



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION J.R.NO. 298 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 23(3)(F)**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26**

**IN THE MATTER OF THE COPYRIGHT ACT CAP 130 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE COPYRIGHT REGULATIONS, 2004**

**AND**

**IN THE MATTER OF AV-02032-CERTIFICATE OF A COPYRIGHT WORK FOR MY SKOOL TV SHOW**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE EXECUTIVE DIRECTOR,**

**KENYA COPYRIGHT BOARD.....RESPONDENT**

**AND**

**YELLOW BOX LIMITED.....INTERESTED PARTY**

**EX-PARTE: SUGARCANE COMMUNICATIONS LTD**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 29<sup>th</sup> June, 2017, the *ex parte* applicant herein, **Sugarcane Communications Ltd**, seeks the following orders:

**1. An Order of Prohibition do issue against the Respondent to stop the Respondent from their intended cancellation of the Applicant's Certificate of Registration of a copyright work number AV-02032 for an audio-visual work titled "My Skool TV Show" dated 19.4.2016 and or their intended expunction of the registration in the name of Sugarcane Communications Ltd for an audio visual work titled "My Skool TV Show".**

**2. An Order of Certiorari do issue against the Respondent to bring before this Court for the purposes of being quashed the decision of the Executive Director of the Kenya Copyright Board made on 14<sup>th</sup> March 2017 of cancelling the Applicant's Certificate of registration of copyright work number AV-02032 for an audio visual titled "My Skool TV Show" dated 19<sup>th</sup> April 2016 and or expunction of the registration in the name of Sugarcane Communications Ltd for an audio visual work titled "My Skool TV Show"**

**3. That cost of this application be provided for**

**Ex Parte Applicant's Case**

2. According to the applicant, it is the registered copyright owner of an audiovisual work titled “*My Skool TV Show*” vide a Certificate of Registration of Copyright of a Work number AV-02032 issued on 19th April, 2016 which was issued after the payment of the requisite fees and on signing the Kenya Copyright Board Declaration. However, unknown to the Applicant on 16<sup>th</sup> November, 2016, **Yellow Box Limited** lodged a complaint with the Respondent in regards to the applicant’s said copyrighted work, *My Skool TV Show* and sought that the Respondent do expunge from the Copyright Register all entries in regards to the ownership of *My Skool TV Show*, the cancellation of the certificate issued to the applicant and a change of ownership of *My Skool TV Show* to be made in the name of **Yellow Box Limited**.
3. According to the applicant, despite having particulars of the applicant’s Directors, the Respondent did not bother to communicate to them in regards to the complaint raised and nor did was the Applicant granted an opportunity to be heard and or respond to the complaint as raised. However vide a letter dated 14<sup>th</sup> March, 2017 sent on email and addressed to the applicant’s Directors, which made reference to an alleged letter by the Respondent dated 13<sup>th</sup> January, 2017, the Respondent informed them of the decision to expunge the registration in the name of **Sugar Box Productions** (sic) within the next Seven (7) days from 14<sup>th</sup> March, 2017. However, no postal, residential or email address was indicated in the said letter despite the same having been submitted by the applicant on the forwarding letter and the application for registration of the audiovisual work.
4. The applicant averred that on receipt of the said letter dated it instructed its Advocates on record who wrote to the Respondent on 20<sup>th</sup> March, 2017 and 29<sup>th</sup> March, 2017 demanding that the Applicant be granted an opportunity to respond to the complaint raised. However, by a letter dated 30<sup>th</sup> March, 2017, the Respondent wrote to the ex-parte Applicant’s Advocates on record requiring them to address the question of title with the complainant rather than the issue of de-registration. Consequently the applicant’s Advocates wrote to the Respondent on 10<sup>th</sup> April, 2017 in response to the complaint lodged on 16<sup>th</sup> November, 2017 regarding the ex-parte Applicant copyrighted audiovisual work titled “*My Skool TV Show*”.
5. The applicants averred that since then their Advocates have closely been following up on any action undertaken by the Respondent in regards to the complaint raised and vide a letter dated 18<sup>th</sup> May, 2017 the applicant’s Advocates on record wrote to the Respondent inquiring on the status of the Applicant’s certificate but the same has not elicited any response and the Applicants are apprehensive that the Respondent will continue with his illegal actions of cancelling the Applicant’s certificate and or expunging its details from their system.
6. The applicants averred that there is reasonable apprehension that the Respondent may in contravention of the law and in an abuse of the due process of the law issue a Certificate of the Applicant’s copyrighted work to a third party to the detriment of the Applicant. The applicant avers that the intended cancellation of the Applicant’s Certificate of registration of a copyright work and or expunction of its details from the Kenya Copyright Board is unfair, illegal, unreasonable and was made without any justifiable cause and contrary to article 47 of the constitution and the principles of natural justice and therefore there is need of this Court’s interference by issuing an judicial review order prohibiting the Respondent from such conduct that is contrary to the law.
7. It was the applicant’s case that since the decision by the Respondent was reached arbitrarily, illegally and in contravention of Article 47 of the Constitution and the laid down principles of natural justice there is need to quash it as it was irrational, unfair, unreasonable and was made without any justifiable cause.
8. It was the applicant’s position that if it is indeed true that the Respondent sent the letter dated 13<sup>th</sup> January, 2017 via email to the ex-parte applicant as alleged, he ought to have annexed an email printout. The applicant averred that it received the letter dated 14<sup>th</sup> March, 2017 on email on 15<sup>th</sup> March, 2017 which was sent by one **Mary Luvayo** and the postal copy in July 2017, after the institution of these proceedings. The applicant lamented that it was indeed suspect that the Respondent sent a rather important letter asking for the ex-parte applicant’s response to the interested party is complaint via email but sent the decision via email and post.
9. The applicant averred that upon receipt of this letter, its Advocates on record wrote to the Respondent on 20<sup>th</sup> March, 2017 and 29<sup>th</sup> March, 2017 asking him for time to respond to the allegations raised by the Interested Party, but the Respondent responded on 30<sup>th</sup> March, 2017 that “*they should sort out or rather address the question of the title with the complainant rather than the issue of de-registration*”. Consequently, the applicant’s Advocates addressed the interested party’s complaints vide their letter of 10<sup>th</sup> April, 2017. However, unknown to them, the Respondent had gone ahead and issued the Interested Party with a certificate of copyright to “*My Skool TV Show*” on 28<sup>th</sup> March, 2017, a fact that the applicant came to learn on service of the Interested Party’s Application to be enjoined in these proceedings.
10. It was the applicant’s position that it is evident that the Respondent was made aware of the fact that the applicant had not received the letter on 13<sup>th</sup> January, 2017 before issuance of the certificate to the interested party and therefore the prudent thing would have been to allow the ex-parte applicant a chance to respond to the complaint raised by the interested party before issuing it with a certificate.
11. Based on legal advice, the applicant averred that pursuant to rule 8(13) of the Copyright Rules 2004, the Respondent ought to hear both parties before ordering any rectification , expungement and or collection of the copyright register, something the Respondent deliberately and intentionally failed to do. Since the letter of 13<sup>th</sup> January, 2017 was never served upon the ex-parte applicant or its director despite the Respondent having all their details in the system, the applicant averred that it was malicious and false for the Respondent to allege that it followed the laid out procedure in arriving at his decision of 14<sup>th</sup> March, 2017.
12. The applicant therefore insisted that the actions of the Respondent of reaching a decision without granting the ex-parte applicant a chance to be heard not only violated the right to a fair hearing and fair administrative action guaranteed by the Constitution but also violated the rules of natural justice and specifically the *audi alteram partem* rule and ought not to stand.
13. The applicant then proceeded to refute the allegations made by the interested party.
14. The applicant relied on Article 47 of the Constitution which according to it guarantees the right to fair administrative action and that

before a decision is made, the party which will adversely be affected by the decision ought to be heard, something that the Respondent never bothered to do as the Applicants were never heard. It therefore contended that the actions of the Respondent violated the constitutional right to a fair hearing as enshrined by Article 50(1). In its view, having demonstrated intentional non-involvement in the expungement proceedings, this Court ought quash the decision by the Respondent contained in the letter dated 14<sup>th</sup> March, 2017, cancel the certificate so issued, and order that the Respondent does allow the ex-parte applicant to be heard and a determination of such hearing be issued accordingly.

15. In its submissions, the applicant contended that whereas section 22 of the **Copyright Act** of Kenya provides the Appeal mechanism if one is aggrieved by the decision of the board, that Appeal mechanism connotes that the aggrieved party does not dispute the process that led to the decision but rather disputes the decision itself, which is not the case herein.

16. In this regard the applicant relied on the decision of **Korir, J** in JR Case 326 of 2016- **Republic vs. Chairman Githunguri District Alcoholic Drinks Regulation Committee Ex-Parte Marion Wanjiku & 2 Others [2014] eKLR** where he held that:

**“Looking at the application as presented to this court, I find that the same is directed at the decision making process. In my view, it is a matter that falls into the province of judicial review and the Applicant cannot be faulted for opting for judicial review.”**

17. It was the applicant's case that since it is questioning the process that led to the decision of 14<sup>th</sup> March, 2017 and in particular the fact that it was never heard and therefore was denied its right to a fair hearing, fair administrative action under the Constitution and as provided for under the rules and principles of natural justice, the Appeal will not cure this violation since the Appeal only questions the decision and not the process while on the other hand the Judicial Review proceedings question the process and not the decision. To the applicant, the appeals procedure provided for under section 22 of the **Copyright Act** would not comprehensively address the issues raised in the applicant's application. The question as to whether the Kenya Copyright Board through the Respondent followed the procedural requirements in reaching the impugned decision can only be answered through judicial review proceedings as instituted herein and not invoking the Appeals mechanism provided for by the Act.

18. In support of its case the applicant relied on **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D**. The applicant further relied on this Court's decision in Judicial Review Miscellaneous Civil Application 458 of 2016- **Republic vs. Agriculture Fisheries and Food Authority Ex parte: Mshale Commodities Limited [2017] eKLR** and submitted that the constitution further guarantees a right to fair hearing under article 50(1) and therefore any action that contravenes these articles should not be allowed by the Court to stand.

19. According to the applicant, the allegation that the letter of 13<sup>th</sup> March, 2017 was sent by email by the Respondent remain unsubstantiated as no proof in terms of an email printout has been produced by the Respondent. Accordingly, the Court was urged to observe that the Respondent failed to meet the ingredients to a fair hearing and therefore the process of reaching the decision of 14<sup>th</sup> March, 2017 was illegal and tainted with procedural impropriety, was irrational and unreasonable as the Respondent upon information of non-receipt of the letter of 13<sup>th</sup> January, 2017 ought to have halted any cancellation and expungement and instead allowed the Applicant an opportunity to answer to the complaint something he deliberately failed to do.

20. According to the applicant whereas the Respondent claimed that the Applicant was not the sole author of the audio-visual work giving a presumption that the interested party was also considered as one, nowhere in either the complaint nor the pleading filed herewith has the interested party claimed authorship of the said work hence that conclusion was could not be rational, legal, reasonable and proper.

21. In the applicant's view, a public body cannot be said to have followed the process if the Applicant who was affected by the decision was denied a chance to be heard. Denial of the hearing amounts to arbitrary abuse of power and the Court should not allow such a decision to stand and we urge this Court to find that the Respondent's decision of cancelling and or expunging the registration in the name of Sugar Box (sic) Productions was illegal, irrational and tainted with procedural impropriety and therefore a perfect candidate for quashing. It therefore urged this Court to allow the Notice of Motion Application dated 27<sup>th</sup> June 2017 with costs to the Applicant.

### **Respondent's Case**

22. The application was opposed by the Respondent herein, **The Executive Director' Kenya Copyright Board**.

23. According to the Respondent, the ex parte applicant applied for registration of copyright for audio-visual work titled “*My Skool TV Show*” which application was allowed and the applicant issued with a certificate No, AV-02032. However, it later turned out that the ex parte applicant was not the sole author of the said work, information that they had not disclosed at the registration of copyright application and in the circumstances the said certificate had been issued erroneously due to the fact that not all information was disclosed to the respondent's office by the ex parte applicant.

24. The Respondent disclosed that this fact emerged when the respondent received a letter from the advocate of the interested party detailing the interested party's extensive participation in the production of the said works. Following this, Kenya Copyright Board wrote to the ex parte applicant on the 13<sup>th</sup> January, 2017, requesting them to respond to the allegations in the said letter within seven (7) days failing which the respondent would proceed to expunge the copyright registration in the name of Sugar box (sic) productions Ltd. It was averred that upon the lapse of seven days, on the 14<sup>th</sup> March, 2017, having not heard from them, the respondent wrote to the ex parte applicant informing them of the decision to expunge the registration in the name of **Sugar Box Ltd** pursuant to Regulation 8(13)(b) of the **Copyright Regulations, 2004**.

25. The Respondent contended that it was quite suspect that the ex parte applicant received the letter dated 14<sup>th</sup> March, 2017 but alleges

never to have received the earlier one dated 13<sup>th</sup> January yet the two letters are the same and none of them bears any email or postal address. The Respondent however asserted that the letter dated 13<sup>th</sup> January, 2017 was sent to the ex parte applicant via email but they refused and/or neglected to attend to its contents hence prompting the respondent to take the action that he took.

26. The Respondent insisted that its action is sanctioned by law (Regulation 8(13) of the Copyright Regulations) hence the application for orders of Certiorari and Prohibition has no basis as due process was followed. Its case was that the application is a waste of this Court's precious time and an abuse of the process of the Court. According to the Respondent, the application is tainted with malice as the ex parte applicant knows very well that they misled the respondent in the application for registration of copyright thereby taking undue advantage over the interested party who had substantially contributed to the production of the work.

27. It was the Respondent's position that the applicant has come to court with unclean, tainted hands and therefore totally un-deserving of the prerogative writs of Certiorari and Prohibition sought herein.

### **Interested Party's Case**

28. The application was similarly opposed by the interested party, **Yellow Box Limited**.

29. The substance of the interested party's case was that the ex parte applicant deceitfully and unilaterally and in bad faith applied for registration of the copyright over the audio-visual work "My Skool TV Show" belonging to the interested party without the consent of the interested party.

30. Upon discovery of the ex parte applicant's action, the interested party lodged a complaint with the respondent to revoke the certificate of registration of the copyright wrongfully issued to the ex parte applicant and on 13<sup>th</sup> January, 2017, the Respondent notified the ex parte applicant of the said complaint and requested the applicant to respond within 7 days which the ex parte applicant failed to do.

31. Accordingly on 14<sup>th</sup> March, 2017, the Respondent wrote to the ex parte applicant informing them that it had expunged the registration of their certificate. Consequently the Respondent issued the same to the interested party as the owner of the said work and registered as number AV-02225.

32. It was disclosed by the interested party that being the rightful holder of the copyright challenged herein, it had commenced infringement proceedings against the ex parte applicant in Nairobi HCC No. 308 of 2017: Yellow Box Limited vs. Sugarcane Communications Limited and The Standard Group.

33. It was the interested party's case that since the Respondent had the jurisdiction to deal with the complaint, where the decision maker has given its decision in accordance with the laid down procedure, where there is an alternative remedy and/or appeal mechanism established by an Act of Parliament, the Court must leave the parties to exhaust the said statutory procedures and can only exercise jurisdiction as an appellate Court. It was therefore averred that it is in the interest of proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution under section 21 of the **Copyright Act** be followed.

34. It was further contended that where a decision has been made, an order of prohibition is powerless and cannot issue. However an order of certiorari only issues where the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with which is not the position in this case.

### **Determinations**

35. I have considered the foregoing as well as the submissions filed and the authorities cited.

36. Regulation 8(13) of the **Copyright Regulations, 2004** provides as follows::

***(13) The Board may, on an application of the Executive Director or of any person aggrieved, and upon hearing the parties concerned, order the rectification of the Copyright Register by –***

***(a) making any entry wrongly omitted to be in the Copyright Register;***

***(b) expunging any entry wrongly made in, or remaining on the Copyright Register; or***

***(c) correcting any error or defect in the Copyright Register.***

37. According to the Respondent, it received a letter from the advocate of the interested party detailing the interested party's extensive participation in the production of the subject works. Following this, Kenya Copyright Board wrote to the ex parte applicant on the 13<sup>th</sup> January, 2017, requesting them to respond to the allegations in the said letter within seven (7) days failing which the respondent would proceed to expunge the copyright registration in the name of Sugar box (sic) Productions Ltd. It was averred that upon the lapse of seven days, on the 14<sup>th</sup> March, 2017, having not heard from them, the respondent wrote to the ex parte applicant informing them of the decision to expunge the registration in the name of **Sugar Box Ltd** pursuant to Regulation 8(13)(b) of the **Copyright Regulations, 2004**.

38. The ex parte applicant's case however was that vide a letter dated 14<sup>th</sup> March, 2017 sent on email and addressed to the applicant's Directors, which made reference to an alleged letter by the Respondent dated 13<sup>th</sup> January, 2017, the Respondent informed them of the

decision to expunge the registration in the name of **Sugar Box Productions** (sic).

39. In effect the applicant contends that prior to the letter of 14<sup>th</sup> March, 2017, it never received any other letter complaining of its registration of the said works and inviting its comments thereon.

40. Although the Respondent contends that it wrote to the ex parte applicant on 13<sup>th</sup> January, 2017 requesting it to respond to the allegations in the said letter within seven (7) days, the alleged letter dated 13<sup>th</sup> November, 2017 is not exhibited. To make matters worse it is indicated that the same was sent via email yet there is no such evidence on record. In effect, there is no evidence either that the said notification existed or that it was ever sent since a copy thereof has not been exhibited and there is no evidence that it was in fact dispatched. In my view, since it is the Respondent that was positively averring that it had complied with the law the burden shifted to it to prove that this was in fact the position as this is what section 109 of the **Evidence Act** provides. The law as I understand it is that where the law imposes a duty upon a person and what is alleged is simply a negative of that performance, it would be onerous for the Court to expect such a person to prove the same. In other words it is sufficient if the person simply denies the fact and the burden then shifts to the other party to prove that the law was adhered to. That was the position in **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85** and **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30**.

41. Section 4(3) of the **Fair Administrative Action Act**, a statute enacted pursuant to Article 47 of the Constitution, provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action. This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

**“I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best...; 4.*The person accused must know the nature of the accusation made*; 5.*A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward*; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”**

42. In this case there is no evidence that the ex parte applicant was accorded an opportunity of being heard before a decision which was obviously adverse to its interests was made by the Respondent. The Respondent has however contended that the application is tainted with malice as the ex parte applicant knows very well that it misled the Respondent in the application for registration of copyright thereby taking undue advantage over the interested party who had substantially contributed to the production of the work. It was therefore averred that since the ex parte applicant had come to court with unclean, tainted hands, it was totally undeserving of the orders sought herein.

43. Whereas the Board may well have had proper reasons to act in the manner it did, where its decision is tainted by procedural impropriety in particular breach of the rules of natural justice, the same cannot stand. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456**, it was held that:

**“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.”**

44. It was contended that there were alternative dispute resolution mechanisms which the applicant ought to have resorted to. In my view the remedy for objecting to the intention to cancel a registration is only triggered when the notification is given to the person affected. Where no such notice is given as it is alleged in this case, that option is non-existent. Again with respect to an appeal, without a decision having been taken on the grievance of a party, it cannot be said that an appeal is the most convenient, beneficial and effectual remedy in those circumstances.

45. It is therefore my view that the applicant cannot be locked from invoking this Court’s judicial review jurisdiction based on the existence of an alternative remedy since such remedies amount to a mirage.

46. Having considered the issues raised in this application, the inescapable conclusion I come to is that the decision of the Respondent was tainted with procedural irregularities and cannot stand. In the circumstances this application is merited.

**Order**

47. In the result an order of certiorari is hereby issued removing into this Court for the purposes of quashing the decision of the Executive Director of the Kenya Copyright Board made on 14<sup>th</sup> March 2017 of cancelling the Applicant's Certificate of registration of copyright work number AV-02032 for an audio visual titled "My Skool TV Show" dated 19<sup>th</sup> April 2016 and or expunction of the registration in the name of Sugarcane Communications Ltd for an audio visual work titled "My Skool TV Show" which decision is hereby quashed. I however decline to issue the order of prohibition as what was sought to be prohibited had already been done.

48. I must however make it clear that this decision does not mean that the registration of copyright in the subject works by the ex parte applicant was proper. It only means that the process by which that registration was cancelled was unprocedural. Accordingly nothing bars the Respondent from initiating proper proceedings in order to determine the interested party's complaint de novo, if it so wishes.

49. As the merits of the case remain undetermined, there will be no order as to costs.

50. It is so ordered.

**Dated at Nairobi this 13<sup>th</sup> day of February, 2018**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of:*

*Miss Irungu for the Applicant*

*Mr Munyi for the Interested Party*

*CA Ooko*