



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO 147 OF 2019**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOM AS ENSHRINED UNDER ARTICLES 35(1)(b) AND**

**43 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23,**

**258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 258**

**AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**PHILIP NJOROGE KIMANI.....PETITIONER**

**VERSUS**

**LIBERTY AFRICA TECHNOLOGIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**SAFARICOM LIMITED .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**THE PETITION**

1. The Petitioner through a Petition dated 9<sup>th</sup> April, 2019 seeks the following reliefs:-

*a. An order of declaration that the Respondents' continued refusal/denial of access by the Petitioner to the original 2<sup>nd</sup> Respondent's revenue reports/statements indicating the performance of the Petitioner's musical works on the 'Skiza Tunes' platform is without any just, lawful and reasonable cause and is in violation of the right to access information guaranteed of Article 35(1)(b) of the Constitution.*

*b. An order of declaration declaring that the 2<sup>nd</sup> Respondent's continued refusal/denial of access by the Petitioner to the '#622#' revenue verification platform for the musical works listed under 'Schedule B' is without any just, lawful and reasonable cause and is in violation of the right to access information guaranteed at Article 35(1) (b) of the Constitution.*

*c. An order of declaration declaring that the Petitioner's fundamental rights and freedom as enshrined under Article 43 of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents through their refusal to give to the Petitioner the information it requested or release all the original 2<sup>nd</sup> Respondent's revenue reports/statements indicating the*

*performance of the Petitioner's musical works on the 'Skiza Tunes' platform.*

*d. A compulsory order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to forthwith release to the Petitioner all the original 2<sup>nd</sup> Respondent's revenue reports/statements indicating the performance of the Petitioner's musical works on the 'Skiza Tunes' platform.*

*e. A compulsory order compelling the 2<sup>nd</sup> Respondent to forthwith give to the Petitioner access to the \*622# revenue verification platform for all the Petitioner's musical works listed under 'Schedule B' herein and which musical works are still in use on the 2<sup>nd</sup> Respondent's 'Skiza Tunes' platform.*

*f. An Order of Declaration declaring that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the Respondents herein as provided for under 35(1)(b) of the Constitution of Kenya, 2010.*

*g. The Court to assess the quantum of damages and compensation to be paid by the Respondents;*

*h. Costs of this Petition.*

### **THE 1<sup>ST</sup> RESPONDENT'S RESPONSE**

2. The 1<sup>st</sup> Respondent is opposed to the Petition and has filed Replying Affidavit sworn by Stanley Wachira dated 15<sup>th</sup> May, 2019, and a further Affidavit by Stanley Wachira sworn on 11<sup>th</sup> March 2020.

### **THE 2<sup>ND</sup> RESPONDENT'S RESPONSE**

3. The 2<sup>nd</sup> Respondent is also opposed to the Petition and rely on its Replying Affidavit dated 20<sup>th</sup> May 2020.

### **BACKGROUND**

4. In 2008, the 2<sup>nd</sup> Respondent introduced a caller ring back tone service commonly known as 'Skiza Tunes' whereby subscribers can customize the ring back tone on their Safaricom line by leasing ringtone from the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents entered into Content Provision Agreement whereby the 1<sup>st</sup> Respondent would sub-license to the 2<sup>nd</sup> Respondent various content rights licenses obtained from musicians, for use in the 2<sup>nd</sup> Respondent's 'Skiza Tunes' platform.

5. In 2013, the Petitioner, being a singer, composer and/or producer of certain musical works, executed a Mechanical Deed of Assignment dated 9<sup>th</sup> January 2013 with the 1<sup>st</sup> Respondent: effectually assigning to it the rights in his musical works for use by the 2<sup>nd</sup> Respondent through sales and marketing of ringtones and ring-back tones on the 2<sup>nd</sup> Respondent's 'Skiza Tunes' platform. Consequently upon the foregoing assignment, the 1<sup>st</sup> Respondent coded the Petitioner's musical works and put them to use by the 2<sup>nd</sup> Respondent in the 2<sup>nd</sup> Respondent's 'Skiza Tunes' platform; and from which use of the musical works, the 2<sup>nd</sup> Respondent collects revenues that are shared between the 1<sup>st</sup> Respondent and the Petitioner as per the terms of the Deed of Assignment.

6. The 1<sup>st</sup> Respondent being a Premium Rate Service Provider (PRSP), in conformity with the terms of the Deed of Assignment aforesaid, periodically remits to the Petitioner a part of the revenue collected by the 2<sup>nd</sup> Respondent upon the use of the Petitioner's musical works within the 'Skiza Tunes' platform.

### **PETITIONER'S CASE**

7. The Petitioner's case is that both Respondents have conspired to keep secret the true value and earnings/revenue of the Petitioner's musical works in use on the 'Skiza Tunes' platform. It is the Petitioner's contention and firm belief that the Respondents are underpaying him, and they have connived to issue the Petitioner with adulterated revenue reports which do not show active daily/monthly number of musical downloads.

8. It is further Petitioner's connotation that while the 1<sup>st</sup> Respondent, being the 2<sup>nd</sup> Respondent's authorized Premium Rate Service Provider (PRSP), directly received the Petitioner's revenues from the 2<sup>nd</sup> Respondent and on behalf of the Petitioner. The 2<sup>nd</sup> Respondent also formulated a platform known as the '\*622#' platform for use by musicians to verify the correctness of revenues earned from the use of their musical works on the 'Skiza Tunes' platform. It is further Petitioner's case that in furtherance of the above-said illegalities, the Petitioner has been deliberately denied access to the '\*622#' platform and is therefore unable to verify the correctness of the revenue received as a result of the use of some of his musical works on the 'Skiza Tunes' platform.

9. The Petitioner additionally avers that while the Petitioner yearns to verify the true value of his musical works and the correctness of the revenue remitted to him by the 1<sup>st</sup> Respondent, the Respondents have failed, refused and/or neglected to reveal/disclose to the Petitioner the 2<sup>nd</sup> Respondent's original 'Skiza Tunes' revenue statements despite numerous requests to do so, in outright violation of the Petitioner's constitutional right to information guaranteed at **Article 35 of the Constitution of Kenya**.

10. The Petitioner therefore intends to verify the authenticity and correctness of the revenue and revenue reports from the 1<sup>st</sup> Respondent by

comparing the extrapolated data therein with the original revenue reports generated by the 2<sup>nd</sup> Respondent that contains daily and monthly downloads of the Petitioner's musical works. The need for the aforesaid comparison is necessitated by the evidently clear consistent decline in the Petitioner's monthly revenue over the past year, and also due to the fact that before July, 2015, the Petitioner received little or no revenue for his musical works.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

11. The 1<sup>st</sup> Respondent case is that the Petition in so far as it relates to the 1<sup>st</sup> Respondent is an abuse of the Court process and has no merit for the reasons that:-

- a) The Petitioner's rights have not been infringed or threatened by infringement by the 1<sup>st</sup> Respondent.*
- b) The 1<sup>st</sup> Respondent has provided all documents sought by the Petitioner as admitted in pages 31 – 79 of the Petitioner's supporting affidavit.*
- c) The 1<sup>st</sup> Respondent promised to provide the remaining documents as requested and the same were provided through annexure marked 'OG-1' annexed to its replying affidavit of 15<sup>th</sup> May 2019 sown by Sidney Wachira and filed on 15<sup>th</sup> May 2019.*
- d) The 1<sup>st</sup> Respondent also provided the Petitioner with copies of statements of financial review in respect of all songs assigned to it by the Petitioner as forwarded to it by the 2<sup>nd</sup> Respondent through the annexure marked SW-1(a) and (b) of the further affidavit dated 11<sup>th</sup> March 2020 sown by Sidney Wachira and filed in Court on 12<sup>th</sup> March 2020.*
- e) The Petitioner has not complained to the 1<sup>st</sup> Respondent on any issue regarding the reports sent to it but instead rushed to this Court.*

### **THE 2<sup>ND</sup> RESPONDENT'S CASE**

12. It is averred by the 2<sup>nd</sup> Respondent that vide its Replying Affidavit dated 20<sup>th</sup> May, 2020 that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein entered into a Content Provision Agreement dated 24<sup>th</sup> April, 2009 ("The Agreement"). Under clause 8 of the agreement, the 1<sup>st</sup> Respondent agreed to grant the 2<sup>nd</sup> Respondent non-exclusive and revocable rights and licenses to use and reproduce the content delivered to it for the following purposes:-

- a) Marketing, selling, and licensing as applicable the content and;*
- b) Making a reasonable number of copies of the content for non-commercial backup and Archival purposes only.*

13. The 2<sup>nd</sup> Respondent further states that under clause 4 of the agreement the 1<sup>st</sup> Respondent gave the following warranties to the 2<sup>nd</sup> Respondent to the effect that:-

- a) The 1<sup>st</sup> Respondent had obtained the necessary licenses to copyright works including the right to distribute and/or assign rights to the copyright works.*
- b) The 1<sup>st</sup> Respondent had obtained and made payment for the necessary licenses, rights of use, assignment and approvals from all relevant authorities for the provision of copyright works.*
- c) The use, acquisition or supply of the copyright works by the 2<sup>nd</sup> Respondent to its end users shall not infringe in any way whatsoever the intellectual Property rights of any person. necessary licenses, rights of use.*

14. Further and in addition under clause 7 of the agreement the 2<sup>nd</sup> Respondent avers, the obligation of the 1<sup>st</sup> Respondent's included:-

- a) To obtain and make payments (where applicable) on time for all the necessary licenses, rights of use, assignments and approvals from any relevant authorities and the copyright owners for the provision of content and ensure that the approvals and the licenses are updated throughout the term of the agreement.*
- b) To obtain and maintain at its own cost compatible system being all such necessary equipment as are necessary for the provision of content.*
- c) To comply with the terms of the agreement and observe the best practices during the subsistence of the agreement.*

15. That it is 2<sup>nd</sup> Respondents' case that it offers the sound recordings on the Skiza platform for use and or sale to the various subscribers or end users who select the Petitioner's songs in digitized form to use as a caller ring back tone.

16. It is further stated by the 2<sup>nd</sup> Respondent, that it remits the revenue collected to the 1<sup>st</sup> Respondent only with respect to the schedule of songs that it has in its portal. The 2<sup>nd</sup> Respondent's case therefore is that the songs complained of by the Petitioner were not updated in the

Portal by the Petitioner as was required after the upgrade done to the system in 2017. As such, no revenue accrues to him with respect to those particular songs.

17. In conclusion, the 2<sup>nd</sup> Respondent aver that what is before this Court is a contractual dispute disguised as a Constitutional Petition.

### **SUBMISSIONS**

18. The Parties herein filed submissions in support of their rival position. The Petitioner filed submissions dated 5<sup>th</sup> February 2020; whereas the 1<sup>st</sup> Respondent's submissions are dated 17<sup>th</sup> August 2020 and those of the 2<sup>nd</sup> Respondent dated 29<sup>th</sup> September 2020. The submission as filed shall be considered in the analysis and determination of the Petition.

### **ANALYSIS AND DETERMINATION**

19. Upon consideration of the pleadings herein, rival submissions and various authorities relied upon by the parties, the following issues arise for consideration:-

**a) Whether the Petition meets the threshold of a Constitutional Petition.**

**b) Whether the Petitioners' right to access of information has been infringed by the Respondents.**

#### **A. WHETHER THE PETITION MEETS THE THRESHOLD OF A CONSTITUTIONAL PETITION.**

20. On the issue as to whether the Petition as drawn and filed meets the threshold of a constitutional Petition it is trite that, where it comes to matters concerning the violation of human rights is well expended and found in the case of *Anarita Karimi Njeru vs. Republic (1979) eKLR* where the Court stated that:-

**"...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."** (Emphasis added)

21. Similarly, in *Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR* it was held:-

**"Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any) ... In my view the Petitioner has failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not)."** (Emphasis added)

22. From the facts of this case and parties pleadings, it is not in dispute that the Petitioner herein voluntarily assigned his rights to the 1<sup>st</sup> Respondent herein. Further it is noted that it is not in dispute that the 1<sup>st</sup> Respondent had contracted the 2<sup>nd</sup> Respondent whereby the former licenced various content rights licenses obtained from musicians, for use on the "skiza platform". It is therefore evident that there is no privity of contract between the Petitioner and the 2<sup>nd</sup> Respondent to give rise to any rights averred to by the Petitioner. It is clear what exists in this matter is a contract between the Petitioner and 1<sup>st</sup> Respondent. The Petition is an attempt by the Petitioner to benefit from a clear contractual allegations of a contract that the 2<sup>nd</sup> Respondent is not a party.

23. A perusal of the Petition as drawn and filed it is clear that it has not set out with a reasonable degree of precision that of what he complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed. A party seeking constitutional reliefs is under obligation to prove violation of his rights under various provisions of the Bill of rights. It has time and again been clearly stated a party must not only state the provisions of the Constitution allegedly infringed in relation to the rights violated but has also to state the manner of infringement and the nature and extent of the infringement and nature and extent of injury suffered (if any). Considering the Petition herein, in my view, I find the Petitioner has failed to discharge the burden of proof as set out in the *Anarita Karimi Njeru v Republic Case (supra)*.

24. I find what is before this Court is not a constitutional Petition but a contractual dispute disguised as a Constitutional Petition. I therefore find that the Petition herein has not met the threshold of a Constitutional Petition.

#### **B. WHETHER THE PETITIONER'S RIGHT TO ACCESS OF INFORMATION HAS BEEN INFRINGED BY THE RESPONDENTS.**

25. The Petitioner contend that the failure or refusal to release the originals of the 2<sup>nd</sup> Respondent's "skiza Tunes" Revenue Report indicating the active daily (monthly) musical downloads, which information the Petition has sought in vain, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in violation of his rights as guaranteed under **Article 35 of the Constitution** which entitles him to access such information.

26. On the right to access information **Article 35 of the Constitution** provides:-

**"35. (1) Every citizen has the right of access to-**

*(a) information held by the State; and*

*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*  
*28 Constitution of Kenya, 2010*

*(3) The State shall publish and publicise any important information affecting the nation.”*

27. Further the right to information has also been given statutory underpinning under *Section 4 of the Access to Information Act, 2016*, as follows:-

**“4. Right to information**

**(1) Subject to this Act and any other written law, every citizen has the right of access to information held by-**

**a) The state; and**

**b) Another person and where that information is required for the exercise of protection of any right or fundamental freedom.”**

28. It should be clearly noted that the right of Access contains three key elements being thus, the first is the entitlement to information from the state or to information held by another person required for exercise of protection of a fundamental right and freedom under *Article 35 (1)*. The second element contained in *Article 35(2)* is the right to correction or deletion of untrue or misleading information that affects a person. *Article 35(3)* is the third element which imposes on the State the obligation on the State to publish and publicise important information. See *Charles Ombaga & 8 others vs. Attorney General & another [2014] eKLR*.

29. The intention in *Article 35(1)* was clearly to create two distinct situations with regard to the right of access to information: one in which the citizen are entitled as of right to information held by the State; the other in which a citizen could access information from another, thus a private person, for the exercise or promotion of another right or freedom. (See *Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 others (2013) eKLR*). The Petitioner herein only seeks to demonstrate a violation of the Petitioner’s right under *Article 35(1)(b) of the Constitution. Article 35(1)(b) of the Constitution*, which is the linchpin of the Petitioner’s case, is in the following terms:

**“35. (1) Every citizen has the right of access to – (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”**

30. The Petitioner have submitted that there had been a violation of his constitutional rights under *Article 35(1)(b) of the Constitution* as a consequence of the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish him with the original 2<sup>nd</sup> Respondent’s ‘Skiza Tunes’ revenue reports/Statements, which information essentially informs the Petitioner’s ability to earn a living through the use of his copyrighted musical works on the ‘Skiza Tunes’ platform: a fact that directly affects the Petitioner’s economic and social rights under *Article 43 of the Constitution*.

31. The 1<sup>st</sup> Respondent in response urge that there was no infringement of the Petitioner’s right to access of information by the 1<sup>st</sup> Respondent as alleged or at all and further urged that there is no genuine Constitutional Petition before this Court. This is based on, the Petitioner’s alleged admission on paragraphs 15 and 23 of the Petitioner’s supporting affidavit that **“the 1<sup>st</sup> Respondent has been periodically remitting to me revenue as a result of the use of my copyrighted musical works on the ‘skiza tunes’ platform.”**

32. Further it is noted that the Petitioner has attached to his supporting affidavit at pages 31 – 79 of his bundle of documents, revenue reports and statements in relation to his musical works sent to him by the 1<sup>st</sup> Respondent as sought in the letters referred to therein. Additionally it is also noted that the 1<sup>st</sup> Respondent sent the Petitioner copies of the statements of revenue as received by the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondent.

33. It is 1<sup>st</sup> Respondent’s case that the Petitioner did not raise any issue in relation to the revenue reports as submitted to him but instead opted to file this suit claiming a violation of his rights under *Article 35(1)(b) of the Constitution*. The action of which the 1<sup>st</sup> Respondent terms as an abuse of the Court process.

34. It should be appreciated that Constitutional litigation is a serious matter that should not be sacrificed at the alter in form of all manner of frivolous litigation christened as Constitutional Petition, when in actual fact are not and which would otherwise be adequately handled in other legally constituted forums.

35. Upon consideration of the Petition herein it is clear that the issues that were raised by the Petition herein are subject to a Mechanical Deed of Assignment which the Petitioner claims the 1<sup>st</sup> Respondent to have allegedly broken. I find that even if that was the case, which the 1<sup>st</sup> Respondent does not admit, the Petitioner herein ought to have persuaded his claim thereafter the provisions of the Mechanical Deed of Assignment through appropriate avenues, such as contract law, as compared to christening the issues therein as constitutional issues and filing the present Petition. This is a clear case of an abuse of the Court process.

36. To buttress the above proposition reliance was placed in the case of *Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority & another* (2016) eKLR and *Speaker of the National Assembly vs. James Njenga Karume* [1992] eKLR, as quoted with authority in the *Roshanara Ebrahim vs. Ashleys Kenya Limited & 3 others* [2016] eKLR case above pronounced itself that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

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

37. It should further be noted that Courts have on a number of occasions pronounced themselves on the need of upholding the principle of “constitutional avoidance.” The Supreme Court dealing with the principle in the case of *Communications Commission of Kenya & 5 others vs. Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014*, as quoted with authority in the *Roshanara Ebrahim vs. Ashleys Kenya Limited & 3 others* [2016] eKLR stated thus:-

**“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S. v Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]: “ I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”**

38. In view of the aforesaid I find that it is clear that the Petition herein is not a genuine Constitutional Petition.

39. Notwithstanding the above, I have to consider herein whether the Petition meet the Constitutional threshold for the provision of information held by the Respondents as provided for in **Article 35(1)(b) of the Constitution**. The Petitioner herein has not demonstrated, firstly, that the information so sought is held by the 1<sup>st</sup> Respondent and secondly he has not shown that the information so sought is “required” for protection of its economic and social rights under **Article 40 of the Constitution**.

40. The Courts have time and again pronounced themselves that for a person other than the state to be obligated to provide information to an applicant, the Applicant ought to show, firstly, that the information is held by that person. It is not enough for a party to speculate who has the information. Reliance on the proposition is placed in a decision by Justice Mumbi Ngugi in *Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 others* [2013] eKLR to wit, it was stated:-

**“Article 35(1)(b) states that ‘Every citizen has the right of access to- (b) information held by another person and required for the exercise or protection of any fundamental right or freedom.’ In my view, in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.”**

41. In the instant Petition, the Petitioner vide his own admission in paragraphs 15 and 23 of his supporting Affidavit to the Petition admits to have received revenue statements from the 1<sup>st</sup> Respondent in respect of the musical works in the original form from the 1<sup>st</sup> Respondent as received from the 2<sup>nd</sup> Respondent as requested by Petitioner. However the Petitioner does not consider the reports as produced as “original” but has not proved or given reason as to why he believes the original revenue reports other than the ones provided to him are in possession of the 1<sup>st</sup> Respondent. The Petitioner in this case has failed to demonstrate the information sought are held by the 1<sup>st</sup> Respondent.

42. As to what amounts to required information, the Constitutional Court by South Africa in the *Cape Metropolitan Council vs. Metro Inspection Services Western Cap CC and others* (10/99) [2001] ZASCA as quoted with authority in the *Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 others* [2013] eKLR case above, stated at paragraph 56 thus:-

**“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”**

43. Further as regards as to what is considered to be of assistance in the exercise or protection of the right, the Constitutional Court of South Africa in the *Unitas Hospital vs. Van Wyk and Another* (231/05) [2006] ZASCA 34, stated thus:-

**“[17] The threshold requirement of ‘assistance’ has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of ‘assistance’ will not be enough.”**

44. The Constitutional Court of South Africa in the case of *Unitas Hospital vs. Van Wyk and Another* (231/05) [2006] ZASCA 34, while dismissing the application for provision of a document, was however quick to point out that as to what consists of ‘require’ should be interpreted on a case to case basis. It stated thus:-

**“I respectfully share the reluctance of Comrie AJA to venture a formulation of a positive, generally applicable definition of what ‘require’ means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term ‘require’ with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: the question whether the information sought in a particular case can be said to be ‘required’ for the purpose of protecting or**

*exercising the right concerned, can only be answered with reference to the facts of that case having regard to the board parameters laid down in the judgment of our courts, albeit, for the most part, in a negative form.”*

45. From the Petitioners’ pleadings and submission it is not in doubt that the information sought by the Petitioner is not required for the exercise or protection of his economic and social rights under **Article 43 of the Constitution** as alleged since the information so sought is readily available to him. Further by virtue of the Petitioners’ own admission in paragraph 10 of the supporting affidavit to his Petition, the Petitioner confirms that the 2<sup>nd</sup> Respondent has formulated a Platform known as the \*622# platform for use by musicians, including the verifications of the correctness of revenues earned from the use of their musical works on the skiza tunes platform. The Petitioner also confirms in paragraph 12 of his affidavit supporting the Petition, that some of his musical works are listed on the \*622# Platform and he can thus be able to verify the correctness of the revenues earned vis a vis the revenue reports sent to him by the 1<sup>st</sup> Respondent.

46. It is also noted as to the absence of some of his works on the said Platform, the Petitioner was advised by the 2<sup>nd</sup> Respondent in the course of these proceedings that the same was due to the fact that he had not availed the 2<sup>nd</sup> Respondent with copyright certificates in relation to the works missing from the Platform. The Petitioner was asked to provide the said certificates and the situation has since been corrected. It therefore follows that the Petitioner can verify the revenue performance of his works from the \*622# Platform.

47. **Article 35 of the Constitution** guarantee every citizen the right to information held by the state or another person required for the exercise of a right or fundamental freedom. However, this right is not absolute and may be limited. ...Reliance in support of the proposition is placed in the Court of Appeal decision in the case of **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** where it was stated:-

*“This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information.”*

48. It is worthy to note that in addition to the above the **Access to Information Act 2016** was enacted to provide guidance to the limitation to be applied when a party seeks access to information. **Section 6 of the Access to Information Act 2016** provides for limitation. **Section 6(1) (e) of the Act** provides that the right of access to information can be denied if:-

*“substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained.”*

49. I find the Petitioner herein in seeking to have the 2<sup>nd</sup> Respondent divulge information arising from a separate contractual agreement, on the basis that there is need to authenticate the right of the 1<sup>st</sup> Respondent is likely to substantially prejudice the commercial interest of the 2<sup>nd</sup> Respondent or a third party from whom information would be obtained. I further find that if 2<sup>nd</sup> Respondent is directed to proceed to provide information sought by a non-party to contractual agreement it shall be prejudicial to the parties to the contract. The giving of the information herein is subject to limitation under **Section 6(1) of Access to Information Act 2016**. It is therefrom not absolute to have such information released.

50. *In view of the conclusion that I have come to as regards this Petition, I am satisfied that the Petition does not meet the threshold of a constitutional Petition. The access to information further as sought offends Section 6 (1) (e) to Information Act 2016.*

51. *The upshot is that the Petition herein is without merits. The Petition is dismissed with costs.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF OCTOBER, 2021.**

.....

**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**