



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**JUDICIAL REVIEW APPLICATION NO. 282 OF 2019**

**IN THE MATTER OF AN APPLICATION BY KENYA NATIONAL CHAMBER OF**

**COMMERCE & INDUSTRY-MACHAKOS BRANCH, AND MACHAKOS**

**BAR & HOTEL OWNERS WELFARE FOR JUDICIAL REVIEW**

**ORDERS OF CERTIORARY AND PROHIBITION.**

**IN THE MATTER OF ISSUANCE OF DEMAND NOTICES**

**FOR LEVYING OF UNGAZETTED TARIFFS**

**BETWEEN**

**KENYA NATIONAL CHAMBER OF COMMERCE &**

**INDUSTRY-MACHAKOS BRANCH.....1<sup>ST</sup> APPLICANT**

**MACHAKOS BAR & HOTEL OWNERS WELFARE.....2<sup>ND</sup> APPLICANT**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK).....1<sup>ST</sup> RESPONDENT**

**KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP)..2<sup>ND</sup> RESPONDENT**

**PERFORMER'S RIGHTS SOCIETY OF KENYA (PRISK).....3<sup>RD</sup> RESPONDENT**

**RULING**

1. In these proceedings the applicants' cause of action is that section 5 of the *Copyright Act Cap 130, Laws of Kenya* (hereinafter referred to as "the Act"), the Kenya Copyright Board is mandated to licence and regulate the activities of Collective Management Societies including the gazetting of audio-visual tariff through the Cabinet Secretary in charge of Copyright issues. The Respondents are Collective Management Societies that are mandated under the said Act to collect and disburse royalties to authors of, inter alia, audio-visual works. By a Legal Notice No. 57 of 21<sup>st</sup> April, 2017 which was made pursuant to section 46A of the said Act, the tariffs payable for use of copyrighted audio-visual works were set out but the same expired on 31<sup>st</sup> December, 2018 and that currently there are no new gazetted tariffs.

2. It was however averred that the Respondents' agents, employees and others acting on their authority have been demanding, levying and receiving royalties based on a document entitled "Proposed New tariffs" a document that has not been gazetted as required under section 46 aforesaid. The applicants therefore were apprehensive that they stand to suffer irreparable harm and injury by being subjected to imminent threat of having their premises raided and being liable to prosecution.

3. It was contended by the applicants that the issuance of the said demand notices, levying and receiving of royalties without the gazetted tariffs is illegal, irregular and unreasonable. Accordingly, in these proceedings they seek an order of certiorari quashing the said unlawful

action and prohibiting the Respondents from doing so.

4. After leave was granted but before the substantive application could be heard, the Respondent raised preliminary objections which are the subject of this ruling:

**1) The Suit herein is premature, irregular, misplaced and an outright abuse of court process.**

**2) This Court lacks Jurisdiction to hear and determine this matter and the suit herein visibly violates the Sections 27(2) and 48(1), (2)d & (3) of the Copy Right Act, Cap 130 Laws of Kenya.**

**3) Significantly, under the Copy Right Act, Cap 130, Laws of Kenya, which is the statute under which the Applicants' Application is grounded, parties, are bound to refer any disputes arising therefrom to the Competent Authority.**

5. Therefore, the main issue for determination is whether this Court has jurisdiction to entertain these proceedings.

6. According to the Respondents, these proceedings are misplaced and premature in the circumstance since the matter herein belongs to the jurisdiction of a competent Authority. It was submitted that a competent authority has been set up under section 48 of the **Copyrights Act**, Cap130, Laws of Kenya and that the drafters of the said legislation went a step further, and outlined the functions of the Competent Authority.

7. According to the Respondents, from the reading of section 48(3) of the said Act, it is clear that once a dispute is referred to the Competent Authority, the Authority is obliged to give both parties an opportunity to present their respective cases. It was further submitted that there being a Competent Authority duly established by the said Act, this court should be left to exercise its supervisory role as envisaged under Article 165 of the Constitution.

8. In this regard, it was therefore submitted that it is premature to bring this suit to this court, hence this suit should be removed from this court, and filed with the Competent Authority. In support of their submissions the Respondents cited the Court of Appeal decision of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.**

9. It was contended that whereas under the said Act, which is the statute under which the Applicants' Application is grounded, parties, are bound to refer any disputes arising therefrom to the Competent Authority, in the current case, there has been no attempt by the Applicants to refer the dispute herein to the said Authority as prescribed under section 48 of the Act. It was the Respondents' case that the Competent Authority is a court of competent jurisdiction and must not at any time be ignored as to do so, as the applicants have done, amounts to selective application of the law, which this court should not tolerate. This court was therefore urged to take cognisance of the intent of the drafters of the Act, and not to interfere with their intent, by overlooking the said provision.

10. The objection was however opposed by the applicants. According to them, while the Act provides for the creation of a Competent Authority, it proceeds to provide for its duties which duties are in a manner of speaking, the jurisdiction of the Authority. However, the jurisdiction of any quasi-judicial tribunal is never unlimited but is always circumscribed by the law creating it.

11. In this case it was submitted that under section 48 aforesaid, the Competent Authority arbitrates disputes between the Kenya Copyright Board (also a creation of the Act) and collecting societies. However, none of the duties include the arbitration of disputes between users of copyright and collecting societies or the granting of the orders sought for in this matter. Accordingly, this court's jurisdiction has not been ousted by the statute or any other legislation when arbitrating disputes between users of copyright and collecting societies.

12. It was therefore submitted that this preliminary objection is nothing but a farce; a smoking mirror; a desperate hail Mary; an obfuscation of the Respondents true intent, to delay these proceedings so that they can continue in their unabated illegal collection of un-gazetted royalties. The court was therefore urged to not only dismiss the preliminary objection with costs, but that the costs be assessed and made payable within a timeframe to be prescribed by the court so that litigants such as the Respondents cannot abuse the court process.

### **Determination**

13. I have considered the issues raised herein.

14. It is trite that where there is an efficacious remedy provided by law, the same ought to be resorted to first. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

**"...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that 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.”

15. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that:

**“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”**

16. On the issue whether the Court’s jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, under Article 2 of the Constitution, sovereign power which is delegated to *inter alia*, the judiciary, is to be exercised in accordance with the Constitution. In terms of administrative action, Article 47 as read with Article 165(6) donates to the High Court supervisory powers of the High Court with respect to decisions of the subordinate Courts and inferior tribunals or bodies. Pursuant to Article 47 Parliament enacted the *Fair Administrative Action Act*, 2015. Section 9(2), (3) and (4) thereof provides:

***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

17. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In Re Preston [1985] AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. I therefore associate myself with the position adopted by Emukule, J in Revital Healthcare (EPZ) Limited & Another vs. Ministry of Health & 5 Others [2015] eKLR at paragraph 10 where he cited with approval the case of Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004 in which it was held that:-

**“...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”**

18. It was similarly held in Republic vs. National Environment Management Authority [2011] eKLR, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

**“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”**

19. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. I therefore agree with the decision in Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887 that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. I associate myself with Mwera, J (as he then was) in Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010 to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly, I agree that where there is an alternative remedy and procedure available for the resolution of

the dispute that remedy ought to be pursued and the procedure adhered to.

20. I associate myself with **Majanja J's** views in **Dickson Mukweluine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly, the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

21. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows:

**“Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit...If the Court acts without jurisdiction, the proceedings are a nullity...The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister...Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.**

22. In the result I am of the view and I hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

23. However, the decision of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** ought to be taken note of. In that case, the learned Judge expressed himself as follows:

**“The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal...It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.”**

24. Therefore, any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

25. In this respect in **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520**, **Visram, J** (as he then was) held, based on **Anisminic Ltd. vs. The Foreign Compensation Commission & Another [1969] 1 All ER 208**, that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not.

26. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327**, where it was held that

**“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”**

27. It was my view that even in cases where the alternative remedy is in addition to the right to access the Court, to interpret the provisions in such a manner as to render the provision for alternative remedy illusory, would defeat the whole purpose of making provisions for alternative remedies. Therefore, where the alternative route does not necessarily lock out judicial process, the alternative remedies being a route provided under the relevant Act ought to be adhered to unless circumstances militate against that route. That notwithstanding as was held by

this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 while citing **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. In my view, where a remedy provided is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. In appreciating this position the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109**, quoted **Smith vs. East Elloe Rural District Council [1956] AC 736 at 750-1** and **R vs. Port of London Authority Ex Parte Kynoch Ltd [1919] 1 KB 176 AT 188** and stated that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

28. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999**.

29. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**.

30. That leads me to whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute herein. Section 48 of the **Copyright Act Cap 130**, Laws of Kenya provides as follows:

***(1) There shall be a competent authority appointed by the Minister for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.***

***(2) Subject to subsection (3), in any case where it appears to the competent authority that -***

***(a) The Board is unreasonably refusing to grant a certificate of registration in respect of a collecting society; or***

***(b) The board is imposing unreasonable terms or conditions on the granting of such a certificate; or***

***(c) A collecting society is unreasonably refusing to grant a licence in respect of a copyright work; or***

***(d) A collecting society is imposing unreasonable terms or conditions on the granting of such a licence;***

***the competent authority may direct that as respects the doing of any act relating to work with which the collecting society is concerned or with respect to the granting of a certificate to operate as a collecting society, a licence or a certificate shall be deemed to have been granted by the collecting society or the Board at the time the act is done or the application is made, provided the appropriate fees are paid or tendered before the expiration of such period or periods as the competent authority may determine.***

***(3) Where a dispute has been referred to the competent authority under this section, the competent authority 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.***

31. According to Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1) which clause establishes subordinate courts. Under section 169(1)(d) subordinate courts are Magistrate's Courts, Kadhi's Courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2) of the Constitution. The Competent Authority is established pursuant to section 48 of the said Act. Pursuant to Article 169(2) the jurisdiction, functions and powers of the subordinate court are conferred by the respective Acts of Parliament establishing the particular subordinate Court. In other words, subordinate courts being creatures of the statute must only exercise the powers conferred upon them by the statute creating them pursuant to the Constitution.

32. In Judicial Review Application No. 106 of 2014 – **Republic vs. Public Procurement Administrative Review Board & Others Exp Olive Telecommunication PVT Limited** the Court expressed itself as follows:

***“In our view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its***

**statutory powers and duties as a result of its own errors or the conduct of others and based on East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it...Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation.”**

33. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.

34. In this case it is clear that the powers conferred under section 48(2)(a) and (b) of the Act deal with situations where the decision being challenged is one made by the Copyright Board. Subsection (2)(c) deals with a situation where there is a refusal to grant a licence while (d) deals with imposition of unreasonable terms or conditions in the grant of such a licence. Nowhere in the said provision is a challenge to the imposition of tariff without gazettment dealt with. Accordingly, section 48 cannot be expanded to include a dispute relating to unlawful imposition of tariffs which is what is being challenged in these proceedings.

35. I therefore find that whereas the objection raised in these proceedings fails and is dismissed with costs to the *ex parte* applicants, the costs will however be taxed in the usual manner.

36. Orders accordingly.

**Ruling read, signed and delivered in open court at Machakos this 26<sup>th</sup> day of July, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

*Mr Mburu for the applicants*

*Mr Odhiambo for the Respondent*

*CA Geoffrey*