



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CONSTITUTIONAL PETITION NO. E4 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, 29, 30, 40, 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE BILL OF RIGHTS

AND

IN THE MATTER OF INFRINGEMENT OF SECTION 46 OF THE COPYRIGHT ACT

BETWEEN

FRANCIS NZIOKI KAVUU.....APPLICANT/PETITIONER

VERSUS

KENYA COPYRIGHT BOARD.....1ST RESPONDENT

ROLANDS LLP.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

KENYA MUSIC COPYRIGHT SOCIETY OF KENYA.....1ST INTERESTED PARTY

PERFORMERS RIGHTS SOCIETY OF KENYA.....2ND INTERESTED PARTY

KENYA ASSOCIATION OF MUSIC PRODUCERS.....3RD INTERESTED PARTY

MUSIC PUBLISHERS ASSOCIATION OF KENYA.....4TH INTERESTED PARTY

RULING

1. This ruling is in respect an application filed by the Petitioner vide notice of motion dated 28.9.2020 that is brought under Articles 19, 21(1), 22(1), (2) & 23(1); 40, 47 of the Constitution of Kenya and Rule 23(1) of the Constitution of Kenya (Protection of Rights and

Fundamental Freedoms) Practice and Procedure Rules, 2013.

2. The background to these proceedings was the draft forensic report dated 4.9.2020 that was said to have been adopted on 21.9.2020 as the final report and that the decisions of the 1st respondent due to reliance on the said report indicated in what was stated to be the press release issued on 22.9.2020. The press release is what has triggered this petition.

3. Aggrieved by the vagaries surrounding the said report, the Petitioner herein filed the instant petition in which he seeks various orders which in principle seek to have the impugned reports and decisions based on the same set aside.

4. The Applicant/Petitioner seeks the following orders in his application:

a. Spent.

b. Spent.

c. That pending hearing and determination of this petition, this honorable court be pleased to issue conservatory orders suspending the draft forensic report dated 4.9.2020 and adopted on 21.9.2020 as the final report and all consequential decisions of the 1st respondent made dependent on the said forensic audit report culminating in the press release issued on 22.9.2020 by the 1st respondent;

d. That this honorable court be pleased to issue any order/directions that are appropriate in the circumstances.

e. That the costs of this application be borne by the 1st and 2nd respondents.

5. In support of the application was an affidavit deponed by the applicant on 28.9.2020 wherein he annexed a copy of the press release, a copy of the draft report and the response by the 1st and 2nd respondents.

6. The grounds of the application were briefly that;

a. The 1st respondent contrary to section 46(e) of the Copyright Act that was said to have been applied retrospectively did appoint the 2nd respondent to inspect the books of account of the 1st to 3rd interested parties as if they were collective management organizations for the period 2017 to 2019.

b. The 1st interested party was never licensed as a collective management organization for the years 2017 to 2018

c. A draft forensic report was made by the 2nd respondent and the 1st respondent threatened to submit the said report to law enforcement authorities for the prosecution of the 1st to 3rd interested parties' officials. It was also threatened that the 1st to 3rd interested parties would be restructured, their memorandum and articles of association would be altered and their management would be overhauled.

d. It was stated that the decision to act on the draft report was illegal, in bad faith, in violation of the petitioner and interested parties rights under Articles 33 and 47 of the constitution, in disregard of the rules of national justice and in violation of fair administrative action.

e. The petitioner averred that the filed petition has chances of success and that the actions of the 1st respondent are prejudicial to the applicant and the interested parties hence the need to grant the orders sought.

7. The respondent opposed the application vide replying affidavit deponed on 22.10.2020 by George Nyakweba who is stated to be the Deputy Executive Director of the 1st respondent. It was admitted that the 1st respondent appointed the 2nd respondent to conduct a forensic audit for the period 1.1.2017 to 31.12.2019 on the 1st to 3rd respondents (sic). It was averred upon advise from his counsel on record that the 1st respondent in so ordering the audit acted within its mandate under the Copyright Act 2001 as amended by the Copyright Amendment Act 2019 and in compliance with the court order in the case of **Laban Toto Juma & 4 Others v Kenya Copyright Board, Kakamega Petition 3B of 2017**.

8. According to the deponent, the court in the abovementioned case in order to protect the copyright holders directed the 1st interested party to account within 30 days to the 1st respondent all license fees and royalties collected from 1.1.2017 and issue further orders and directions. It was pointed out that the 1st interested party failed to account for royalties collected without a license hence necessitating a forensic audit. It was averred that there was no requirement for consultation with the 1st interested party when conducting the audit and that the 1st to 3rd interested parties were notified vide letter dated 24.6.2020 (GN3) of the audit and they raised no objection. It was averred that the audit unearthed a number of malpractices within the functions of the interested parties and confirmed the complaints from music artists (GN5a, b, c, d & e). The deponent averred that the interested parties were invited to respond to the issues raised in the audit report vide letter dated 7.9.2020 (GN6), however their response was considered unsatisfactory. It was averred that the audit was conducted lawfully and professionally and did not offend any law or legislation and that the 1st respondent was conducting its regulatory duties. It was pointed out that the conservatory orders sought were overtaken by events and that the orders sought ought not to be granted as it would be akin to undermining the regulatory mandate of the 1st respondent.

9. There is no indication of any other response to the application.

10. Parties agreed to canvass the application vide written submissions that are duly on record. Learned counsel for the applicant submitted that the singular issue for determination is whether the petitioner met the conditions for grant of conservatory orders. Learned counsel emphasized that the petitioner was at this stage required to establish a prima facie case with likelihood of success and the prejudice to be suffered if the orders are not granted; reliance was placed on the case of **Center for Rights Education and Awareness & 7 Others v A.G (2011) eKLR**. It was the strong argument of counsel that reliance on the report would infringe their rights under Articles 36 and 47 of the Constitution. Counsel further submitted that the case of **Laban Toto Juma & 4 Others v Kenya Copyright Board, Kakamega Petition 3B of 2017** did not direct the 1st respondent to conduct an audit on the interested parties and that the 2nd to 4th interested parties were not parties to the said case. It was therefore the argument of counsel that the petitioners established a prima facie case with likelihood of success.

11. On the element of prejudice, it was submitted that the measures proposed to implement the findings of the audit report for example to *submit the said report to law enforcement authorities for the prosecution of the 1st to 3rd interested parties officials, to restructure the CMO management, to make changes to the 1st to 3rd interested parties and overhaul of their management* would be prejudicial to the petitioner. On the public interest requirement, in placing reliance on section 2 and 46(4)(c) of the Copyright Act, it was submitted that a Collective Management Organization (CMO) is meant to safeguard the rights of its members and that interfering with the operations of the CMO without engaging its members for example the petitioner infringes on their constitutional rights.

12. In response, counsel for the respondent submitted that the application did not warrant the grant of interlocutory conservatory orders. It was submitted that the petitioner had not demonstrated a prima facie case with likelihood of success. Reliance was placed on the case of **Platinum Distillers Limited v Kenya Revenue Authority (2019) eKLR** and **Cascade Co Ltd v Kenya Association of Music Productions & 3 Others (2015) eKLR**. According to counsel, section 46E of the Copyright Amendment Act did not restrict the period within which inspection of books and accounts and records could be done hence there was no retrospective operation of the law. It was pointed out that retrospectivity applied to criminal provisions while section 46E of the Copyright Amendment Act was not. Reliance was placed on the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** where it was stated that;

“(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that:

“Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law”.

(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury’s Laws of England, 4th Edition Vol. 44 at p.570).”

13. According to counsel, the forensic audit was conducted procedurally and the interested parties were aware of the same hence there was compliance with Articles 33 and 47 of the Constitution. It was submitted that it could not be proven that what was said to be the threats of the 1st respondent were implemented. Counsel further submitted that the grant of the orders sought would not enhance constitutional values as the state is enjoined under Article 40(5) to protect intellectual property. It was also submitted that the denial of conservatory orders would not render the substratum of the petition nugatory and that there would be no prejudice suffered if the conservatory orders are denied. On the element of public interest, it was submitted that the 1st respondent is a regulator and the interested parties ought to be regulated since if unchecked then the members of the CMO’s would be at a loss. It was pointed out that the prayers sought had been overtaken by events as the DCI obtained a warrant vide **Exparte Misc App E293 of 2020** in the case of **R (through DCI) v Music Copyright Society of Kenya & 2 Others** to carry out investigations. The court was urged not to grant the orders sought.

14. I have considered the application the subject of this ruling, the response thereto and the submissions made on behalf of the parties.

15. 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).

16. The applicant/petitioner herein in principle is asking the court to interfere with the authority of the 1st respondent’s office on grounds that it occasioned the conduct of a forensic audit on the interested parties by retrospectively applying the law and made decisions pursuant to the report; it was alleged that these actions have breached the constitutional rights of the petitioner.

17. The issue for determination is whether the orders sought should be granted. The applicant would have to satisfy the court that he meets the requirements for grant of the conservatory orders sought.

18. The circumstances under which conservatory orders may be granted were discussed in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR**, thus:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

19. This position was reinforced by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Ors (2014) eKLR** where the Supreme court held:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

- (iii) that it is in the public interest that the order of stay be granted.”

20. The first condition the applicant is required to discharge is to establish a prima facie case with a likelihood of success. From the evidence on record, there is a petition that has been filed and is yet to be heard. Without preempting the outcome of the petition, the issues which the petitioner intends to canvass at the hearing of the petitions are the contention that the respondent performed various acts that were in breach of rights as listed in the petition.

21. I have noted that the respondent has defended its actions as being in line with the Copyright Amendment Act, 2019 and which the petitioner in his petition has taken issue with the same. The Copyright Amendment Act states in material part as follows;

“46E. (1) The Executive Director may of collective management authorize a person, in writing, to inspect books of accounts and records of a collective management organization.

(2) When an inspection is made under subsection (1), the collective management organisation concerned and every officer and employee thereof shall produce and make available to the person making the inspection all the books, accounts, records and other documents of the organization as the person making the inspection may require and within seven days or such longer times as he may direct in writing.

(3) A person who wilfully fails to produce any books, accounts, records document, correspondence, statements, returns or other information within the period specified in the direction under subsection (2) commits an offence under the provisions of this Act and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three months or to both.

(4) The person authorized to inspect a collective management organization shall report to the Board on— (a) any breach or non-observance of the requirements of this Act or regulations; (b) any irregularity in the manner of conduct of the business of the organization; (c) any apparent mismanagement or lack of management skills in the organization; or (d) any other matter warranting remedial action or a forensic audit.

(5) The Executive Director of the Kenya Copyright Board shall, by notice in writing, and after giving the collective management organization reasonable opportunity of being heard, require the inspected organization to comply by such date or within such period as may be specified therein, with such directions as he considers necessary in connection with any matter arising out of a report made under this section.

(6) The powers conferred by subsection (1) may be exercised in the following circumstances— (a) where a petition for inspection has been made by not less than forty five percent of the membership specifying breach of instruments establishing the entity, the regulations or the Act; (b) failure by a collective management organization to account for monies to at least twenty percent of its members; (c) failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it; (d) where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed; (e) where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business; (f) where a collective management organization has persistently failed to adhere to its set administrative budget without a reasonable cause; Or (g) where a collective management organisation has failed to comply with a request for information or records from its members or the Board.

46F. (1) Where the Kenya Copyright Board determines through the results of an audit or inspection report that a collective management organization conducts its business in a manner contrary to the provisions of this Act or of any regulations or any other Act or in any manner detrimental to or not in the best interests of its members, the Board may—

- (a) recommend the suspension or removal of any officer or employee of the organization who, in the opinion of the Board, has contributed or caused the contravention of any law.
- (b) issue directions regarding measures to be taken to improve the management of the organization or to secure or improve compliance with the requirements of this Act, any regulations or any other written law or regulations;
- (c) require the organization to reconstitute its board of directors;
- (d) demand for a plan to resolve all deficiencies to the satisfaction of the Board;
- (e) appoint a person as the chairperson who is suitably qualified and competent in the opinion of the Board to advise and assist the organization in developing and implementing a corrective action plan and the person appointed shall regularly report to the Board on the progress of the implementation plan;
- (f) issue an order placing the organization under statutory management;
- (g) order for the revocation of the collection license;
- (h) order for the convening of a special general meeting by the organization;
- (i) order the organization to take such other action that the Board may deem necessary to rectify the deficiency, or issue such administrative directives as it may deem necessary

22. The learned authors of Halsbury's Laws of England in 4th Edition Re-Issue Volume 44 (i) para1433 rendered themselves as follows:-

“It is a principle of legal policy that an amending enactment should be generally presumed to change the relevant law only from the time of the enactment’s commencement.”

23. In the case of **Municipality of Mombasa v Nyali Ltd (1963) EA 371-4** Newbold J sitting in the Court of Appeal for Eastern Africa stated that:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”

24. Further, in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR**, the Supreme Court while considering the question whether the retrospective application of a statutory provision is unconstitutional stated as follows:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:(i) is in the nature of a bill of attainder;(ii) impairs the obligation under contracts;(iii) divests vested rights; or (iv) is constitutionally forbidden”

25. THE COPYRIGHT (AMENDMENT) ACT No. 20 of 2019 indicates its Date of Assent as 18th September, 2019 and the Date of Commencement as 2nd October, 2019. The amendment act introduced the amendment through which the actions were said to be justified. In the case of **Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833** the Privy Council held as follows:-

“Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”

26. According to the evidence relayed via the affidavit in support of the application, I am satisfied that there is a prima facie case with likelihood of success; *a priori* the implementation of the decision of the 1st respondent may have the likelihood of infringement of the rights of the applicant.

27. The 2nd element to consider is if the order sought is not granted then the intended petition will be relegated to an academic exercise. If the orders sought are not granted then it will be akin to determining the petition against the applicant who deserves to be heard on the merits. I therefore find that the petition will be rendered nugatory if the orders sought are not granted.

28. On the public interest element, The 10th Edition of Black's Laws Dictionary at page 1425 defines "public interest" as:-

“...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

29. The public interest element that will be fulfilled if the orders sought are granted is that of the retrospective operation of the law. I see no other public interest consideration because in any event, the interested parties still have an obligation to provide accounts by dint of section 47 of the Copyright Act 2001 that provides that:

“(1) A collecting society shall, as soon as reasonably practicable after the end of each financial year, submit to the Board— (a) a report of its operations during that year; (b) a copy of its audited accounts in respect of that year.

(2) This section shall apply without prejudice to the obligations of a collecting society under the provisions of the Companies Act (Cap. 486).

30. In the result I would need to hear from the parties on the merits of the petition where I will consider whether or not it is unconstitutional to allow a retrospective operation of the Copyright Amendment Act 2019 and also whether the 1st respondent fits within the exceptions to the rule of English law that no statute shall be construed to have a retrospective operation. Bearing in mind that the 1st respondent had pointed out that some of the prayers have been overtaken by events, I find that prayer No. 3 is now merited pending the determination of the petition. There is merit in granting the conservatory orders in order to preserve the subject of the dispute and to ensure that the determination of the pending petition does not become an academic exercise.

31. The upshot of the foregoing is that the petitioner's application dated 28.9.2020 has merit. The same is allowed in terms of prayer No.3. The parties are now urged to set down the hearing of the petition on priority basis. The costs hereof shall be in the cause.

It is so ordered.

Dated and delivered at Machakos this 9th day of December, 2020.

D. K. Kemei

Judge