



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JUDICIAL REVIEW NO. 4 OF 2019**

***IN THE MATTER OF LEAVE GRANTED TO THE APPLICANT TO APPLY FOR AN ORDER OF CERTIORARI VIDE THE COURT ORDER THE 26<sup>TH</sup> DAY OF MARCH, 2019 AND ISSUED ON THE 27<sup>TH</sup> DAY OF MARCH 2019***

**AND**

***IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WAY OF CERTIORARY BY KISUMU BAR OWNERS ASSOCIATION***

**AND**

***IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010***

**AND**

***IN THE MATTER OF COPYRIGHT ACT, CHAPTER 130 OR THE LAWS OF KENYA***

**AND**

***IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015***

**KISUMU BAR OWNERS ASSOCIATION,**

**SOLOMON MARTINS OMUTSANI.....APPLICANT**

**VERSUS**

**THE KENYA COPYRIGHT BOARD (KECOBO).....1<sup>ST</sup> RESPONDENT**

**RULING**

The application before me is for Judicial Review, by way of an Order of Certiorari, to quash the decision made by the **KENYA COPYRIGHT BOARD (KECOBO)**, at a time when the said Board was not properly constituted.

- 1. KECOBO** has the legal mandate conferred upon it by **Section 3** of the **Copyright Act**, which is the enforcement of copyright and related acts.
- The Applicant, **KISUMU BAR OWNERS ASSOCIATION**, does not question the mandate of the Board.
- Their concern is the issuance of a Certificate of Renewal of Registration on 1<sup>st</sup> February 2019.
- The said certificate was issued by the Executive Director of the Board.
- According to the Board, the issuance of licences to **COLLECTIVE MANAGEMENT ORGANIZATIONS (CMOs)** was done pursuant to order which a **3-Judge** bench had given in **KAKAMEGA PETITION NO. 3B OF 2017**, (which had been consolidated with **KISUMU PETITION NO. 11 OF 2017** and also **KISUMU PETITION NO. 15 OF 2017**).
- On 13<sup>th</sup> July 2018 the Court delivered its judgment, in which one of the reliefs granted was in the following terms;

***“(d) All interim orders issued in this matter are hereby discharged and for the avoidance of doubt, the Kenya Copyright Board shall be at liberty to proceed with the process of calling for new applications for Collecting Societies under Section 46 (2) of the Copyright Act.”***

7. Therefore, when the Board invited interested firms to submit their expression of interest for registration as a Collective Society, on 2<sup>nd</sup> August 2018, the Board was giving effect to the decision of the Court.

8. Thereafter, the Board facilitated a meeting at the **NHIF** Auditorium on 11<sup>th</sup> September 2018. Once again, that meeting constituted the furtherance of the orders made by the court on 13<sup>th</sup> July 2018, requiring the Board to ensure that there was Public Participation.

9. According to the Board, a licence was issued by it on 1<sup>st</sup> February 2019, giving a licence to the **MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK)**, enabling it to collect royalties on behalf of authors and publishers of musical works.

10. The Board contends that the licence in issue was only given out after a rigorous competitive process, which involved, inter alia, the public.

11. The Applicant did not question the procedure utilized by the Board in arriving at the decision to grant a licence to **MCSK**.

12. The question that arises is whether or not there was a duly constituted Board at the time when the licence was issued to **MCSK**.

13. The Respondents concede that;

***“THAT the last gazetted CMO tariffs gazetted by the Attorney General on 24<sup>th</sup> March 2017 expired on 24<sup>th</sup> March 2018.”***

14. Nothing turns on the gazettelement of the **CMO** tariffs, in this case.

15. The issue before me is whether or not the Board was properly constituted at the time it issued a licence to **MCSK**.

16. The Respondents acknowledged that pursuant to the 1<sup>st</sup> Schedule of the **Copyright Act, 2001**, the members of the Copyright Board hold office for a period of 3 years.

17. It is common ground that the term of the last Board ended on 30<sup>th</sup> October 2018.

18. The Respondents conceded that since 30<sup>th</sup> October 2018 when the term of the last Board expired, the Attorney General had not yet gazetted a new Board of Directors.

19. In the circumstances, it follows that by 1<sup>st</sup> February 2019, when a licence was issued to **MCSK**, the same was not issued by a duly constituted Board.

20. The Executive Director of the Board, is also the Secretary to the said Board. He also serves as an ex-officio member of the Board.

21. The Executive Director was responsible for the day to day running of the affairs of the Board.

22. However, it must be emphasized that the Executive Director is not synonymous with the Board. He cannot constitute himself into the Copyright Board.

23. It therefore follows that when the Executive Director issued a licence to **MCSK** on 1<sup>st</sup> February 2019, at a time when the Copyright Board was not properly constituted, he acted without the requisite legal mandate.

24. Accordingly, the application before me is well merited. I therefore remove the Certificate of Renewal of Registration dated 1<sup>st</sup> of February 2019 and place it before this Court, and proceed to quash it forthwith.

25. Before concluding this judgment, I wish to make it clear that the steps which had been taken by the Board prior to the expiry of its term, remain un-affected by the quashing of the licence.

26. Finally, I order that each party will pay its own costs of the application. I so order because none of the Respondents were responsible for the action taken by the Executive Director of the Copyright Board. Indeed, it is the very fact that the Board was not properly constituted, or at all, which has led to the quashing of the licence that had been issued. Therefore, the Board cannot be compelled to pay costs of this litigation.

27. Similarly, the exparte Applicant did not provide the court with any reasons which could lead the court to hold the Attorney

General liable for the costs.

**DATED, SIGNED and DELIVERED at KISUMU**

**This 8<sup>th</sup> day of October 2019**

**FRED A. OCHIENG**

**JUDGE**