argument based on the doctrine of exhaustion of remedies collapses.

37. Second, I will discuss the issue whether an invoice is a decision amenable to judicial review. The objection by the Respondents counsel as I see it is that there is "no decision has been made to be subjected to Judicial Review proceedings." Simply put, they maintain that an invoice is not a decision capable of being quashed.

38. The applicants counsel on the other hand relied on the definition of an administrative action in section 2 of the FAA Act and argued that the invoice falls within the ambit of the said definition, hence, it is amenable to judicial review.

39. The applicants' substantive application is expressed under Order **53** Rules **3 (1)** of the Civil Procedure Rules, 2010. It was not brought under Article 47 of the Constitution or provisions of the FAA Act. It is beyond argument that Order 53 (2) of the Civil Procedure Rules, 2010 requires the existence of a decision. The provision requires that the decision be attached to the application. The rule requires the existence of a judgment, order, decree, conviction, or other proceedings. A strict reading of Order 53 of the Civil Procedure Rules, 2010 lead to the conclusion that an invoice is not a decision amenable to judicial review. It should be recalled that sections **8** and **9** of the Law Reform Act[12] are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction.

40. However, in my view, the argument that an invoice is not a decision can hold sway if we are to determine the issue based on traditional common law Judicial Review principles. The Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[13] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

41. Legal rights refers to rights according to law. It exists under the rules of some particular legal system. A legal right is a claim recognizable and enforceable at law.[14] The legal right and legal remedy are correlative.

42. My reading of the definition in section 2 of the FAA Act is that all an applicant is required to do is to demonstrate that the impugned decision violates or threatens to violate legal rights or violation of the Constitution. The applicant has not in my view demonstrated that the invoice violates its legal rights nor has the applicant demonstrated a violation of the Constitution.

43. In my view, the applicant is simply disputing royalties demanded in the contested invoice. As explained below, the applicant's claim discloses a civil dispute as opposed to judicial review grounds. To this extend, I hold and find that the invoice under challenge is not a decision capable of being challenged by way of a judicial review. On this ground, this case fails.

44. This leads me to the next issue that is whether the applicant's claim based on the invoice is a civil suit disguised as a judicial review application. *First*, the applicant is challenging the manner in which the invoice was arrived at. It terms the amount as arbitrary. *Second*, the applicant lists what it refers to as relevant considerations which were not considered. These are (i) that the applicant does not operate on the basis of a hotel or multi-room accommodation licence, (ii) that the Apartment is a residential apartment made up of several midterm to long term town living apartments, (iii) that the property is made up of several town apartments run on a serviced apartments concept where the developer offers shared amenities, (iv) it does not offer piped music or common point television decoding to the residents and (v) there is no public performance of copyright material at the apartments, (vi) that the Respondents never provided the basis for the break down for the sad sum, (vii) that the amount claimed was arrived at arbitrarily, without taking into account factors such as the nature, scope and the applicant's size of operations. (viii) Lastly, it states that by failing to provide proof of authority to levy the said sum, it acted *ultra vires* and in breach of Article 47 of the Constitution.

45. The above ground cited by the applicant are contested issues of facts. Even the attempt to invoke Article 47 does not alter the pith and substance of grounds cited. They are all contested issues of facts. The applicant expects this court to resolve issues of fact and grant judicial review remedies. The simple question I pose is whether judicial review deals with contested issues of facts. My answer is that it does not. This above position was ably addressed in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji****[15]***as follows:-

"….where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in

a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...."

46. The above excerpt captures the position with sufficient clarity. It represents the correct statement of the law which has to date stood unchallenged. Judicial Review does not deal with contested issues of facts which requires parties to adduce evidence and be cross-examined. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others*[16] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be mae on merits which in turn requires evidence to be taken to decide issues of fact.[17]

47. The substance of the applicant's case as I understand it will stand or fall on the resolution of the above issues. To resolve the said issues and arrive at a finding whether or not the levy is justified requires oral evidence. Simply put, the applicant ought to have filed a plaint in the civil division instead of improperly invoking judicial review jurisdiction.

48. Judicial review does not deal with contested issues of fact. It deals with the legality or otherwise of a decision. Judicial review applications deal with well-known settled and defined grounds. These are illegality, irrationality, *ultra vires*, and proportionality. Section 7 of the FAA Act expanded the grounds of judicial review. None of the grounds in the said section has been proved in this case. This case falls outside the scope of judicial review jurisdiction. I find and hold that on this ground, this case collapses.

49. The next issue for determination is the assault on competence of the second to the fourth Respondents. The applicant's counsel cited *Kisumu Bar Association v Kenya Copyright Board*[18] which held that the first Respondent's board was not properly constituted. Standing on this decision, counsel questioned the validity of the second to fourth Respondent's certificates dated 1st February 2019 arguing that as at the said date, the first Respondent could not validly issue certificates.

50. First, I will address the relevance of the decision in *Kisumu Bar Association v Kenya Copyright Board*[19] to the instant case. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[20]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

51. The ratio of any decision must be understood in the background of the facts of the particular case.[21] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[22] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[23]

52. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[24]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[25] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[26]

53. The following excerpt from the judgment in *Kisumu Bar Association v Kenya Copyright Board*[27] relied upon by the applicant is relevant:-

15. The issue before me is whether or not the Board was properly constituted at the time it issued a licence to MCSK. 16. The Respondents acknowledged that pursuant to the 1st Schedule of the Copyright Act, 2001, the members of the Copyright Board hold office for a period of 3 years.

17. It is common ground that the term of the last Board ended on 30th October 2018.

18. The Respondents conceded that since 30th October 2018 when the term of the last Board expired, the Attorney General had not yet gazetted a new Board of Directors.

19. In the circumstances, it follows that by 1st February 2019, when a licence was issued to MCSK, the same was not issued by a duly constituted Board.

20. The Executive Director of the Board, is also the Secretary to the said Board. He also serves as an ex-officio member of the Board.

21. The Executive Director was responsible for the day to day running of the affairs of the Board.

22. However, it must be emphasized that the Executive Director is not synonymous with the Board. He cannot constitute himself into the Copyright Board.

23. It therefore follows that when the Executive Director issued a licence to MCSK on 1st February 2019, at a time when the Copyright Board was not properly constituted, he acted without the requisite legal mandate.

24. Accordingly, the application before me is well merited. I therefore remove the Certificate of Renewal of Registration dated 1st of February 2019 and place it before this Court, and proceed to quash it forthwith.

25. Before concluding this judgment, I wish to make it clear that the steps which had been taken by the Board prior to the expiry of its term, remain un-affected by the quashing of the licence.

54. Clearly, from the above excerpt, the issue before the court in the above case was whether or not the Board was properly constituted at the time it issued the license the subject of challenge in the said case. From the above excerpt, it was acknowledged that pursuant to the 1st Schedule of the Act, the members of the Copyright Board hold office for a period of 3 years. The issue before this court is simple. This court is being invited to quash a specific invoice and to prohibit the Respondents from levying royalties.

55. Differently put, before me is not a contest on the validity of the term of office of the Board as at the time it issued the licenses in question. It was not a pleaded issue in this case. It was introduced by way of submissions. It is not one of the issues raised in the Statutory Statement or the founding affidavit. The reliefs sought in a suit flow from the pleadings. The pleadings and the prayers sought will help in appreciating the nature of the dispute before the court. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[28] on the principles of good pleading:-

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. … Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

… Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."[29] *(Emphasis supplied)*

56. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

57. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*[30] rendered itself as follows:-

"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

58. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unleaded issues as having been fully investigated. Order 15 Rule 2 of the Civil Procedure Rules, 2010, provides that the court may frame the issues from all or any of the following materials—

a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;

b. allegations made in the pleading or in answers to interrogatories delivered in the suit;

c. the contents of documents produced by either party.

59. It is therefore clear that issues in a suit arise, flow from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The need for pleadings to be as precise as possible cannot be doubted. In *M N M vs. D N M K & 13 Others*,[31] it was held that:-

> *"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:*
>
> *"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."*
>
> *Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:*
>
> *"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."*
>
> *A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However, that was clearly not the case in this appeal."*
>
> 60. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[32] This being the case, the argument introduced by way of submissions suggesting that the Board was not properly constituted is a substantive issue that ought to have been pleaded and proved. How can this court be called upon to decide an issue based on allegations introduced by way of submissions? The Respondents were perfectly entitled to be alerted on all the issued they were required to confront, which is consistent with the rules of fair play. Thus, introducing issues by way of submissions is in appropriate because such issues require to be proved by way of evidence and that a respondent is entitled to respondent to the case confronting him. It follows that the applicant's counsel's invitation to this court to find that "the Board was not properly constituted" based on unpleaded arguments fails for reasons discussed herein above.

61. Lastly, I will address the issue whether the applicant has established any grounds to warrant the reliefs sought. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[33]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

62. Thus, when the legality of a decision, act or omission is challenged, a court ought first to determine whether, through the application of all legitimate interpretive aids,[34] the impugned decision, act or omission is capable of being read in a manner that complies with the mandate conferred by the enabling statute. The Constitution requires a purposive approach to statutory interpretation.[35]The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[36] The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."**[37]***

63. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

64. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[38]A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[39] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*[40] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

65. The preamble to provides that it is “An Act of Parliament to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes.” It defines a "Collective Management Organization” as follows- “means an organization 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.”

66. Section 5 of the act provides that the functions of the Board shall be to *inter alia*— (b) license and supervise the activities to license and supervise the activities of Collective Management Societies as provided for under this Act. The second to the fourth Respondents were duly licensed under the act as demonstrated by the licenses annexed to their respective affidavits.

67. The applicant’s counsel argued that the Respondents were not gazetted, hence challenging the validity of their appointment. My reading of the material presented before this court and the law leaves me with no doubt that the Kenya Association of Music Producers (KAMP) is licensed by the Kenya Copyright Board (KECOBO) to represent the rights and interests of producers of sound recordings through collection of license fees and distribution of royalties in accordance with the Act. Similarly, the third Respondent, the Music Copyright Society of Kenya is appointed under the provisions of the act, thus it has the legal competence.The fourth Respondent, Performers Rights Society of Kenya (PRISK) is a performer works licensing company appointed as a collecting society under the act.

68. An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondents.

69. The grant of the orders of *Certiorari* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

70. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

71. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable, or where the applicant could have applied for another remedy. In the instant case, the applicant had an option of filing a civil suit where the contested issues of fact presented in this court could be resolved. Additionally, the applicant admits having paid similar licenses for at least three previous years. It now claims to have paid under a mistake. Such a claim is unconvincing.

72. The invitation to this court to compel the Respondents to refund the amounts paid previously was made in the submissions. It is not a pleaded issue. Such a prayer cannot be entertained at all in the circumstances of this case. I have already addressed the function of pleadings. I need not repeat it here.

73. The power of the court to review an administrative action is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. None of these has been proved in this case.

74. In view of my analysis, determination and conclusions arrived at above, it is my finding that the applicant has not established any grounds for the court to grant the judicial review orders sought. Accordingly, the applicant’s application dated **2nd** September 2019 is hereby dismissed with costs to the Respondent.

Right of appeal.

Dated, Signed and Delivered at Nairobi tis 11th day of March 2020

John M. Mativo

Judge

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[1] Act No. 12 of 2001.

[2] Cap 486, Laws of Kenya-Repealed by Act No. 17 of 2016.

[3] Act No. 23 of 2013.

[4] Kisumu JR No 4 of 2019.

[5] {2018} e KLR.

[6] Act No. 4 of 2015.

[7] {2016} e KLR.

[8] {2013} e KLR

[9] {2015} e KLR.

[10] Constitutional Petition Number 317 of 2015.

[11] Act No. 23 of 2013.

[12] Ibid.

[13] Act No. 4 of 2015.

[14] In re estate of FOLWELL, 68 N.J. Eq. 728, 731 (N.J. 1905).

[15] {2014} eKLR.

[16] {2016} e KLR.

[17] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[18] Kisumu JR No 4 of 2019.

[19] Kisumu JR No 4 of 2019.

[20] As observed in *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967.

[21] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[22] Ibid

[23] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[24] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[25] Ibid.

[26] Ibid.

[27] Kisumu JR No 4 of 2019.

[28] In *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6].

[29]See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

[30]{2015} e KLR.

[31] {2017} e KLR.

[32] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[33] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[34] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[35] Ngcobo J while interpreting a similar provision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[36] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[37] *University of Cape Town vs Cape Bar Council and Another* 1986 (4) SA 903 (AD). See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[38] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[39] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[40] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.