



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 350 OF 2015**

**BETWEEN**

**DAVID KASIKA ..... 1<sup>ST</sup> PETITIONER**  
**ALI MUKWANA AKHONYA ..... 2<sup>ND</sup> PETITIONER**  
**SARAH OUNDO NAGAYA ..... 3<sup>RD</sup> PETITIONER**  
**BRIAN JUMA ..... 4<sup>TH</sup> PETITIONER**  
**MOSES KUNG’U ..... 5<sup>TH</sup> PETITIONER**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED ..... RESPONDENT**  
**SAFARICOM LIMITED .....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This petition concerns the alleged violation of the petitioners’ rights under Article 36 and 40 of the Constitution. The petitioners challenge the collection of royalties by the respondent from their musical works on a platform known as the ‘*Skiza Tunes*’ platform. They allege that the collection of royalties by the respondent violates their constitutional rights under Articles 36 and 40 of the Constitution which guarantee the right to freedom of association and property, respectively.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners describe themselves as composers and performing artists of music and audio-visual works. They are also registered members of the Music Copyright Society of Kenya Limited (**MCSK**), the respondent. The 4<sup>th</sup> and 5<sup>th</sup> petitioners are also composers and performing artists of musical and audio-visual works. They are not, however, members of MCSK.
3. MCSK, the respondent, is a company limited by guarantee and a non-profit making organization licensed by the Kenya Copy Right Board (**KECOBO**) to collect royalties for authors, composers,

arrangers and publishers of musical works who are its members in respect of public performances and broadcast to the public.

4. The interested party, Safaricom Ltd (**Safaricom**), is the registered proprietor of the **Skiza Tunes** platform, a platform which enables telephone users to select and download ring-back tones to their phones. It was joined to the present proceedings by consent of the parties as the subject of this petition revolves around royalties in respect of tunes downloaded from the *Skiza Tunes* platform.
5. This petition was heard together with **Petition No. 317 of 2015- Expedia Limited & Another vs The Attorney General and 4 Others**. A proposal to consolidate the petitions on the grounds that they raised the same issues was opposed by the respondent in this case. However, while the petitions were argued as separate suits, it is noteworthy, as will be apparent later in this judgment, that some of the parties filed pleadings in which they addressed themselves to both petitions. Consequently, while the Court will address itself to the central issue raised in this petition, the crux of the dispute, which revolves around the question whether section 30A is a violation of the petitioners' right to association and property, will be addressed in **Petition No 317 of 2015**.

### **The Petitioners' Case**

6. The petitioners have set out their case in the petition dated 24<sup>th</sup> August, 2015. The petition is supported by affidavits sworn by the petitioners, a further affidavit sworn by the 2<sup>nd</sup> petitioner, Mr. Ali Mukhwana Akhonya, on 2<sup>nd</sup> November, 2015, written submissions dated 2<sup>nd</sup> December 2015 and supplementary submissions dated 1<sup>st</sup> February, 2016. Their case was presented by Learned Counsel Mr. Kiingati.
7. Ms. Nagaya, the 3<sup>rd</sup> petitioner, deposed that she became a member of MCSK on 5<sup>th</sup> July, 2011 and she has since produced two albums with about ten songs. She contended that sometime in 2011, she was approached by a company called Liberty Afrika Limited, a Content Service Provider, to put her two music albums on Safaricom's Skiza Tunes portal as a ring-back tone. She states that she allowed the said company to edit and format her two albums into content that is capable of being placed on the said Skiza Tunes portal and place them therein. According to Ms. Nagaya, her songs were well received on the Skiza Tunes Portal as a number of private individual subscribers have downloaded them and used them as their ring-back tones.
8. Ms. Nagaya deposes further that on 18<sup>th</sup> August, 2015, she learnt through various press reports that MCSK had concluded an agreement with Safaricom to facilitate the collection of her royalties from her private performance on the Skiza Tunes Portal. She visited MCSK's offices to inquire about the development and on what authority MCSK was signing with Safaricom to collect the royalties for her private performances. She states that she was ignored and was never given any explanation. It is her contention that MCSK did not consult her prior to entering into the said agreement with Safaricom, and the agreement has remained a mystery and has never been availed to her.
9. Ms. Nagaya contends that the ring-back tone is her private performance. Consequently, the royalties earned therefrom are not subject to collection by MCSK. She states that on 14<sup>th</sup> March, 2014, the Chief Executive Officer of MCSK acknowledged in an interview on Citizen Television that ringtones and ring-back tones such as those on the Skiza Tunes Portal are a private performance and therefore beyond the scope of MCSK's royalty collection powers.
10. Ms. Nagaya further deposes that MCSK is not a trustworthy entity. She contends that it will mismanage the royalties she earns from her private performances which it is not entitled to collect. She also alleges that MCSK was, sometime in 2011, deregistered by its regulator, KECOBO as a collecting management organization because of the mismanagement of collected royalties for public performances and failure to adhere to regulations. She also argues that MCSK still persists in its mismanagement of collected royalties for public performances and has as a result received a

letter from KECOBO threatening it with denial of an operating license.

11. Ms Nagaya alleges that MCSK's audited accounts show a clear case of deliberate mismanagement of public performance royalties and therefore they cannot be trusted to handle private performance royalties. She argues that should the private performances on the Skiza Tunes portal be allowed to be managed by MCSK, it will be handed over to an unlicensed Content Service Provider that the MCSK's Chief Executive Officer has an interest in, and that MCSK has already appointed a company called Nasratech Limited whose shareholders, she alleges, are the wife and brother-in-law of MCSK's Chief Executive Officer, to handle the Skiza tunes portal.
12. Ms Nagaya further contends that MCSK has been extremely reluctant to share the logs of her public performances, and she has only received Kshs1,300 for her public performances since she joined MCSK as a member. She contends that despite her songs receiving massive airplay, and despite her demanding her payments, MCSK has failed, neglected and refused to account for and remit her royalties earned through the public performances of her musical works.
13. Like Ms. Nagaya, the 2<sup>nd</sup> petitioner, Mr. Ali Mukhwana Akhonya, makes various allegations against MCSK with regard to its collection of his royalties. He contended that since he joined MCSK four years ago, he has received a total of Kshs 2,000 as royalty for his public performances. Similar averments were made by the 1<sup>st</sup> petitioner, Mr. David Kasika, who deposed that he has only received Kshs 2,000 in royalties from the respondent.
14. The 5<sup>th</sup> petitioner, Mr. Moses Kung'u, made averments similar to those of Ms. Nagaya and the 1<sup>st</sup> and 2<sup>nd</sup> petitioner and echoed their dissatisfaction with the agreement between MCSK and Safaricom.
15. The 4<sup>th</sup> petitioner, Brian Juma, is not a member of MCSK. He deposes that he was approached in April, 2013 by a company called Cellulant Limited, a Content Service Provider, to put his two albums on Safaricom's Skiza Tunes portal as a ring-back tone. After detailed discussion with the said company, he allowed the company to edit and format his songs into content capable of being placed on the Skiza Tunes portal. It is his contention that his songs have since then been well received by a number of private individuals.
16. On 18<sup>th</sup> August, 2015 he learnt, through press reports, that MCSK had concluded an agreement with Safaricom to facilitate collection of his private performance royalties from the Skiza Tunes portal. He contends, however, that despite his songs having received massive airplay, MCSK has failed, neglected and/ or refused to account for and remit the royalties earned through the public performance of his music.
17. In their further affidavit sworn by Mr. Ali Mukhwana Akhonya in response to the reply to their petition by the respondent, the petitioners maintained that MCSK was deregistered by KECOBO as a Collective Management Organization (CMO) on 1<sup>st</sup> April, 2011 vide Gazette Notice No. 5093 of 19<sup>th</sup> April, 2011. Mr. Akhonya deposed that the said Gazette Notice has not been revoked by the Copyright Board, and consequently, MCSK has been operating and contracting illegally. Mr. Akhonya alleged that the purported renewal of MCSK's licence is a forgery as no license could issue to an organization that has been deregistered.
18. The petitioners further contend that CMOs are not allowed by law to directly collect royalties from public performances as that is a function of the Copyright Board. They argue that the royalties allegedly collected under the agreement between MCSK and Safaricom are unlawful as the Cabinet Secretary concerned has neither approved it as a tariff nor gazetted it; and in any event, the agreement between MCSK and Safaricom has since been terminated and Safaricom cannot therefore insist on complying with a non-existent agreement.
19. The petitioners further argue that the Skiza Tunes portal is not a public performance; that the

- content published on the platform does not in any way amount to publication for commercial purposes, and neither MCSK or Safaricom sought either their consent or that of MCSK's membership to collect the royalties on their behalf.
20. The petitioners allege that they have not assigned their rights to MCSK, terming the allegation by the respondent that they have done so fictitious and a forgery; and further, that no such assignment has been done as to do so would be in contravention of the law.
  21. In their submissions, the petitioners reiterated their depositions. Mr. Kiingati submitted on their behalf that section 30A of the Copyright Act is a violation of the 3 Step Test established by Article 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works, 1988 and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869. This was because, as stated in the commentary by the World Trade Organization Dispute Panel, the section unreasonably prejudices the copyright owners' right to exclusively control the exploitation of their copyrighted works. It was also their submission that an unreasonable loss of income to the copyright owner arises as the MCSK, as the Collecting Management Organization, will use 70.8% of the collected royalties on administration fees and expenses, while paying them 29.2% on account of the royalties.
  22. The petitioners further argued that at the time the section was introduced, there existed, since 2008, agreements between Premium Rate Service Providers and musical artists for the reproduction and provision of musical works on mobile phones platforms such as the Skiza Tunes Portal. Consequently, these agreements, which have subsisted without a hitch, provided musical artists with a platform for their works on the mobile phone platforms. In addition, in their view, the Skiza Tunes portal does not qualify as an exceptional circumstance that would warrant the introduction of compulsory licensing by section 30A of the Copyright Act.
  23. They argued further that section 30A of the Copyright Act limits their right to property as provided under Article 40 of the Constitution and Article 17 of the Universal Declaration of Human Rights and further, that it derogates from sections 26, 28 and 30 of the Copyright Act because the requirement for the payment of royalties to CMOs limits the ability of copyright holders to directly receive remuneration for their works and takes away their freedom to deal with their proprietary rights.
  24. The petitioners further submitted that section 30A of the Copyright Act contravenes their right to freedom of association under Article 36 of the Constitution, Article 20 of the Universal Declaration of Human Rights, and Article 22 of the International Covenant on Civil and Political Rights. They submitted, in reliance on the decision in **Civil Liberties Organization vs Nigeria, Communication No. 101 of 1993** in which the importance of the right to freedom of association was underscored, that section 30A compels copyright owners to become members of CMOs when they would rather not.
  25. It was their submission, finally, that the Skiza portal operated by Safaricom qualifies as a telecommunication system as defined by section 2 of the Kenya Information and Communication Act, Cap 411A. As a result, MCSK, as a CMO, does not have a license to operate a telecommunication system as required under section 24 of the Kenya Information and Communication Act and is therefore prohibited from dealing in any way with digital content on the Skiza portal.
  26. In response to a challenge by the respondent to the jurisdiction of this Court to deal with this matter, the petitioners relied on the decision in **Council of Governors and 3 Others vs The Senate and Others [2015] eKLR** to submit that this Court has the jurisdiction to hear and determine the question of whether any law is inconsistent with or in contravention of the Constitution.
  27. The petitioners therefore prayed that the Court allows their petition and grants the following orders:

- i) That a permanent injunction restraining the respondent either by itself, servants, agents, employees, assignees and/or representatives from demanding for, receiving, collecting, retaining or in any way whatsoever dealing with royalties from private performances.*
- ii) That a declaration to issue that royalties earned from private performance by performing artists is beyond the ambit of the respondent as a Collective Management Organization.*
- iii) That a declaration to issue that music and such other performances relayed to individual mobile telephony subscribers on their telephone handsets and such other personally used gadgets is a private performance beyond the royalty collecting scope of the respondent as a Collective Management Organization.*
- iv) That an order to issue compelling the respondent to render a full account of all performance logs on the basis of which it collected royalties for and on behalf of the petitioners.*
- v) That an order to issue compelling the respondent to render a full account for all royalties owed to the petitioners for their performances.*
- vi) That an order of compensation do issue for violation of the petitioners' rights and an inquiry to quantum be gone into.*
- vii) That such further orders or relief do issue pursuant to Article 23 (3) of the Constitution.*
- viii) That the respondents be condemned to pay the petitioners' cost of and incidental to this petition.*

## **The Respondent's Case**

28. In opposing the petition, MCSK filed an affidavit in reply sworn by its Chief Executive Officer, Mr. Maurice Okoth, on 28<sup>th</sup> August, 2015, and written submissions dated 25<sup>th</sup> January, 2016.
29. Mr. Okoth deposes that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, being members of MCSK, are bound by the terms of the Memorandum and Articles of Association of MCSK. As a result, since the claims in the present petition pertain to the administration of their copyrights by MCSK, they should be addressed through mechanisms provided for in the said Memorandum and Articles of Association through arbitration as provided under article 78 thereof.
30. Mr. Okoth asserted that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> petitioners have failed to disclose to the Court that they have all assigned their rights in their works to MCSK subsequent to the execution of deeds of assignment between them and the MCSK that effectively grants MCSK exclusive rights over the said works. It is deposed further on behalf of MCSK that the three petitioners have not revoked the deeds assigning their rights to MCSK.
31. According to Mr. Okoth, MCSK is a duly registered Collective Management Organization with a valid license to collect, on behalf of copyright holders, royalties with respect to the use of works associated with the holders. Pursuant to section 3 of its Memorandum of Association, MCSK has established and created several structures to collect and administer royalties on behalf of its members. In this regard, jointly with other registered Collective Management Organizations with similar mandates, it approached Safaricom with a view to configure means to collect royalties for their members whose works were being used on various Safaricom platforms such as the Skiza Tunes portal.
32. The respondent avers that Safaricom, through the Skiza Tunes platform, transmits to its subscribers the said music tunes which are mainly copyrighted material of holders, some of whom are members of MCSK. This transmission, for all intents and purposes, amounts to communication to the public of the said works, and thus qualifies as a public performance.

33. It was Mr. Okoth's further deposition that CMOs and Safaricom have the capacity to enter into valid and lawful contracts within the objects and powers conferred upon them by their respective Memorandum and Articles of Association; that the terms of the said contract are enforceable by the parties thereto; the petitioners are not privy to the said contract and accordingly, the prayers sought by the petitioners in this petition violate the doctrine of privity of contract since it is only parties to a contract who can enforce rights under the contract.
34. In its submissions, MCSK submitted that this Court lacks the jurisdiction to deal with the issues raised in this petition since any dispute between it and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners ought to be referred to arbitration as required by article 78 of its Memorandum and Articles of Association. It maintained that the petition has been lodged without any reference to an arbitration process and the Court therefore lacks jurisdiction to determine the matter. MCSK relied in support of this submission on the decisions in **John Wafula Mukhwana and Another vs Music Copyright Society of Kenya and 3 Others, HCCC No. 161 of 2015** and **Antony Munene Maina vs Student Organization of the University of Nairobi (SONU) and Another, HC JR Misc. App. No. 111 of 2015** in which the Court held that it could not interfere with matters that were subject to arbitration as to do so would amount to the Court taking over the role of the arbitrator.
35. It was MCSK's further submission, relying in support on the decision in **Abdirahman Affi Abdalla vs Osupuko Service Station Ltd and Another [2012] eKLR**, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, who are its members, are bound by the terms of its Memorandum and Articles of Association.
36. With regard to the 4<sup>th</sup> and 5<sup>th</sup> petitioners, the respondent submitted that they had not demonstrated how it has violated their copyrights. Its position was that the arrangement it has with Safaricom excludes them and they therefore have no cause of action against it.
37. MCSK asked the Court to disregard various averments by the petitioners which it termed as scandalous as they imputed misconduct and bad faith on its part. It asked the Court to be guided by the decision in **Joseph Gitau and 2 Others vs Ukay Estate Limited, HCCC No. 813 of 2004** with regard to what constitutes a scandalous pleading.

### **The Interested Party's Case**

38. Safaricom filed an affidavit in opposition to this petition and petition No. 317 of 2015 in which it addressed the issues raised in both petitions. The affidavit was sworn by its Product Manager, Ms. Carol Njagi, on 9<sup>th</sup> October 2015. It also filed submissions dated 7<sup>th</sup> December, 2015, which were highlighted by its Learned Counsel Ms. Kageni.
39. Ms. Njagi's deposes that prior to the introduction of the impugned section 30A of the Copyright Act, there existed Content Service Providers (CSP), who would contract with rights owners for the use of their copyright works on the Skiza platform. The CSP would in so doing take the music, digitize it and convert it into ringtones and ring-back tones. Payment for the usage of such copyright works would be made through the CPS who would then pay the rights owners.
40. Thereafter, Safaricom entered into an agreement with the Kenya Association of Music Producers (KAMP), The Performers Rights Society of Kenya (PRSK) and the MCSK who are the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents respectively in Petition No. 317 of 2015. The three organisations were at all material times CMOs licensed under the Copyright Act by KECOBO.
41. Ms. Njagi deposes that the agreement was to enable Safaricom pay the licence fees that accrue from the use of music works and sound recordings, or such part of the music work or sound recording in the repertoire that is owned or controlled from time to time by the CMOs. The CMOs would then distribute royalties to the respective right owners, thereby enabling the money received from the Skiza platform to be channeled to the rights' owners.
42. According to Safaricom, the Skiza platform falls within the definition of sound recording as it

involves an aural fixation of sounds or representation of sound when a person who has subscribed is called by any other person. Further, that the Skiza performance does not contain any images or any form of audio-visual works and it therefore qualifies as a sound recording within the definition of the Copyright Act.

43. It was Safaricom's further deposition that the music in the Skiza platform is not a private performance. Its averment was that where there is a series of repeated transmissions of the same work to different recipients, that amounts to a public performance in accordance with the Copyright Act.
44. Ms. Njagi averred further that in accordance with section 30A of the Copyright Act, it is mandated to pay for the use of the rights owners' copyright works only to licensed CMOs; that the membership of such CMOs is open to all owners of copyright and related rights and the CMOs act on behalf of the copyright owner and administer the licensing rights, collection of royalties and enforcement of rights on their behalf. Safaricom's deposition was that due to the sheer number of artists and the different rights that accrue to different people from the usage of copyright works, it is challenging for it to individually contact all the rights owners to obtain permission as well as to monitor the usage of the copyright works.
45. Additionally, it was Ms. Njagi's averment that it is not feasible to deal with individual rights that accrue from public use hence the need for the CMOs. The CMOs are supposed to receive authorisation from rights owners to grant rights in, exploit such rights and distribute the remuneration for the uses made, and owners of copyright should be paid royalties on account of the popularity of their works.
46. In its view, the Copyright Act provided for the incorporation of the CMOs whose roles were to collect remuneration in areas difficult for owners to collect and assess royalties themselves. Further, due to the impracticability of individually managing rights to copyright works, both to the right owners and users, there is a need for the CMOs as they bridge the gap between the rights owners and the rights users. Its averment was therefore that the petitioners are at liberty to collect their respective portion of the negotiated licences from the registered CMOs.
47. Accordingly, Ms. Njagi deposed that none of the petitioners' rights have been infringed or are threatened with infringement. In her view, the petitioners have not been precluded from exercising their fundamental rights and freedoms when royalties from the Skiza platform are collected on their behalf and paid to them through their registered CMOs.
48. With respect to the question whether the use of ring back tones was a public or private performance, Ms Njagi stated that copyright in ring-back tones invokes reproductive rights and public performance rights; that the public performance happens whether the performance or display is made in the same place or separate places, or at the same time or different times.
49. While conceding that it had previously entered into agreements with Content Service Providers, Safaricom's position was that it had varied these agreements on 26<sup>th</sup> June, 2015 in order to comply with the provisions of the Copyright Act that prohibit persons from conducting the business of a copyright collecting organization without a certificate of registration. It was further its deposition that contracts entered into by the petitioners prior to the amendment of the law must adopt to the change in law and not vice-versa.
50. In its submissions, Safaricom conceded that the Court has jurisdiction to determine whether there has been a violation of the petitioners' rights, whether the Copyright Act is inconsistent with or in contravention of the Constitution, and whether anything said to be done under the authority of the Constitution or the Copyright Act is inconsistent with, or in contravention of, the Constitution.
51. It observed that the substratum of the present petition is the management of MCSK, and none of the orders that the petitioners were seeking refers or relates to the Constitution. Safaricom further observed that the petitioners were seeking interpretation of the Copyright Act without any

reference to the Constitution, and whether anything done under the said Act was in violation of the provisions of the Act. In its view, the issues raised in this petition fell outside the jurisdiction of this Court, and are best addressed in an ordinary civil suit.

52. With respect to the substantive issues raised in the petition, Safaricom took the position that it is clear that it is not only when a sound recording is publicly performed that a single equitable remuneration must be paid by the user and that if the said sound recording is also either communicated to the public, published for commercial purposes or a reproduction of such recording is used directly for broadcasting, then a single equitable remuneration must be paid by the user to the respective Collective Management Organization for onward payment to the performer and the producer of the sound recording.
53. Accordingly, that the process of downloading a Skiza tune is as described in section 30A (4) of the Copyright Act, as the section brings the musical works transmitted through the Skiza platform within the ambit of section 30A (1) of the said Act. As such, it matters not whether or not the said transmission qualifies as a public performance. It argued further that whether or not a subscriber downloaded the musical works for commercial intent is neither here nor there as Parliament in its wisdom acknowledged that by virtue of section 30A (1), a single equitable remuneration must be paid by the user to the respective CMO for onward payment to the performer and the producer.
54. Additionally, its contention was that under section 30A(4), sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen are automatically considered to have been published for commercial purposes and therefore are within the ambit of section 30A (1).
55. In Safaricom's view, neither section 26 (1) (b) nor section 28 (3) of the Copyright Act exclude the requirement for a single equitable remuneration to be paid by the user of a sound recording to the respective CMO for onward payment to the performer and the producer of the sound recording, when the said sound recording is published for commercial use.
56. Safaricom further took the position that if the Court determines that the issue whether the transmission of copyrighted works through the Skiza platform qualifies as public performances, then in determining whether performances of ring-back tones constitute communication to the public or public performance, the Court should be guided by the case of **Entertainment Software Association vs Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34, [2012] 2 S.C.R 231 para 77**.
57. It submitted further that even if only one person enjoys the performance of a ring-back tone at a time, that is performance and it constitutes communication to the public as there is a series of repeated sound transmissions of the same works to numerous recipients when they call the subscriber. Further, that the phrase 'to the public' as was held in **Canadian Wireless Telecommunications Association vs Society of Composers, Authors and Music Publishers of Canada, 2008 FCA 6, [2008] 3 F.C.R 539**, includes when a person offering members of the public the opportunity to download ringtones for their mobile phones.
58. Safaricom further relied on **USA vs American Society of Composers, Authors and Publishers, 41 Civ 1395, Cellulant Kenya Ltd vs Music Copyright Society of Kenya Ltd, Civil Case No. 154 of 2009** and a book by **Prof. Vaver, Intellectual Property Law: Copyright, Patents, Trade-Marks, 2<sup>nd</sup> Edition, 2011** to submit that the ring-back tone is a public performance since it is a transmission of the same work to numerous different recipients. Accordingly, that since the ring-back tones is part of public performances, collection of royalties should be done by a Collective Management Organization and is not payable directly to the artists.

## Determination

59. I have read and considered the respective pleadings and submissions of the parties in this matter. The petitioners are dissatisfied with the agreement between MCSK and Safaricom under which MCSK collects their royalties from the Skiza Tunes platform which belongs to Safaricom. While they make various arguments and submissions with regard to the performance, legality and integrity of MCSK, as well as the meaning and interpretation of various provisions of the Copyright Act, it must be remembered that this is a constitutional petition alleging violation of constitutional rights.

60. Consequently, the key issue for determination is whether there has been any violation of the petitioners' rights by the respondent. As the alleged violation is tied in with what the petitioners refer to as their private performances, which they deem to fall outside the provisions of section 30A of the Copyright Act, I will also consider whether the playback of ring tones on the Skiza Platform is a private or public performance. Should I find in favour of the petitioners on these issues, then I will proceed to consider the remedies to grant them.

## **Jurisdiction**

61. Perforce, however, I must begin with a consideration of the question of my jurisdiction to determine the issues raised by the petitioners. The question of jurisdiction has been a central pillar of the opposition to the petition by MCSK and Safaricom. Their argument, as I understand it, is twofold. First, MCSK argues, in respect to the first three petitioners, that as its members, they are bound by the provisions of MCSK's Memorandum and Articles of Association, which provide for arbitration of disputes. With respect to the 4<sup>th</sup> and 5<sup>th</sup> petitioners, its position is that they are not its members, it has never represented their interests with Safaricom or any other party, and its arrangement with Safaricom is one that strictly involves a catalogue that does not include the works of the 4<sup>th</sup> and 5<sup>th</sup> petitioner.

62. The law with respect to jurisdiction is clear. As was enunciated by Nyarangi J. in **Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd [1989] KLR1**.

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

63. The jurisdiction of the High Court is set out at Article 165(3) of the Constitution, the relevant provisions of which, for present purposes, are in the following terms:

***(3) Subject to clause (5), the High Court shall have—***

- a. ***Unlimited original jurisdiction in criminal and civil matters;***
- b. ***Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
- c. ***...;***
- d. ***Jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-***
  - i. ***The question whether any law is inconsistent with or in contravention with the Constitution;***
  - ii. ***The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;***
  - iii. ***...;***

64. At Article 22, the Constitution grants to every person the right to institute court proceedings alleging violation or threat of violation of a right or fundamental freedom. Article 23 grants the Court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of violations, infringement or threat of violation or infringement of constitutional rights.
65. In this matter, the petitioners are alleging violation of their constitutional rights under Article 36 of the Constitution, which guarantees to everyone the right to freedom of association. They also allege violation of their right to property protected under Article 40 in that their royalties for the private performance of their copyright works are being paid to the respondent by the interested party.
66. In other words, the petitioners are alleging infringement or violation of their constitutional rights. Whether indeed the facts of the case demonstrate a violation of these rights is an entirely different question.
67. It may be, as Safaricom submits, that the facts do not raise a constitutional issue, which **Nyamu, J** (as he then was) in **Muiruri vs Credit Bank Ltd and Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** defined as follows:

***“A constitutional issue ... is that which directly arises from [a] court’s interpretation of the Constitution.”***

68. MCSK has argued that this Court is not the appropriate forum for the determination of this matter. With respect to the 4<sup>th</sup> and 5<sup>th</sup> petitioners, its argument is that they are not its members, and it has not sought to represent them in any way, or to collect their royalties from the interested party.
69. Indeed, it is not clear from the petitioners’ pleadings and submissions, which I have set out above, how the 4<sup>th</sup> and 5<sup>th</sup> petitioners’ rights have been violated by the respondent. From the material before me, a violation of the 4<sup>th</sup> and 5<sup>th</sup> petitioners’ rights can arise, if at all, in relation to the MCSK if it is indeed collecting their royalties and is not remitting such royalties to them, or the Court finds that section 30A of the Copyright Act violates either section 36 or 40 of the Constitution. I will revert to this issue later in this judgment.
70. With respect to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, MCSK argues that as they are its members, they are bound by its Memorandum and Articles of Association and their claims against it should therefore be referred to arbitration pursuant to article 78 thereof. This article provides that:

***“Where differences arise between the Society on the one hand and any of the members, their executors, administrators or assigns on the one hand touching the true intent or construction, or the incidents or consequences of these Articles, or the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes, or touching any breach, or alleged breach of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the society, or to any of the affairs of the society, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom one shall be appointed by each of the parties indifferently.”***

71. As I observed above, this petition relates to the alleged violation of the petitioners’ constitutional rights. This is a claim that falls for determination by this Court in exercise of its constitutional jurisdiction. Should the Court find that the facts disclose a constitutional violation in the requirements of the Copyright Act, then it will give an appropriate remedy as mandated by law. However, should it find that the petition does not disclose a violation of the Constitution, and the

facts disclose a dispute which, in the case of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, properly falls for adjudication as provided under article 78 above, then that will be the end of the matter.

72. It is therefore my finding that this petition, in so far as it seeks determination of the question whether there has been a violation of the petitioners' constitutional rights to association and property by section 30A of the Copyright Act, which has led to the agreement between MCSK and Safaricom for the collection of the petitioners' royalties, is properly before me.

### **Violation of the Petitioners' Rights**

73. As I observed at the beginning of this judgment, this petition raises fundamentally the same issues as were raised in **Petition No. 317 of 2015 - Expedia Limited & Another vs The Attorney General & Others**. In the course of the proceedings, Counsel for the respondent strenuously opposed the consolidation of the two petitions. He maintained that the two petitions raised totally different issues, and as a result, the petitions were heard separately.

74. After carefully reading the pleadings and submissions of the parties, it is evident that the two petitions revolve around two main issues: first, whether the playback of musical works on the Skiza platform is a private or public performance, and secondly, whether section 30A of the Copyright Act is unconstitutional and in violation of Articles 36 and 40 of the Constitution.

75. I have considered the second of these two issues at some length in the judgment on **Petition No. 317 of 2015**. My findings are captured at paragraph 105 to 124 thereof. I need not repeat the in-depth analysis of the issue in this judgment. However, the conclusion that I have come to is first, that section 30A of the Copyright Act does not violate section 36 of the Constitution, and secondly, that there is no violation of the rights of the petitioners under Article 40. This is in light of the fact that there is no compulsion of rights holders to become members of a CMO, and they are entitled to still receive their remuneration from CMOs such as the respondent. I have also found that the requirement that they should receive such remuneration for the use of their artistic works indirectly is not a violation of their property rights.

76. I will now turn to consider the first issue, whether the playback of musical works on the Skiza platform is a private or public performance.

### **Whether Playback of Musical Works on the Skiza Platform is a Private or Public Performance**

77. The petitioners have sought a declaration that music and such other performances relayed to individual mobile telephony subscribers on their telephone handsets and such other personally used gadgets is a private performance beyond the royalty collecting scope of MCSK as a CMO.

78. Safaricom has relied on the provisions of section 30A(4) to submit that the musical works transmitted through the Skiza platform fall within the ambit of section 30A (1) of the Copyright Act which requires that a single equitable remuneration be paid by the user if a sound recording is published for commercial purposes. In its view therefore, it does not matter whether or not the transmission qualifies as a public performance.

79. Safaricom controverts the petitioners' argument that the provisions of section 30A of the Copyright Act do not apply to ring back tones as such tones are played by the subscriber for the benefit of the caller without any commercial intention, and because of the exclusive rights granted to the rights holder under sections 26 (1) (b) and section 28(3) of the Copyright Act. In its view, the provisions of section 30A(4), however, bring Skiza Tunes within the ambit of the Act. Since the law specifically provides that sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen will be considered to have been published for commercial purposes, it will not matter whether or not the subscriber downloaded the musical works for commercial purposes.

80. I have considered the provisions of section 30A (4) relied on by Safaricom. It states that:

***“For the purposes of Section 30A, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.”***

81. As noted above, I have considered at length in **Petition No 317 of 2015 - Xpedia Limited vs AG** the question whether section 30A violates the right to property of copyright holders. My finding was that it did not, and the rights of copyright holders under sections 26 and 28 of the Act are not interfered with by the requirements of the section. That finding applies equally to the petitioners’ arguments in this case regarding these two sections. I am therefore in agreement with the submissions by Safaricom that neither section 26(1) (b) nor Section 28(3) of the Act excludes the requirement for a single equitable remuneration to be paid by the user of a sound recording to the respective CMO for onward payment to the individual rights holders.

82. The petitioners have placed heavy emphasis on the distinction between public and private performance, their case being that since the downloading of songs on the Skiza Tunes Platform amounts to a private performance, then section 30A does not apply, and the respondent and other CMOs cannot collect royalties on their behalf as required under the section. However, in my view, taking into account the provisions of section 30(4) set out above, it appears to me, as intimated by Safaricom, that whether the downloading of tunes on the Skiza Tunes platform is a public or private performance is an academic point: section 30(4) makes clear that for purposes of section 30A, making available sound recordings and fixations of performances by wire or wireless means in such a way that members of the public may access them from a place and a time that they individually choose renders them liable to the application of section 30A.

83. However, and while I believe that this is a matter for consideration before a commercial court dealing with the question of copyright, I will briefly consider the issue.

84. The petitioners have relied on the decision in **Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121 (2008)** to argue that the performance is private, as opposed to public, when ringtones are communicated to individuals through a process such as is available through the Skiza Platform.

85. No decisions from this jurisdiction on this point were placed before me by the parties hereto. However, I am persuaded by the reasoning in **Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada, 2008 FCA 6, [2008] 3 F.C.R. 539**, relied on by Safaricom, in which it was held that a person offering members of the public the opportunity to download ringtones for their mobile phones thereby communicates the musical works contained in the ringtones to the public. It was stated in that case that the approach

***“is consistent with the language of [s. 3(1)(f) of the Act] and its context. It also accords with common sense. If a wireless carrier were to transmit a particular ringtone simultaneously to all customers who have requested it, that transmission would be a communication to the public. It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times. [para. 43]”***

86. Similarly, in the dissenting opinion in the Canadian case of **Entertainment Software Association vs Society of Composers, Authors and Music Publishers of Canada [2012] 2 SCR 231**, it was noted that:

***“... As noted above, to “communicate” means to “impart” or “transmit”. The Oxford English Dictionary (online) defines “transmit” as: “[t]o cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space; to convey, transfer; . . . [t]o convey or communicate (usually***

*something immaterial) to another or others” (emphasis added); and, in a more technical sense: “[t]o send out electric signals or electromagnetic waves corresponding to (an image, a programme, etc.).”*

87. In the same decision, the Learned Judge went on to state that:

*“... A transmission of a single copy of a work to a single individual is not a communication to the public within the meaning of section 3 (1) (f) of the Copyright Act. However, where there is a series of repeated transmissions of the same work to different recipients, each transmission cannot be analyzed in isolation, even if each transmission is initiated at the request of an individual member of the public. Focusing on transmissions individually loses sight of the true character of the activity in question. Copyright protection is not dependent on the technicalities of methods of transmission. In the case of online music services, it is hardly possible to maintain that there is no intention that the same work ever be transmitted again.”*

*“A rule that each transmission must be analyzed in isolation because each is initiated at the request of an individual member of the public would have the effect of excluding all interactive communications from the scope of the right to communicate to the public. Nothing in the wording of section 3 (1) (f) of the Act excludes pull technologies from its scope or restricts communications to the public to a purely non-interactive context.”* (Emphasis added)

88. I am in full agreement with the view expressed in the above decisions, which I believe apply in respect to the Skiza Tunes. While the tunes are downloaded by individuals and are communicated at different times to individuals, it would be contrary to common sense to then argue that they are therefore private performances or communications and therefore outside the ambit of section 30A of the Act. In my view therefore, a series of repeated transmissions of the same works to a number of recipients constitutes communication to the public. However, as I have found that section 30(4) renders the private/public performance question moot, I believe I need say no more on this issue.

89. Secondly, it is my finding that section 30A of the Copyright Act is not inconsistent with the Constitution, nor does it violate the rights of the petitioners guaranteed under Articles 36 and 40 of the Constitution. That being the case, the royalties from the Skiza Tunes portal are amenable to collection by the CMOs, and the petitioners are free to join any of the licensed CMOs for that purpose.

### **Allegations Against the Functioning of the Respondent**

90. The petitioners have made various allegations against the respondent, including that it has been deregistered by the Copyright Board, and that its licence to operate as a CMO is a forgery. The respondent asks the Court, and I must agree with it on this, that I disregard the allegations of impropriety against it which it terms as scandalous. Should there indeed be cases of criminal conduct on the part of the MCSK and its officers, which is what the petitioners in effect allege, such conduct should be reported to the appropriate authorities to be dealt with in accordance with the relevant law.

91. With respect to the other grievances against the respondent, it is to be observed, first, that the 4<sup>th</sup> and 5<sup>th</sup> petitioners are not members of MCSK. As already observed, there was no evidence before me that demonstrated how their rights were being violated by the respondent. In my view, the two petitioners are at liberty to enter into an agreement with another CMO, which would be collecting their royalties from Safaricom. If there is any element of compelling them to become members of MCSK, that would be in violation of their rights. However, with regard to the collection of royalties, as I understand it, CMOs may collect and remit royalties for members and non-members. Where they do that, as appears to be the case under the agreement with Safaricom, they

- are duty bound to account to both their members and the non-members for whom they collect royalties.
92. In any event, as I have observed in the judgment in Petition No. 317 of 2015, the mandate of licensing, supervising and overseeing the functioning of CMOs lies with KECOBO under section 46 of the Copyright Act.
93. With respect to the 1<sup>st</sup> - 3<sup>rd</sup> petitioners, they have entered into agreement with, and are members of, the respondent. They too have made various allegations against MCSK, inter alia, that it was deregistered by KECOBO, and they have also cast aspersions on its integrity and financial probity. These, however, are not matters that fall within the constitutional jurisdiction of the Court. Should there be a basis for these allegations, the petitioners must report them to the appropriate authorities, including KECOBO, which has the power to cancel the licence it has issued to MCSK. In addition, as provided under section 46(5), where a CMO is not operating to the satisfaction of members, the Copyright Board is authorized to licence another CMO dealing with that class of rights. This is an option that is open to the petitioners to follow up on if the respondent is deemed to be exploiting them or engaging in unethical conduct.
94. In any event, I note that MCSK has the mandate, as provided under its Memorandum and Articles of Association:
- “To exercise and enforce on behalf of members of the Society, being the composers of musical works or the authors of many literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyright in such works all the rights, economic or moral, and remedies of the proprietors by virtue of the Copyright Act, or otherwise in respect of any exploitation of their works and in particular, to administer all the rights relating to the public performance, broadcasting, communication to the public by wire or wireless including transmissions to subscribers to a diffusion and/or any digital service, graphic or mechanical reproduction, translation, adaptation, photocopying or similar reproduction (such as digital copying) and any form of use of such works.”***
95. From the documents before me, it is apparent that MCSK is licenced under section 46 of the Copyright Act as a Copyright Collective Management Organization with the mandate to collect and distribute royalties to its members. While the petitioners have alleged that it has been deregistered, section 46 (1) of the Copyright Act provides that:
- (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.***
96. Had there been an infringement of the provisions of the Act by the respondent, then such infringement should have been brought to the attention of the KECOBO, which has the mandate, under section 46, to take action against CMOs such as MCSK in respect of such breaches.
97. The petitioners have also sought for various other orders directed at the respondent, including an order to compel MCSK to avail to them a full account of all performance logs on the basis of which it collected royalties for and on their behalf. They have also sought an order for a full account for all royalties owed to them for their performances.
98. It may be argued that these are not orders that are available to the petitioners from a Court exercising its constitutional jurisdiction. However, I bear in mind that the Court has very wide jurisdiction under Article 165(3) of the Constitution and further, it has the jurisdiction, under Article 23(3), to grant parties in a matter before it appropriate relief with a view to ensuring that justice is done. Further, Article 35 grants to everyone the right to information while Article 10 underscores the values of transparency and accountability as constitutional values.

99. Bearing those constitutional imperatives in mind, it appears to me that in this matter, the petitioners' grievances arise as a result of a lack of openness and transparency, perceived or real, on the part of the respondent. As a statutory CMO, MCSK has an obligation to be transparent with its members with regard to the royalties it has collected on their behalf. With respect to non-members such as the 4<sup>th</sup> and 5<sup>th</sup> petitioners, in light of its duties under section 30A and 46 of the Copyright Act, as well as its agreement with Safaricom, it must equally account for any royalties collected on their behalf.

100. The appropriate order therefore that commends itself to me in the circumstances of this case, and which I hereby issue, is that the respondent does render, within 45 days hereof, a full account of all performances logs on the basis of which it collected royalties from Safaricom Ltd, the interested party, for and on behalf of the petitioners.

101. With respect to costs, I direct that each party bears its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 11<sup>th</sup> day of May 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Simiyu instructed by the firm of Musyoka Murambi & Associates for the petitioner.**

**Mr. Maloba instructed by the firm of Conrod Maloba & Associates Advocates for the respondent.**

**Ms. Kageni instructed by the firm of Muriu, Mungai & Co. Advocates for the interested party.**