



**Music Copyright Society of Kenya v Safaricom Limited & 3 others; Xpedia Management Limited & 3 others (Interested Parties); Kenya Copyright Board (Intended Amicus Curiae) (Civil Case E260 of 2022) [2024] KEHC 4817 (KLR) (Civ) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4817 (KLR)

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

**CIVIL**

**CIVIL CASE E260 OF 2022**

**DAS MAJANJA, J**

**MAY 8, 2024**

**BETWEEN**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... PLAINTIFF**

**AND**

**SAFARICOM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AIRTEL KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**TELKOM KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**HUAWEI TECHNOLOGIES KENYA LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**XPEDIA MANAGEMENT LIMITED ..... INTERESTED PARTY**

**LIBERTY AFRIKA TECHNOLOGIES LIMITED ..... INTERESTED PARTY**

**CELLULANT LIMITED ..... INTERESTED PARTY**

**MTECH LIMITED ..... INTERESTED PARTY**

**AND**

**KENYA COPYRIGHT BOARD ..... INTENDED AMICUS CURIAE**

**RULING**

1. The court is being called upon to determine three applications and a Preliminary Objection. The Plaintiff's ("MCSK") Notice of Motion dated 08.07.2022, the 1<sup>st</sup> Defendant's ("Safaricom") Notice of Motion dated 19.07.2022, the Intended Amicus Curiae's ("KECOBO") Notice of Motion dated



- 18.08.2022 and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties’ (“Xpedia” and “Liberty”) Notice of Preliminary Objection dated 06.10.2022.
2. MCSK’s Notice of Motion dated 08.07.2022 is made, inter alia, under Orders 40 Rule 2 of the Civil Procedure Rules (“the Rules”) and seeks the following orders:
    1. Spent
    2. Spent\*
    3. Spent
    4. That pending the inter-partes hearing of this suit, the Honourable Court do issue orders of Temporary Injunction barring/restricting Safaricom Limited, Airtel Kenya Limited, and Telkom Kenya Limited the Defendants/Respondents, from distributing, remitting and/or disbursing to the Interested Parties and any third party whomsoever, except through the Music Copyright Society of Kenya, Royalties payable for the exploitation of Performing and Reproduction Rights of copyrighted musical works in the form of ring back tones, in any manner whatsoever, copyright exclusively assigned to Music Copyright Society of Kenya Limited.
    5. That pending hearing and determination of this suit, the Honourable Court be pleased to issue an Order directing and/or compelling the Defendants herein, Safaricom Limited, Airtel Kenya Limited, Telkom Kenya Limited, and Huawei Technologies Kenya Limited to render accounts to Music Copyright Society of Kenya Limited (MCSK), the Plaintiff, in respect of royalties due for the exploitation of Performing and Reproduction Rights in copyrighted musical works in the catalogue/repertoire exclusively assigned and reciprocated to MCSK for the period 1<sup>st</sup> January 2020- 30 June 2022
    6. Costs of this Application be provided for.
  3. The Notice of Motion is grounded on the facts on its face and the supporting affidavit of Dr. Ezekiel Mutua, MCSK’s Chief Executive Officer, sworn on 08.07.2022. It is opposed by Safaricom through the replying affidavit sworn on 04.11.2022 by its Senior Legal Counsel, Daniel Ndaba, by the 2<sup>nd</sup> Defendant (“Airtel”) through the replying affidavit sworn on 08.11.2022 by Lilian Mugo, its Head of Legal Affairs, by Xpedia and Liberty through the replying affidavit of their director, Sidney Wachira sworn on 18.07.2022 and by the 3<sup>rd</sup> Interested Party (“Cellulant”) through the replying affidavit of its Manager in charge of Legal and Regulatory Affairs, Yvonne Karongo, sworn on 21.10.2022.
  4. Safaricom’s Notice of Motion dated 19.07.2022 is made, inter alia, under Order 2 Rule 15(1)(d) of the Rules and seeks to strike out the suit or in the alternative, stay this suit pending the hearing and determination of HCCHR Petition No. E435 of 2020: Music Copyright Society of Kenya v Kenya Copyright Board & 2 Others. The application is grounded on the facts set out on its face and the supporting affidavit of Daniel Ndaba sworn on the same day. It is supported by Airtel through the replying affidavit of Lilian Mugo sworn on 19.10.2022. It is opposed by MCSK through the replying affidavit of Dr. Ezekiel Mutua sworn on 20.07.2022 and the Grounds of Opposition dated 20.02.2023.
  5. KECOBO’s Notice of Motion dated 18.08.2022 is made under *the Constitution*, the *Judicature Act* (Chapter 8 of the Laws of Kenya), the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), *High Court (Organization and Administration) Act*, 2015 and Practice Directions To Standardize Practice And Procedures in The High Court and seeks leave to be granted for it to be enjoined in this suit as Amicus Curiae and upon grant of leave, the Amicus brief dated 26.07.2022 be deemed as properly filed. The application is supported by the grounds on its face and the supporting affidavit of George



Nyakweba, KECOBO's Deputy Executive Director, sworn on 18.08.2022. It is opposed by MCSK through the Grounds of Opposition dated 20.02.2023.

6. Xpedia's and Liberty's Notice of Preliminary Objection dated 06.10.2022 ("the Objection") seeks to strike out the suit for having being instituted by way of Originating Summons as the prayers sought do not fall under the purview of Order 37 Rule 11 of the Civil Procedure Rules and is therefore contrary to section 19 of the Civil Procedure Act and Order 3 Rule 1 (1) of the Rules.
7. In addition to their pleadings, the parties have also filed written submissions which I shall not highlight but make relevant references in my analysis and determination.

### **MCSK's Origination Summons and Notice of Motion**

8. MCSK claims that contrary to the express provisions of the Copyright Act, the Defendants and the Interested Parties have purported to exploit Performing and Reproduction Rights in Kenyan and international copyrighted musical works in MCSK's controlled catalogue/repertoire in the form of ring back tunes without MCSK's prior authority. Further, that the Defendants have been paying royalties to the Interested Parties for the exploitation of Performing and Reproduction Rights in the form of ring back tunes in Kenyan and international copyrighted musical works in MCSK's controlled catalogue/repertoire without MCSK's prior authority.
9. MCSK avers that it is an Exclusive Assignee authorized by law and Right Holders, Authors, Composers, Arrangers and Publishers of copyrighted musical works who are its members to manage, administer and enforce the exploitation of Performing and Reproduction rights anywhere and by anybody globally. That it is an Exclusive Assignee duly mandated and authorized under the Copyright Act having acquired the rights in copyright that it owns, administers and manages through; Exclusive and Non-Exclusive Deeds of Assignment for Performing Rights executed by Kenyans and resident Right Holders of copyrighted musical works who are more than 15,000 in number and Exclusive Reciprocal Agreements for Performing Rights existing between MCSK and Sister Organizations for non-resident right holders in the Kenyan territory.
10. MCSK reiterates that despite it being an exclusive assignee of copyright, the Defendants have in the absence of consent/license or authorization from MCSK continuously exploited Performing and Reproduction Rights in Copyrighted musical works in MCSK's controlled catalogue/repertoire through ring back tunes. That the mandate to collect and distribute royalties from the exploitation of performing and Reproduction Rights in copyrighted musical works in its catalogue/repertoire is an exclusive preserve of MCSK, a mandate that the Defendants and Interested Parties have illegally abrogated themselves by purporting to collect and distribute royalties in respect of exploitation of the Performing and Reproduction Rights in copyrighted musical works in MCSK's controlled catalogue/repertoire.
11. Thus, MCSK avers that it is in the interest of justice that the Defendants and Interested Parties be restrained from infringing Performing and Reproduction Rights in copyrighted musical works in the catalogue/repertoire exclusively assigned and reciprocated to MCSK through ring back tunes, to wit, re-assigning copyright owned by MCSK and/or collection and/or distribution of royalties in respect of MCSK's assigned/owned Performing and Reproduction rights. That it is further in the interest of justice and further protecting the copyright of MCSK and its members that the Defendants be ordered to render accounts pertaining the revenue generated from the exploitation of MCSK's Copyright.
12. For these reasons, MCSK urges the court to allow the prayers sought in its Originating Summons and the Notice of Motion.



## Safaricom and Airtel's Reply

13. Safaricom states that it routinely enters into agreements with Premium Rate Service Providers (PRSPs), including the Interested Parties, for the provision of musical content to Safaricom for use as ring back tunes and that these arrangements are made on the strength of licensing agreements entered into between the PRSPs and the musical copyright owners, authorizing their copyright works to be used on digital platforms. The PRSPs, in turn, receive royalties from Safaricom and forward the amount due to the copyright owners directly to them.
14. Safaricom avers that MCSK is fully aware of these arrangements between Safaricom, PRSPs and musical copyright owners, which have been the subject of previous litigation in *Mercy Munee Kingoo & another v Safaricom Limited & another* [2016] eKLR, in which the Court declined to restrict the payment points through which musical copyright owners may receive royalties to Collective Management Organizations (CMOs) such as MCSK. That the Court instead upheld the right of musical copyright owners to associate with PRSPs and therefore, MCSK has failed to establish any legal basis for its claim that it is an Exclusive Assignee authorized by law and copyright holders who are its alleged members to manage, administer and enforce the exploitation of its members' Performing and Reproduction Rights in copyrighted musical works. Further, that MCSK's claims to be the owner of the assigned copyright of its purported members and at the same time to be administering the copyright on their behalf are mutually exclusive and contradictory.
15. Safaricom avers that MCSK has not provided any evidence to show that the list of names annexed to its Supporting Affidavit and marked 'MCSK 2' in fact comprises individuals who have applied for and actively maintained membership with MCSK.
16. Safaricom states that this suit is incompetent and bad in law as it raises contentious questions of fact and law which are not appropriate for determination by way of Originating Summons. That MCSK filed HCCHR Petition No. E435 of 2020: *Music Copyright Society of Kenya v Kenya Copyright Board & 2 Others*, which raises similar issues as those raised in the instant suit and on 30.09.2022 and Judgment was delivered dismissing the said petition whereby the Court further held that MCSK is required to be licensed by KECOBO.
17. Safaricom states that MCSK has not provided any evidence that it is duly licensed by KECOBO to carry out collective management and/or administration of copyright as required by section 46 of the [Copyright Act](#) and that MCSK lacks the requisite locus standi to institute this suit.
18. Safaricom adds that the application does not meet the threshold for grant of temporary injunctive orders for the reasons that MCSK has neither demonstrated a prima facie case with any chance of success nor even disclosed a cause of action against Safaricom for which it may seek a remedy from the Court, that MCSK has not demonstrated any loss, damage and/or injury occasioned to itself or its purported members by Safaricom or that would be suffered by them if the orders sought are not granted and that the orders sought, if granted, would in fact cause grave financial losses to the parties herein as well as to MCSK's purported members, thus tilting the balance of convenience against MCSK.
19. Airtel avers that it is duly licensed by the Communication Authority of Kenya (CAK) to provide, inter alia, platforms which (subject to complying with Airtel's terms and conditions), enables third party users to select and download ring-back tones to their phones and that it is the use of copyrighted works on this platform that is at the heart of this suit. That one of such third party users are the PRSPs licensed by the CAK, who contract with various copyright holders/owners (being composers, producers and performing artists of musical and audio-visual works) to digitize their various works, channel it through



- Airtel's platform and allow monetization of such works (to the public) for a fee. The fee/payment for the usage/download (by any willing third party) of such copyright works would be made through Airtel's platform to the contracted PRSPs who would then pay the rights owners/artists part of such fee and Airtel having rights to part of the fee (also) as consideration for the service they provide the PRSP respectively. That the PRSPs first receive authorisation from the various artists/ owners of the copyrighted work.
20. Airtel avers that Cellulant and the 4<sup>th</sup> Interested Party ("Mtech") are PRSPs engaged in the business of inter alia promotion and distribution of various musical and artistic works through digital platforms and that Airtel entered into separate agreements with them for the use of Airtel's platform. Airtel states that in December, 2012 Parliament passed the Statute Law (Miscellaneous Amendments) Act which introduced section 30A into the *Copyright Act* which directed that all royalties would be remitted through CMOs such as MCSK and not to the PSRPs. Airtel avers that pursuant to its agreements with Cellulant and Mtech with whom Airtel has a direct link with are to the best of Airtel's knowledge not members of MCSK or any CMO for that matter. It is Airtel's position that the caller ring back tones are in the category of the performance rights for which the CMOs are not allowed to handle and that MCSK has not provided sufficient evidence to show that it is well equipped to deal with digital contents and further, it is not licensed under the Kenya Information Communication Act to handle digital contents such as the Caller Ringback tunes contents akin to the licensing Airtel and the various PRSPs hold in law.
  21. Airtel states that MCSK's prayers and/or allegations that it is the Exclusive Assignee by law to receive royalties on behalf of Kenyan and International artists is an act equivalent to forcing the artists to become members of MCSK and is a violation of their rights provided under Article 36 of *the Constitution* as membership is voluntary, with an 'opt in' or an 'opt out' approach. Airtel further proffers that MCSK seeks to enforce section 30A of the *Copyright Act* which was declared unconstitutional by the Court in *Mercy Muneo Kingoo & another v Safaricom Limited & another* [2016] eKLR and as such, MCSK cannot rely on this provision as it was deleted and no longer exists.
  22. Airtel also states that it is not mandatory for the artists and producers to be members of MCSK for them to receive their remuneration for the use of their copyright works and MCSK can only pay those registered with them. That since Cellulant and Mtech are legally licensed PRSPs, they can and/or allowed to receive the royalties of those artists who are contracted with them and that both Airtel, and the PRSPs are not illegal organizations. Further, that Airtel has numerous subscribers and it is able to manage all their affairs and its technology platform is robust and very advanced and it has been of great service to Kenya. That to date, Airtel has been paying the royalties due to various artists through the PRSPs and has not been charged in any court for violating the law.
  23. Airtel takes a further position that the agreements between itself, Cellulant and Mtech and between Cellulant and Mtech and the rights owners are private arrangements which should not be rewritten by the Court. That MCSK's contention to be an Exclusive Assignee, solely mandated to handle/ receive royalties and/or remuneration on behalf of artists is illegal and contrary to the provisions of the Competition Act 2010, which prevents exclusive arrangements unless expressly consented to by the Competition Authority of Kenya. Airtel states that MCSK has not tabled any exemption it sought and obtained from the Competition Authority of Kenya for it to enjoy the alleged exclusive rights to handle the works and revenue on behalf of the various artists or evidence whether in the form of sworn affidavits by all its alleged members and/or a unanimous resolution, signed by all its members agreeing to the alleged exclusivity. Airtel notes that such consents/documents would need to be tabled before the Competition Authority of Kenya to justify any request for an exemption to enter into an exclusive arrangement.



24. Airtel states that the copyrighted works owned by the various artists constitute their property (intellectual property) and are akin to all other property rights, the freedom to contract, freedom to own, freedom to associate, freedom to earn a living, freedom to own and use/exploit property for gain and privity of contract remain available to such artists and MCSK ought not to be allowed to curtail their said constitutional rights. Further, that Airtel in its respective agreements with Cellulant and Mtech agreed that they would fully indemnify Airtel against any liability that would be occasioned by any lack of such authorisation to contract and/or in relation to any breach of intellectual property owned by the various artists.

### **Xpedia and Liberty's Reply**

25. Xpedia and Liberty state that they are in the business of promoting and distribution of various musical and artistic works through digital platforms and that they also own various copyright works. They further state that they have over the years been licensed by thousands of copyright owners to use and exploit their copyright works for the mutual benefit of themselves and the copyright owners and that they continuously engage with various copyright owners and continue to enter into agreements and arrangements with copyright owners for the exploitation of the copyrights through digital platforms.
26. Xpedia and Liberty state they have entered into agreements with mobile phone service providers that authorize the mobile phone service providers to provide the various works to members of the public through the mobile phones in the form of downloads. That MCSK has ever since the year 2008 been aware of this and has on its part authorized Liberty to utilize works within its own repertoire. Xpedia and Liberty depone that MCSK is a CMO that derives its mandate from KECOBO and that MCSK has not been licensed by KECOBO to deal with performing and or reproduction rights and consequently MCSK has no legal basis for making the claims it has made.
27. Xpedia and Liberty claim that MCSK has often been mismanaged to the extent of being denied an annual license by KECOBO with the effect that copyright holders who have given Xpedia and Liberty authority to exploit their works would lose revenues when MCSK fails to meet the requirements by KECOBO. Xpedia and Liberty assert that copyright holders have the right to enter into agreements with other persons for exploitation of their works and that most have been able to improve their lot by working with the Interested Parties as compared to when they are solely dependent on MCSK.
28. Xpedia and Liberty contend that the Originating Summons is bad in law as the issues before the Court are not issues that can be dealt with through an Originating Summons. Further, that the orders in the Summons cannot be granted as the Copyright Owners have entered into agreements with Xpedia and Liberty who have in turn entered into agreements with Safaricom and the copyright owners receive payment on a monthly basis based on their respective agreements. Consequently, that the copyright owners will suffer no loss if the orders sought in the Originating Summons and in the Notice of Motion are not granted. That in fact, the grant of any temporary injunction will distort the existing arrangement among copyright owners, the Interested Parties and the mobile phone companies to the detriment of the copyright owners and that the balance of convenience thus tilts in favour of denying the application for injunction.
29. Xpedia and Liberty further state that MCSK's application for injunction is caught up by laches as the arrangement between the Defendants, the Interested Parties and the Copyright Owners has been going on since around the year 2008 and MCSK has been aware of this and cannot therefore come to court this late in the day to purport that the arrangement is not proper.



## **Cellulant's Reply**

30. Cellulant states that it entered into agreements with different copyright owners to exploit their works in different ways, such as ring back tunes, for the mutual benefit of itself and the copyright owners. That consequently, Cellulant only acted upon being licensed by the various copyright owners and not on its own volition and that it also entered into agreements with Safaricom that authorizes it to provide the various works to members of the public through the mobile phones in the form of ring back tunes. Cellulite also states that MCSK is aware of this arrangement since it began and it was actually part of a meeting held in February, 2016, to come up with an efficient arrangement to govern the release of royalties acquired from the ring back tunes.

## **Safaricom's Application**

31. Safaricom states that MCSK has failed to disclose that the matter in issue in the instant suit is also directly and substantially in issue in HCCHR Petition No. E435 of 2020: Music Copyright Society of Kenya v Kenya Copyright Board & 2 Others which is currently awaiting delivery of judgement. That in both matters, the issues are whether MCSK has the exclusive, or any, legal mandate to manage, administer and enforce the exploitation of performing and reproduction rights in copyrighted musical works of its alleged members, and to collect and distribute royalties in respect of the exploitation of exclusively assigned and reciprocated performing and reproduction rights.
32. Therefore, Safaricom avers that this suit is therefore an abuse of the court process and that there is an imminent risk that the Court may issue conflicting orders on a matter before another Court of the same status, hence occasioning embarrassment. That it is in the interests of justice and to avoid duplicity of proceedings that this suit is either struck out or stayed pending the final determination of the Petition and that the Court has the power to grant the orders sought.
33. Airtel supports the application by stating that the instant suit has been brought in bad faith and MCSK is guilty of material non-disclosure whereby key details that would affect the hearing and determination of this suit have intentionally been hidden from the Court. That the outcome of HCCHR Petition No. E435 of 2020 is likely to affect outcome of the instant suit being that in this suit, the Court is equally being called upon to determine whether MCSK has exclusive and/or legal mandate to manage, administer and enforce the exploitation of performing and reproduction rights in copyrighted musical works of its alleged members, and to collect and distribute royalties in respect of the exploitation of exclusively assigned and reciprocated performing and reproduction rights.

## **MCSK's Reply**

34. In response, MCSK avers that it had disclosed the existence of the said HCCHR Petition No. E435 of 2020 via Para.10 of its deponent's affidavit in support of the motion and did also attach the order of Justice Mrima mandating MCSK to administer the rights of its members as well as to collect and distribute royalties in respect of musical works owned by it. That indeed, the said matter is pending judgment and that there are orders issued on 12.03.2021 in favour of MCSK still in force.
35. In MCSK's view, HCCHR Petition No. E435 of 2020 is materially different from the instant suit for the reasons that it is between different parties, the main respondents in HCCHR Petition No. E435 of 2020 being the Attorney General and KECOBO Board; it challenges, in the main, constitutionality of a statute and its enforceability by the state with a focus on whether MCSK requires a license to administer collect and administer its members rights and also whether the state can impose a value on music; and Skiza tunes and revenues accruing from it are not the subject matter of the proceedings.



36. MCSK states that the grant of the orders sought strengthens rather than contradicts the orders of Justice Mrima in force at the moment and that Safaricom should be a neutral party to these proceedings and it is in its interest to have royalties paid to the rightful owner unless they are acting in cohort with the Interested Parties to exploit economic rights owned by MCSK unlawfully.

### **Xpedia's and Liberty's Objection**

37. As stated, Xpedia and Liberty seek the striking out of the suit for having being instituted by way of Originating Summons as the prayers sought do not fall under the purview of Order 37 Rule 11 of the Rules and is therefore contrary to section 19 of the Civil Procedure Act and Order 3 Rule 1 (1) of the Rules.

### **MCSK's Response**

38. In response to the Preliminary Objection, MCSK submits that it filed a suit based on a deed and written instruments and the only way to approach a Court in such a case is by an originating summons and that is Order 37 Rule 11 of the Rules. Thus, MCSK submits that the assertions about reliefs sought and all the other things alleged in the Preliminary Objection do not arise and that Order 37 is particular on instances or suits that require an originating summons and that the one filed before the court is one of those suits that require an originating summons. Thus, MCSK presents that the Preliminary Objection is not anchored on any law and therefore urges the Court to dismiss it.

### **KECOBO's Application**

39. KECOBO states that it is a state corporation established under the Copyright Act to administer copyright and related rights in Kenya including license and supervise the activities of CMOs and that it has been greatly involved in administration of technical matters revolving around copyright and related rights in Kenya. KECOBO states that it has a legitimate interest to be enjoined in this suit to submit on copyright and related rights questions which are fundamental to the suit's determination. That this suit is of great public interest as the outcome is likely to affect exploitation of copyright and related rights of millions of right holders in Kenya and beyond Kenya and that KECOBO's participation in these proceedings will substantively contribute towards realizing a decision that is well informed professionally sound, and amenable to public interest.

### **MCSK's Reply**

40. MCSK opposes the KECOBO's application on the ground that KECOBO has outrightly taken sides by their conduct and the position they have taken previously. That an amicus curiae is not supposed to take any side in the proceedings but help the Court in fair adjudication of the matter but KECOBO intends to clothe itself in the amicus garments and in that disguise be a party with interests in the proceedings.
41. MCSK contends that history is stubborn and because MCSK and KECOBO have pending issues to be resolved, clearly, KECOBO cannot be objective even if they wanted to be. It thus urges the court to decline the application made by KECOBO because they have an interest in the suit and even if they deny that, then they will be biased because MCSK had litigated against them in the mentioned petition HCCHR Petition No. E435 of 2020 and that the amicus must not only claim impartiality but must appear so.



## Analysis and Determination

42. I have gone through the applications, rival depositions and submissions of the parties. Safaricom, Xpedia and Liberty have raised technical issues that impeach the competence of the suit and the jurisdiction of the court to entertain the same in their respective applications and Objection and therefore, I propose to first deal with them before determining those of KECOBO and MCSK, if at all.

### Whether the Originating Summons is properly before the court

43. As stated, Xpedia and Liberty state that the suit ought to be struck out for having been instituted by way of Originating Summons as the prayers sought do not fall under the purview of Order 37 Rule 11 of the Rules and is therefore contrary to section 19 of the *Civil Procedure Act* and Order 3 Rule 1 (1) of the Rules which provide that ‘Every suit shall be instituted in such manner as may be prescribed by rules’ and that ‘Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.’ Order 37 Rule 11 of the Rules states that, “Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.”
44. As submitted and highlighted by the parties, the issue of originating summons has been discussed in a catena of decisions. In *Kenya Commercial Bank v Oisebe* [1982] eKLR, the Court of Appeal cited several decisions with approval including the dictum of Windham CJ., in *Ramji Kulsumbhai v Ramji’s Executors and Others* [1957] EA 701 where he stated that, “It was pointed out in *Re Giles (2)* [1980] 43, Ch D 391, that such procedure was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.” (see also *Bhari v Khan* [1965] EA 94). The position in *Oisebe’s Case* (Supra) was affirmed by the Court of Appeal in *Kibutiri v Kibutiri* where the court once again stated as follows:

The procedure by way of originating summons is intended: “to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.” This was said in *Re Giles (2)* [1890] 43 Ch D 391, a decision cited with approval by this court’s predecessor in *Kulsumbhai v Abdulhussein* [1957] EA 699. See also *Bhari v Khan* [1965] EA 94 in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.

45. On the basis of the cases cited above, the Originating Summons would ordinarily be struck out but the law has since changed. Order 37 rule 19 of the Rules provides as follows:

[Order 37, rule 19.] Powers of court upon hearing of summons.

19. (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.



- (2) Where the court makes an order under subrule (1), Order 11 shall apply.
- (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
- (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).
46. The Court of Appeal (per Ouko P.) stated in *Kenya Hotels Ltd v Oriental Commercial Bank Ltd* (Formerly known as *The Delphis Bank Limited*) NRB CA Civil Appeal No. 252 of 2009 [2019] eKLR that, “an originating summons cannot therefore be defeated merely because the dispute is highly contentious, complex or involving serious questions of law.” The court has the jurisdiction to issue directions and direct the manner in which it shall proceed. Subrule 2 of Rule 19 aforesaid is also clear that even if the matter ought to have been commenced by way of a plaint, the court may still give directions instead of striking it out. The Court of Appeal made the same point in *Shadrack BungeI (Suing as Administrator of the Estate of Joseph Kipkering- Deceased) v Selina Jerotich (Sued as the administrator of the Estate of Mary Jepkosgei Kiswai- Deceased)* [2021] eKLR when the court dealt with the same issue and explained that, “The only issue, we respectfully disagree with the learned Judge, is his finding that an Originating Summons was an unsuitable vehicle to take the dispute to court, since in his view, the dispute was not one envisaged under Order 37 of the Civil Procedure Rules. The truth is that by virtue of that very Order 37 Rule 19 the summons can be converted into a plaint if the circumstances allow.”
47. Based on the provisions of Order 37 rule 19 of the Rules, I decline to strike out the Originating Summons merely because the suit ought to have been brought by way of a different pleading other than an originating summons. The Objection dated 06.10.2022 is therefore dismissed.
- Whether the instant suit is Res judicata HCCHR Petition No. E435 of 2020
48. In its application, Safaricom stated that the present suit is also similar to HCCHR Petition No. E435 of 2020 that is pending judgment before the court. However, MCSK produced the judgment delivered by the court on 30.09.2022.
49. For res judicata to apply, the following elements must all be satisfied; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see *Gichuki v Gichuki* [1982] KLR 285).
50. I have gone through the pleadings in this suit and those in HCCHR Petition No. E435 of 2020 in which MCSK filed a petition against KECOBO, the Attorney General and the Cabinet Secretary Ministry of ICT, Innovation and Youth Affairs. In its petition, it sought inter alia a declaration that section 46, 46A-G of the *Copyright Act* offends Article 40 of *the Constitution* to the extent that it perpetuates infringement/violation of intellectual property rights by requiring a rights holder to seek a license before exercising/exploiting/administering its own rights, a declaration that section 46A of the *Copyright Act* is unconstitutional and offends Article 27 and 40 of *the Constitution* to the extent that it allows the Respondents to arbitrarily peg value of music/tariff to a percentage of business permit/liquor license, a declaration that section 46A of the *Copyright Act* perpetuates discrimination and violates the right to property by imposing a flat rate tariff on broadcasters of musical works and a declaration that MCSK does not require a collecting license to administer/enforce/collect royalties in respect of its resident and non-resident authors, composers, arrangers and publishers of musical works who are its members.



51. Juxtaposing the parties and prayers aforementioned in HCCHR Petition No. E435 of 2020 and those in the instant suit, it is obvious that the same are materially different. The petition challenged the constitutionality of section 46A of the Copyright Act, the manner in which tariffs are to be applied and the requirement by MCSK to have a collecting license to administer/collect and distribute royalties on behalf of its members. In this suit, MCSK seeks to assert its mandate by stating that it is them, as exclusive assignees rather than the Defendants and the Interested Parties, who have the right to collect and/or distribute royalties in respect of exploitation of Performing and Reproduction rights.
52. I therefore find and hold that this suit is not res judicata HCCHR Petition No. E435 of 2020 as the parties in the two suits are not only different but the issues and subject matter for determination are also substantially different. Safaricom's Notice of Motion dated 19.07.2022 is therefore dismissed.

### **Injunction sought by MCSK**

53. My disposal of the Xpedia's Objection and Safaricom's application means that I can now determine MCSK's Notice of Motion which principally seeks an injunction against the Defendants and the Interested Parties and an order against the Defendants to render accounts to MCSK in respect of royalties due for the exploitation of Performing and Reproduction Rights in copyrighted musical works in the catalogue/repertoire exclusively assigned and reciprocated to MCSK for the period 01.01.2020 to 30.06.2022.
54. The parties agree that in order to succeed in an application for an injunction, MCSK as the applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. These three conditions are to be applied as separate, distinct and logical hurdles which the application is expected to surmount sequentially (see *Giella v Cassman Brown* [1973] EA 348 and *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR). This means that if MCSK does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
55. As to what constitutes a prima facie case, the parties have also rightly submitted that the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is, "...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter." Therefore, MCSK is to demonstrate and establish a case that it has an exclusive mandate to collect and distribute royalty payments on behalf of its members to the exclusion of the Defendants and the Interested Parties.
56. MCSK submitted that the first reason why this case is prima facie is because there are deeds of assignment through which MCSK has been granted exclusive rights by its members to collect royalties and distribute to them. The second reason is that when Safaricom was sued by one of the assignors for playing their music, Safaricom stated that MCSK had given them permission to play the music. That these two grounds are clear indicators that MCSK has a prima facie case with a probability of success.
57. In response, the Defendants and the Interested Parties stated that they collect and remit royalties on the strength of Licensing Agreements entered into between the PRSPs and the musical copyright owners, authorizing their copyright works to be used on digital platforms and the PRSPs in turn, receive royalties from Safaricom and Airtel and forward the amount due to the copyright owners directly to them.



58. According to Safaricom, the judgment in HCCHR Petition No. E435 of 2020, MCSK required to be licensed by KECOBO and that MCSK had not provided any evidence that it is duly licensed by KECOBO to carry out collective management and/or administration of copyright as required by section 46 of the Copyright Act.
59. I note that both parties have relied on and have annexed Deeds of Assignment and Licensing Agreements that both assign such rights or license to the parties to deal in the copyrighted owners' rights and in return the parties collect and/or share out the royalties or monies collected from the use of those rights. These Agreements have not been impugned meaning that MCSK's argument of exclusivity cannot hold at this stage. I cannot also ignore the court's decision in HCCHR Petition No. E435 of 2020 which found that MCSK was a CMO within the meaning of the Copyright Act and therefore subject to lawful regulation including licensing by KECOBO. Safaricom have averred that MCSK holds no such license to act as a CMO and thus, is not able to act as a CMO in negotiating, collecting and distributing royalties on behalf of its copyright rights holders and members. This further negates MCSK's position as being the only entity that can collect and administer royalties as the absence of a license means that it cannot carry out those roles.
60. It is for the above reasons that I find that MCSK has not made out a prima facie case with a probability of success and in line with the decision in Nguruman Limited(supra), its quest for an injunction stops at this point. Since no prima facie case has been set out that it is the exclusive Assignee of the copyrighted owners' rights, it has no right at this stage to know about the accounts of the Defendants, the Interested Parties as their agreements with the copyright owners have little or nothing to do with MCSK.
61. MCSK's application therefore fails and is therefore dismissed.

#### **KECOBO's application for Amicus Curiae**

62. As stated, KECOBO seeks to be an Amicus Curiae as it contends that this suit is of great public interest as the outcome is likely to affect exploitation of copyright and related rights of millions of right holders in Kenya and beyond and that KECOBO has a legitimate interest to be enjoined in this suit as Amicus Curiae to shed light to diverse copyright and related rights questions which are fundamental to the suit's determination. That participation of KECOBO in the proceedings will substantially contribute towards realizing a decision that is well informed, professionally sound and amenable to public interest.
63. The Defendants and the Interested Parties do not oppose KECOBO's application. MCSK opposes it by claiming that KECOBO has already taken sides on this matter in light of their previous litigation in HCCHR Petition No. E435 of 2020.
64. MCSK has rightly cited the Supreme Court decision in Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others SCK Petition No. 12 of 2013 [2015] eKLR which fortified the position of an amicus curiae and the guiding principles that the court is to apply considering an amicus application. The apex court held as follows:
- (41) From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:
- i. An amicus brief should be limited to legal arguments.
  - ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.



- iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of *the Constitution's* call for resolution of disputes without undue delay. The Court may therefore, and on a case-by-case basis, reject amicus briefs that do not comply with this principle.
- iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
- v. The Court may call upon the Attorney- General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
- vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v. IEBC & Others; S.C. Petition No. 5 of 2013*-Katiba Institute's application to appear as amicus).
- vii. An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.
- viii. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.
- ix. In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.
- x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.

(42) In addition, we would adopt, with respect, certain guidelines which emerge from Mr. Justice Odunga's decision in the Justice Tunoi case (op.cit.) :

- xi. The applicant ought not to raise any perception of bias or partisanship, by documents filed, or by his submissions.
- xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
- xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.
- xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
- xv. Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.

(43) In addition to these guiding principles, the following directions may be applied by a Court considering an amicus application:



- i. A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as amicus.
- ii. The Court may exercise its inherent power to call upon a person to appear in any proceedings as amicus curiae.
- iii. In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as amicus curiae, and denial or acceptance such of an application should have finality.
- iv. The Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.
- v. The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as amicus curiae.

65. MCSK has raised the issue of impartiality of KECOBO and the perception of bias against it. I have gone through the amicus brief attached in KECOBO's application and note that it tends to support the position taken by the Defendant and the Interested Parties that PRSPs and copyright owners are free to contract with each other and that CMOs such as MCSK have no exclusive right to receive and distribute royalties from the Defendants. MCSK has also stated that MCSK was involved in mismanagement and loss of royalties collected on behalf of right holders and that its license has never been reinstated to date since the year 2020. My reading of this brief and the history of KECOBO and MCSK in HCCHR Petition No. E435 of 2020 leads me to conclude that an ordinary litigant will perceive the position taken by KECOBO in its brief to be biased and against MCSK. I therefore reject KECOBO's application.

66. Notwithstanding the position I have taken regarding KECOBO, I have no doubt that KECOBO has an interest in these proceedings. It has been mentioned by all the parties and I think it is in the interests of justice that it is joined as an interested party to these proceedings in order to effectively determine the dispute.

### **Disposition**

67. In sum, I now dismiss the applications dated 08.07.2022, 19.07.2022, 18.08.2022 and the Preliminary Objection dated 06.10.2022. Since all parties have lost, each party shall bear its own costs. KECOBO is hereby joined as the 5<sup>th</sup> Interested Party.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2024.**

**A. MABEYA**

**JUDGE**

