



**Music Copyright Society of Kenya (MSCK) v Kenya Copyright Board & 2 others; Performing and Audio-Visual Rights Society of Kenya (Interested Party) (Commercial Petition E014 of 2024) [2025] KEHC 1423 (KLR) (Commercial and Tax) (3 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 1423 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL PETITION E014 OF 2024  
JWW MONG'ARE, J  
MARCH 3, 2025**

**BETWEEN**

**MUSIC COPYRIGHT SOCIETY OF KENYA (MSCK) ..... PETITIONER**

**AND**

**KENYA COPYRIGHT BOARD ..... 1<sup>ST</sup> DEFENDANT**

**CHAIRMAN- KENYA COPYRIGHT BOARD ..... 2<sup>ND</sup> DEFENDANT**

**EXECUTIVE DIRECTOR- KENYA COPYRIGHT BOARD ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**PERFORMING AND AUDIO-VISUAL RIGHTS SOCIETY OF KENYA ..... INTERESTED PARTY**

**RULING**

1. What is before this court is an application filed by the Applicant on 18<sup>th</sup> June 2024 brought under Rules 23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 seeking the following prayers:-

1. Spent
2. Spent
3. Spent



4. That the Honourable Court be pleased to suspend the Operating Licence issued to the interested Party by the Respondents pending the hearing and determination of this Application.
  5. That the Honourable Court be pleased to issue a conservatory order restraining the interested party from collecting and/ or distributing any monies and royalties for and on behalf of the Petitioner/applicant and its affiliate members on the strength of the Operating Licence issued to it by the 1<sup>st</sup> Respondents pending the hearing and determination of this Application.
  6. That the Honourable Court be pleased to allow and/or permit the Petitioner/applicant to continue collecting monies and distributing royalties to its affiliate members on the strength of the Operating Licence previously issued in favour of the Petitioner/Applicant pending the hearing and determination of this Petition.
  7. That the Honourable Court be pleased to issue an order restraining the Respondents from issuing an Operating Licence to any Collective Management Organizations (CMO) pending the hearing and determination of this Application/Petition.
  8. Costs.
2. The application is supported by the elaborate grounds set out on its face. The Respondent by way of reply filed a notice of Preliminary Objection dated 20<sup>th</sup> July 2024. The 1<sup>st</sup> Interested Party filed a Notice of Motion application on 24<sup>th</sup> June 2024, seeking to discharge and set aside the exparte orders of this court issued 18<sup>th</sup> June 2024 and strike out the petition. The said application was supported by the grounds set on its face and a supporting affidavit of Joseph Njagih sworn on 24<sup>th</sup> June 2024. The 2<sup>nd</sup> Interested Party filed a replying affidavit to both the Application by the Petitioner and the Notice of Preliminary Objection by the 1<sup>st</sup> Respondent and the Application by the 1<sup>st</sup> Interested Party sworn by Maurice Okoth, the Chief Executive Officer of the 2<sup>nd</sup> Interested Party sworn on 22<sup>nd</sup> November 2024. The application was canvassed by way of written submissions. The Applicant filed its written submissions dated 11<sup>th</sup> November 2024 and 1<sup>st</sup> Interested Party filed its written submissions on 18<sup>th</sup> November 2024 and the 1<sup>st</sup> Respondent filed its written submission dated 18<sup>th</sup> November 2024.

### **Analysis and Determination**

3. I have carefully considered the petition and the two applications and the supporting affidavits and the affidavits in reply and opposition thereto. I have equally considered the Notice of Preliminary Objection filed by the 1<sup>st</sup> Respondent in response to the petition herein and the application. I note that the Preliminary Objection raises a question of jurisdiction of this court to hear and determine the Petition and the Application filed alongside by the Petitioner on 18<sup>th</sup> June 2024.
4. Before delving into the merits of the said application, I think it is important from the onset to determine the jurisdiction question before this court. The Respondent vide the Notice of Preliminary Objection argues that this court lacks jurisdiction to entertain the Petition and the application herein on account of failure by the Petitioner to exhaust the statutory dispute resolution mechanisms set out by law before approaching this court.



5. The Court of Appeal in *Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* 1989 KLR emphasized the need for a court of law or tribunal to settle the question of jurisdiction on the outset once the same is raised. Justice Nyarangi JA, (as he then was) stated as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before. Jurisdiction is everything. Without it, a court has no power to make one more step. Once a court tribunal or court holds that it has no jurisdiction, it must down its tools.”

6. Parties further agree that the locus classicus case on Preliminary Objection is the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Limited* (1969) EA 696 where the court has settled on what amounts to a Preliminary Objection. The court in the said matter described a Preliminary Objection as follows;

“..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

This was reiterated in the case of *Biosystems Consultants v Nyali Links Arcade* (C.A No. E185 of 2023) KEHC 21068 (KLR) by a Ruling of 31.7.2023 when the court observed as follows:-

“..... It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection only three documents are required in addition to the constitution. The impugned law, the Plaintiff/pleading and the preliminary objection.”

7. The 1<sup>st</sup> Respondent argues that the rights that the petition seeks to protect are those to be found in Article 11 and 40 (5) of the *Constitution of Kenya*, 2010, where right to intellectual property rights is to be found and the need to protect those rights for the enjoyment of the same by the people of Kenya. The 1<sup>st</sup> Respondent argued that pursuant to the said constitutional safeguards and in order to give life to the same, Parliament enacted The *Copyright Act* No. 12 of 2001. It is this piece of legislation that establishes the 1<sup>st</sup> Respondent and gives it the mandate to licence and supervise the activities of collective management societies, (CMOS) to which the Petitioner is one of them.
8. The dispute that gave rise to the present petition arose as a result of the 1<sup>st</sup> Respondent’s refusal to award a licence to the Petitioner for the collection and distribution of royalties to its members. The 1<sup>st</sup> Respondent argues that under The *Copyright Act*, appeals against the 1<sup>st</sup> Respondent’s refusal to grant a Certificate of Registration to a collective management organization shall be first heard and determined by The Copyright Tribunal established by section 48 of the said Act. It follows therefore that this petition and or appeal against such a refusal to be licenced should have been first brought before The Copyright Tribunal for determination.
9. I therefore agree with the arguments by the 1<sup>st</sup> Respondent that it is necessary under the doctrine of exhaustion that a party must exhaust all the dispute mechanisms where they exist before approaching a court of law. The 1<sup>st</sup> Respondent has referred this court to the decision of the court of appeal in



*Geoffery Muthinja & another v Samuel Muguna Henry & 1756 other* (2015) eKLR, where the court stated as follows:-

“..... it is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought be the for a of last resort and not the first port of call...exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in protection of his own interest within the mechanisms in place for resolution outside courts. This accords with article 159 of the constitution which commands courts to encourage alternative means of dispute resolution”.

10. Similarly the Court of Appeal in *Speaker of National Assembly v James Njenga Karume* (1992) eKLR had the following to say:-

“...in our view, there is considerable merit in the submissions that where there is a clear procedure to be followed for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed.”

11. I agree with the above holdings by the Court of Appeal which bind me. I note in its response and submissions the Applicant has not rendered an explanation as to why it did not first file this petition and the application before the said Copyright Tribunal. The Copyright Tribunal is a creature of the statute and set out as a mechanism to resolve disputes such as the one before this court. I am persuaded therefore the Preliminary Objection has been raised purely on a point of law and in line with the decision in *Mukisa(supra)* meets the threshold of a Preliminary Objection. This therefore means that under the *Copyright Act*, this dispute must first and foremost be raised for determination before the body set out by law to hear and determine such disputes in the first instance. The Petition and the subsequent application offend the doctrine of exhaustion and are premature. I will therefore not proceed to consider the application on merit at this point.

12. In conclusion I find merit in the Preliminary Objection by the 1<sup>st</sup> Respondent. I direct that the dispute before this court first and foremost, be determined by The Copyright Tribunal whose mandate is to hear disputes of a similar nature. I therefore find and hold that this court is without jurisdiction and must down its tools at this juncture. The Application is therefore dismissed for want of merit and the Petition herein struck of want of jurisdiction. Costs of this application shall be borne by the Applicant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2025**

**J.W.W. MONG'ARE**

**JUDGE**

In the presence of:-

Mr. Ndungu Wachira for the Petitioner/Applicant

Mr. Nyabwegi for the 1<sup>st</sup> Defendant/Respondent

N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant/Respondent

Mr. Kilonzo for the 1<sup>st</sup> Interested Party

Mr. Atieno for the 2<sup>nd</sup> Interested Party



