



Kenya Copyright Board v Kenya Association of Music Producers & another; Music Copyright Society of Kenya (Interested Party) (Civil Appeal E1035 of 2024) [2025] KEHC 6108 (KLR) (Civ) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 6108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1035 OF 2024

TW CHERERE, J

APRIL 3, 2025

BETWEEN

KENYA COPYRIGHT BOARD APPELLANT

AND

KENYA ASSOCIATION OF MUSIC PRODUCERS 1ST RESPONDENT

PERFORMING AND AUDIO-VISUAL RIGHTS SOCIETY OF

KENYA 2ND RESPONDENT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA INTERESTED PARTY

RULING

1. The application before the Court is the Notice of Motion dated 06th September 2024, brought by the Appellant, Kenya Copyright Board (KECOBO) against the 1st Respondent, Kenya Association of Music Producers (KAMP), the 2nd Respondent Performing and Audio-Visual Rights Society of Kenya (PAVRISK) and the Interested Party, Music Copyright Society of Kenya (MCSK), under Articles 10, 11(2)(c), and 50 of the *Constitution*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules. KECOBO seeks a stay of execution of the judgment delivered by the Copyright Tribunal on 03rd September 2024 in COPTA/E002/2024, pending the hearing and determination of this appeal.
2. The grounds for the application and the supporting affidavit of Mr. Paul Kaindo, the Acting Assistant Executive Director, Legal Department of KECOBO, filed on the same date, lay the background and



- basis of the request for stay. Mr. Kaindo deposes that the annulment of the licence granted to the PAVRISK has subjected rights holders to a vacuum in royalty collection, risking significant losses.
3. The PAVRISK supports the application through a replying affidavit sworn on 11th October 2024 by its Chief Executive Officer, Mr. Joseph Njagih, who contends that the Tribunal erred in annulling its registration while simultaneously directing the issuance of provisional licences to organizations that had failed the evaluation criteria. Mr. Njagih further swore a supplementary affidavit dated 24th March 2025, asserting that the vacuum created by the Tribunal's orders has resulted in massive losses and confusion in the industry.
 4. The KAMP opposes the application through the replying affidavit sworn on 08th October 2024 by its Chief Executive Officer, Mr. Maurice Okoth. He deposes that the application does not meet the threshold for stay and that KECOBO has failed to demonstrate how it stands to suffer loss. He asserts that the 1st Respondent's members continue to suffer losses as 1st Respondent is not yet licensed to collect royalties. Mr. Okoth filed a further affidavit dated 04th November 2024, reiterating that the Appellant is in contempt of lawful orders and cannot benefit from its defiance.
 5. The MCSK also opposes the application via an affidavit sworn by Mr. Richard Sereti, Acting Chief Executive Officer, on 24th March 2025. He contends that the KECOBO's actions are aimed at circumventing lawful court orders and that granting stay would exacerbate the confusion and illegality already introduced by KECOBO. It was additionally argued that KECOBO does not have a right of appeal to this court.
 6. In submissions, Mr. Nyabwengi for the KECOBO argued that the application satisfies the requirements for stay under Order 42 Rule 6 and relied on *Butt v Rent Restriction Tribunal* [1979] eKLR. He submitted that the Appellant, as a state agency mandated to protect intellectual property, acts in the public interest, and that unless stay is granted, the appeal will be rendered nugatory. Counsel also cited *Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union* [2012] KECA 231 (KLR) and *Matata & Another v Rono & Another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 in support thereof.
 7. Mr. Wambua for the PAVRISK aligned with the KECOBO's position and added that failing to grant stay promotes an absurdity whereby no legitimate Collective Management Organization (CMO) exists to collect royalties. He relied on *Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others* [2012] eKLR to underscore the role of public interest in judicial decision-making and the need to avoid interpretations that lead to unworkable or illogical outcomes.
 8. Opposing the application, Mr. Oduor, counsel for KAMP, submitted that KECOBO's continued breach of the Tribunal's orders undermines the rule of law and erodes the legitimacy of its appeal. He emphasized that KECOBO has not demonstrated any direct or personal loss and accused it of acting in bad faith to support PAVRISK, despite clear and binding judicial pronouncements by the Tribunal.
 9. Mr. Okubasu, counsel for MCSK, submitted that the application amounts to a misuse of the court process and urged the Court to dismiss it on the ground that the Appellant has failed to demonstrate substantial loss. He further contended that the Interested Party stands to suffer prejudice if the orders sought are granted, and maintained that the Tribunal's judgment was grounded in principles of fairness and procedural compliance.
 10. Before delving into the substantive issues for determination, I consider it necessary to address a preliminary matter that arose during the hearing of this application. Mr. Nyabwengi, appearing for KECOBO, and Mr. Wambua, for PAVRISK, raised a preliminary concern regarding the representation of the KAMP. They submitted that the firm of TRIPLEOKLAW LLP had come on record for KAMP



after the delivery of judgment, without complying with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. In response, Mr. Oduor, counsel for KAMP, informed the Court that a Notice of Change of Advocates dated 11th March 2025 had been duly filed, and maintained that the firm of TRIPLEOKLAW LLP was properly on record.

11. Given that this issue was brought to the Court's attention, it would not serve the interests of justice to disregard it, even though it was not fully canvassed by the parties.
12. Courts have inherent authority to address and determine points of law suo motu, where necessary, to ensure justice is done and that legal proceedings adhere to the applicable rules and principles. This proactive judicial approach safeguards the integrity of the process and upholds the rights of all parties.
13. The rules governing the change of advocates after judgment are set out in Order 9 Rule 9 of the Civil Procedure Rules. It provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
14. This rule ensures a structured and transparent transition of legal representation post-judgment and is intended to protect the procedural rights of all parties and non-compliance may render subsequent actions by the new advocate improper.
15. However, it is important to distinguish between proceedings that continue in the same court and those that commence afresh in a different forum. In *Tobias M. Wafubwa v Ben Butali KSM CA Civil Appeal No. 3 of 2016 [2017] eKLR*, the Court of Appeal clarified that an appeal constitutes a new and distinct proceeding and is not a continuation of the trial court proceedings. As such, the requirement under Order 9 Rule 9 does not apply to advocates taking over representation for purposes of an appeal.
16. In the present case, the firm of TRIPLEOKLAW LLP took over the conduct of the appeal on behalf of the KAMP from the firm of Mike Otieno & Co. Advocates. All that was required was the filing and service of a notice of change of advocates, which was duly done. The firm is therefore properly on record for the KAMP.
17. Having carefully considered the affidavit evidence on record, the written and oral submissions of counsel, and the authorities cited by the parties, the Court identifies the following as the key issues for determination:
 1. Whether KECOBO has a right of appeal to this Court
 2. Whether the KECOBO has satisfied the conditions for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules;
 3. Whether the KECOBO has demonstrated the risk of substantial loss;
 4. Whether the KECOBO's non-compliance with the Tribunal's orders affects its entitlement to equitable relief;
 5. Whether the stay sought would advance or undermine public interest;
 6. Whether the grant or refusal of stay would result in regulatory absurdity;
 7. Who should bear the costs of the application



1. Whether KECOBO has a right of appeal to this Court

18. MCSK contended that KECOBO lacks a right of appeal to this Court from the decision of the Copyright Tribunal.
19. However, Article 165(6) and (7) of the *Constitution* vests the High Court with supervisory jurisdiction over subordinate courts and quasi-judicial bodies established by statute. In *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Selex Sistemi Integrati* [2008] eKLR, the High Court affirmed that statutory tribunals fall within the scope of its supervisory powers, underscoring the principle that such bodies are subject to judicial oversight.
20. Further, in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR, the Court of Appeal held that where a statute provides for an appeal from a tribunal, such an appeal ordinarily lies to the High Court unless expressly barred. This reinforces the right of parties aggrieved by the decisions of statutory tribunals to seek recourse through the judicial system.
21. In view of the foregoing, the objection to the jurisdiction of this Court to hear and determine KECOBO's appeal and accompanying application is without merit.

2. Threshold for Stay Under Order 42 Rule of Civil Procedure Rules

22. Order 42 Rule 6(2) sets out three requirements for the grant of a stay of execution:
 - a. The application must be made without unreasonable delay;
 - b. The applicant must demonstrate substantial loss if the order is not granted;
 - c. The applicant must offer security for the due performance of the decree.
23. The Notice of Motion dated 06th September 2024 was filed promptly, within three days of the impugned judgment and the first requirement is therefore satisfied.
24. Although Order 42 Rule 6(2)(b) generally requires an applicant to furnish security for the due performance of the decree this requirement is inapplicable in the present matter for the reason that KECOBO is a statutory regulator with no monetary liability arising from the impugned judgment. The nature of the application before the court concerns regulatory compliance rather than the enforcement of a financial decree. Accordingly, the question of security does not arise in the circumstances of this case.

3. Demonstration of Substantial Loss

25. The cases cited, particularly the ones referencing "substantial loss" and the potential for an appeal to be rendered nugatory, set a key framework for determining whether a stay of execution should be granted. The decision in *Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union* [2012] KECA 231 (KLR) clearly emphasizes that the concept of substantial loss is intended to protect an appellant from losses that would render the outcome of the appeal nugatory or devoid of practical value. Similarly, in *Matata & Another v Rono & Another* [2024] KEHC 2799, the court emphasizes that both substantial loss and prompt action are necessary for preserving the subject matter of the appeal.
26. The reasoning in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 supports the idea that substantial loss must be of real value, not merely a theoretical or nominal loss.



27. In the present case, however, the distinction lies in the KECOBO's admission that no direct loss would be incurred by them. Instead, the harm seems to be directed at third parties, specifically the intellectual property rights holders whose royalties are not being collected. This assertion weakens the argument for substantial loss on the part of KECOBO itself, as the prejudice is borne by parties other than KECOBO.

4. Public Interest

28. Public interest is a central consideration in the exercise of judicial discretion and Courts must therefore be cautious not to issue orders that undermine constitutional values or erode public trust in institutions. In *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR, the Supreme Court underscored that public interest must be balanced against legality, accountability, and the need to preserve constitutional order.

29. As much as KECOBO asserts that it acts in the public interest, the broader public good would be more effectively served through the lawful and orderly collection of royalties and their distribution to intellectual property rights holders. To stay an order that seeks to operationalize such collection, especially in accordance with findings of the Tribunal, would be to frustrate a process that promotes fairness, regulatory certainty, and economic justice. Claims of public interest cannot justify unlawful conduct or disobedience of court orders, and courts must remain vigilant against attempts to mask institutional defiance under the guise of public good.

5. Absurdity and Regulatory Chaos

30. KECOBO contends that the current regulatory framework has produced an untenable situation in which three Collective Management Organizations (CMOs) are expected to operate concurrently, despite having allegedly failed to meet the evaluation criteria.

31. In *Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others* (supra) the Court underscored the presumption against absurdity in constitutional and statutory interpretation and held that provisions should not be construed in a manner that leads to unworkable, illogical, or impractical outcomes.

32. In the present matter, however, it is the KECOBO's failure to comply with the Tribunal's lawful orders that has substantially contributed to the regulatory confusion now cited in support of the stay. Granting relief on this basis would offend the constitutional value of the rule of law, one of the foundational principles enshrined in Article 10(2)(a) of the *Constitution*. This Article obliges all state organs, including courts and regulatory bodies, to uphold national values and principles of governance, which include accountability, transparency, good governance, and adherence to the rule of law. Permitting a party to rely on confusion it has itself created through non-compliance would not only undermine judicial authority but would also erode institutional integrity and public confidence in lawful processes. Upholding such conduct would set a dangerous precedent where disregard for legal orders becomes a strategic advantage rather than a breach to be sanctioned.

33. In *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court emphasized that the discretion to grant a stay of execution must be exercised in a manner that preserves the right of appeal. It further affirmed that a successful litigant is ordinarily entitled to enjoy the fruits of their judgment unless it is demonstrated that the appeal would be rendered nugatory in the absence of a stay.

34. The decision affirms that the power to grant stay is a discretionary one, to be exercised judiciously and in accordance with established legal principles. Importantly, the exercise of such discretion is



not automatic but must be anchored in merit, demonstrated through compliance with the statutory requirements set out under Order 42 Rule 6 of the Civil Procedure Rules.

35. In the present case, KECOBO has neither demonstrated that the appeal would be rendered nugatory if stay is denied, nor has it established the likelihood of suffering any substantial loss. The failure to meet these core requirements disentitles KECOBO to the discretionary relief of stay pending appeal.

7. Who bears the costs

36. Section 27(1) of the *Civil Procedure Act* gives courts unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought not to be denied costs unless for good cause to be shown. (See *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR)).
37. In the end, the Notice of Motion dated 06th September 2024, is found lacking in merit and it is dismissed with costs to the KAMP and the MCSK.

DELIVERED AT NAIROBI THIS 03RD DAY OF APRIL 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant -Ubah

For KECOBO - Mr. Nyabwengi for Nyabwengi Omanga & Co. Advocates

For KAMP - Mr. Ochieng Oduor for TRIPLEOKLAW LLP

For PASRISK - Mr. Wambua & Maina for Morris Maina & Co. Advocates

For MCSK - Mr. Musyoka for Okubasu & Munene Advocates LLP

