



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 65 OF 2014**

**IN THE MATTER OF: ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF CONSTITUTIONAL PROVISIONS AND FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 20, 27, 29, 40, 46, 47, 232 AND 259 OF THE CONSTITUTION REGARDING UPHOLDING OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE, PROMOTION OF VALUES THAT UNDERLIE AN OPEN AND DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY, EQUITY AND FREEDOM, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION, RIGHT TO FREEDOM AND SECURITY, PROTECTION OF ECONOMIC INTERESTS, RIGHT TO FAIR ADMINISTRATIVE ACTION, PROMOTION OF VALUES AND PRINCIPLES OF PUBLIC SERVICE AND CONSTRUING OF CONSTITUTION IN MANNER THAT PROMOTES ITS PRINCIPLES, VALUES, ADVANCES HUMAN RIGHTS AND CONTRIBUTE TO GOOD GOVERNANCE**

**AND**

**IN THE MATTER OF: THE IRREGULAR AND ILLEGAL OPERATION AND COLLECTION OF ROYALTIES BY KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP) AND PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK)**

**AND**

**IN THE MATTER OF: WEDNESBURY UNREASONABLENESS AND IRREGULARITY BY THE KENYA COPYRIGHT BOARD**

**AND**

**IN THE MATTER OF: CRIMINAL CASE NO. 526 OF 2014, REPUBLIC VS. LEONARD ACHIDI AND CRIMINAL CASE NO. 527 OF 2014 REPUBLIC VS. SUSAN MWANGI**

**BETWEEN**

**1. MICHAEL BRANHAM KATANA T/A HARSUTAK BAR**

2. KIAMA NGIBUINI

3. STANLEY NGANGA T/A STANBASE PUB

4. PETER MUCHIRI WANJOHI

5. KENNEDY MUMBO T/A BUJUMBURA PUB.....PETITIONERS

ON THEIR BEHALF AND ON BEHALF OF ALL MEMBERS OF  
A WELFARE GROUP KNOWN AS MOMBASA COUNTY BARS,  
HOTELS, RESTAURANTS AND GUEST HOUSES WELFARE

VERSUS

1. KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP)

2. PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK)

3. KENYA COPYRIGHT BOARD.....RESPONDENTS

AND

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

**JUDGMENT**

1. By a Petition dated 17<sup>th</sup> October, 2014 and filed on 24<sup>th</sup> October, 2014, Michael Branham Katana t/a Harsutak Bar, Kiama Ngibuini, Stanley Nganga t/a Stanbase Pub, Kennedy Mumbo t/a Bujumbura Pub (the Petitioners) on their own behalf and on behalf of all members of a **Welfare Group** known as **Mombasa County Bars, Hotels, Restaurants and Guest Houses Welfare** sued the Respondents, the Kenya Association of Music Producers (KAMP), Performers Rights Society of Kenya (PRISK) and the Kenya Copyright Board (KCB) and sought the following orders –

(1) a declaration that the Third Respondent has acted in a Wednesbury unreasonableness manner by initiating and continuing licensing the First and Second Respondents and therefore violating the Petitioners rights to fair administrative action;

(2) a declaration that the Third Defendant should not license more than one entity to collect royalties on behalf of copyright holders in the music and performing arts industry;

(3) a declaration that the First and Second Respondents have no mandate in law to continue collecting royalties on behalf of copyright holders as they have no assignment for the same from a reasonable proportion of copyright holders in the music and performing arts industry;

(4) Criminal Cases No. 526 of 2014, Republic vs. Leonard Achidi and Criminal Case No. 527 of 2014, Republic vs. Susan Mwangi be stayed pending the hearing and determination of this Petition;

(5) a conservatory order restraining the First, Second and Third Respondents whether by themselves, their agents, employees and or servants, from interfering with the Petitioners by demanding that the Petitioners pay money by way of license for royalties due to the copyright holders in the music and performing arts industry;

**(6) the costs of the Petition be awarded to the Petitioner.**

2. The Petition was supported by the Affidavit of Kennedy Mumbo, the Fifth Respondent sworn on 22<sup>nd</sup> October, 2014. Conservatory orders were granted and issued on 6<sup>th</sup> November, 2014, and were expressed to last up to 9<sup>th</sup> December, 2014, staying the prosecution of the accused in Mombasa Chief Magistrate's Court Criminal Case No. 526 and 527 of 2014 respectively. In the event the orders continued pending the Judgment herein.
3. The Petition was however opposed first through the Grounds of Opposition by the Third Respondent dated 21<sup>st</sup> December, 2014, to the effect that the Petition was based upon an erroneous interpretation of the Copyright Act, 2001, and that the users of copyright works do not own any intellectual property in the copyright works they use, but rather, have a business relationship with the copyright owners partly represented by the collecting societies, that is to say, the First and the Second Respondents and the Interested Party.
4. The Respondents also say that there is a well-defined offence under Section 38(2) of the Copyright Act, which the two accused, Leonard Achidi, an employee of Kennedy Mumbo, the Fifth Petitioner, and Susan Mwangi, an employee of the Fourth Respondent, face before a court of competent jurisdiction, and hence their right to freedom is not unduly threatened.
5. The Third Respondent is not a party to the criminal cases before the Magistrate's Court and neither does it conduct premise licensing or set tariffs.
6. The Petition was also opposed by the Second Respondent through the Replying Affidavit of Angela Ndambuki, the Chief Executive Officer of the Performance Rights Society of Kenya (PRISK) and the Kenya Association of Music Producers (KAMP), the First Respondent. This deponent depones that PRISK is mandated under Section 30A of the Copyright Act, 2001 to protect the rights and interests of performers of sound recording and audio-visual and works through collection of a single equitable remuneration equatable fee to which a licence is issued for compliance.
7. It was the Respondents' case that the Petitioners failed and/or neglected and/or refused to pay for and acquire a licence as provided for under the law, despite numerous demands and requests by the Second Respondent and that in light of the foregoing the Petitioners' conduct amounted to infringement upon the rights of performance in breach of the Copyright Act and Articles (1) (e) and 40(5) of the Constitution of Kenya 2010. Consequently the Respondents contend that the charges were not without reasonable or probable cause and were brought by the Director of Public Prosecutions in exercise of its constitutional and statutory duty upon complaints being made against the Petitioners.
8. In the circumstances the Petitioners have failed to disclose how Articles 10, 20, 27, 29, 40, 46, 47, 232 and 259 have been violated. They urge the court to dismiss the Petition with cost.
9. In addition to the basic pleadings, the Petition, the Affidavit in support, in respect of the Petitioners, the Grounds of Opposition and the Replying Affidavit on behalf of the Respondents and the Interested Parties, the Petitioners' counsel also filed further statements of the said Kennedy Mumbo and Susan Mwangi as well as written submissions dated 20<sup>th</sup> May, 2015 together with the authorities attached thereto.
10. Likewise the First and Second Respondents counsel filed written submissions dated 4<sup>th</sup> August, 2015. The Third Respondent's written submissions dated 31<sup>st</sup> August, 2015 were filed on 17<sup>th</sup> September, 2015.
11. I have consequently read and considered the Petitioners' case, as well as the Respondents' and the Interested Party's case, and I set out in the paragraphs following my opinion on the question whether the collection of royalties by the Kenya Association of Music Producers (KAMP), and Performers Rights Society (PRISK) violates any of the Petitioners' rights guaranteed under the Constitution of Kenya 2010,

and in particular Articles 10, 20, 27, 29, 40, 46, 47, 232 and 259 of the Constitution.

### **Analysis and Determination**

12. The Petition is based upon the claim that the Kenya Copyright Board, (the Third Respondent), acted unreasonably by licensing the First and Second Respondents to collect royalty. The Petitioners claim that by the act of collecting and enforcing royalty collection, the First and Second Respondents violated their constitutional rights including the right to equality, and property and that by virtue of the act of licensing the First and Second Respondents the Third Respondent is complicit in the alleged violation of the Petitioners' constitutional rights.

### **Applicable Laws**

13. Copyright is a branch of intellectual property protecting the exclusive rights of authors and thereby secure financial benefits for them. In Kenya, the legal basis of copyright, and of the Petition herein, is found in Articles 11(1)(c) and 40(5) of the Constitution, and the Copyright Act, (Cap 130, Laws of Kenya).

14. The First and Second Respondents are founded and licensed under Section 46 of the Copyright Act, with the oversight role being placed upon the Third Respondent. The First and Second Respondents are in the industry called Collective Management Organizations and go by the acronym "CMOs". These are organizations formed or appointed by copyright owners to administer the licensing of rights, collect royalties and enforce those rights on behalf of the copyright owners.

15. According to most accounts, from the inception of intellectual property as a separate and enforceable right, the traditional and common way of managing economic rights in the field of copyright and neighbouring rights is through individual contracts. The administration of individual contracts became challenging and therefore not feasible or possible. Consequently, the concept of collective management through collective management organizations (CMOs), was developed. In return these organizations/societies (CMOs), receive authorizations from the copyright owners to grant rights in different respects to conclude agreements on exploitation of such rights, collect and distribute the remunerations (fees) for the uses made of the copyright material. The collective arrangement works in the interest both of the copyright owners and the users. The collective management is invaluable to the copyright owners, for without it, they would have no control over the mass uses of their works that take place.

16. The Petition herein was filed by the Petitioners after they were arrested and arraigned in court for failure to procure licenses from the First and Second Respondents as required under Section 46 of the Copyright Act. The Petitioners' case is that the collection of royalties by the First and Second Respondents were illegal. The Petitioners also argue that the licensing by the Third Respondent of the First and Second Respondent was unreasonable, illegal and a duplication of the work of the Interested Party.

### **Issue for determination**

17. The questions which the court is called upon to determine are –

- (1) whether the licensing of the First and Second Respondents by the Third Respondent was unreasonable, illegal, irregular and a duplication of the functions of the Interested Party;
- (2) whether the Petitioners constitutional rights were violated, and
- (3) whether the prosecution of the Petitioners was unreasonable, and illegal.

18. An affirmative answer to the first question would also answer the second and third issues.

**Of whether the licensing of the First and Second Respondents by the Third Respondent was unreasonable, illegal, irregular and a duplication of the work of the Interested Party.**

19. The flagship of the Petitioners' case is the claim that the licensing of the First and Second Respondents by the third Respondent was unreasonable, irregular and a duplication of the function of the Third Respondent, and that consequently unconstitutional. The following paragraphs will show that the licensing of the First and Second Respondents by the Third Respondent was in accord with the provisions of the Constitution, and the Copyright Act.

20. On the constitutional front Article 11(2)(c) enjoins the state to promote the intellectual property rights of the people of Kenya, and Article 40(5) of the Constitution provides that –

**“the state shall support, promote and protect the intellectual property rights of the people of Kenya.”**

21. On the other hand the Third Respondent derives its mandate from the Copyright Act. The Board is established under Part II of the Act, and its functions are set out in Section 5, and include among others licensing and supervising the activities of collective management organizations (CMOs). Section 46(5) of the Act provides that 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 licensed and functions to the satisfaction of its members.

22. In my view, the plain interpretation of this Section is that the Board may licence one collective management organization for each class of rights. There is also no doubt that there exist different classes of rights in the same work. For instance in any musical track, there will be more than one copyright owner, and these will be –

- (1) the composer who wrote the music owns copyright in the musical works;
- (2) the lyricist who wrote the lyrics owns copyright in the literary works;
- (3) the artist who performed the music owns the performers copyright on the sound recording works;
- (4) the maker of the recording (typically the record company), owns the copyright in the sound recording work.

23. In the case of music the right holders may be the composers and publishers, the producer of the sound recording and the performer. Each of these right holders is entitled to receive his/her royalty interests, and for this purpose they may register different collective management organizations to collect their respective class of rights. In Kenya, each of these right holders has a collecting society registered in accordance with the Copyright Act. For instance Performers Rights Society of Kenya (PRISK) protects the rights of performers, the Music Copyright Society of Kenya (MCSK) protects the rights of musicians and/or composers, while Kenya Association of Music Producers (KAMP) protects the rights of producers.

24. These collective management organizations (CMOs) are legally mandated under Part VII of the Copyright Act to collect royalties on behalf of their respective members. They do so by licensing users of members' works on behalf of the member(s). Failure to procure the necessary licence(s) by user from the owner (through the respective collective management organization) amounts to an infringement of Section 35 of the Act, and attracts penal sanctions under Section 38(2) of the Act that –

**“any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.”**

25. It is important to appreciate that the mandates of the three collective management organizations are well defined. The existence of separate set of rights holders, represented by the First and Second Respondents are distinct from those represented by the Interested Party, as highlighted in the respective constitutions or Memorandum of Association which excludes from membership, the rights represented by rival collecting society. The registration of the two Respondents and the Interested Party follows the practice elsewhere. A few examples from outside Kenya will illustrate this point.

26. In India, where the law is similar to the Copyright Act of Kenya, the separation of rights in a musical work is clear and the practice is approved by case law. In India, there is the Indian Performing Rights Society (IPRS=MCSK), Phonographic Society Limited = (PPL=KAMP); and Indian Singers Rights Association (ISRA=PRISK). In the United Kingdom of Great Britain and Northern Ireland, there are two societies. Performers Rights Society (PRS) for music and equivalent to the Music Copyright Society of Kenya (MCSK), the Interested Party, and Phonographic Performance Limited for record producers and Performers (equivalent to KAMP& PRISK combined).

27. The Kenya Copyright Board (KECOBO) is a statutory body established under Part II of the Copyright Act, and as already stated at the beginning of this Judgment, its functions include registration of a collecting society which meets the requirements of registration under Section 46(4) of the Copyright Act. There is no suggestion that either the First and Second Respondents or the Interested Party did not meet the requirements of registration.

28. A suggestion that the Respondents would not demand licence from the Petitioner because there was no assignment of rights from the owners of copyright is misconceived. **Firstly** because, neither the Copyright Act, nor the Copyright Regulations require “**assignment of rights**” as a prerequisite for registration of a collecting society. The only requirement is that the membership of the society must be comprised of persons in the sector and obtain assignment in writing from its members.

29. **Secondly**, an assignment encompasses the total transfer of rights held by one party called the “assignor” to another called the “**assignee**”. An assignment constitutes a complete transfer of the rights to receive the benefits accruing to one of the parties to that contract. An assignment of copyright is a transfer of ownership. A licence however, is merely a permission to do that which would otherwise amount to trespass. **Thirdly**, and in contrast, an assignee, receives a property interest from the original owner, and steps into the shoes of the owner with respect to the rights assigned. As a recipient of a property interest, the assignee enjoys a right against the world, including the right to sue others (including the assignor), in trespass.

30. Besides, Section 33(4) of the Copyright Act provides that a licence to do an act the doing of which is controlled by copyright may be written or oral, or may be inferred from conduct, and whether or not there is a licence is a question of fact.

31. The Petitioners claim that the First and Second Respondents should be de-registered for lacking assignments or licences from their members. No evidence or material was however availed in that regard. And if it were, it is not a function of the court to register or de-register any licensed body. However, my perusal of the KAMP Membership Application Form and PRISK Sound Declaration Form shows that the forms are in fact contracts that have the effect of assigning the rights of any number to KAMP and PRISK, the First and Second Respondents herein. It is therefore reasonable and safe to infer assignment by virtue of membership. A few examples from Indian Court decisions will illustrate the point.

32. In the case of **INDIAN PERFORMANCE RIGHTS SOCIETY LIMITED vs. BRANCH MANAGER, THE MUTHOOOTH FINANCE PRIVATE LIMITED [2010] 42, PTC 752 (Mad)**, the High court of India at Madras granted the Plaintiff a collecting society for publishers and authors, (like the Interested Party (herein)) an injunction against the Cooperative Society which also run a fuel station from playing music for failing to obtain a licence from the collecting society in spite of the society holding a license from phonographic Performance Limited (PPL) a collecting society like the First Respondent – Kenya Association of Music Producers.

33. Likewise, in the case of **FEDERATION OF HOTELS & RESTAURANTS ASSOCIATION OF INDIA vs. UNION OF INDIA & OTHERS [2011], (8), AD (DEL) 720 2011(46) PTC.169** where the court rejected claim by the Plaintiffs to declare the tariff setting powers of the Indian Performing Rights Society (IPRS) and Phonographic Performance Limited (PPL), as a violation of the constitution of India (right to equality Article (4) and freedom to practice any profession, carry on any trade or occupation or business (Article 19(1)(g)) was rejected and the right of the collective management organization was upheld by the High Court of India at Delhi.

34. These two cases emphasize the point that the function of the Third Respondent of licensing of more than two collective management organizations in the area of music is the norm and is not unreasonable as contended by the Petitioners.

35. In this regard, Mihaly Ficsor, a renowned Hungarian Law Professor, and a foremost authority on Intellectual Property, in his book, **COLLECTIVE MANAGMEENT OF COPYRIGHT AND RELATED RIGHTS FOR WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO, 2002)** writes in Chapter FOUR entitled – **Main Fields and Typical Forms of Collective Management, Cultural Licensing and other Forms of Joint Exercise of Rights** page 40, paragraphs 79-81, and 78, paragraph 213 where the learned author cites the practice of establishment of Collective Management Organizations in different countries, very much similar to the form of organization in Kenya. At paragraphs 79-81, the author says –

**“79. Performing rights organizations are, in general, societies of authors (in addition to the already mentioned SACEM in France, for example, ASCAP in the United States of America, PRS in the United Kingdom, GEMA in Germany, SIAE in Italy, SGAE in Spain, SUISA in Switzerland, ARTISJUS in Hungary, ZAIKS in Poland, SADAIC in Argentina, etc.). the status of these societies differs in various respects; for example, in respect of the form and extent of government supervision; in respect of whether they manage exclusively performing rights (such as SACEM or PRS) or also deal with so-called mechanical rights (such as GEMA or ZAIKS), or they are general societies of authors managing rights in practically all categories of works (such as SIAE or SGAE); in respect of whether they are the only collective organization in the countries concerned to deal with performing rights (which is the case, in general) or there are more than one such organization in the field (for example, in the United States of America where there are three such organizations: ASCAP, BMI and SESAC).**

**80. There are also private bodies other than societies of authors administering performing rights in certain countries (for example, BMI, in the United States of America which is a corporation originally founded by broadcasting organizations).**

**81. In some developing countries – mainly in Africa – public or semi-public copyright organizations manage performing rights, along with other rights in practically all categories of works (for example, ONDA in Algeria, MBDA in Morocco, BSDA in Senegal).”**

36. And on the question of collective management of copyright and related rights the author says at paragraph 213 –

**“213. In several countries where such a right is recognized, performers and producers of phonograms have established joint organizations (for example, LSG in Austria, SOCINPRO in Brazil, GRAMEX in Denmark, Finnish GRAMES in Finland, GVL in Germany or SENA in the Netherlands). In certain other countries, the two categories of beneficiaries have separate organizations (for example, URADEX in Belgium, ADAMI and SPEDIADAM in France, IMAIE in Italy, GEIDANKYO in Japan, AIE in Spain or SAMI in Sweden for performers, PPL in the United Kingdom and IFPI national groups in other countries for producers of phonograms).”**

37. It is therefore quite clear as it is the practice world-wide, it is the function of the Third Respondent as

regulator to licence the First and Second Respondents as Collective Management Organizations and that such function is not only reasonable but is also in accord with Kenya laws, namely, the Copyright Act, and Regulations thereunder and international practice. The inevitable conclusion is that the First and Second Respondents are legally mandated to collect royalties and to enforce non-compliance.

38. The other inevitable conclusion is that since the Interested Party, the Music Copyright Society of Kenya, by its constitution (Memorandum and Articles of Association) cannot represent the interests of the First and Second Respondents, and so cannot be the sole royalty collection Society licensed in Kenya for music. There is no basis in law for the suggestion that the Third Respondent should de-register the First and Second Respondents and such order would breach the right of those class of rights that the First and Second Respondents represent, the right of the copyright owners to their intellectual property, the right of association and the right to fair administrative action as guaranteed by the Constitution.

39. Article 19(1) of the Constitution falls under the title **Rights and Fundamental Freedoms**, and states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. And Article 19(2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. It is trite law that such rights are not absolute. Article 19(3)(c) provides that the rights and fundamental freedoms in the Bill of Rights are subject to the limitations contemplated in the Constitution. The limitations take into account the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others as provided in Article 24(1)(d).

40. Article 20(2) of the Constitution provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Consequently the right of every person to form and join an association of his choice is protected under Article 36. And so is the right to own property of any description under Article 40. Under the interpretation Article 260, "**property**" includes any vested or contingent right to or interest in or arising from among others, intellectual property. It is the duty of the State under Articles 11(2)(c) and 40(5) to support, promote, and protect the intellectual property rights of the people of Kenya. Protecting, supporting and promoting the intellectual property of Kenyans includes the duty of the State to punish persons who infringe copyright in order to protect the intellectual rights of the holder.

41. The Petition herein is expressed to be brought under Article 22 of the Constitution. Under rule 10(1)(d) of the **Constitution of Kenya (1) Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, every constitutional petition must disclose the nature of injury caused or likely to be caused to the Petitioners or the person whose name the Petitioner has instituted the suit, or in a public interest case to the public, class of persons or community. That is consonant with the decision of the court in the case of **ANARITA KARIMI NJERU vs. REPUBLIC [1976-1980] 1KLR 1272**, that a constitutional petition must state, with reasonable precision the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that –

**“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case), that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”**

42. The Petitioners in this case, have not only failed to raise any constitutional matter in the Petition but have also failed to comply under the rule aforesaid, and the mandatory injunction in **Anarita Karimi Njeru vs. Republic** (supra). I agree with counsel for the Respondents that the entire Petition reveals a dispute of a commercial nature concerning a disputed debt and does not fall under the purview of Article 22 of the Constitution.

43. The Petitioners claim that the Third Respondent acted unfairly in taking administrative decision of registering and renewing the licence of the First and Second Respondents allegedly without consultation.

44. This is rather a strange claim. The Petitioners organization, Mombasa County Bar, Hotels, Restaurants & Guest Houses W.G. Group Name “Project”, was registered on 29<sup>th</sup> November, 2013 (Petitioners’ Exhibit KM-1A) and found the Respondents already registered and operation at that date. The Petitioners as a Welfare Group cannot therefore claim to demand consultation over a process that predates its (the Petitioners’ Welfare Groups) existence. The Welfare Group has not initiated any process to trigger an administrative process to claim breach of the Constitution. There is consequently no basis for claiming lack of consultation in participation by the Petitioners.

45. Counsel for the Petitioners relied on the decision of the court in **REPUBLIC vs. KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP) & 3 OTHERS, ex parte Pubs, Entertainment and Restaurants Association of Kenya [2014] eKLR** in support of the proposition that the Third Respondent had failed to offer the Petitioner access to a fair administrative process.

46. The answer to this claim is simple. The mandate of the Third Respondent or the competent authority under Section 48 of the Copyright Act is to set tariffs where there is no agreement between the users and the collecting societies, and to settle disputes between the collective management organizations (CMOs) and the Kenya Copyright Board itself.

47. The gist or substance of the Petition herein is about the very existence of the First and Second Respondents as licensed by the Third Respondent. There is however no reference in the entire Petition or prayers therein to failure by the Third Respondent to set or determine tariffs between the collecting societies and the users of copyright material or property. The Petition is about the legality of licences not the tariff as it ought (perhaps) to have been. It is a poor attempt to clutch at straw by the Petitioners and the reference to the decision in **Republic vs. Kenya Association of Music Producers** is totally irrelevant to the claims in this Petition. There is no material to show breach by the Third Respondent in particular of any constitutional right of the Petitioners as claimed.

48. Similarly, the Petitioners claim that the Third Respondent failed to treat the users and owners of copyright with equality. This is a matter which this court takes judicial notice that the interests of the two groups are not always in harmony as is clearly shown in this Petition. The Third Respondent is an organ of state, and a state agency, its mandate is to execute the obligations placed upon the state by the constitution, to protect and secure the interests of property owners in accordance with Articles 11(2)(c) and 40(5) of the Constitution. As such state agency it cannot work against its own statutory mandate and obligation. The claim of alleged discrimination has no basis.

### **Determination**

49. The upshot of this analysis is that there is evidence or material that the rights of the Petitioners’ have been breached. There is no evidence or material that the Third Respondent acted in an unreasonable manner. There is no basis for invocation of the Wednesbury principle of unreasonableness – **PROVINCIAL PICTURES LIMITED vs. WEDNESBURY CORPORATION**.

50. The entire Petition is an attempt to evade the payment of what is due and fair to the copyright owners represented by the First and Second Respondents. Any decision in that regard will be in breach of the fundamental rights and freedom to associate under Article 38 and the right to property under Article 40 of the constitution by members of those two collecting societies, and it is consequently rejected.

51. In conclusion, the Petition herein is not only misinformed but is entirely misconceived. There is neither evidence nor material that the Third Respondent has abused its power or violated the rights of the Petitioners as the rights in music is owned separately and their owners must be remunerated as required by the Copyright Act, and indeed the Constitution of Kenya 2010.

52. Having come to the above conclusions in respect of all the issues, I find and hold that the Petition

herein is baseless, and is dismissed with costs to the Respondents to be agreed upon and in default to be taxed by the Taxing Officer of this court.

53. There shall be orders accordingly.

**Dated, Signed and Delivered at Mombasa this 22<sup>nd</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Miss Murage holding brief Mr. Gikandi for Petitioners

Mr. Sitonik holding brief Mr. Lusi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

No Appearance for 3<sup>rd</sup> Respondent

No Appearance for Interested Party

Mr. Kaunda Court Assistant