REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW APPLICATION NO. 6 OF 2017

IN THE MATER OF:

LAW REFORM ACT CHAPTER 26 LAW OF KENYA SECTION 8

AND

THE CONSTITUTION OF KENYA, 2010 ARTICLE 23 (3) (F).

AND

THE COPYRIGHT ACT NO. 12 OF 2001

AND

AN APPLICATION FOR LEAVE TO APPLY JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC…….....…….....……APPLICANT

Versus

ATTORNEY GENERAL….……RESPONDENT

EXPARTE APPLICANTS:

BOSCO MWITI NYAGA & DAVID MUGENDI NDWIGA

JUDGMENT

[1] By a notice of motion dated 5th June 2017 the ex parte Applicants seeks from this Court the following Orders;

> **a) An Order of Certiorari by way of Judicial review calling for and to quash the Kenya Gazette Notice No. 57 published on 21st April 2017 in so far as it purports to set tariffs for private performances which includes but is not limited to caller ring back tones and ringtones.**
>
> **b) An order of Prohibition do issue prohibiting the Respondent from interfering, gazetting, publishing, setting and or in any way whatsoever interfering with rates of copyright royalties derived from private performances which includes but is not limited to caller ring back tones and ringtones**

[2] The Application is predicated on the Law Reform Act Section 8& 9, the Constitution of Kenya Article 23 and under Order 53 Rule (1) to (4) of the Civil Procedure Rules. The grounds on which the application is premised are set out in the notice of motion and supported by an affidavit sworn by David Mugendi Ndigwa. The grounds may be summarized to be:

> *(i)That digital content is a private performance and therefore not liable to collection through the Collective Management Organization.*

(ii) That the Kenya Gazette No. 57 published on 21st April 2017 purports to put into the public realm private performances.

(iii) That the impugned Gazette Notice is forcing performing artists to belong to and associate with the Collective Management Organizations, against their wish especially with respect to collection of royalties for Private performances

(iv) The Kenya Gazette Notice No. 57 published on 21st April 2017 is in outright contravention of this Court's judgment In ***Malindi Constitutional Petition No. 5 of 2016*** *as it purports to put in the public realm private performances.*

(v) That as such the Respondent acted beyond its powers, in purporting to circumscribe payable tariffs for private performances.

(vi)That the respondent prior to publication of the Kenya Gazette Notice No. 57 failed to engage the public as envisaged by Article 110 and 118 of the Constitution.

[3] The Respondent filed grounds of opposition dated 24th October 2018 claiming;

(i) That the ex-parte applicants herein lack the requisite locus standi to move the court for the Orders Sought

(ii) That the Notice of motion is misinformed, mischievous and an abuse of the court process as it is based on a misconstruction of the functions and responsibilities of the respondent.

(iii) That the Orders sought are untenable and cannot issue.

(iv) The Copy right Act in Particular Section 46 (A) makes no distinction between the Public and Private Performances making the applicants distinction academic and moot.

(v) The alleged assignees are not registered in terms of Section 46 of the Copyright Act.

(vi) The overall effect of the Notice of Motion is to create administrative chaos as opposed to Order as envisaged by Section 46 (A) of the Copy right Act.

(vii) The Applicants have misconstrued the distinction between royalties and Sale of works.

(viii) The notice of motion purports to challenge the Constitutionality of Section 46 (A) of the Copyright Act.

(ix) There is no evidence and duty as against the respondents to show that the functions and powers of the respondent as envisaged by Section 4 (A) require public participation.

SUBMISSIONS

[4] Both parties have filed their respective submissions.

Applicants Submissions

[5] The ex-parte applicants submitted that they are authors, composers and performers of musical works and audio visual works below. And, all the intellectual rights thereto are vested in them. These works are:-

For the 1st *Applicant:*

(1) Wewe Mtakatifu

(2) Heshima Yote

(3) Maisha Kwa Shetani

(4) Ushuhuda

(5) Yale Umetenda

(6) WanyoroTosha.

For the 2nd Applicant:-

(1) Icoki

(2) JehovaNiwe

(3) Eterea Mwathani

(4) Mutiwa Mbaara

(5) Ndahoyaya Undathime

(6) Jesu Niwe Murithi

(7) Linga Mwana Jesu

(8) Tugirie Maithori

(9) Ndabaya Undathime.

[6] They also averred that their intellectual rights were by way of assignment vested in Expedia Investment Limited for the 1st Applicant and Liberty Afrika Limited for the 2nd Applicant both being content service providers duly Licensed by the Communication Authority of Kenya.

[7] They also argued that their Musical works have been digitized and uploaded by the content Service providers onto Safaricom Limited Service Portal among other private portals on which it is used as a caller ring back tone and also digitized and uploaded onto the internet among other media from which it is downloaded and or streamed thereafter used as a ringtone.

[8] The Applicants Submit that in Approving and publishing the tariffs the respondent is enjoined under Article 10 (2) (a) of the Constitution to promote national values and principles of governance. This is a matter of Public interest and executive order and the Respondent prior to approving and publishing the tariffs is enjoined by the Constitution to engage the public and seek their participation. To this end they rely on the cited decision of **Odunga J.** In **Robert. N. Gakure & Anor v Governor Kiambu County & 3 others** & inter alia decision in the Court of Appeal **Kiambu County Government & 3 Others vs Robert. N. Gakure & others [2007] eKLR.**

[9] They expounded on the above submission by stating that the Respondent did not inform the Applicant and members of the public that he had tariffs he intended to approve and publish. The decision was unilateral, irrational and in contravention of Section 5 of the Fair Administrative Actions Act No. 4 of 2015.

[10] It was also submitted that the Kenya Gazette Notice 57 published on 21st April 2017 is in outright contravention of **Malindi Constitutional Petition No.5 of 2016 Mercy Munee Kingoo & Anor vs. Safaricom Ltd & Anor [2016] eKLR** since it purports to put in the public realm private properties. He also referred to the cited case of **Shaban Mohamed Hassan & 703 others vs. Attorney General & 3 others [2013] eKLR**

Respondents Submissions

[11] The Respondents submitted that the Applicants herein do not have locus standi to move the court for the Orders Sought since their intellectual property were by assignment vested to their Service Providers. They also aver that the assigns herein are not registered. That the effect of the assignment is that the applicants do not have enforceable rights for interest vis-à-vis the Gazette notice for it only affects the assigns who are directly affected by its contents.

[12] The Respondents also urged that the notice of Motion lacks merit as the functions of the Attorney General as envisaged in Section 46 (A) of the Copyright Act is the 'approval and publishing' of royalties; this does not require public participation- that duty squarely falls under the realm of the Collective Management Organizations. On the genre of protected works, the provisions make no distinction between public and private performances for purposes of payable tariffs. The Respondent does not set tariffs as argued by the applicant. It only approves what has been set by the collective society which is the creators of the tariffs.

[13] Lastly the Respondents argued that the applicant's works are public performances since they are communications to the public. Therefore, the Orders sought are untenable and only seek to create administrative chaos. That what is being enforced by the Act is Royalties as opposed to Sale of works. The Respondent cited the following authorities; **Micheal Branham Katana t/a Harsutak Bar & 4 others –vrs- Kenya Association of Music Producers** and **David Kasika& 4 others –vs- Music Copyright Society of Kenya Limited and Another [2016] eklr.**

ANALYSIS AND DETERMINATION

[14] The issue being raised by the Applicant and Respondent relate to Section 46 (A) and the Gazette Notice No. 57 published on 21st April 2017. Therefore, as was submitted by the Respondents, the issues for determination may be summarized as followed;

a. **Whether the Ex-parte applicants herein have locus Standi to move Court for the Orders Sought.**

b. **Whether the Notice of Motion is misinformed, mischievous, lacks merit and is an outright abuse of the court process.**

Of locus standi

[15] The Applicants herein filed these proceedings in their Capacity as authors, composers and performers of musical works. It is not in dispute that the Applicants herein had engaged their respective content Service providers to manage their intellectual properties. The Respondents have made averments that the applicants relinquished their rights to the respective Content Service Providers. According to the Agreement made by the Applicants to their Respective Service Providers **"Assigned Rights"** shall mean the rights of the assignor transferred to the company in accordance with the terms of the agreement. It also describes **"The Assignment"** as mechanical rights in the musical works which now belong to or shall hereafter be acquired or created by or become vested in the assignor and the interest thereof. **"Mechanical rights"** have been described as the right to make or cause to be made in any part of the world records for the purposes of offering or exposing the musical works for hire by way of sale, directly or indirectly.

[16] In claiming that the Applicants have no locus standi, the Respondent relies on the decision of the **Michael Branham Katana t/a Harsukat Bar & 4 others vs Kenya Association of Music Producers (Kamp) & 3 others [2016]** where the Court held that an Assignment transfers all proprietary rights including a right to sue others. However, I should refer to **Section 33 of the Copyright Act** which provides;

> **33. Assignment and licences**
>
> **(1) Subject to this section, copyright shall be transmissible by assignment, by licence, testamentary disposition, or by operation of law as movable property.**
>
> **(2) An assignment or testamentary disposition of copyright may be limited so as to apply only to some of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.[Emphasis Mine]**

[17] The case of **Michael Branham Katana t/a Harsukat Bar & 4 others vs Kenya Association of Music Producers (Kamp) & 3 others [2016]** aptly apply to an exclusive licensee as provided for in **section 34 of the CopyRight Act**. In **Vermont Flowers (EPZ) Limited v Waridi Creations Limited [2014]** eKLR the Court provided this distinction when it held;

> **"…….according to section 34(1) of the Copyright Act, once a license is properly granted by the owner of the copyright, the exclusive licensee shall have the same rights of action and be entitled to the same remedies, as if the licence were an assignment and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence were granted. The nature of intellectual property and the strict requirements of the law make it absolutely necessary that the licensee should plead his status that he is an exclusive licensee; give all particulars of the licence as well as the copyright for which he has been granted exclusive licence by the owner……"**

[18] It has been argued that the Applicants relinquished their rights. That may be so but from the record it is only to the production and distribution of their musical works and the interests accruing thereof. I however find it startling the argument by the Respondent that the assignment has not been registered. If that be the case, then the first ownership of the copyright remains to be the author, or composer or performer. The Respondents argument is therefore self-defeating. Again, a look at Section 32 of the Copyright Act author, composers and performing artists have moral as well as economic rights. They also retain residual litigation rights. The section provides;

> **32. Moral rights of an author**
>
> **(1) Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to—**
>
> **(a) claim the authorship of the work; and**
>
> **(b) object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation.**
>
> **(2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author but the right to exercise any of the said rights shall be transmissible by testamentary disposition or by operation of the law following the demise of the author.**
>
> **(3) The author has the right to seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, where such work would be or is prejudicial to his honour or reputation.**

[19] Looking at the pleadings and papers filed, in Particular their Agreement with the Content Service providers it is clear that the Gazette Notice No. 57 will eventually affect the revenue they would get at the end. This is so because the gazette notice sets out the Royalty tariffs to be paid out which the Organizations manage and/or collect. In turn therefore the rights of the authors and composers are affected. The Agreement does not relinquish the Applicants rights to sue or be sued. The agreement only grants the assignees the right to representation which extends to production and distribution. **Section 35 of the Act** also grants the owners of any Copyright the right to institute legal proceedings against the infringement of his rights and seek reliefs of such an infringement including but not limited to infringement of proprietary rights.

[20] The distinction of individual proprietary rights against the rights of the Collective Management organizations was also raised. This was addressed in the case of **Xpedia Management Limited & 4 others v Attorney General & 5 others [2016] eKLR**where the court held;

122. I have not heard any of the respondent's dispute the exclusive rights of artists set out under sections 26, 28 and 30 of the Act. What I understand the position to be is that since not every individual artist can negotiate with every individual user of artist work and collect remuneration for such use, there shall be a system, provided by legislation and in accordance with international treaties such as WPPP, for collective management and collection of remuneration through collective management organisations. Thus, while artists will still be entitled to the control of their copyright, which will remain vested in them, they will not collect revenue directly but through CMOs." (Emphasis added)

[21] I am aware that the Constitutionality of Section 30A that provided for the Collection of remuneration by the Collective Management Authority was subject of ***Mercy MuneeKingoo and Another v Safaricom and Another*** **MLD Petition No. 5 of 2016 [2016] eKLR** and was declared unconstitutional, but the distinction still remains true. The distinction of individual rights and the right to association was also discussed in **Laban Toto Juma& 4 others v Kenya Copyright Board & 9 others [2018] eKLR** where the Court held;

37. As to whether section 46 of the *Act* limits the 1st and 2nd petitioners' freedom of association under Article 36(1) and (2) of the Constitution, we find and hold that nothing in the *Act* compels them to forego their intellectual property rights assigned to MCSK. They have a right to join and participate in the activities of an association of their choice. There is also nothing in the *Act* that compels them to join another association. We also find nothing in the *Act* which limits the ability of MCSK to collect royalties on their behalf and as KECOBO pointed out, the licenced CMO is required to collect royalties on behalf of non-members and it is up to MCSK to decide how it wants to collect royalties on behalf of its members. In this respect, the decisions we cited relating to section 30A of the *Act* can be distinguished.

[22] In the final result, I find that it is not a must that, for the Applicants herein to bring an actionable claim against the actions of the Respondent, they have to be registered to a relevant Collective management organization (herein also referred to as CMO). I also find that whereas the decision as to the collectable tariffs in the Gazette notice may have been allegedly made between licensed CMOS and the respondents, by virtue of the law and the Constitution there is need for public participation which includes the individuals not coveredby the licensed CMOS. The action they bring relates not only to the process and functionality of Section 46A but also relates to the lack of public participation and their individual proprietary rights that have to be protected by the Act. I therefore find that the Applicants have the locus standi to seek the Orders Sought.

Of merit of the Notice of Motion

[23] The newly introduced section 46A creates an approval system for all tariffs set by the collection Society to license copyright users. This new section prohibits any registered Collection Management Organization from imposing or collecting royalty based on tariffs that have not been approved and published in the Government Gazette from time to time. The section provides;

46A. Approval for imposition and collection of levy

Notwithstanding any other provision of this Act, no collecting society shall —

(a) impose or collect royalty based on a tariff that has not been approved and published in the Gazette by the Cabinet Secretary in charge of copyright issues in the Gazette from time to time; or

(b) levy royalty on users exempted by the Cabinet Secretary by notice in the Gazette.

[24] I find the Respondents averments that they only "approve and publish" the royalties to be oblivious of the art of approving and publishing tariff rates for royalties purposes. They seem to suggest that their work is mere rubberstamping of the decisions made by the organizations without confirming and/or establishing compliance with the law and the Constitution on protection of rights of authors, composers and performers of musical works. The main purpose of the Act is for the Cabinet secretary, which includes the Attorney General within the meaning of **Section 3 of the Interpretations and General Provisions Act** to protect the rights of author's composers and performers of musical works that have been registered under the Act from being infringed. The preamble states that the Act is *An Act of Parliament to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes.* More specific is Section 5 (b)(e)(f) and (g) which assigns the functions of the Board to include:-

(b) to license and supervise the activities of collective management societies as provided for

(e) enlighten and inform the public on matters relating to copyright and related rights;

(f) maintain an effective data bank on authors and their works; and

(g) administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.

Within these parameters, I do not think that Section 46 (A) limit the responsibility of the Respondent to merely approving and publishing of tariffs for royalties. In fact, the requirement to enlighten and inform the public on matters relating to copyright and related rights is an embodiment of the principle of public participation enshrined in the Constitution. In any case, article 10 binds the Respondents as state officers in exercise of public power or implementation or making of policy decisions. See the article below:-

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all

persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

[25] The Act itself does not give a definition of or distinction between "Royalty/Rolalties" and or "Special works". I will however borrow from the **Black's Law Dictionary 9th Edition pg. 1445** which describes Royalty as;

> **Intellectual property-A payment-in addition to or in place of an upfront payment-made to an author or inventor for each copy of a work or article sold under a copyright or patent.**

[26] Royalty is therefore part of the economic rights of the owner of copyright. Pend that for a while.

Of ringtones and call-backs tones

[27] Whether or not the ring tones and call back tones are governed by this Act and especially section 46 was determined in **Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd [2009] eKLR.** The Court addressed the distinction between public and private performance and also found that MCSK was right in seeking royalties on behalf of its members when it held;

> **"It seems to this court that the plaintiff is confusing the copyright of the artist that arises from its fixation, with the copyright that accrues to the artist from its communication to the public by public performance. In the present application, there is no dispute that the plaintiff converts the music of the artist into a digital form that can be downloaded as a ringtone. Section 26(1) of the Copyright Act, 2001, provides as follows:**
>
> **"Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its transition or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original;…"**
>
> **According to Section 28(1) of the Copyright Act, 2001, the copyright in sound recordings shall be the exclusive right of the copyright owner in respect of direct or indirect reproduction of the sound, or the distribution to the public of copies by way of sale, rental, lease, hire, loan or in any similar arrangement, or the importation into Kenya or the communication to the public or the broadcast or the sound recording in whole or in part either in its original form or in any form recognizably derived from the original. "Fixation" is defined under Section 2 of the Copyright Act, 2001, as "the embodiment of sounds or images, or of the representation thereof from which they can be perceived, reproduced or communicated through a device". "Reproduction" is defined under the said section as "the making of one or more copies of a work in any material form and includes any permanent or temporary storage of such works in electronic or any other form".**
>
> **What is clear therefore is that the defendant, as the collecting society on behalf of the music artists, had the authority to deal with the plaintiff in regard to the music that the plaintiff converted into ring tones. The plaintiff, irrespective of whether it entered into individual agreements with the music artists, is required in law to deal with their legal representative i.e. the defendant. Although the Copyright Act, 2001, does not specifically prohibit any party from entering into an individual agreement with a copyright owner, upon careful evaluation of the Copyright Act, 2001, it was clear to the court that the law deemed it necessary that a Copyright Collection Society be established for the purposes of coordinating and administering the collection of royalties from persons who have been licensed by the copyright owners to exploit the copyright…."**

[27] The decision in **David Kasia& 4 others vrs Music Copyright Society of Kenya and Anor [2016] eKLR** also tackled the difference between of public and Private performances and held that caller back tones and ringtones are public performances; the distinction however does not apply to the provisions of Section 46 of the Copyright Act. The main issue in contention is whether the caller ring back tunes and ringtones should still be in the preview of section 46 and section 46 A. The Applicants based their arguments on the decision in ***Mercy Munee Kingoo and Another v Safaricom and Another*** **MLD Petition No. 5 of 2016 [2016] eKLR that:-**

"……..I do find and hold that the petitioners' rights to associate with their PRSPs are being infringed. The petitioners are involved in an industry which involves the youths as well as well established artists. It takes time, money and hard work to produce the artistic works. The law should not way-lay the artists at the very end of the process and order them to receive their royalties through three Collective Management Organizations. What is so special with these three organizations? Such an arrangement is tantamount to obstructing an employee or anyone not to get his salary or payment through any other bank other than the one preferred by the employer or paying body. This is unconstitutional. The 2010 Kenyan Constitution has pumped fresh air and freedom into the Kenyan society. No Kenyan should have his options of how he would like his payments to be made after his/her hard work limited to a specific paying point. This amounts to tethering one's freedom of association and right to choose where to be paid and limiting such fundamental rights and freedoms to only three CMOs is unconstitutional. That cannot be allowed in a democracy like ours based on equality, human dignity and the rule of law.

In the end, I do find that to the extent that section 30A of the Copyright Act, Cap 130 Laws of Kenya limits the artists' right to choose how their royalties are to be paid, that section is unconstitutional as its effect is to limit the petitioners' freedom of association. Further, taking into account the fact that section 30A of the Copyright Act was enacted without public participation and its effect is to be applied retrospectively without regard to existing arrangements between artists and their contracted Premium Rate Service Providers, that section is unconstitutional.

The 1st respondent entered into an agreement in 2015 with the three CMOs whose effect is to channel their royalties through those CMOs. The 1st respondent's position is that the agreement is a private arrangement and the petitioners are strangers to it yet at the same time contends that section 30A illegalizes payments to other institutions other than the three CMOs. Such arrangement is unconstitutional as it indirectly bind third parties who are not privy to the contract……..."

[28] I am aware also that in **Laban Toto Juma& 4 others v Kenya Copyright Board & 9 others [2018] eKLR** Section 46 was found not to be unconstitutional, and that it is justifiable limitation under article 24 of the Constitution.

[29] Having stated the judicial decisions on the matter, of significance is that one of the purposes of the Copyright Act is to protect the copyright holders from infringement of their Copyright works. Section 46A of the Act prohibits any imposition or collection of royalty based on a tariff that has not been approved and published in the Gazette by the Cabinet Secretary in charge of copyright issues in the Gazette from time to time. The purport of the section is to protect corpyright and to ensure inclusion of all players including the CMOS, Private Premier Service Providers and the Copyright holders in policy decisions which affect the rights of copyright owners. Dealing only with CMOS at the exclusion of the authors, composers and performing artists does not fit the constitutional bill. It bears repeating that public participation is a constitutional principle which ensures as mush consultation and involvement of the persons to be affected by the decision is attained. I am aware the word ''consultation'' gained notoriety and political connotation during the coalition government. Similarly, the amount of public participation that should be sufficient and the methodology thereof for purposes of the Constitution are major points of debate amongst eminent judges, jurists, legal practitioners and other eminent disciplines. Nonetheless, within the new constitutional dispensation of justification of public decisions, involvement of artists in the formulation of tariffs on royalties for their works is a must. Artists should be engaged in the decision making process of a decision that is likely to affect them; the royalties that he/she would get is in the centre of the rights. The approval and publishing of royalties should therefore involve Public Participation.

[30] The Respondent has argued that the functionality of Section 46 and Section 46A does not presuppose public participation but as I have stated above I am content to cite **Laban Toto Juma& 4 others v Kenya Copyright Board & 9 others [2018] eKLR** especially that;

48. While we agree that the FAA leaves any administrator to utilize its own procedures, we reject the argument that public participation is not required under the Act. A reading of section 5 of the FAA opens with the phrase,"In any case ……" which means that this provision is applicable notwithstanding the provisions of section 4(6)of the Act. We further find and hold that section 5 of the FAA is an elaboration of public participation, which is a national value, recognised in Article 10(2)(a) of the Constitution and is thus implied in any process for issuing of licences under the Act.

49. There is no evidence that KECOBO issued a public notice inviting public views in regard to the licence proposed to be issued in line with section 5(1) of the FAA. <u>Although MPAKE raised an attractive argument in regard to the capacity of the 1st and 2nd petitioners as shareholders of MCSK to participate in the proceedings in their own right, we hold that the right of public participation is wider than the right of the petitioners as shareholders of MSCK. It is a right of the public to participate in the decision making process that affects them</u>.

50. In the context of the Act, <u>the provisions of section 5(1) of the FAA assume greater significance due to the fact that only one CMO is licenced to represent a particular class of right holders and category of works. Those right holders include non-members of CMOs who must be able to ventilate their views and have an interest in whichever CMO is selected to act on their behalf. We therefore find and hold that the process of issuing a licence by KECOBO on 27th March, 2017 under section 46 of the Act violated section 5(1) of the FAA</u> [Emphasis mine]

[31] The upshot therefore is that the Respondent herein acted outside the parameters of the law when it did not conduct public participation prior to the setting of the tariffs. Consequently, the eventual Gazette NoticeNo.57 published on 21st April 2017 is an expression of the violation I have stated. However the rates set for private performances should and still remain in the purview of the Provisions of the Act and indeed section 46 and 46A.

[32] Reasons wherefore I do find merit in the Applicants Notice of motion only to the extent that public participation was not done prior to the gazettement of the Gazette Notice published on 21st April 2017. As a consequence, I hereby quash the Kenya Gazette Notice No. 57 published on 21st April 2017.

[33] Given the nature of these proceedings, I order each party to bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 11th day of February, 2019.

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F. GIKONYO

JUDGE

In presence of

Muchiri for Wahome for ex parte applicants

Kithinji for Kiongo for A.G

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F. GIKONYO

JUDGE