



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW CASE NO. 32 OF 2014**

**IN THE MATTER OF LICENCES AND LEVIES CHARGED BY THE KENYA ASSOCIATION  
OF MUSIC PRODUCERS AND THE PERFORMERS RIGHTS SOCIETY OF KENYA**

**AND**

**IN THE MATTER OF THE NAKURU MUNICIPALITY PUBS, BARS, RESTAURANTS AND  
HOTEL OWNERS ASSOCIATION**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP).....1<sup>ST</sup> RESPONDENT**

**PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK).....2<sup>ND</sup> RESPONDENT**

**EX PARTE**

**NAKURU MUNICIPALITY PUBS, BARS, RESTAURANTS**

**AND HOTEL OWNERS ASSOCIATION (*suing through their trustees*).....SUBJECT**

**JUDGMENT**

**Introduction**

1. By an application dated the 16<sup>th</sup> September, 2014 and filed on the 22<sup>nd</sup> September, 2014 the Applicant, Nakuru Municipality Pubs, Bars, Restaurants and Hotel Owners Association and duly registered under the Societies Act vide certificate of registration No. 34553 sought an order of prohibition to restrain the Respondents Kenya Association of Music Producers as the 1<sup>st</sup> Respondent and Performers Rights Society of Kenya as the 2<sup>nd</sup> Respondent from collecting licence fees and or levies from the membership of the Applicant.

2. The Application is premised on the grounds that the Respondents have been demanding for payment of licence fees and levies on behalf of the performers and music producers who claim to be collecting agents for the respective rights holders. It is stated that the Applicants members operate hotels, bars, pubs and other catering establishments within the Nakuru Municipality where they have installed radios, televisions and other music devices. It is their contention that they have taken out licences from the music copyright Society of Kenya for the copyrights that cover all the rights in the music industry, including the additional levies and licences being demanded.

3. On the other hand the Respondents, and each one of them have been demanding for separate payments of licences and royalties for playing the same music and purport to issue separate licences failing which the respondents have been invading the applicants establishments with demands and threats of confiscation of their music devices unless payments of the separate licences are paid.

4. Faced with the imminent harassment and interference in their businesses by the Respondents agents by seizing without any lawful orders the Applicants music devices and demanding the payment to the said agents of the disputed licences and levies, they have sought the courts intervention by way of Judicial Review orders of prohibition.

5. The application is opposed.

The Chief Executive Officer of the 2<sup>nd</sup> Respondent, with authority from the 1<sup>st</sup> Respondent has filed a very detailed and lengthy replying affidavit in opposition.

## **6. The Applicants case**

The Applicant through its members state that they pay all royalties to the Music Society of Kenya which covers all the levies and licences that the Respondents have been demanding from its membership. It is not disputed that the Respondents are collecting agents under the Copyright Act of Kenya, No. 21 of 2001 nor is their mandate to collect licence fees in dispute. It is within the Applicants knowledge that the music they play attracts copyright and they have taken out licences issued by the Music Copyright Society of Kenya, a collecting society on behalf of the copyright holders of the music, that takes care of all licences and levies. They argue that the proposed levies and licences demanded by the Respondents would amount to double payments for the same music played on their same premises, and thus are unfair, illegal, unreasonable arrived at irregularly and procedurally and in breach of their legitimate expectations.

It is argued that the proposed levies and licences were never communicated to their association or any of the members, and that as they were not notified, or invited to participate in their formulation and approval nor gazetted/published, the Respondents failed in their duty to communicate the passage and approval of the levies to them, they are in breach of rules of natural justice by withholding information that would affect them economically and financially and a breach of their constitutional rights as enshrined in Article 43 of the Constitution. Being illegal, and unprocedurally unfair, the court has been urged to issue an order of prohibition to restrain the Respondents from implementing the payment of the levies and licence fees.

## **7. The Respondents' case**

In her replying affidavit in opposition to the application, the Chief Executive Officer of the 2<sup>nd</sup> Respondent has averred that that the Respondents are private companies limited by guarantee and therefore not subject to Judicial Review proceedings that only ought to issue to public bodies. She however agrees that the Respondents are collecting agents under the Copyright Act and it is within their mandate to collect the disputed licence fees and levies for each of the Respondents separately from the Applicant and its members.

It is argued that the 1<sup>st</sup> Respondent collects licence fees and levies on behalf of rights owners of music producers of sound recordings while the 2<sup>nd</sup> Respondent collects licence fees of performers' – musicians, singers, instrumentalists and actors in any sound recording or audio visual works whenever such works are broadcast to the public, that the two separate payments that the Applicants are opposed to. This she states is in line with the producers and performers economic rights where they receive financial compensation for use of their works.

In her submission for the Respondents, Ms. Okimaru Advocate admitted that indeed there were no consultations prior with the Applicant as they were not stakeholders. She further stated that the levies and licence fees under dispute were not discussed or communicated to the Applicant but given to the

Collective Management Organizations (“CMO”) whose role is to bridge the gap between the right owners and the right users of their work, the Applicant. That the collective management is the process of negotiating rates, terms of use with the users, issuing licences, authorizing and collecting and distributing royalties on behalf of the members. The question then begs, the Applicant being the body representing music users, was, it represented in the “CMO” where the rates and terms were negotiated and agreed? The answer is that the Applicant was not consulted or represented in the said negotiations as stated above, and admitted by the Respondents, and in any event, that Judicial Review proceedings do not apply to private bodies as the Respondents, but to public bodies only, hence the application is non suited.

8. In the case of **Mureithi & 2 others -vs- Attorney-General & 5 others HC MCA No. 158 of 2005, Nyamu J. (as he then was)** held that -

an order of prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land but not only for excess of jurisdiction but also for departure from the rules of natural justice, that it does not lie to correct course, practice or procedure of the inferior tribunal or a wrong decision on the merits of the proceedings.

9. The court further proceeded to state that prohibition does not lie where a decision has been made, that an order of prohibition would not be efficacious against the decision made, and can not quash a decision already made, and can only prevent the making of a contemplated decision. Judicial Review and the remedy of prohibition and mandamus, he continued, are only available to public bodies, and can not issue against private bodies. The above principles were upheld in the case **Miscellaneous Judicial Review Application No. 438 of 2013 – In the matter of Joceinta Wanjiru Raphael (2014) KLR.** In this matter, a decision to levy the disputed licence fees had already been made in the process of being implemented.

10. Are the Respondents then public or private bodies?

- Counsel for the Respondents submitted that the Respondents are private companies limited by guarantee and mandated to collect royalties on behalf of music performers which function is not a public duty but of a private nature, on behalf of private individuals over their artistic works, hence there being no public duty to be performed, and the Respondents not being public bodies, then Judicial Review proceedings are inappropriate in the circumstances.

11. I have considered all the submissions by the respective parties, the pleadings and authorities in support of the submissions.

Judicial Review proceedings are governed by Article 165(6)(7) of the Constitution which provides as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person body or authority exercising a Judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration.

Article 47(1) & (2) of the Constitution states that every person has the right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair.

Article 260 defines a person as including “a company, association or other body of persons whether incorporated or unincorporated.”

From the above, a company is a “person” within the meaning of Chapter V of the Constitution, and by its nature, can be a corporation and enjoys the rights and obligations of a person. It therefore includes a

company or a corporation. The High Court has been mandated by the Constitution to protect and prohibit any tribunal or authority from acting contrary to the rules of natural justice, in this matter, by imposing regulations, levies and licence fees which were arbitrarily arrived at without the participation of the Applicants. That could be so, are there another remedies that ought to be exhausted before seeking judicial review orders which by its nature is a remedy of last result?

12. The matter between the parties hereof is one of a contractual nature, between the Applicant representing its membership, and the Respondents as mandated by the collective management organizations. In my view, these are contractual and/or commercial arrangements and disputes concerning the parties that ought to be sorted in court as commercial disputes where the contractual or commercial agreements and obligations can be interrogated for their legal validity.

Having said so, and having considered the holdings in the case **Judicial Review Case No. 335 of 2013, In the matter of the Pubs, Entertainment and Restaurants Association and Kenya Association of Music Producers & 3 Others**, I find that the remedy of prohibition under Judicial Review proceedings does not lie against the Respondents who are private companies with no public duty. They owe their duty to their contracting partners. As stated earlier, the remedy, in the dispute, in my mind, lies in the Commercial Division of the court.

I further proceed to state that had I found that the Respondents had an obligation to perform public duties, and therefore Judicial Review proceedings were appropriate, I would have held them liable for departure from rules of natural justice and contravention of the principle of public participation, communication and consultation with the Applicants who are stakeholders in the matter of the levies and licence fees, in addition to contravening Article 47 of the Constitution that gives every person a right to fair administrative action that is efficient, lawful, reasonable and procedurally fair.

The upshot of the above is that Judicial Review orders cannot be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as they are not public bodies hence the application dated the 16<sup>th</sup> September, 2014 is disallowed. Each party shall bear its own costs.

**Dated, signed and delivered at Nakuru this 27<sup>th</sup> day of March 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Aim holding brief Githui for Applicants

N/A for Respondents

Omondi - Court clerk