



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 244 OF 2011**

**MEDIA OWNERS ASSOCIATION.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**MINISTRY OF INFORMATION AND**

**COMMUNICATION.....2ND RESPONDENT**

**DR PETER BITANGE NDEMO.....3RD RESPONDENT**

**COMMUNICATIONS COMMISSION OF KENYA.....4TH RESPONDENT**

**FRANCIS W. WANGUSI.....5TH RESPONDENT**

**DR MOHAMED ISAHAKIA.....6TH RESPONDENT**

**AS CONSOLIDATED WITH JR MISC. NO. 284 OF 2011**

**BETWEEN**

**MAGIC RADIO LIMITED.....APPLICANT**

**AND**

**THE COMMUNICATIONS COMMISSION OF KENYA.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 18th January, 2012 in which the Applicants challenge the legal capacity of the Petitioners in the present Petition being **Petition No. 244 of 2011** to sue. In the Motion brought under certificate of urgency, the Applicants seek a court order that the Petition dated 14th November, 2011 be struck out on the following grounds;

- a) *The Petitioner never authorised or sanctioned the filing of the said Petition;*
- b) *The Petition is lodged by a body which lacks legal capacity to sue; and*

c) *It is in the interests of justice that the said petition be struck out as it having been filed without the knowledge, sanction and authority of the Petitioner is an abuse of the court process.*

2. The genesis of the matter dates back to a Chamber Summons Application dated the 14th November, 2011 filed together with a Petition and Supporting Affidavit dated the same day and sworn by Samuel Kamau Macharia, who described himself as 'the Chairman of the Media Owners Association.' After hearing the Application, I granted interim *ex parte* orders in terms of prayer 2 of the Application, to wit, that *“Pending the hearing and determination of this application inter partes, a conservatory injunctive order be issued restraining the 2nd and 3rd Respondents or any of them from canceling, stopping, suspending, restricting or in any way howsoever interfering with the Petitioner's and its members' licenses, frequencies, broadcasting spectrums and Broadcasting Services.”*

3. The Petition and the Chamber Summons were triggered by a Public Notice issued by the 3rd Respondent on 5th August, 2011 under the banner, 'Licensing of Broadcasters under the new Regulatory Framework.' Later on 11th November, 2011, the Communications Commission of Kenya (“the Commission”) subsequently published another public notice in the *Daily Nation Newspaper* entitled, *'Licensing of Existing Broadcasters under the new Regulatory Framework.'* The Petitioner's stance was that the Ministry lacked the mandate to supervise or in any way attempt to control the licensing of broadcasters in view of **Article 34** which obliges Parliament to enact legislation to provide for the establishment of a body for the setting of media standards and monitor compliance with those standards.

4. The Application before me is supported by the Affidavit of Eric Babare Orina, who describes himself as “the current chairman of the Media Owners Association of Kenya” in which he depones that he received information from the print media that a constitutional reference had been filed in the High Court at Nairobi by the Media Owners Association. That, this came as a great shock to him as there was no resolution to institute such legal proceedings and no instructions had been given to any firm of advocates to commence the Petition on behalf of the Applicants.

5. The Applicant sought this court's assistance to ascertain the validity of the proceedings before it and order the production of the certificate of registration of the Petitioner and the resolution and/or minutes of the meeting authorizing the commencement of the proceedings herein.

6. During the oral submissions, Ms Ndegwa, advocate for the Applicant relied on written submissions dated 12th June 2012 and reiterated that the Applicants never sanctioned the filing of the Petition and that therefore the Petitioner lacked the capacity to sue.

7. Ms Ndegwa further submitted that what was in issue before the court was the question of legal capacity and not ownership. Terming the Petition as an abuse of court process, Counsel relied on the decisions in *Dennis Oloigero & 2 others v The Art Ventures Limited & 2 others*, HCCC 1358 of 2005[2006] EKLR, *Savana Jua Kali Association(suing through its chairperson Anne Khasoa) v Councillor Amos Ngata*, HCCC 529 of 2004[2005] eKLR and *Fort Hall Bakery Co. v Frederick Muigai Wangoe*[1959]EA 474 for the proposition that the Applicant/Petitioner lacked the legal capacity to sue by fact of it being unregistered and that therefore the Petition was a nullity.

8. Mr Kilonzo, advocate for the Communications Commission of Kenya (“the CCK”), the 3rd Respondent, was in support of the Motion. In its Replying Affidavit sworn by one John Omo, the Corporation Secretary dated 30th January, 2012, it concurred that the Petitioner lacked the legal capacity to sue and asked the court to strike out the Petition *in limine* in the event it found that the Petitioner was unregistered.

9. The CCK deponed that in earlier correspondence from the Registrar-General's office the registered officials of the Media Owners Association of Kenya (“MOA”) were revealed to be Daniel Kamau(Chairman), Lydia Holt(Vice Chairman), Jane Wagesa(Secretary) and Enock Onchonga(Treasurer). The CCK further contended that in view of this, Samuel Kamau Macharia, the deponent of the Supporting Affidavit to the Petition was not the Chairman of MOA and as such, lacked the legal capacity to swear the Affidavit as he did. In adopting the submissions of the Applicants, the

CCK urged that in the absence of registration under the law, **section 4(1)** of the Societies Act, must be invoked to declare the Petitioner an unlawful society. The section states that, “**Every society which is not a registered society or an exempted society is an unlawful society.**”

10. The CCK urged that the Petitioner/Applicant be compelled to produce the registration documents and/or particulars of the Petitioner, if any, together with the authority or resolution allowing the deponent, S.K. Macharia to make the Supporting Affidavit as he did.

11. Mr Kaumba representing the Attorney General, the 1st Respondent was in support of the Application and had nothing useful to add to the Submissions made on behalf of the Applicant.

12. The Petitioner (now Respondent in the present Application) opposed the Application and urged the court to dismiss it and allow the Petition to proceed. In a Further Affidavit filed on **28th June, 2012** sworn by Joshua Chepkwony, who describes himself as the Vice Chairman of the Media Owners Association, the Petitioner avers that the Applicants were deliberately misleading the Court and were intent on defeating the course of justice.

13. In the Further Affidavit, it is deponed that a 'Change of Officers' form was filed with the Registrar of Societies indicating the Applicants as the current officers, and on the the same day, the Petition was filed. It is the Petitioner's further case that the returns to effect 'Change of Officers' was dated 18th December, 2011 and were filed on 31st January, 2012 and therefore it was not possible to have effected the change on 14th November 2011, the same date the Petition was filed. While admitting to an oversight on its part in filing of Annual returns since its inception, Mr Chepkwony on the Petitioner's behalf deponed that the annual returns filed by the Applicants were fraudulent and averred that default on its part would not be a justifiable reason for impostors to be irregularly registered as officials of the Petitioner's Association.

14. Relying on the affidavits of S.K. Macharia and Mr. Chepkwony, Mr Muite SC representing the Petitioner opposed the Application arguing that the core issue raised was that of media freedom and that **Article 22** of the Constitution gave the right to any person to institute proceedings to protect the Bill of Rights. Mr Muite further submitted that a change of officers was made by impostors as a result of which a criminal complaint was filed and that criminal investigations were on-going in that regard.

15. Mr Muite urged the court to dismiss the Application adding that the Petitioner has a right to institute proceedings on behalf of all media houses as they are affected by the orders issued by CCK. He urged that the letter and spirit of **Articles 22 and 159** should move the court to hear the matter. Further, that as a result of the registration of impostors, the Petitioner through its immediate past Chairman, Mr. Samuel Kamau, Macharia lodged a complaint with the Registrar General on 20th March, 2012. In the event, he urged that the Application be dismissed with costs.

### **Determination**

16. I must from the outset point out that this court has chosen restraint and refuses to descend into the arena of prodding into the question as to the status of registration of the Petitioner or who is or is not a *bona fide* official of MOA. My task here is to walk the fine line and determine the singular whether the Petitioner has the **legal capacity** to institute the Petition as it did. I say so because a close reading of the pleadings reveal that what the Applicants are in essence asking this court to do is to conduct a mini inquiry as to the status of registration of the Petitioner but particularly the question as to legitimacy of the office bearers by calling upon the court, *'to ascertain the validity of the proceedings before it by ordering the production of the certificate of registration or certificate of registration or certificate of exemption from registration of the institutor of these proceedings and the resolution and/or minutes of the meeting authorizing the commencement of the present Petition.'*

17. It is notable that there are other institutions mandated to deal with complaints such as those raised by the Applicants. There are already in place statutory mechanisms of determining such issues and other institutions vested with the powers to investigate alleged offences under the **Societies Act, Chapter 108 of the Laws of Kenya**(hereinafter “the Act”). It is now a well established principle of law that where there

are specific procedures provided for redress, the same ought to be followed (See Speaker of the National Assembly v Karume[2008]1 KLR, Kipkalya Kones v R & another [2006] eKLR and Kimani Wanyoike v Electoral Commission of Kenya & Another[1995] eKLR.

18. According to its long title, the Societies Act is, “**An Act of Parliament to make provision for the registration and control of societies.**” **Section 38** of the Act gives investigatory powers over alleged offences under the Act to the Registrar of Societies, an administrative officer or any police of above the rank of the Inspector of Police. While it is obvious that in the circumstances of the present case the issue of legal capacity cannot be completely divorced from the question of registration of MOA, I will quickly point out that the two are severable and the business of this court is to confine itself to the question as to whether the Petitioner has the legal capacity to sue.

19. **Part II** of the Act deals with unlawful societies. An unregistered society is an unlawful society by dint of section 4(1) to the Act which states that, “**(1) Every society which is not a registered society or an exempted society is an unlawful society.**” **Part III** of the Act deals with the registration of societies. The pertinent provisions read as follows;

**9. Every society shall, in the prescribed manner and within twenty-eight days after the formation thereof, make application to the Registrar for registration or for exemption from registration under this Act.**

**10. (1) Upon application being made in the prescribed manner for registration of a society, the Registrar shall, subject to this Act, register the society by entering in the register of societies, kept for the purpose, the prescribed particulars and the date of the entry.**

**(2) Upon application being made in the prescribed manner for exemption of a society from registration, the Registrar may, with the approval of the Minister, so exempt the society, and if he does not so exempt the society he shall treat the application as an application for registration and shall, subject to the provisions of this Act, register the society.**

**(3) Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.”**

20. Counsel for the Petitioners urged that the Petition ought to be allowed to go on for hearing as framed in view of **Article 22** which gives a right to any person to institute civil proceedings. The Article reads as follows;

**“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group or class of persons;**

**(c) a person acting in the public interest; or**

**(d) an association acting in the interest of one or more of its members.**

[Emphasis added]

21. I have considered the authorities relied on by the Applicants and the Respondents for the proposition that being an unlawful society, the Petitioner lacked the legal capacity to sue, namely Dennis Oloigero & 2 others v The Art Ventures Limited & 2 others, Savana Jua Kali Association (suing through its

*chairperson Anne Khasoa) v Councillor Amos Ngata, and Fort Hall Bakery Co. v Frederick Muigai Wangoe*(above).

I however find these cases distinguishable for two reasons: First, these cases preceded the promulgation of the Constitution of Kenya, 2010 which under **Article 22** whose provisions are set out elsewhere in the body of the decision, in effect relaxed the strict rules of legal personality hence underscoring the right of access to justice. I note in particular that **Clause (1)(b)** provides that '**a person acting as a member of, or in the interest of, a group or class of persons**' may institute court proceedings. No evidence has been presented or allegation made that the Petitioner and deponent in the present Petition is not a member of, or is not acting in the interest of a group or class of persons namely, the owners of media houses as to dis-entitle him to move the court under **Article 22** of the Constitution, nor has any presentation been made that the suit as instituted is unrepresentative of the interests it purports to represent or is founded on bad faith.

22. In fact, in their pleadings, the Applicants are quick to give an undertaking in the following words, **"THAT I give an undertaking to this Honourable Court that the Petitioner will withdraw this application and from these proceedings should the said documents be provided to the satisfaction of this Honourable Court."**[para 9 of the Supporting affidavit]. What the Applicants are thus asking this Honourable court is simply for it to conduct an inquiry as to the *bona fide* officials of the Petitioner. This, as I will rule, is an issue best addressed by another forum. In that regard, I adopt the sentiments expressed by this court in *Commission for the Implementation of the Constitution v Parliament and another, Nairobi Petition No. 454 of 2012* where it was stated, **"...I think the common law notions regarding capacity to be sued must yield to the Constitution...The doctrine of legal personality must thus be read against the beam of the rich provisions of our Constitution."**

23. Second, despite the clothing by the Applicant of the real issues in controversy as simply a question of legal capacity to institute the present petition, the crux of the Applicant's orders appears to me to be a contest between who the legitimate official bearers for MOA are, a matter which, as I have noted above, is within the precincts of other institutions and whose investigations are currently under way. Although I am aware that criminal and civil proceedings may proceed concurrently under by dint of **section 193A of the Criminal Procedure Code**, the circumstances of this case is such that an inquiry on the matter by court would tend to compromise the already ongoing investigations in the criminal process and for the present purpose I find superfluous. It is not in contention that there is already a criminal complaint raised over the issue of official bearers of MOA. In a letter addressed to the Registrar General by SK Macharia dated 20th March, 2012, the complainant raised the question as to the filing of returns by alleged impostors stating that that none of the purported office bearers of MOA owned or are represented by any known Media House. The letter concluded by calling for, "thorough investigations with a view to criminally prosecuting any person who such investigations might disclose having committed any crime or crimes." There is also the letter by the Director of Public Prosecutions dated 27th April 2012 addressed to the Commissioner of Police requesting on the update on the criminal investigations and directing that the same be expedited.

24. **Section 24** of the Act makes it an offence for a person to act or purport to act as an officer of a registered society and who has not been duly appointed or elected as an officer of that society. **Section 18** further provides for the mechanisms of dealing with disputes regarding officers of an Association. The section reads as follows;

**"Disputes as to officers.**

**18. (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.**

**(2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.**

**(3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.”**

25. In addition, **Part VI** of the Act provides for investigation of offences and punishment of offenders under the Act. I have not been shown that such stipulated mechanisms of solving the disputes have been followed and failed to resolve the controversy. The issue as to whether the Petitioner is an unlawful society is a question to be determined under the statutory regime under the Societies Act including criminal sanctions and it is not for this court to delve into these matters particularly where these are not significant in determination of the issue of legal capacity. I also do not detect any injustice that may be occasioned on either parties in proceeding with the matter.

Conversely, granting the Applicant's prayers will lead to injustice as against the Petitioner in both the contentious Petition and the consolidated matter due to delay or failure to determine the substantive issues at hand. Entertaining the issues will further convolute and prolong the matter and cloud the real issues of determination in the Petition which is against public interest and against the principles of exercise of judicial authority of this court enshrined under **Article 159** on expeditious delivery of justice.

26. For these reasons, I decline to allow the prayers sought in the Notice of Motion of 18th January, 2012. The Application is hereby dismissed. Consequently, the hearing of the substantive issues raised in **Petition No. 244 of 2011** as consolidated with **Petition No. 284 of 2011** both dated 14th November, 2011 shall proceed for hearing without delay.

27. Costs shall be in the cause.

28. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2013**

**ISAAC LENAOLA**  
**JUDGE**

**In the presence of:**

*Irene – Court clerk*

*Miss Ibrahim holding brief for Mr. Issa for Petitioner*

*Mr. Makori holding brief for Miss Ndegwa for Applicant*

**Order**

*Ruling duly delivered*

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

*Petitions to be heard on 16th April 2013. In the meantime to finalize the filing of Submissions.*

*Notice to issue. Interim orders extended.*

**ISAAC LENAOLA**  
**JUDGE**  
**22/2/2013**