



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 3B OF 2017

LABAN JUMA TOTO.....1ST PETITIONER

DAVID AMUNGA.....2ND PETITIONER

VERSUS

THE KENYA COPYRIGHT BOARD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA.....1ST INTERESTED PARTY

MUSIC PUBLISHERS

ASSOCIATION OF KENYA.....2ND INTERESTED PARTY/APPLICANT

AND

REUBEN APWONYO KABAKA

SAMUEL NAMATETE WEPUKHULU

DAVID LUTALI SAKARI

PIUS WAFULA

MICHAEL WAFULA WANYAMA.....3RD - 11TH INTERESED PARTIES

MOSES WESWA MABONGA

GIDEON BARASA STEVEN

ARNOLD IVAYO KUYALI

WILBERT WANYAMA WAFULA

AUGUSTINE MBII KAVINDU.....12TH INTERESTED PARTY

ALBERT GACHERU KIARIE....PROPOSED 13TH INTERESTED PARTY

RULING NUMBER 3

Introduction

1. This petition was filed on 03.04.2017 and contemporaneously with the petition the petitioner filed the Notice of Motion dated 03.04.2017 seeking the following orders.

1) *THAT the application herewith be certified as urgent, service of the same be dispensed with in the first instance and the same be heard ex-parte.*

2) *THAT this Honourable court be pleased to issue conservatory orders staying the decision of the 1st Respondent on 27th March, 2017 approving the licence of the 2nd interested party and revoking the licence of the 1st interested party pending the inter –parties hearing of this application.*

3) *THAT this Honourable court be pleased to issue conservatory orders staying the decision of the 1st Respond of 27th March, 2017 approving the licence of the 2nd interested party and revoking the licence of the 1st interested party pending the inter-parties hearing of the petition herein.*

4) *THAT this honourable court be pleased to issue any further orders and directions as it may deem fit in the interest of justice.*

5) *The cost of the application be in the cause.*

2. The application was premised on grounds set out on its face and is also supported by the affidavit sworn by David Amunga who describes himself as a copyright holder whose fundamental rights have been infringed and or are threatened with infringement. There is also the other supporting affidavit sworn by Laban Juma Toto dated 03.04.2017.

3. In the petition, the petitioners seek the following wills and declarations;-

a) *A DECLARATION that the decision of the 1st Respondent of 27th March, 2017 approving the licence of the 2nd interested party and revoking the licence of the 1st interested party is inconsistent with the Constitution and the Fair Administrative [Action]Act and thus null and void.*

b) *A DECLARATION that the decision of the 1st Respondent of 27th March, 2017 approving the licence of the 2nd interested party and revoking the licence of the 1st interested party denies, contravenes, violates, infringes and threatens the petitioner’s constitutionally protected freedom of Association, Right to Protection of Property and Right to Fair Administrative Action as enshrined under Article 36, 40 and 47 of the Constitution.*

c) *A DECLARATION that the decision of the 1st Respondent of 27th March, 2017 approving the licence of the 2nd interested Party and revoking the licence of the 1st Interested Party was ratified without public participation in violation of Article 10(2) of the Constitution of Kenya.*

d) *An order of Certiorari to bring to this court for the purposes of being quashed, the decision of the 1st Respondent of 27th March, 2017 approving the licence of the 2nd interested party and revoking the licence of the 1st interested Party.*

e) *An order of Mandamus to compel the 2nd Respondent to appoint the Competent Authority in*

terms of Section 48 of the Copyright Act.

f) Costs of this petition.

The Parties

4. The main parties in this petition are the petitioners, Laban Juma Toto and David Amunga who are both adults of sound mind, both of whom are artists of musical works (the petitioners). The 1st Respondent is described as a Board established under Section 3 of the Copyright Act with authority to supervise, regulate and issue licences to Collective Management Organizations with regard to collection and distribution of royalties. The 2nd Respondent, who is the Attorney General is sued in his capacity as the Principal Legal Advisor to the Government of the Republic of Kenya and representative of the National Government in all litigation to which the Government is a party pursuant [to] and within the meaning of Article 156 of the Constitution of the Republic.

5. The 1st Interested Party (1st I.P), is a registered Collective Management Organization and is a company limited by guarantee duly incorporated under the Company's Act, Cap 486 Laws of Kenya with its registered offices in Nairobi. The 2nd Interested Party (2nd I.P) is a collective Management Organization, a company limited by guarantee duly incorporated under the Company's Act Cap 486 Laws of Kenya with its registered offices in Nairobi.

6. Since the filing of the petition on 03.04.2017, other interested parties have come on board, namely Reuben Apwonyo Kabaka, Samuel Namatete Wepukhulu, David Lutali Sakari, Pius Wafula, Michael Wafula Wanyama, Moses Weswa Mabonga, Gideon Barasa Steven, Arnold Ivayo Kuyala, Wilbert Wanyama Wafula and Augustine Mbii Kavindu as 3rd – 12th Interested parties. Albert Gacheru Kiarie seeking to be enjoined in this petition as the 13th Interested Party. Apart from the proposed 13th I.P, all the other parties in this matter are represented by counsel.

7. Though the matter has been ongoing since early April, 2017, the hearing of the petition is yet to take off. On 25.07.2017 the Court gave directions after Mr. Ongoya, and Mr. Matete both applied to cross-examine Mr. Edward Sigei concerning his affidavit filed on 14.09.2017. The reason for the request for cross-examination was that there were allegations and counter allegation which can only be clarified on cross-examination. Though Mr. Kaindo for the respondents objected to the request for cross examination of Mr. Edward Sigei, the court allowed the same and the cross examination of Mr. Edward Sigei on the affidavit dated 14.09.2017 was fixed for 10.11.2017.

8. In the meantime and by his application dated 02.10.2017, Mr. Albert Gacheru Kiarie sought to be enjoined as the 13th IP. His application was certified urgent and fixed for hearing inter-parties on 11.10.2017. When the matter came up on the said date, the same could not proceed because Mr. Kiarie was served while he was in court with some of the responses. While Mr. Kiarie was perusing the responses to his application in readiness to canvass the application for joinder, Mr. Asewe, Counsel for the 2nd I.P made an application under Article 165(4) of the Constitution of Kenya, 2010 seeking to have an order of this court made for the Hon the chief Justice to empanel a bench of not less than three judges to hear this matter, which he submitted raises substantial issues. According to Mr. Asewe, the first issue revolves around the interpretation of the provisions of the Copyright Act and in particular Section 46 thereof which stipulates as follows:-

“ Part Vi - Collective administration of Copyright

1) 46(1) No person or association of persons shall commence or carry on the business of a copyright collecting society except under or in accordance with a certificate of registration granted under this Section.

2) Applications for registration as collecting societies shall be made to the Board accompanied with the prescribed fees and the Board, by a Gazette notice is empowered to declare a body which

has applied for registration a collecting society, for all relevant copyright owners or for such classes of relevant copyright owners as are specified in the notice.

3) Every certificate issued to a collecting society shall be in the prescribed form and shall unless cancelled be valid for a period of twelve months from the date of issue.

4) The board may approve a collecting society if it is satisfied that:-

- a) the body is a company limited by guarantee and incorporated under the Companies Act.
- b) it is a non –profit making entity
- c) its rules and regulations contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of members of the collecting society are adequately protected.
- d) its principal objectives are the collection and distribution of royalties; and
- e) its accounts are regularly audited by independent external auditors elected by the society.

5) The Board shall not approve another collecting society in respect of the same class of rights and category of works if there exists another collecting society that has been licenced and functions to the satisfaction of its members.

6) The Board may, where it finds it expedient assist in establishing a collecting society for any class of Copyright owners.

7) There shall be a transitional registration period not exceeding six months from the date of commencement of this Act:

- i. Provided that the Minister may extend the period upon application by a collecting society.

8) All collecting societies that are presently registered under any other written law in Kenya, shall within the period specified in subsection (7) apply for and obtain a certificate under this Act.

9) The Board may by notice in the Gazette register a collecting society if its satisfied that the collecting society;-

- a) is not functioning adequately as a collecting society.
- b) is not acting in accordance with its memorandum and Articles of Association or in the best interests of its members
- c) has altered its rules so that it no longer complies with subsection 4 of this section and;
- d) it has refused or failed to comply with any of the provisions of this Act

9. It is noted that under Section 46(1)(a) of the copyright Act, the 1st respondent is under a duty to supervise other parties in this suit. Mr. Asewe also submitted that the petition raises other issues around the Fair Administrative Actions Act and in particulars around Section 4(6) of the said Act, which provides that;-

“4(6) where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.”

10. Thirdly, Mr. Asewe submitted that in the last 14 months or so the High Court has issued various orders on collective management. Mr. Asewe submitted that in all the cases, the Music Copyright Society was a party. Other cases that have been filed on matters music copyright include;

- *Nairobi HC Constitutional Petition No. 51 of 2017 – Dan Okoth – Vs- Kenya Copyright Society of Kenya*
- *Judicial Review 75 of 2017 – Music Copyright Society of Kenya - Vs _ Kenya Copyright Board and IPO Kenya*
- *Nairobi JR 144 of 2017 – Music Copyright Society of Kenya = Vs – Kenya Copyright Board and MPAKE*
- *Nairobi HC Constitutional Petition No. 350 of 2015 David Kisaka & 5 Others – vs – Music Copyright Society of Kenya and Safaricom.*
- *Nairobi HC Constitutional Petition No. 317 of 2015 – Xpedia Management Limited – Vs – The AG and 4 others.*

Response to the application

11. Mr. Kaindo, for the 1st Respondent and holding brief for counsel for the 2nd respondent supported the application by Mr. Asewe. He concurred with the submission that this Petition raises substantial matters whose determination would best be made by a bench of not less than three judges.

12. Mr. Bernard Otieno, for the 12th I.P also supported Mr. Asewe’s application and added that the issue of Collective Management has become very substantial in all the cases that are currently before the courts and that it would be necessary to have a bench of not less than three judges to make a determination of all the issues. Counsel also submitted that the multiplicity of suits filed on the issue shows that the matter is one of great public interest.

The Jurisdiction of this court on certification

13. The Jurisdiction of this court on the issue of certification is governed by Article 165(4) of the Constitution which reads as follows;-

“ (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

14. This court therefore has the singular responsibility to say whether or not, as submitted by counsel, there are questions of law in this petition that can be classified as substantial questions to be determined by a bench of not less than three judges.

What is the definition of a “substantial question of law?”

15. Although the Constitution of Kenya 2010 does not define what a substantial question of law is, the courts have themselves endeavoured to give the definition. In this regard, Hon. Odunga J in petition Nos. 7 and 8 of 2014 – Martin Nyaga & Others – vs – The Speaker County Assembly of Embu and others stated the following.

“It is therefore my view that a matter be considered to raise a substantial question of law if, inter alia, any or all of the following factors are present: whether the matter is moot in the sense that a matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed off. The effect of the prayers sought in the petition and the level of interest generated by the petition.”

16. In the later case of **Philip K Tunoi and Another – vs – Judicial Service Commission & another [2015] eKLR** the court stated that before a matter is said to be a substantial point of law, the court must decide;-

“Whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought and the level of public interest generated by the petition.”

17. There are other cases from other jurisdictions in which the issue of substantial question of law has arisen. In the case of **Chunilal V Mehta – vs – Century Spinning and Manufacturing CO. AIT 1962 SC 1214**, an authority that was applied by the court in the **Martin Nyaga case** (above) the court said;-

“..... A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court, or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be substantial.”

18. The case of **Santosh Hazari – vs – Purushottam Tiwari (2001) 2 SCC 179**, an authority that was adopted by the court in **Coalition for Reforms and Democracy (CORD) & another – vs – Republic of Kenya & Another [2015] eKLR**, the Court stated its view on the issue of substantial point of law as follows;-

“A point of law which admits of no two opinions may be a proposition of law, but cannot be a substantial question of law. To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.”

19. It behoves this court to note however, that not all constitutional questions translate into substantial questions of law, even though the questions may generate considerable public interest. What this means is that Article 165(4) of the Constitution only comes into play when it is absolutely clear to the High Court that the issue falls within the definition of substantial question of law to warrant being heard by a bench of not less than three judges, otherwise the one judge bench should proceed to deal with the matter as provided under Article 165(3).

20. Having said the above, this court’s final decision on whether the application by counsel appearing succeeds or fails is dependent upon the following broad parameters:-

- a) Whether the matter in controversy falls within the provisions of Article 165(3)(b) or (d).
- b) Whether the issue directly or indirectly and substantially affects the rights of the parties;
- c) Whether it is an open question that has not been settled by the law and therefore having no binding precedent;
- d) Whether the issue is of great public interest and what effect the prayers sought have on the public domain.
- e) Whether, because of the complexity of the issue, substantial time is required to dispose of the same.
- f) Whether this petition meets the constitutional threshold for certification

21. I will now move forward and address each parameter in turn.

(a) Whether the issue falls under Article 165(3)(b) or (d)

22. Under the above provisions, the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or threatened. The court also has jurisdiction to hear and determine any question respecting the interpretation of the Constitution including questions of inconsistencies between any law and the Constitution, whether any action taken under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution and any matter relating to constitutional powers of state organs in respect of County Governments and any other matter relating to the constitutional relationship between the levels of government. The High Court also has jurisdiction under the above provisions to determine a question relating to conflict of laws under Article 191.

23. A look at the petition herein reveals that the same is anchored in Articles 19-24, 36, 40 and 47 of the Constitution with allegations that there is violation and/or threatened violation of fundamental rights and freedoms of the individual as enshrined under Articles 36, 40 and 47 of the Constitution. The petition is also based on the Copyrights Act Cap 130 of the Laws of Kenya and the Fair Administrative Actions Act, 2015. The petitioners seek three declaratory orders together with orders of certiorari and Mandamus. The order for mandamus is to compel the 2nd Respondent to appoint the competent Authority in terms of Section 48 of the Copyright Act.

24. There is therefore no doubt in the mind of this court that the petition as drawn and filed falls within the ambit of Article 165(3)(b) and(d). Issue (a) herein above framed is thus answered in the affirmative.

(b) Whether the issue directly or indirectly and substantially affects the rights of the parties.

25. There can be no doubt that the issues raised in the Petition directly, indirectly and substantially affect the rights of the parties. Whereas the petitioners are claiming that there is violation and/or threatened violation of their rights and fundamental freedoms, the respondents and the interested parties are seeking to secure their own respective positions in line with the statutory provisions, and in particular the Copyright Act, which is “AN ACT of Parliament to make provision of copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for related purposes.” Section 46 of the Act provides for collective administration of copyright, a provision that indeed affects all the parties to this petition. From the petition, Section 48 of the Copyright Act is yet to be complied with. In any event, the prayers/declarations sought by the Petitioners if granted, shall substantially affect the rights of other parties as so clearly described by the petitioners.

26. It is therefore my finding that each of the parties to this petition shall be directly or indirectly and substantially affected by whatever orders the court may issue as mandated by Article 165 of the Constitution.

(c) Whether it is an open question in that the same has not been settled by the law of the land or by binding precedent

27. What can be discerned from the list of cases cited by counsel is that all the cases are still new, the earliest of which was filed in 2015. None of the cases has been conclusively determined by the law of the land, and as of now, there is no binding precedent from the Supreme Court. The general principles to be applied are therefore yet to be determined. The issues raised in this petition and in the other pending cases are still debatable and not yet settled by the law of the land. It is also clear to this court that with the coming into force of the Constitution of Kenya, 2010, and the promulgation of the Fair Administration Actions Act 2015, the public is now more empowered to question the actions of the 1st Respondent as well as the actions of the interested parties and in particular the actions of the 1st and 2nd Interested parties because of the peculiar powers donated to them under the Copyright Act. That being the case, I am satisfied that the issues raised in this petition still remain open, and the same have not been settled by the law of the land so as to be excluded from the provisions of Article 165(3)(b) and (d).

(d) Whether the issue is of great public importance and the effect of the prayers sought on the public domain.

28. From the pleadings herein, and from the multiplicity of suits that have been filed and are still pending in various courts in this country, the issues for determination in this petition go beyond the interests of the parties themselves. The issues affect the entire music industry in the country. In the case of ***Hermunus Philipus Sty – vs - Giovanni Ginechi Roscone – Civil Application No. 4 of 2014 (Unreported 4/2012)*** the court hearing the matter expressed itself as follows as to what amounts to a matter of public importance:

“..... the importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance . While the matter involves a point of law and that it is for common good, that such point of law be clarified so as to enable the courts to administer the law not only in the case at hand, but also in such cases in future.....”

29. It has already been stated above that there is a multiplicity of suits in various courts in the country and that in those cases most of the parties herein are parties. It is imperative therefore that common principles be developed so that this case, and the other pending cases, and such other cases as maybe filed in the future can be decided from a similar platform of law.

(e) The complexity of the issues and the time required for disposal

30. The matters raised in this petition have been in the courts since 2015, and as stated in the proceedings paragraphs, all the cases are yet to be finally decided. It is not lost to this court that more suits are likely to be filed. It is also noted from the pleadings that the matters raised in this petition are not matters that this court deals with as a matter of routine. The matters belong to a peculiar category under copyright law, and as such and in light of the provisions of the Constitution 2010 and the Fair Administrative Actions Act 2015, the issues need further interrogation. If the history of this petition is anything to go by, the issues require much time for disposal, especially when there are so many interested parties. It is thus not in doubt that the issues raised in this petition will have a great impact and effect on the entire Music industry in the country, and the resolution of such issues shall not only stabilize the Music industry but will also ensure that parties are governed by principles that have been settled by the law of the land. Getting to such a stage will also advance the rule of law through observance of the fundamental freedoms in the Bill of Rights and promote development of the law as well as ensure good governance in the music industry.

31. There may be need to consolidate all the pending cases of which the court has been informed and even those that may be in other courts and of which the court has not been informed. The decision for consolidation, however, does not rest with this court.

(g) Whether this petition meets the constitutional threshold for certification

32. The court has carefully considered the parameters that determine when a matter can be certified under the provisions of Article 165(4) of the Constitution. The court is aware that no submissions were received from counsel for the Petitioners and the 3rd – 11th Interested parties (who though served, for the proposed 13th Interested Party’s application on 11.10.2017 did not turn up) it is nonetheless clear that any orders for certification would not prejudice the said parties. From the submissions made, and from the individual findings on each of the parameters to be taken into account for certification, I find that the threshold for certifying this matter as raising a substantial issue of law has been achieved. Accordingly, I make the following orders:-

1. This matter is certified as raising substantial questions of law under Article 165(3)(b) and (d) of the Constitution of Kenya, 2010.
2. The matter be and is hereby referred to the Hon. The chief Justice under Article 165(4) of the Constitution to, upon concurrence, empanel a bench of an uneven number of Judges being not less than three to hear this case.

3. Costs shall await the outcome of the petition.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 19th day of October, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Asewe (present)..... for 2nd interested party
and holding brieffor Mr. Kaido for 1st and 2nd Respondent
and for Mr. B. Otienofor 12th Interested Party
M/S Khaminwa & Co. (absent)for Petitioner
M/S Maloba & Associates(absent).....for 1st interested party
M/S Ongoya & Wambola(absent).....for 3rd – 11th Interested Parties
.....Polycap.....Court Assistant