



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CORAM: R.N. SITATI, D.S MAJANJA & T. CHERERE JJ**

**KAKAMEGA PETITION NO. 3B OF 2017**

**CONSOLIDATED WITH**

**KISUMU PETITION NO. 11 OF 2017**

**AND**

**KISUMU PETITION NO. 15 OF 2017**

**BETWEEN**

LABAN TOTO JUMA .....1<sup>ST</sup> PETITIONER  
DAVID AMUNGA.....2<sup>ND</sup> PETITIONER  
KISUMU BAR OWNERS ASSOCIATION.....3<sup>RD</sup> PETITIONER  
KISUMU GREEN GARDEN RESTAURANT.....4<sup>TH</sup> PETITIONER  
KENNEDY MOSES AMAKOYE.....5<sup>TH</sup> PETITIONER

**AND**

THE KENYA COPYRIGHT BOARD.....1<sup>ST</sup> RESPONDENT  
THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT  
MUSIC COPYRIGHT SOCIETY OF KENYA .....3<sup>RD</sup> RESPONDENT

**AND**

MUSIC PUBLISHERS ASSOCIATION OF KENYA.....1<sup>ST</sup> INTERESTED PARTY  
SAFARICOM KENYA LIMITED.....2<sup>ND</sup> INTERESTED PARTY  
KENYA COMMERCIAL BANK LIMITED.....3<sup>RD</sup> INTERESTED PARTY  
EQUITY BANK LIMITED.....4<sup>TH</sup> INTERESTED PARTY  
STANDARD CHARTERED BANK LIMITED.....5<sup>TH</sup> INTERESTED PARTY  
BARCLAYS BANK LIMITED.....6<sup>TH</sup> INTERESTED PARTY  
ABC BANK LIMITED.....7<sup>TH</sup> INTERESTED PARTY

## JUDGMENT

### **Introduction**

1. This judgment is in respect of the three named consolidated petitions which the Chief Justice directed should be heard by a bench of three judges in accordance with **Article 165(4)** of the Constitution. Although the files before us are voluminous, the issues in contention are straight forward as are the basic facts giving rise to the petitioners' claims. The basic facts are not contested. In fact, the affidavits largely dwell on arguments and submissions rather than facts.

2. As some of the parties' names suggest, this case involves copyright and in that regard the petitioners allege that their fundamental rights and freedoms have been violated as a result of the decision made by the Kenya Copyright Board ("KECOBO") which is a corporate body established under **section 3** of the **Copyright Act, No 12 of 2001** ("the Act"). It is empowered, under **section 5(b)** of the Act to, "*license and supervise the activities of collective management societies as provided for under this Act.*" On 27<sup>th</sup> March 2017, KECOBO issued a licence to collect and distribute royalties to the 1<sup>st</sup> interested party, Music Publishers Association of Kenya ("MPAKE"). The other applicants for the licence were the 3<sup>rd</sup> respondent, Music Copyright Society of Kenya ("MCSK") and National Music Copyright Society of Kenya ("NAMCOS").

3. MCSK and MPAKE are Collective Management Organisations (CMOs). Under **section 48(4)** of the Act, a Collecting Society, "*means an organization which has as its main objects, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licences in respect of copyright works or performer's rights.*" All parties agree that CMOs are a necessary incident of enjoyment of copyright in artistic works. Their necessity and rationale has been recognised and explained in several cases within our jurisdiction. In **Xpedia Management Limited and Others v Attorney General and Others NRB Petition No. 317 of 2015 [2016] eKLR** the court observed that

*[123] I am satisfied that, as submitted by MCSK, the individual management of rights is virtually impossible with regard to certain types of use for practical reasons. MCSK illustrates this point by submitting that a right-holder is not materially capable of monitoring all uses of his works as he cannot, for instance, contact every single entertainment establishment, radio or television station to negotiate licenses and remuneration for the use of his works. Conversely, it is not practical, as submitted by MCSK, for a user to seek specific permission from every right owner for the use of every copyrighted work.*

4. Further in **Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd ML HCCC No. 154 of 2009 [2009] eKLR** the Court noted that:

*The necessity of a Copyright Collecting Society such as the defendant [MCSK] is imperative on account of the fact that such society has the expertise and means of monitoring copyright users for the purposes of assessing royalties that is required to be paid to individual copyright owners. It would be impossible for an individual artist, like in the instance case relating to music, to monitor the various media that exploit the copyright of such artists to determine the level of royalty that should or ought to be paid.*

5. It is against this background that we turn to consider the petitions before us.

### **The Petitions**

#### ***Kakamega Petition No. 3B of 2017***

6. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners, who are music artists and members of MCSK, lodged their petition against KECOBO and the Attorney General. They joined MCSK and MPAKE as interested parties to the case. The gravamen of their case is that the action by KECOBO of registering MPAKE to the exclusion of MCSK violated their freedom of association, right to property and right to fair administrative action protected under **Articles 36, 40** and **47** of the Constitution respectively.

7. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners complain that following the licencing of MPAKE as a CMO to the exclusion of MCSK, they will not enjoy their intellectual property rights as they are not members of MPAKE. That the decision takes away their rights, as copyright holders, to collect royalties for use of their works through their society. They contend that MPAKE only represents publishers and would collect payment but not remit it to copyright owners who are not its members. The petitioners further contend that the decision by KECOBO effectively forces them to join MPAKE in order to collect their royalties in contravention of **Article 36(2)** of the Constitution.

8. As regards the decision not to licence MCSK, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners complain that there was no public participation in the manner in which KECOBO dealt with the licence application process contrary to **Article 10(2)** of the Constitution. They also complain that the decision to refuse MCSK, a licence violated **section 5(1)** of the **Fair Administrative Action Act, Act No. 4 of 2015** ("the FAA") as KECOBO failed to give notice before making the decision of 27<sup>th</sup> March 2017 and also failed to consider the petitioners' views.

#### ***Kisumu Petition No. 11 of 2017***

9. The 3<sup>rd</sup> and 4<sup>th</sup> petitioners, an association of bar owners and a restaurant respectively, filed their petition against MCSK. KECOBO and MPAKE were joined to the petition as interested parties. The gravamen of their case is that MCSK continued to collect royalties on behalf of copyright holders yet the licence issued to it by KECOBO had expired by effluxion of time on 31<sup>st</sup> December 2016. They contend that since its application for a new licence was rejected by KECOBO, it had no right to collect licence fee on behalf of copyright holders.

#### ***Kisumu Petition No. 15 of 2017***

10. The 5<sup>th</sup> petitioner, a performing and reproduction author and an MCSK member, brought his petition against MCSK and joined the 1<sup>st</sup> to 7<sup>th</sup> interested parties herein together with KECOBO as interested parties. The gravamen of his complaint was that MCSK continued to collect royalties despite orders issued in *Kisumu Petition No. 11 of 2017* restraining it from collecting royalties and paying for order directing the 2<sup>nd</sup> to 7<sup>th</sup> interested parties to account for the money collected by MCSK.

### 1<sup>st</sup> Respondent's Case

11. The response by KECOBO is contained in the deposition of its Executive Director, Edward Sigei. He deponed that MCSK was authorised to operate as a CMO under the *Act* until 31<sup>st</sup> December 2016 when its licence expired and it was not renewed for the year 2017 as it failed to comply with the conditions of previous licence. He confirmed that KECOBO, as the only authorised licencing authority under the *Act*, duly licenced MPAKE to collect and distribute royalties on behalf of copyright holders on 27<sup>th</sup> March 2017 as it complied with the provisions of the *Act*.

12. KECOBO explained that when the MCSK license expired on 31<sup>st</sup> December 2016, it invited applications for a new license in the prescribed manner. MCSK, which was among the applicants, lodged its application but did not attach its audited accounts for the year ended 30<sup>th</sup> June 2016 as required by **section 47(a)** of the *Act* and **Regulation 16** of the *Copyright Regulations, 2004* ("the *Regulations*") and a list of royalties paid within that period. That after scrutinizing the applications from three applicants including MCSK, KECOBO declined to renew its application as it did not furnish the audited accounts or a list of its members.

13. KECOBO denied that licencing MPAKE in any way violated the rights of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners as CMOs make it easier for right holders to collect payment for use of their work, as it is practically impossible for every right holder to collect payment from each user. It further urged that CMO's are required to collect and distribute royalties to all relevant right holders and that it is not necessary for a copyright holder to be a member of a licenced CMO to benefit from the royalties.

### 3<sup>rd</sup> Respondent's Case

14. MCSK supports the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' case. Its position is set out in the Replying Affidavit of Merit Simiyu, who is its acting Chief Executive. He deponed that MCSK had over 12,000 members and had registered as a collective society since enactment of the *Act*. Mr Simiyu deponed that KECOBO always had access to MCSK's books of account and had exercised its supervisory authority to monitor its activities and ensure that it administers royalties appropriately.

15. As regards the application for a licence, Mr Simiyu admitted that MCSK did not submit the audited accounts as required but through a letter dated 21<sup>st</sup> December 2016 written by its chairman, it requested for time to submit the accounts at a later date. The Legal and Technical Committee was also informed of this predicament at the meeting of 19<sup>th</sup> January 2017 while reviewing the application for the licence and where draft accounts were submitted. Mr Simiyu explained that failure to submit audited accounts was, in part, due to several lawsuits from members challenging MCSK's legitimacy.

16. Mr Simiyu also deponed that on 17<sup>th</sup> February 2017, KECOBO informed MCSK that its application was incomplete as it did not have audited accounts for the year ending 30<sup>th</sup> June 2016 and a list of members and royalties paid to each of them as required by **Regulation 16** of the *Regulations* as read with **section 47** of the *Act*. MCSK finally submitted its audited accounts on 13<sup>th</sup> March 2017, paid the balance of the application fee and furnished a list of payees who had received their royalties. KECOBO invited MCSK for a meeting on 15<sup>th</sup> March 2017 where it presented the application. Following the meeting KECOBO notified MCSK of its decision on the licence by a 27<sup>th</sup> March 2017.

17. MCSK also contended that its right to fair administrative action under **Article 47(1)** of the Constitution was violated because it was not given an opportunity to explain some issues raised in the letter dated 27<sup>th</sup> March 2017. Some of the issues included the fact that MCSK's Board expenses went beyond the cap of Kshs. 8 million set by KECOBO, that its financial report was not a true reflection of the state of affairs of accounts and that the some of the royalties and beneficiaries reflected was from revenues from the previous financial years.

18. MCSK contended that as a result of this violation and refusal to grant it the licence, it stands to suffer irreparable harm as it has over 200 employees who stand to lose their jobs in addition to other obligations including servicing creditors and paying rent.

19. Like the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, MCSK maintains that the failure to issue it with a licence essentially forces its members to associate themselves with another society without their consent thereby violating their freedom of association guaranteed under **Article 36** of the Constitution.

### 1<sup>st</sup> Interested Party's Case

20. MPAKE opposed the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' petition and supported the decision taken by KECOBO through the affidavit of its Chairman, Bernard Kioko. He deponed that MPAKE represents the rights of authors, composers and publishers and not just publishers, as alleged by the petitioners, as it was licenced as such to collect and distribute royalties for one year commencing March 2017.

21. Mr Kioko contended that the petitioners did not demonstrate that their rights were violated. He argued that if the petitioners' prayers were granted it would effectively take away the role of the State in regulating CMOs thus resulting in chaos. He further contended that MPAKE's licence does not take away the petitioners' property rights as the petitioners are neither compelled to join MPAKE nor to forfeit their membership of MCSK. Further that the decision whether to join an association or not was a personal one and one is not compelled by the *Act* to join any association. He maintained that as a licence holder, MPAKE had a statutory obligation to serve both members and non-members who were all entitled to remuneration whenever their copyright was used.

22. As regards violation of the right to fair administrative action, MPAKE's position was that the award of a licence is a statutory function governed by the **Act** and **Regulations** and that there is no requirement under the **Act** for public participation when registering or deregistering a collecting society. It further submitted that the **FAA** did not apply to licensing of CMOs since the **Act** was exhaustive and had a Competent Tribunal to resolve licensing disputes.

### Determination

23. Apart from what was pleaded in the respective depositions and supported by the affidavits, the parties filed written submissions setting out their respective arguments. The petitioners and 3<sup>rd</sup> respondent alleged that the action by KECOBO of licencing MPAKE under **section 46** of the **Act** violated their fundamental rights and freedoms particularly of their right to property and freedom of association. Thus in our view, the arguments by the petitioners and 3<sup>rd</sup> respondent are that the provisions of **section 46** of the **Act** are implicated in violation of those rights and as such the provision is unconstitutional. Shorn of the details of the arguments, we find that there are two issues for resolution:

- (a) Whether **section 46** of the **Copyright Act** violates fundamental rights and freedoms and whether it is unconstitutional.
- (b) Whether the decision by KECOBO to licence MPAKE violated **Article 47(1)** of the Constitution.

### Whether section 46 of the Copyright Act is unconstitutional

24. **Section 46** of the **Act** is found in **Part VII** of the **Act** titled "**Collective Administration of Copyright**". The parts relevant to this determination provide as follows:

*46(1) No person or association of persons shall commence or carry on the business of a copyright collecting society except under or in accordance with a certificate of registration granted under this section.*

*(2) Applications for registration as collecting societies shall be made to the Board accompanied with the prescribed fees and the Board, by a Gazette notice is empowered to declare a body which has applied for registration a collecting society, for all relevant copyright owners or for such classes of relevant copyright owners as are specified in the notice.*

*(3) Every certificate issued to a collecting society shall be in the prescribed form and shall unless cancelled be valid for a period of twelve months from the date of issue.*

*(4) The Board may approve a collecting society if it is satisfied that—*

*(a) the body is a company limited by guarantee and incorporated under the Companies Act (Cap. 486);*

*(b) it is a non-profit making entity;*

*(c) its rules and regulations contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of members of the collecting society are adequately protected;*

*(d) its principal objectives are the collection and distribution of royalties; and*

*(e) its accounts are regularly audited by independent external auditors elected by the society.*

*(5) The Board shall not approve another collecting society in respect of the same class of rights and category of works if there exists another collecting society that has been licensed and functions to the satisfaction of its members.*

25. It is well established that every statute enjoys a presumption of legality and it is the burden of the petitioners to show or demonstrate otherwise (see **Ndyanabo vs Attorney General of Tanzania [2001] EA 95**). In order to determine whether the statute is unconstitutional, the court must have regard not only to its purpose but also its effect. This principle was clearly enunciated by the Supreme Court of Canada in **R v Big M Drug Mart Ltd [1985] 1 S.C.R. 295** as follows;

***Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.***

26. We understand the complaint by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and supported by MCSK to be that **section 46(5)** of the **Act** is unconstitutional in so far as it prohibits KECOBO from approving another collecting society in respect of the same class of rights and category of works if there exists another collecting society that has been licenced. They contend that this violates freedom of association guaranteed under **Article 36** of the Constitution which states as follows;

*36(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that:

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before registration is cancelled.

27. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners explained that as members of MCSK, they had assigned their rights to it and until they revoke the same, these rights are enforceable and ought to be respected and as such they cannot be compelled to join another CMO in order to enjoy and enforce their rights. The petitioners submit that denial of the licence to MCSK adversely affects membership of the society.

28. MPAKE urges that the court should adopt a purposive approach in determining the validity of **section 46** of the **Act** in order to uphold the collective administration of copyright in Kenya. It submits that the CMOs enjoy a monopoly which is regulated and that the presence of multiple CMOs for the same class of rights and category of works would be inefficient and fail to capitalize on economies of scale.

29. KECOBO's position is that **section 46** of the **Act** is not unconstitutional and does not violate the rights of the petitioners. It submits that any copyright holder is free to join any association and the **Act** does not require any to terminate membership of an organization or require anyone to join an organization. As regards collection and distribution of royalties, it submitted that after collecting licence fee, the licenced CMO is required to distribute the royalties to individual rights holders or to other membership organization which are not licenced for onward transmission to its members. As such it submitted that there was nothing preventing MCSK from receiving fees collected by MPAKE for onward distribution to its members.

30. Does licensing of a single organization under **section 46** of the **Act** limit the freedom of association protected by **Article 36 (1) and (2)** of the Constitution? On this issue we agree with the submission by KECOBO that the **Act** does not restrict the rights of any copyright holders from engaging with a CMO of their choice or compel them to join an organization against their choice or participate in the activities of the organization. While it is true that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have freedom to engage with their nominated CMO, we understand their grievance to be that their nominated CMO was not licenced to collect royalties.

31. A similar concern was raised in *Mercy Munee Kingoo and Another v Safaricom and Another MLD Petition No. 5 of 2016 [2016] eKLR* in relation to **section 30A** of the **Act** (now repealed by **Act No. 11 of 2017**) which provided that payment of remuneration for use of sound recordings and audio visual work for producers and performers be paid through CMOs. Chitembwe J., held that;

*Section 30A of the Copyright Act does not illegalize payment of royalties to any person other than CMOs. If that is the case, then the section would be violating the petitioners' right of freedom of association as well as freedom not to be compelled to join any kind of association. If all royalties are to be paid through CMOs, the effect would be that an artist cannot receive his/her royalties until he/she joins one of the three CMOs. The dispute is about payment point and each artist should be at liberty to be paid through the point of his choice. Receiving royalties for an artist who is not your member is unconstitutional.*

.....

*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.*

32. Dealing with a similar provision in the *Xpedia Management Limited Case (Supra)*, Mumbi Ngugi J., came to a different conclusion and held that;

*[110] I have read and considered the provisions of section 30A, which I have set out elsewhere above. I have not been able to find anything in it that compels a person who is a copyright holder to join a CMO, failing which, as the petitioners suggest, he would not be able to receive remuneration for the use of his works.*

The learned judge concluded, as we have set out at paragraph 3 above, that the provisions were justified on the ground that it would be impractical for the user to collect royalties on its own without the assistance of the CMO.

33. Both the cases we have cited dealt with **section 30A** of the **Act** which provided, at the relevant part, as follows;

*30A (1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer.* [Emphasis ours]

34. It is readily apparent from **section 30A** aforesaid, that it was mandatory for the user to be paid through the CMO hence a user was compelled to join a CMO to realise his or her payment. Thus Chitembwe J., had no difficulty in finding the provision unconstitutional. We note however, that the learned judge did not proceed to consider whether the violation was justified under **Article 24** of the Constitution.

35. We now turn to consider whether **section 46** of the **Act** violates the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' right to property. For clarity, the provisions of **Article 40** of the Constitution, which protect the right to property state as follows;

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

36. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners do not argue that their rights to acquire and own property have been violated nor has it been contended that the State has attempted to acquire their property. As we understand it, the petitioners have assigned their intellectual property rights to MCSK for management and collection of royalties. The petitioners, in our view, have not demonstrated any violation of **Article 40** of the Constitution.

37. As to whether **section 46** of the **Act** limits the 1<sup>st</sup> and 2<sup>nd</sup> 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.

38. Even assuming that **section 46** of the **Act** violates the freedom of association, we would find and hold that the violation is justified under **Article 24(1)** of the Constitution which provides as follows;

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

39. In **Attorney General and Another v Randu Nzai Ruwa and Others** NRB CA Civil Appeal No. 275 of 2012 [2016] eKLR, the Court of

Appeal cited with approval what the South Africa Constitutional Court stated in *State v Samuel Manamela & Another CCT 25/99 [2000] ZACC 5*. It warned against using the factors set out in the clause as a laundry list. The exercise, it noted, should be approached substantively by balancing the rights and limitations against the values underlying the Constitution and the Bill of Rights. The Court stated as follows;

*It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. .... Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting.*

40. The function and necessity of CMOs has been adequately demonstrated and justified elsewhere in this judgment and the decisions we have cited. The reason they are provided for is consistent with the State's responsibility to promote and protect intellectual property, of which copyright in artistic works is a component. **Article 40 (5)** of the Constitution, which anchors this responsibility, provides that, "*The State shall support, promote and protect the intellectual property rights of the people of Kenya.*" We also accept that in a developing country such as ours, well managed CMO's will assist in nurturing artists by protecting their intellectual property rights.

41. The effects of licencing one CMO for a class of rights holders is ameliorated by a rigorous licencing regime that requires full transparency under the superintendence of KECOBO. This is the reason, for example, that the licence is tenable for only one year and the licenced CMOs is required to provide details of its accounts and payment of royalties to both members and non-members.

42. On the whole therefore we would find and hold that if indeed there is a limitation on freedom of association, it is reasonable and in line with the objects and purposes of the Constitution.

#### **Whether the decision to licence MPAKE violated Article 47(1) of the Constitution**

43. The parties did not dispute the power of KECOBO to issue a licence under section **46** of the **Act** and which we have found does not violate the Constitution. The question we have to consider is whether the process of awarding the licence to MPAKE on 27<sup>th</sup> March 2017 was consistent with the provisions of **Article 47(1)** of the Constitution which provides, "*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*" In addition, and pursuant to **Article 47(3)** of the Constitution, Parliament enacted the **Fair Administrative Action Act, No. 4 of 2015** ("the **FAA**") to elaborate and enhance the right to fair administrative action.

44. **Section 46(2)** of the **Act** provides the framework for application for the licence while **Regulation 16** of the **Regulations** merely provides for the documents that are to accompany the application. The regulation states as follows;

##### *16. Application for registration of a collecting society*

*(1) An application for registration of a collecting society under section 46(2) of the Act shall be made on Form No. CR 12 accompanied by the following documents—*

*(a) a certificate of registration as a company limited by guarantee and incorporated under the provisions of the Companies Act, cap. 486*

*(b) a certified copy of a society's Memorandum and Articles of Association;*

*(c) where applicable, a certified copy of the society's annual return filed with the Registrar of Companies showing the corporate structure of the society during the period of January to December of the previous year;*

*(d) where applicable, audited accounts of the society for the five years preceding the date of its application for registration as a collecting society under the Act and these Regulations*

*(e) a full list of the names and addresses of all the members of the society; and*

*(f) any other document or information that the Board may require the society to produce*

*(2) A certificate of registration of a collecting society shall be in Form No. CR 13.*

*(3) An application for renewal of registration of a collecting society and certificate of renewal of registration of such society shall be in Form No. CR 14 and Form No. 15 respectively*

45. Having considered the evidence and depositions in the matter we have no doubt that KECOBO complied with **Regulation 16** of the **Regulations**. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners' complaint is that it did not comply with the provisions of **section 5(1)** of the **FAA** which provides

as follows:

*5(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-*

*(a) issue a public notice of the proposed administrative action inviting public views in that regard;*

*(b) consider all views submitted in relation to the matter before taking the administrative action;*

*(c) consider all relevant and material facts; and*

*(d) where the administrator proceeds to take the administrative action proposed in the notice-*

*(i) give reasons for the decision of administrative action as taken;*

*(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and*

*(iii) specify the manner and period within which such appeal shall be lodged.*

46. Under **section 3**, the **FAA** applies to all state and non-state agencies including any person exercising administrative authority, performing a judicial or quasi-judicial function under the Constitution or any written law or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. Thus the **FAA** applies to all actions by KECOBO.

47. In its submissions, KECOBO did not address whether it complied with the **FAA**, particularly **section 5(1)** thereof when considering the licence for the year 2017. MPAKE contended that the provisions for public participation did not apply to licencing procedures and were indeed excluded by **section 4(6)** of the **FAA** which states:

*Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.*

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**. Although MPAKE raised an attractive argument in regard to the capacity of the 1<sup>st</sup> and 2<sup>nd</sup> 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.

50. In the context of the **Act**, 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 27<sup>th</sup> March, 2017 under **section 46** of the **Act** violated **section 5(1)** of the **FAA**.

51. Before we conclude this aspect of this case, we note that it is the duty of KECOBO to treat every applicant for the licence fairly as no CMO is entitled to the licence as a matter of course. We note that the Regulations do not provide datelines for applications. In this respect, MSCK was provided an advantage not afforded to other applicants to furnish its documents late. Further, there was what amounts to *ex-parte* communication between the KECOBO and MSCK. We suggest that KECOBO promulgates clear regulations regarding timelines for submissions and consideration of applications to avoid allegations of unfairness.

52. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners also raised the issue that a Competent Authority under **section 48** of the **Act** had not been appointed and in that regard sought an order of mandamus. The Competent Authority is empowered to intervene where KECOBO unreasonably refuses to grant a certificate of registration in respect of a collective society or imposes unreasonable terms and conditions on the granting of such certificate. It may also intervene where a collective society unreasonably refuses to grant a licence in respect of a copyright work or imposes unreasonable terms or conditions on the granting of such a licence. We take judicial notice that the Attorney General appointed members of the Authority by **Gazette Notice No. 29** dated 2<sup>nd</sup> March 2018.

53. In light of the finding we have reached on violation of **Article 47(1)** of the Constitution, we do not consider it necessary to comment on or consider the allegations by MCSK that its rights were violated. MCSK did not file its own petition or cross-petition which would entitle it to relief on the basis of its pleadings. We further find that our consideration would now be academic since the period of the licence issued on 27<sup>th</sup> March 2017 has now expired.

**3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners’ and interested parties’ case**

54. The case of 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners was grounded on the fact that MCSK was collecting royalties based on the conservatory orders issued in **Kakamega Petition 3B of 2017**. Since the petitioners were aggrieved by conservatory orders issued in that petition, they ought to have applied to be parties to that petition or challenged the order as it affected them. It was improper to launch a collateral challenge to an order issued in pending proceedings through another suit.

55. However, the issues raised by the petitioners are not idle. The licence issued by KECOBO to MCSK for the year 2016 expired on 31<sup>st</sup> December 2016. Under **section 45(1)** of the **Act**, no person is allowed to collect royalties unless they are licenced and issued with a certificate which is tenable for a period of 12 months under the **Act**. There is evidence that MCSK was collecting royalties despite the fact that its licence had expired. The collections were through the interested parties who were acting as their agents for purposes of collection. As a result, the relief that commends itself to us is to order MCSK to give an account of all licence fees and royalties collected after its licence expired on 31<sup>st</sup> December 2016. In order to protect copyright holders following the expiration of the licence issued to MCSK on 31<sup>st</sup> December 2016, we direct the MCSK to account to KECOBO for all the licence fees and royalties collected from 1<sup>st</sup> January 2017 to date within the **next thirty (30) days** and KECOBO shall be at liberty to issue any further orders and directions.

### **Conclusion and Disposition**

56. We have found that **section 46** of the **Copyright Act** is not unconstitutional and does not violate the right to property protected under **Article 40** of the Constitution or the freedom of association protected by **Article 36(1)** and **(2)** of the Constitution.

57. As regards the right to fair administrative action, we find and hold that **section 5** of the **Fair Administrative Action Act** applies to the proceedings for issuing of a licence under **section 46** of the **Act** and **Regulation 16** of the **Copyright Rules**. As a result, we hold that the right of fair administrative action protected by **Article 47(1)** of the Constitution was violated as a result of failure to allow public participation when the licence was issued to MPAKE on 27<sup>th</sup> March 2017.

### **Reliefs**

58. Following what we have set out above, we now issue the following reliefs;

(a) We declare that **section 46** of the **Copyright Act** does not violate the right to property under **Article 40** of the Constitution or the freedom of association under **Article 36** of the Constitution.

(b) We declare that the process of issuing the licence on 27<sup>th</sup> March 2017 by KECOBO to MPAKE violated the provisions of **section 5** of the **Fair Administrative Actions Act** and **Article 47(1)** of the Constitution and the licence is HEREBY declared null and void.

(c) The Music Copyright Society of Kenya be and is hereby directed to account for all the licence fees and royalties collected from **1<sup>st</sup> January 2017 to date** within the next **thirty (30) days** from the date hereof. The accounts shall be delivered to the Kenya Copyright Board which shall be at liberty to issue any further orders and directions.

(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**.

(e) We make no order as to costs.

**DELIVERED, DATED and SIGNED at KAKAKMEGA this 13<sup>th</sup> day of July 2018.**

**R.N. SITATI**

**D.S. MAJANJA**

**T.W.CHERERE**

**JUDGE**

**JUDGE**

**JUDGE**