



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

PETITION NO. E011 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 36, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION OF ARTICLES 27, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

FRANCIS NZIOKI KAVUU.....APPLICANT/PETITIONER

VERSUS

KENYA COPYRIGHT BOARD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF ICT,

INNOVATION & YOUTH AFFAIRS.....3RD RESPONDENT

RULING

1. This ruling is in respect to the Preliminary Objection dated 08.01.2021 filed by the 1st Respondent herein wherein it raised several preliminary points of objection in point of law with the principal objection being that this court lacks jurisdiction to determine the matter and grant the reliefs sought as there is a Copyright Tribunal established under section 48 of the Copyright Act to hear appeals against the 1st Respondent's refusal to grant a certificate of registration to a collective management organization.

2. The preliminary objection aforesaid is supported by the grounds set out therein as follows:

a) This Honourable Court lacks jurisdiction to determine the matter and grant the reliefs sought because there is a Copyright Tribunal established under section 48 of the Copyright Act to hear appeals against the 1st Respondent's refusal to grant a certificate of registration to a collective management Organization.

b) The cause of action arose in Nairobi and all parties herein and their respective advocates reside in Nairobi and not Machakos. Therefore, the petition ought to have been filed in Nairobi for convenience of the parties.

c) There is no cause of action. The cause of action has extinguished because of the decision by the 1st Respondent related to revocation of Music Copyright Society of Kenya license for year 2020 which has already expired.

*d) The Orders sought herein are contrary to the Court Order's dated 9th December 2020 in **Petition E4 of 2020 Francis Nzioka Kavuu v Kenya Copyright Board and Others** whose net effect is to prevent the 1st Respondent from determining whether the interests of members of the collective management organization are adequately protected while considering the application for*

licensing for the year 2021 as required by Section 46(4) of the Copyright Act until the case is heard and determined.

3. The background to these proceedings was the official letter by the Kenya Copyright Board dated 10.12.2020. The letter noted the revocation of the license of the Music Copyright Society of Kenya through a meeting of the Kenya Copyright Board of Directors held on 10. 12. 2020. The same was said to have been adopted on 21.9.2020 as the final step due to the failure of the Petitioner to adhere to the provisions of Section 46(9) of the Copyright Act in fulfillment of licensing conditions set out by the 1st Respondent on 24.01.2020. The Correspondence is what has triggered this petition.

4. Parties were directed to canvass the preliminary objection by way of written submissions. It is only the submissions of the Petitioner and the 1st Respondent that are on record.

5. In submissions filed on 27.01.2021, Counsel for the 1st Respondents opted to abandon ground 2, 3 and 4 of its Preliminary Objection and rely on ground 1 only. More specifically, the 1st Respondent submitted on the following Preliminary Objection;

“This Honourable Court lacks jurisdiction to determine the matter and grant the reliefs sought because there is a Copyright Tribunal established under section 48 of the Copyright Act to hear appeals against the 1st Respondent’s refusal to grant a certificate of registration to a collective management Organization.”

The court was urged to dismiss the petition with costs.

6. According to Counsel for the 1st Respondent, the instant matter involves a Petitioner aggrieved by the decision of the Kenya Copyright Board and as stipulated under section 21 (1) of the Copyright Act No. 12 of 2001 such a party may, within 60 days from the date of the decision of the Board, appeal to the Copyright Tribunal. The Copyright Tribunal being an appointment of the Chief Justice is for the specific purpose of exercising jurisdiction under the Copyright Act where any matters referred to it are determined by such Tribunal.

7. The Counsel further submitted that it is trite law that where a dispute resolution mechanism exists outside Courts, the same ought to be exhausted before the jurisdiction of the Court is invoked. He relied on Article 159 (2) (c) of the Constitution and section 9 (2) and (3) of the Fair Administrative Action Act No. 4 of 2015. He further relied on the cases of: ***National Environment Management Authority, CA No. 84 of 2010 and Vania Investment pool ltd. Capital Markets Authority & 8 Others, CA NO. 92 OF 2014.***

The Petitioner herein is appealing against the 1st Respondent’s decision communicated on 10.12.2020 to revoke the Music Copyright Society’s collecting Management Organization 2020 license, denying access to funds, refusing to consider and grant the operating license for the year 2021. This appeal falls within the jurisdiction of the Copyright Tribunal by virtue of Section 21 and 28 (4) (b) of the Copyright Act No. 12 of 2001 in the first instance.

8. The Counsel further submitted that where an issue is pending in a court of law for adjudication between the same parties, the issue is sub-judice and any other Court is precluded from trying that issue as long as the first suit is ongoing. He quoted the case of ***Republic v. Paul Kihara Kariuki, Attorney General & 2 and Law Society of Kenya HCJR/E045/2020***. He submitted that a similar Petition, dated 24.12.2020 which is the same date as the Notice of Motion and Petition before this Honourable Court, seeking similar orders has also been filed by Music Society of Kenya at Nairobi under ***Petition No. E435 of 2020 Music Copyright Society of Kenya v. Kenya Copyright Board, Attorney General and Cabinet Secretary Ministry of ICT, Innovation and Youth Affairs***. The same seeks exactly the same orders as this Petition before this Honourable Court and the advocate is the same as the one acting in this matter.

9. Learned Counsel finally submitted that this Honourable Court should not at this stage delve into the merits of the substantive issues raised in the Notice of Motion dated 24.12.2020 and the Petition of even date as doing so will prejudice the parties since they may want to revert to the statutory body mandated to deal with the issues raised. It was submitted that the application dated 24.12.2020 has been filed contrary to section 6 of the Civil Procedure Act, and is an abuse of the Court process as this Honorable Court lacks the requisite jurisdiction to hear and grant the orders prayed for. Learned counsel maintained that the Orders granted on 28.12.2020 be set aside and the Petitioner’s Notice of Motion and Petition dated 24.12.2020 be struck off with costs to the Respondents on grounds that it is an abuse of court process.

10. In response to the 1st Respondent’s submissions, the Petitioner submitted that the 1st Respondent’s Preliminary Objection did not meet the definition of a preliminary Objection as captured in the case of ***Mukisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd (1969) E.A 696***.

Counsel for the Petitioner also noted that from the Petitioner’s pleadings it is clear that the Petition is not based on any issues that would amount to the same falling within the jurisdiction of the Tribunal as noted under section 48 of the Copyright Act. The Counsel referring to the contents of the letter dated 10.12.2020 noted that the actions by the 1st Respondent infringes on the petitioner’s Intellectual Property rights and such contravenes the provisions of Article 40 (5) of the Constitution in which the state is enjoined to promote and protect the intellectual rights of the people of Kenya. He relied on the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others (2012) eKLR para 68 and Republic V Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited (2014) eKLR***.

11. Counsel for the Petitioner further submitted that the institution of this Petition is derived from Article 22 of the Constitution which gives each and every person the right to institute Court proceedings claiming that a Right as enshrined in the Bill of Rights has been violated, infringed or is threatened. Article 258 further granting Locus to any person to institute proceedings where a provision of the Constitution is contravened. Article 23(1) going ahead to bestow jurisdiction upon the High Court to hear and determine issues pertaining to the violation of human rights which jurisdiction is further restated under Article 165 (3).

He further relied on the cases of ***Kenya National Chamber of Commerce & Industry- Machakos Branch & Another v. Music Copyright***

12. On the 1st Respondent's decision to abandon three of the grounds in its Preliminary Objection and that the 1st Respondent's objection that the cause of action arose in Nairobi and that all the parties to this suit reside in Nairobi and as such the Petition ought to have been filed in Nairobi, the Counsel for the Petitioner submitted that the procedure in Constitutional Petitions such as is before this Court are governed by the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under Rule 8(1)**. He further quoted the case of **Chispine Munyane Papa & Another vs National Environment Management Authority & Another (2018) eKLR**.

Counsel for the Petitioner further relied on Article 165 (3) of the Constitution of Kenya quoting the case of **Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another (2013) eKLR**.

13. With regard to the Orders being referred to by the 1st Respondent, the Counsel for the Petitioner submitted that there is no relationship between the said Order and the issues being raised in this Petition such as to merit the ground raised by the 1st Respondent.

14. The Counsel for the Petitioner further submitted that the 1st Respondent has additionally sought to introduce a new ground of objection through their written submissions. The 1st Respondent claims that this Petition offends the sub-judice rule since there is a petition seeking similar orders and has been filed by Music Copyright Society of Kenya at Nairobi, the Counsel for the Petitioner finally submits that the onus lies upon the 1st Respondent to adduce evidence to show that this suit is similar to the Nairobi Petition alluded to and that it offends the sub-judice rule.

15. The Counsel for the Petitioner, finally submitted that the Preliminary Objection by the 1st Respondent lacks merit and should therefore be dismissed with costs.

16. I have given due consideration to the preliminary objection raised by the 1st Respondent and the submissions presented. A valid Preliminary Objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696**, the *Locus classicus* on Preliminary Objections in this region, **Law JA** stated:

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

17. For a Preliminary Objection to succeed, the following tests ought to be satisfied: firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

In the words of Sir Charles Newbold P at page 701, B: -

"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

18. Having looked at the definition of a preliminary objection, the issue for determination is whether this court has jurisdiction to entertain the petition.

19. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the same, then the suit would be deemed a nullity as per the decision of **Nyarangi J A** in the case of **Owners Of Motor Vessel "Lilian S" Vs Caltex Oil (K) Ltd [1989] KLR 1** that: -

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."

20. In law no court or person assumes jurisdiction. Jurisdiction is a creation of statute. In Kenya, all courts derive their power from the Constitution under Article 159. In selecting a court with power over the type of litigation, regard must be made to the enabling law which empowers such court to hear such a case. Subject to clause (5), the High Court shall have--

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--*

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

e) *any other jurisdiction, original or appellate, conferred on it by legislation.*

21. The Petitioner herein in principle is asking this Honourable Court to interfere with the authority of the 1st Respondent's office on grounds that it threatened not to renew the operating license for 2021 and not to review its adverse and out rightly unconstitutional decision on condition that the Music Copyright Society withdraws unconditionally all cases perceived to be sponsored by the society. The petitioner further averred unlawful and illegal decision violating the Intellectual Property rights of performing and broadcasting as well as mechanical reproduction rights of over 14,000 residents and non-resident authors, composers, arrangers and publishers of musical works must not be stopped by the 1st Respondent and hence the need for the orders sought.

22. Article 23 of the Constitution of Kenya grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

23. It is noted that the 1st Respondent has abandoned the rest of the grounds raised in the preliminary objection and has concentrated on the single ground namely that this court lacks jurisdiction to determine the matter in view of the existence of the Copyright Tribunal established under sections 12 and 48 of the Copyright Act. It was the view of counsel that the petitioner should have exhausted the available dispute resolution mechanisms.

24. The objection by the 1st Respondent is that the petitioner had an alternative remedy by lodging an appeal to the Copyright Tribunal and ought not to have taken the route of a constitutional petition seeking the reliefs now sought. Indeed, it is the right of every Kenyan to approach the High Court whenever their rights are infringed. That might be the case but due the fact that there is some alternative remedy available to the petitioner, this court has to consider whether the petitioner is entitled to approach this court for redress despite the availability of an alternative remedy. In the case of **Republic V. The National Environmental Management Authority CA No. 84 of 2010** the court held that where parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. It is noted that the 1st Respondent had made a decision dated 10. 12. 2020 to revoke the Music Copyright Society's Collecting Management Organization 2020 license and denied them access to funds and declined to consider an operating license for the year 2021.

25. A perusal of sections 21 and 48 of the Copyright Act show that the decisions of the 1st Respondent are to be challenged before the Copyright Tribunal and are as follows:

Section 21(1)----**“A person aggrieved by the decision of the Board under this Act may, within sixty days from the date of the decision, appeal to the Copyright Tribunal.”**

Section 48(1)----**There shall be a Copyright Tribunal appointed by the Chief Justice for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such Tribunal.”**

Section 48(4) (b) (i)-----**Subject to section (5), the Copyright Tribunal shall have jurisdiction to hear and determine-**

a).....

b) An appeal against-

i) The Board's refusal to grant a certificate of registration to collective management organization;

ii) Imposition of unreasonable terms and conditions by the Board for the grant of a certificate of registration;

iii) Unreasonable refusal by a collective management organization to grant a license in respect of a copyright work;

iv) Or imposition of unreasonable terms of conditions by a collective management organization for the grant of a license in respect of a copyright work.”

26. From the above provisions, it is clear to me that the 1st Respondent's duty is to manage and regulate the affairs of collective management

organizations and ensure that they are properly managed for the benefit of its members. Section 48 of the Copyright Act has provided for a tribunal whose main function is to hear and determine appeals against the decisions of the 1st Respondent. I note that the decision made by the 1st Respondent has angered the petitioner who was thus expected to lodge his appeal to the above tribunal. The petitioner has maintained that his constitutional rights have been violated and hence this petition. I find that his grievances could still be addressed by the said tribunal since the complaint in issue related to the decision made by the 1st Respondent and thereafter move to the High Court if not satisfied by the decision of the tribunal. That in my view was the appropriate approach that ought to have been taken by the petitioner. That way, the petitioner could then be said to have exhausted the dispute resolution mechanisms provided before moving to the High Court. The constitution vide Article 159(2)(c) recognizes the use of alternative dispute resolution mechanism. Again, the Fair Administrative Actions Act recognizes the need for an aggrieved party to exhaust alternative dispute resolution mechanisms before approaching the High Court. Section 9(2) and (3) of the Fair Administrative Actions Act No. 4 of 2015 provides as follows:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

Section 9(3) of the Act provides that the High Court or subordinate court shall, if it is satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings.

27. From the foregoing, it would appear that the petitioner was expected to approach the Copyright Tribunal. However, it is noted that the petitioner has opted to file a constitutional petition alleging violation of his constitutional rights namely that his intellectual property rights under Article 40(5) of the Constitution have been infringed. The issue for consideration is whether the tribunal aforesaid has jurisdiction to determine constitutional violations that have been raised by the petitioner. Indeed, the petitioner has a right to approach this court whenever his constitutional rights are violated. The tribunal aforesaid has jurisdiction to hear appeals arising from decisions of the 1st respondent but the nature of the prayers sought herein leaves no doubt that they require to be determined by this court. The prayers are as follows:

a) A declaration that the decision of the Kenya Copyright Board to suspend Music Copyright Society’s license for 2020 is unreasonable and unlawful and constitutes a violation of articles 10, 40(5) and 47 of the constitution of Kenya 2010.

b) A judicial review order of certiorari quashing the decision dated 10.12.2020 to revoke the Music Copyright Society of Kenya’s 2020 license, deny access to funds, refuse to consider and grant operating license for the year 2021.

c) A judicial review order restraining the 1st Respondent from interfering with administration/collection of royalties in respect of performing and broadcasting as well as mechanical reproduction rights of resident and non-resident authors, composers, arrangers, and publishers of musical works.

28. From the above reliefs sought and the powers of the tribunal, it is clear that the Copyright Tribunal’s mandate does not extend to determining matters regarding constitutional violations as now claimed by the petitioner and as such it cannot give to itself jurisdiction in excess of that conferred by statute. In the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others (2012) eKLR** the Supreme Court held as follows :

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

29. Again, the issue of a tribunal exceeding its jurisdiction than that conferred by law was discussed by a three Judge bench in the case of **Republic V Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited (2014) eKLR** when they expressed themselves thus :

“In our view where a statute donates power to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic Vs Kenya Revenue Authority Ex-Parte Aberdare Freight Services Ltd & 2 Others(2004) 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its powers and duties as a result of its own errors or the conduct of others and based on East African Railways Corp Vs Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 (1973) E.A 327, the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it ...Therefore where the law exclusively provides for the jurisdiction for a body or authority, the body or authority must operate within its limits and ought not to expand its jurisdiction through administrative craft or innovation.”

30. As noted above, the petitioner has approached this court pursuant to article 22, 23 and 258 of the constitution claiming violation of his rights under article 40(5) of the constitution. This court has jurisdiction to entertain the matter. The provisions of section 48 of the Copyright Act does not confer the Copyright Tribunal with the jurisdiction to hear and determine constitutional violations arising from revocation of certificate of registration, denying Collective Management Organization access to funds or interfering with their operations by issuing threats. If the petitioner has raised claims of violations of the Bill of Rights, then such claims can only be determined by the High Court and not the tribunal.

31. The 1st Respondent has also claimed that the suit ought to have been filed in Nairobi where the parties and counsels reside and carry on business. That might be the case but then article 165(3) of the constitution gives the High Court unlimited and original jurisdiction throughout the Republic. The petitioner herein has described himself as a resident of Machakos and hence it is perfectly in order for him to lodge the petition in this court. Further, Machakos is a few kilometres from Nairobi and which does not unduly inconvenience the parties in

the suit. Hence, the 1st Respondent's objection regarding the issue of the court's territorial jurisdiction lacks merit.

32. The 1st Respondent's counsel vide his submissions has claimed that this matter is sub judice as there is a pending similar suit in a Nairobi court and went ahead to annex a copy thereof alongside his submissions. I find that to be quite irregular in that any evidence intended to be presented to court ought to be by way of affidavit evince or oral testimony. It is trite law that submissions cannot take the place of evidence. The appropriate way was for the 1st Respondent to file a replying affidavit and avail the said evidence. Nothing barred the 1st respondent from doing that. If the objection raised herein requires such facts to be canvassed, then the same does not amount to a preliminary objection on pure point of law. The 1st Respondent should not hide behind the preliminary objection but should proceed to challenge the petition by filing its response to the petition so that the rival issues can then be thrashed out with finality.

33. In view of the foregoing observations, it is my finding that the preliminary objection raised by the 1st Respondent has not raised pure points of law as the same raises matters of fact that require to be canvassed. Consequently, I find the preliminary objection dated 8.01.2021 lacks merit and is dismissed with no order as to costs. The Respondents are granted leave to file and serve responses within fourteen days (14) from the date hereof while the petitioner is granted leave to file a further affidavit if need be within fourteen (14) days upon being served. Thereafter, the parties to set down the matter for directions on the disposal of the petition.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE