



Ngemu & another v Kenya Copyright Board & 2 others; Safaricom Ltd & another (Interested Parties) (Judicial Review E274 of 2024) [2025] KEHC 5758 (KLR) (Judicial Review) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E274 OF 2024**

JM CHIGITI, J

MAY 8, 2025

BETWEEN

**JUSTUS NGEMU 1ST APPLICANT
SAUL ESIKURI 2ND APPLICANT**

AND

**KENYA COPYRIGHT BOARD 1ST RESPONDENT
THE CABINET SECRETARY OF GENDER, CULTURE, ARTS AND
HERITAGE 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT**

AND

**SAFARICOM LTD INTERESTED PARTY
AIRTEL KENYA INTERESTED PARTY**

RULING

1. The Application that is coming up for determination is the chamber summons dated the 2nd December 2024 wherein the Applicants seek orders;
 1. That Leave be granted for the Applicants to apply for an order of Mandamus to compel the respondents and the 1st and 2nd interested parties to enforce provisions of section 30C [11 and 30C [3] of the copy Rights Act, CAP 130 Laws of Kenya.



2. That the grant of leave does operate as a stay of the 1st and 2nd interested parties remitting and or paying ring back tune net revenue share to Premium Rate Service Providers (PRSP) pending full determination of these proceedings.

The Applicant's case;

1. The applicants are artists who earn a living through royalties payable by Premium Rate Service Providers (PRSP).
2. It is their case that the Copy Rights Act, CAP 130 Laws of Kenya was amendment no. 14 of 2022 and which section 30C was introduced, it states Section 30C. Payment of ring back tune revenue;
 - (1) Without prejudice to section 30B, in the case of ring back tunes, the parties shall share the revenue net of taxes from the sale of ring back tunes, as follows —
 - (a) the premium rate service provider at eight-point five percent;
 - (b) the telecommunication operator at thirty-nine-point five percent;
 - (c) the artiste or owner of the copyright at not less than fifty-two percent.
 - (2) Despite subsection (1), all contracts between premium rate service providers and artistes or owners of the copyright existing before the commencement of this Act shall apply until their expiry, and subsequent contracts shall conform to this provision.
 - (3) The telecommunication operator shall remit directly to the artiste or owner of the copyright the ring back tune net revenue share allocated to them as specified subsection (1).
3. It is their concern that despite the said amendment and the law, the respondents have continued to allow through omissions the 1st and 2nd interested parties to breach the law by letting them pay ring back tune net revenue share to Premium Rate Service Providers (PRSP).
4. The applicants argue that they have tried in vain to engage the respondents with a view of implementing the said provisions of the law but their efforts to no avail.
5. Towards demonstrating this, it is their case that on 27.7.2023 the 1st applicant wrote to the 1st respondent to convene a meeting on the issue of direct SKIZA payment of artist
6. On 31.7.2023 the 1st respondent in a letter addressed to the 1st applicant sought to engage more stake holders and proposed a meeting that never was on the week of 7th to 11th august,2023.
7. Further on 18.9.2023 the 1st applicant wrote the 1st respondent on the issue of direct payment but the same was never responded to
8. They argue that on 21.3.2024 the 2nd respondent wrote to the interested parties with a view of seeking ways of implementing section 30 C of the copy right law.
9. On 4.4.2024 upon honoring the meeting convened by the 2nd respondent the 1st applicant requested the said 2nd respondent to convene another meeting to deliberate the emerging issues that had been identified in the meeting of the 27.3.2024
10. They argue that the respondents and interested parties continue to infringe the applicants' copyrights by failing and or neglecting the direct payment of pay back ring tones to the applicants and other artists.



11. According to them there is no legal justification for the respondents and interested parties' inaction of by passing the law and instead effecting direct skiza payment through Premium Rate Service Providers (PRSP) without the license of the applicants.
12. Unless restrained by this Honorable Court, the respondents and interested parties threaten and intends to continue the infringing acts complained of and the applicants and the entire music fraternity will or will continue to suffer loss and damage.
13. It is their case that Section 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013 illuminates the concept of an interested party.

“Interested party” means a person or “entity” that has an “identifiable stake or legal interest” or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”
14. They rely on the supreme court in *Muruatetu & another v Republic of Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated) [2016] ICESC 12 (KLR) (Civ) (28 January 2016) (Ruling)*.
15. According to '[141 Black's Law Dictionary, 9th Edition, defines "intervener" (at page 897) thus;

'One who voluntarily enters a pending lawsuit because of a personal stake in it" and defines 'Interested Party' (at p.1232) thus: A party who has a recognizable stake (and therefore standing) in a matter".

'[151 On the other hand, an amicus is defined in Black's Law Dictionary thus: 'A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'."
16. The Applicants argue that on 31.7.2023 the 1st respondent herein vide a letter annexed as JN3 dated 31.7.2023 sought to engage stake holders in regard to the issue in court of non-compliance with section 30C of the copy rights Act.
17. The said letter was copied to The Chief Executive Officer Safaricom PLC. The interested party herein. JN4 is a letter by the 1st applicant dated 18.9.2023.
18. Fundamentally the letter dated 21.3.2024 by the 2nd respondent was addressed to the both the 2 interested parties herein i.e. which at page 2 of the said letter dated 21.3.2023 by the Ministry of Gender, Culture, The Arts & Heritage states inter alia “we have received complaints of artists through their umbrella association, music associations alliance of Kenya that this section of the law i.e. section 30 of the Copyrights Act, has not been implemented.”

“The ministry is keen on ensuring that the *copyright act* is implemented so that artists receive their royalty payments directly as envisioned in the law”
19. On the legal threshold with rely on *Multiline Services Limited v Nairobi City County Government (Judicial Review Application E025 of 2023) [2023] KEHC 23794 (KLR) (Judicial Review) (19 October 2023) (Ruling)* This court held that

“From the foregoing, in an Application for leave, such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of



the evidence before it [court] and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.”

20. In *Ndubi v Gituma* (Sued as the Legal Representative of the Estate of Jenny_ Mwhaki Gituma - Deceased) (Environment and Land Appeal E005 of 2023) [2024] KEELC 4322 (KLR) (22 May 2024) (Judgment) the court cited the decision in *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* (2014) eKLR, where the court held that equity should suffer 110 wrong without a remedy, no man shall benefit from his wrongdoing, and equity detests unjust enrichments. The appellant knew that he had obtained more money and was supposed to facilitate the documentation.
21. It is their case that the strict non-enforcement of the law has caused economical and financial hardship not only to the 2 applicants herein but to the entire music fraternity within the republic of Kenya. Having tried to amicably resolve the issue with the respondents the applicant have no other avenue than to seek for an order of mandamus after the respondent and their agents and interested parties herein. Its only the interested parties who are gaining financially to the disadvantage of the applicants.
22. Significantly section 30 (3) of the act states "The telecommunication operator shall remit directly to the artiste or owner of the copyright the ring back tune net revenue share allocated to them as specified subsection (1)."
23. In this regard, the telecommunication operator is the 1st interested party. Consequently, the act also has placed the 1st interested party with an obligation to comply with the law. In principal this court can.
24. They rely on Section 35 of the act provides for infringement it states that (1) Copyright or related rights:
rights —
 - (a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; orAs to the relief this court can issue we are guided by Section 35D of the act provided for Application for injunction. The section states that;
 - (1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.
Lastly as to the omissions and inaction of the interested parties' non-compliance with the law the act provided under section 38A. Offence by body corporate. It states;
 - (1) Where a body corporate is convicted of an offence under this Act, every person who at the time the offence was committed was in charge of orro as responsible to the body corporate for the conduct of its business and affairs is also deemed to have committed the offence and shall be liable to prosecution.
 - (2) Where it is proven that a body corporate committed an offence under this Act (Oith the consent, connivance or willful lack of due diligence by a person in charge of or responsible to the body corporate for the conduct of its business and affairs, the person shall be guilty of the offense.

The 1st Respondents Case;

25. The 1st Respondent submits it is trite law that Judicial review is only available where the decision-maker has acted unlawfully, irrationally, or unreasonably, and it is necessary for the court to intervene.



26. In the case of *Republic v. Kenya National Examinations Council & 2 Others* [1997] eKLR, The Court of Appeal stated that Judicial Review remedies of certiorari, mandamus, and prohibition are available where there is an abuse of power or violation of legal duty.
27. Mandamus is a remedy available to compel a public authority to perform a statutory duty. The Court in *Republic v. Judicial Service Commission & Another* [2010] eKLR emphasized that mandamus is only available where there is a clear legal duty to act, and the duty must be a specific and unequivocal one.
28. Section 30B of the *Copyright Act* No. 12 of 2001 which the Applicants' rely on addresses the payment of ring back tune revenue and was introduced through the Copyright (Amendment) *Act No. 14 of 2022* passed by Parliament in February 2022 and signed into law by the President in April 2022.
29. It establishes a revenue-sharing formula for ring back tunes, ensuring that artistes or copyright holders receive a fair portion of the income generated. Specifically, the revenue is distributed as follows:
 - a. Artistes or copyright holders: at least 52%
 - b. Telecommunication operators: 39.5%
 - c. Premium rate service providers: 8.5%
30. The Interested Parties herein are required to remit the revenue allocated to artistes directly to the artistes or copyright holders, eliminating intermediaries and ensuring timely payments. Notwithstanding this provision, ring back tunes are based on private contractual arrangements between the artistes and Telecommunication operators.
31. It is the Respondent's case that the primary responsibility to enforce compliance with ring back tunes contracts lies with the parties to the agreement. These are; the artistes or copyright holder; Telecommunication operator and the premium rate service provider. There is no statutory enforcement mechanism or obligation placed on the Respondents to enforce the private contractual right under the Section.
32. According to the Respondent, the Applicants have failed to demonstrate that the Respondents have a statutory or common law duty to act in the manner sought.
33. Instead, the Applicants have merely asserted the nonperformance of a contractual duty by the Interested Parties without providing any evidence to suggest that the Respondents have neglected to carry out a statutory duty in an unlawful manner.
34. They argue that the Applicant has not demonstrated that there is no alternative remedy available to them. Mandamus is a remedy of last resort, and before seeking such a remedy, the Applicant must prove that there is no other adequate alternative remedy available to them. In this case, the Applicant has failed to explore other legal avenues that could potentially resolve the issue at hand.
35. In *Republic v. Permanent Secretary, Ministry of Internal Security & Another* [2007] eKLR, the Court emphasized that judicial review is not appropriate where there is another alternative remedy that the Applicant could pursue. The Applicant should, therefore, be required to exhaust other available remedies before seeking Judicial Review by way of Mandamus.

2nd Interested Parties case;

36. It is its case that the Applicants in this instant application are indeed seeking leave to apply for an order of mandamus as against the 1st Interested Party among other parties to the suit. It further its case that Judicial Review remedies are only available as against public bodies.



37. The 1st interested party is not a public body but a limited liability company against which Judicial Review cannot issue. It prays that the chamber summons application dated 2nd December 2024 be dismissed as far as it relates to the 1st interested party with costs provided.

Analysis and determination

38. The issue for determination is whether the Application for leave to institute Judicial proceedings is merited.
39. It is a requirement of the law under Order 53 Rule 1 of the Civil Procedure Rules 2010, that an Applicant must seek leave to institute judicial review proceedings.
40. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
41. The Learned Judge, in *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others* (supra), further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion, but as always it has to be exercised judiciously.
42. In an Application such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.
43. In *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR, the court held that in judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case.
44. In the instant matter, the gist of the Application before this court is that the applicant is seeking for leave to commence judicial review proceedings for orders of Mandamus.
45. Having invoked the judicial review jurisdiction of this court, it was upon the applicant to demonstrate that they have a prima facie case that requires ventilation at a substantive hearing.
46. I have carefully perused the parties respective cases and I am satisfied that the Applicants have made out prima facie case to warrant the grant of the leave sought.
47. In the case of *Taib A. Taib V Minister for Local Government & 3 Others* [2006] eKLR, Maraga J (as he then was) stated that;

“I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore, where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and



purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction”.

The court went further to state that;

“The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

48. In the end, I find that the Application for has merit.

Orders;

1. Leave is hereby granted for the Applicants to apply for an order of Mandamus to compel the respondents and the 1st and 2nd interested parties to enforce provisions of section 30C [11 and 30C [3] of the copy Rights Act, CAP 130 Laws of Kenya.
2. The leave does operate as a stay of the 1st and 2nd interested parties remitting and or paying ring back tune net revenue share to Premium Rate Service Providers (PRSP) pending full determination of these proceedings.
3. The applicant shall file and serve the substantive motion within 14 days of today’s date.
4. The respondent and the interested party shall file and serve its responses to the application within 14 days of service.
5. The applicant shall thereafter file and serve its submissions within 10 days.
6. The respondents and the interested party shall file and serve their submissions within 10 days of service.
7. The matter will be mentioned on 7.7.25 to report compliance.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2025.

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J. M. CHIGITI (SC)

JUDGE

