



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

**PETITION NO. 317 OF 2015**

**XPEDIA MANAGEMENT LIMITED .....1<sup>ST</sup> PETITIONER**  
**LIBERTY AFRICA TECHNOLOGIES LIMITED .....2<sup>ND</sup> PETITIONER**  
**ELIJAH WAINAINA MIRA .....3<sup>RD</sup> PETITIONER**  
**FRANCIS JUMBA .....4<sup>TH</sup> PETITIONER**  
**CAROLYNE WANJIRU NDIBA .....5<sup>TH</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**  
**KENYA COPYRIGHT BOARD .....2<sup>ND</sup> RESPONDENT**  
**KENYA ASSOCIATION OF MUSIC PRODUCERS.....3<sup>RD</sup> RESPONDENT**  
**PERFORMERS RIGHTS SOCIETY OF KENYA .....4<sup>TH</sup> RESPONDENT**  
**MUSIC COPYRIGHT SOCIETY OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**SAFARICOM LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This petition relates to the question whether section 30A of the Copyright Act, Act No. 21 of 2001, is constitutional. The petitioners allege that it is not, and that it violates their rights under Articles 36, which guarantees to everyone the right to freedom of association, and Article 40, with respect to their right to property, specifically with respect to their intellectual property rights.
2. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners, **Xpedia Ltd** and **Liberty Africa Technologies Ltd**, are limited liability companies engaged in the business of promotion and distribution of various musical and artistic works

through digital platforms. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners work in various parts of Kenya and are involved in creation and performance of musical works.

3. The petition has been brought against the Attorney General of Kenya. He is sued in his capacity as the legal representative of the government of Kenya pursuant to the provisions of Article 156 of the Constitution.

4. The 2<sup>nd</sup> respondent is the Kenya Copyright Board (hereafter “KECOBO”). KECOBO is established under the Copyright Act and mandated to, among other things, licence and supervise the activities of **Collective Management Organizations (CMOs)** such as the 3<sup>rd</sup> to the 5<sup>th</sup> respondents.

5. The 3<sup>rd</sup> respondent, **Kenya Association of Music Producers (KAMP)** is, as its name suggests, a CMO licensed under the Copyright Act to represent music producers. The 4<sup>th</sup> respondent, **Performers Rights Society of Kenya (PRISK)**, is also a CMO licensed under the Copyright Act to represent performers, while the 5<sup>th</sup> respondent, the **Music Copyright Society of Kenya (MCSK)**, is a company limited by guarantee and also licensed by KECOBO as a CMO.

6. Safaricom Ltd (hereafter ‘Safaricom’) was joined to the petition as an interested party. It is the registered proprietor of the **Skiza Tunes** platform or portal, a platform which enables mobile telephone users to select and download ring-back tones to their phones. It is the use of copyrighted works on this platform that is at the heart of this petition.

7. This petition was supported by the petitioners in **Petition No. 350 of 2015-David Kasika & Others vs The Music Copyright Society of Kenya**. While the respondent in that case, **MCSK**, the 5<sup>th</sup> respondent in this case, resisted the consolidation of the two petitions, they raise the same issues regarding the constitutionality of section 30A of the Copyright Act and its application in relation to the use of the Skiza Tunes platform belonging to Safaricom. Consequently, the findings and conclusions on some issues in this petition shall, notwithstanding the non-consolidation of the two matters, apply to both petitions to obviate the need to repeat the analysis and findings on the two issues.

## **The Pleadings**

8. In the petition dated 29<sup>th</sup> July, 2015, the petitioners allege that section 30A of the Copyright Act is unconstitutional. They contend that it violates their right to freedom of association guaranteed under Article 36 of the Constitution, as well as their right to property under Article 40(5). They have set out their averments of fact in five affidavits, sworn respectively by Mr. Sidney Wachira, the Director of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, Mr. Elijah Wainaina Mira, Francis Jumba and Carolyn Wanjiru Ndiba. They also filed a supplementary affidavit sworn by Mr. Wachira on 11<sup>th</sup> September, 2015, a further affidavit sworn by Mr. Wachira on 18<sup>th</sup> November 2015, and written submissions dated 18<sup>th</sup> November 2015.

9. Mr. Wachira deposes that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners have over the years acquired copyright to works of numerous artists numbering over 5, 000. They also continuously engage with various artists and continue to enter into agreements and arrangements with them on exploitation of the copyrights, in the form of literary works, performing rights, and rights in audio-visual works and sound recordings, through digital platforms.

10. The 1<sup>st</sup> and 2<sup>nd</sup> petitioner further aver that they have entered into agreements with mobile phone service providers that authorize the mobile phone service providers to provide the various works to members of the public through mobile phones in the form of downloadable content.

11. They are, however, aggrieved by the requirements of section 30A of the Copyright Act which authorizes CMOs to collect payments on behalf of owners of copyrights in the nature of performing and producing rights. They argue that the section takes away their rights and those of other copyright holders to collect payments from users of their works. In their view, the CMOs represent copyright owners who

are their members, and would therefore, as provided in the section 30A, collect payments but not remit such payments to copyright owners who are not members.

12. According to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, a copyright holder who is not a member of any CMO risks having revenues collected by the CMOs and retained as the CMOs only represent their members. As a result, for the copyright holders to have a chance at receiving payment from the CMOs, they have to join them, and are therefore compelled to become members of organisations they would rather not join.

13. The petitioners further depose that the CMOs retain a certain proportion of the funds collected on behalf of copyright holders irrespective of what the copyright holder wishes. In their view, section 30A creates confusion as it requires that remuneration collected by the CMOs is shared equally between a producer and performer but does not provide who among the many CMOs is to do the actual collecting and distribution. In this regard, it is their contention that the 3<sup>rd</sup> to 5<sup>th</sup> respondents, **KAMP**, **PRISK** and **MCSK** have relied on the section to demand and collect royalties from users when the provision only allows them to collect a single equitable remuneration.

14. The petitioners' grievance against **KECOBO** is that it has failed to give any directions with regard to collection of the remuneration and distribution of the payments. This, they contend, has resulted in a lack of fair and reasonable administrative action, leading to further confusion, overpayments by users and lack of a clear mode of sharing and distribution.

15. The petitioners further argue that **KECOBO** has licensed four CMOs whose roles overlap. This has resulted in users of copyright works being made to make multiple payments for the same copyright to the different CMOs contrary to Article 47 of the Constitution. They further contend that the licences were issued without any specific directions to the CMOs with respect to which category of rights each of them is to deal with. They assert that this has resulted in confusion and duplication of roles and is a further violation of Article 47 of the Constitution.

16. The 1<sup>st</sup> and 2<sup>nd</sup> petitioner are further aggrieved by the interpretation given to section 30A of the Copyright Act by the 4<sup>th</sup> respondent, **PRISK**. Their contention is that **PRISK** has held that performing rights are not transferable, and that the petitioners therefore hold no rights in performance despite the fact that the petitioners have entered into legal agreements with owners of the rights. They argue that as a result of this interpretation, **PRISK** claims and intends to collect revenues from users of performing rights with the intention of keeping such revenue, to the exclusion of the petitioners.

17. The petitioners are further aggrieved by section 30A (4) of the Copyright Act. They contend that it creates a situation that has led the CMOs to overcharge copyright users in that it requires that the remuneration be shared equally between the producer and performer but does not provide for the person to collect the remuneration and do the actual distribution. They aver that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have been collecting fees from users of copyrights in a manner that causes double or triple payments for the same works, which is inconsistent with Articles 40 and 47 of the Constitution.

18. With respect to **MCSK**, the petitioners argue that it represents the interests of publishers of music, composers, authors, and arrangers, yet the Copyright Act has no provision for publishers, composers or arrangers but defines authors as those who create copyright works. It was their contention therefore that **MCSK** represents all categories of copyright holders and it therefore carries on the duties and responsibilities of all other CMOs. They further contend that **KOPIKEN** represents the interests of copyright holders in literary works, **KAMP** represents the interests of copyright holders in sound recordings and audio-visual works, while **PRISK** is the relevant collecting society on behalf of performers.

19. They are aggrieved that the 3<sup>rd</sup> and 4<sup>th</sup> respondents have been demanding from them and other copyright users royalties in respect of performing and producers' rights, allegedly under section 30A, and also payment for the royalties from Safaricom in respect of royalties due and owing to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. Their contention is that none of the CMOs is empowered under section 30A to collect

royalties from users of copyrights.

20. In his further affidavit sworn on 18<sup>th</sup> November 2015, Mr. Wachira deposes that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners are limited liability companies whose business is intended to generate and share profits. His deposition was that none of the objects of the two petitioners allows the collection or distribution of royalties, and neither are they intended to be collecting management organizations as defined by the Copyright Act. Consequently, they cannot be termed as collecting societies merely because they are involved with copyright related business.

21. Mr. Wachira reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners have entered into agreements with copyright owners pursuant to section 33 of the Copyright Act. That they are not in the business of collection and distribution of royalties to members as envisaged by section 46 of the Copyright Act. Their averment was that they enter into agreements with copyright owners who allow them to modify and edit their works and then provide such works to mobile phone companies. Accordingly, their role is a value addition role that helps copyright owners' works be accessed through the mobile phone through caller ring back tones, and they are therefore, to that extent, copyright users. The 1<sup>st</sup> petitioner has also, in some cases, been assigned copyrights in absolute manner, and it is therefore a copyright owner.

22. Mr. Wachira avers that their arrangement with artists has been going on without a problem since sometimes in 2008 and has had the effect of enabling artists earn much better remuneration for their intellectual property. Pursuant to their arrangement with artists, the 2<sup>nd</sup> petitioner has been paying licence fees to MCSK, the 5<sup>th</sup> Respondent.

23. The petitioners aver that despite the enactment of section 30A of the Copyright Act, their arrangement with artists went on until sometimes in July, 2015 when the CMOs started interfering on the basis that the section only allows CMOs to enter into collection arrangements with artists.

24. Mr. Wachira deposes that he has information from the over 5, 000 artist whom the 1<sup>st</sup> and 2<sup>nd</sup> petitioners have been working with that most of them are the authors of the literary works in their works, as well as the authors of the dramatic works in issue. Consequently, copyrights in form of literary works and performing rights belong to them. It is also his averment that the artists have paid off the producers for each of their works, and they therefore own copyrights in sound recordings and audio-visual works in their respective works. Accordingly, it is his contention that copyrights in the musical works in the nature of literary works, dramatic works, audiovisual and sound recordings all converge in one person. His averment therefore was that when the 1<sup>st</sup> and 2<sup>nd</sup> petitioner enter into agreements with the artists, the artists assign all their copyrights to them.

25. Mr. Wachira deposes that the point of view taken by the CMOs is that a music copyright owner who owns all the above rights is required to join each CMO if the copyright owner is to receive remuneration. In the petitioners' view, it is very difficult and taxing for each copyright owner to become a member of each CMO, and further, that it is also quite costly to be a member of each CMO as each CMO demands a share of the revenues collected. Further, in the petitioners' view, as each CMO has its own distinct rules and regulations, it would take a copyright owner too much time to follow all of them. As a result, only a few copyright owners are members of all the CMOs.

26. The petitioners contend that as a result of section 30A and for fear of losing revenues, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were forced to join PRISK and KAMP, while the 3<sup>rd</sup> petitioner joined PRISK and KAMP in 2015 for fear of losing revenues collected by the 2<sup>nd</sup> petitioner. The 3<sup>rd</sup> Petitioner, according to Mr. Wachira, was paid royalties collected on his behalf in 2013 and 2014 after he joined the 2<sup>nd</sup> petitioner.

27. It is the petitioner's further averment that the way in which CMOs are going about implementing section 30A contravenes the section. This is because, according to the petitioners, the section allows them to collect a single equitable remuneration for the producer and performer. However, according to the petitioners, the CMOs have sneaked in the MCSK into their arrangement even though it is not envisaged

under section 30A and they have been collecting much more than a single equitable remuneration by purporting to collect royalties on a monthly basis, without having obtained authority from the Cabinet Secretary as required by law.

28. Mr. Wachira denies that the 1<sup>st</sup> and 2<sup>nd</sup> petitioner have been assigned only mechanical rights, asserting that the owners have assigned all their copyrights for purposes of use through caller ring back tones and other related uses.

29. The petitioners deny that section 30A of the Copyright Act mirrors Article 15 of WIPO Performances and Phonograms Treaty or that it is intended to domesticate the provisions of the treaty. In their view, section 30A is inconsistent with the treaty in many respects, and they allege by way of illustration that it takes away rights intended to be conferred by the Treaty. In this regard, they assert that the agreement between the CMOs and Safaricom targets local content of a musical nature only, which in their view contradicts the very intent and purpose of the WPPP.

30. With regard to the appropriate forum for the determination of the issues raised in this matter, the petitioners aver in the supplementary affidavit sworn by Mr. Wachira that the issues raised go far beyond their relationship with CMOs and are constitutional issues that cannot be addressed in any other manner other than through a constitutional petition. Their contention is that the issues in dispute are not simple commercial matters but weighty constitutional matters, and that the orders sought cannot be granted by a commercial court exercising civil jurisdiction.

31. With respect to the position of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners, Mr. Wachira deposed that while they are members of MCSK, they joined the CMO so that it could facilitate the collection of payments on their behalf where they are unable to, as envisaged under the Copyright Act. This was because copyright owners are unable to monitor and collect payments when members of the public import into the country equipment for copying, and they therefore join CMOs to facilitate in collection of payments in such instances. The contention, however, was that these petitioners have not assigned all their rights to MCSK, nor have they ceded any of their rights to contract with other parties.

32. It was further deposed that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners as well as thousands of other copyright owners, who have signed with the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, are able to have their works utilized on the Skiza platform on terms that they can control. They did not therefore wish to have their ability to do so interfered with by CMOs or any other person.

33. According to the petitioners, before the introduction of section 30A of the Copyright Act, copyright owners in musical works and other players in the industry had come up with innovative ways of exploiting their copyrights to the great economic advantage of the owners. They illustrate this by citing the large amount of royalties collected on behalf of some artists by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners as compared to the paltry sums earned when collected by the MCSK.

34. They argue that the manner in which the CMOs were carrying out their duties infringes upon their constitutional right to property by purporting that they are the only ones who can legally collect royalties on behalf of copyright owners. In their view, the role of CMOs is supposed to be to complement their efforts as music copyright owners and not to detract or take away. They contend that section 30A permits CMOs to receive a one off payment for copyrights and not royalties. Consequently, by purporting to collect royalties, the CMOs violate the petitioners' constitutional rights.

35. The petitioners further depose that the Copyright Act intended that there should be CMOs whose role would be to collect remuneration in respect of those areas where it would be difficult for owners of copyrights to collect payments themselves. However, in their view, section 30A has emboldened the CMOs to enter into an arena that was intended to be the preserve of copyright owners, and have granted themselves powers and authority that the Copyright Act did not envisage.

36. The petitioners therefore urge the Court to allow their petition and grant the following orders:

- a. *A declaration that section 30A of the Copyright Act of Kenya is unconstitutional.*
- b. *A declaration that the petitioners' right to property under Article 40 of the Constitution has been infringed and/ or is threatened with infringement by section 30A of the Copyright Act of Kenya.*
- c. *A declaration that the petitioners' right to property under Article 40 of the Constitution has been infringed and/or is threatened with infringement by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.*
- d. *A declaration that section 30A of the Copyright Act of Kenya infringes on and threatens to infringe the petitioners' and other copyright holders freedom of association as enshrined in Article 36 of the Constitution.*
- e. *A declaration that the Kenya Copyright Board by licensing 4 Collective Management Organizations without a clear mandate that avoids duplication of roles has infringed on the fundamental rights and freedoms of the petitioners, copyrights holders and users of copyright as enshrined in Article 47 of the Constitution.*
- f. *A declaration that section 30A of the Copyright Act of Kenya does not permit Collective Management Organizations to collect royalties from users of copyright works.*
- g. *A declaration that by virtue of section 33 of the Copyright Act of Kenya, performing rights are transferable.*
- h. *A permanent injunction restraining the Kenya Association of Music Producers, Performers Rights Society of Kenya and Music Copyright Society of Kenya from collecting royalties from users for works belonging to the petitioners and other copyright holders without the express authority of the petitioners and other copyright holders.*
- i. *An order directing the Kenya Copyright Board to clearly distinguish the roles of each and every Collective Management Organization it licenses to ensure no duplication of roles with each other.*
- j. *Any other order the Court deems just and fit.*
- k. *An order that costs of this petition be borne by the respondents.*

## **The Response**

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

37. The Attorney General filed Grounds of Opposition dated 7<sup>th</sup> October, 2015 in opposition to the petition. His case as set out in the said Grounds is that the petitioners have not disclosed with specific precision sufficient grounds to warrant the nullification of section 30A of the Copyright Act. It is also his contention that the petition does not disclose any violation of the petitioners' rights and amounts to an abuse of the court process. The AG further argues that the petitioners have not demonstrated that section 30A of the Copyright Act defeats the objects and purpose of the Copyright Act, and he prays that the petition be dismissed with costs.

### **The 2<sup>nd</sup> Respondent's Case**

38. The Kenya Copyright Board (KECOBO) filed Grounds of Opposition and submissions dated 25<sup>th</sup> August, 2015 and 4<sup>th</sup> December, 2015 respectively.

39. Its contention is that section 30A of the Copyright Act does not in any way violate the petitioners'

constitutional rights. It states that under section 46 (1) of the Copyright Act, no person or association of persons is permitted to commence or carry on the business of a Copyright Collecting Society except under or in accordance with a certificate of registration granted under the section, and that it is the only body that is statutorily authorized to grant such certificates. In accordance with its mandate, on diverse dates in 2015, it licensed the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and issued them with certificates of registration.

40. According to KECOBO, KAMP, PRISK and MCSK, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, are the only authorized CMOs in Kenya officially authorized to undertake such collections.

41. Like the AG, KECOBO argues that the petitioners have not set out sufficiently the manner in which their rights have been infringed. It argues that it is guided by Articles 11 and 40 of the Constitution in licensing the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, the intention being to maximize the bargaining power of the artists.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Case**

42. KAMP and PRISK oppose the petition. They relied on an affidavit sworn on 21<sup>st</sup> August 2015 by Ms. Angela Ndambuki, the Chief Executive Officer of the Performers Rights Society of Kenya, and a second affidavit sworn on 6<sup>th</sup> October, 2015 by Mr. Otieno Adipo, the Head of Licensing at PRISK, as well as submissions dated 4<sup>th</sup> December, 2015. Their case was presented by Learned Counsel, Mr. Wambua Kilonzo and Ms. Okimaru.

43. The respondents raise several preliminary points with respect to this petition. They argue, first, that the petitioners' grievance is an alleged breach of copyright which is actionable at the instances of the copyright owner by way of a civil suit in the commercial court. Accordingly, as there exists a definite legal regime for the resolution of the petitioners' complaint, this petition is not the proper recourse. In their view, where a matter can be settled without raising a constitutional question, this Court should exercise constitutional avoidance and refer the dispute to the appropriate forum.

44. Notwithstanding that the petition before a Court exercising constitutional jurisdiction is not the appropriate forum for this matter, the 3<sup>rd</sup> and 4<sup>th</sup> respondents nonetheless respond in detail to the averments of fact and contentions on the law made by the petitioners.

45. In her affidavit, Ms. Ndambuki sets out the legal context under which the 3<sup>rd</sup> and 4<sup>th</sup> respondents operate. She avers that they are private companies limited by guarantee and registered under the Companies Act. They are also licensed by **KECOBO** pursuant to section 46(2) of the Copyright Act, as CMOs.

46. In accordance with the mandate granted in law by their registration with KECOBO, the 3<sup>rd</sup> and 4<sup>th</sup> respondents collect licence fees to enforce the rights of producers of sound recordings and the rights of performers of sound recording and/or audio visual works respectively.

47. According to Ms. Ndambuki, the Copyright Act makes provision for copyright in literary, musical and artistic works, audiovisual works, sound recordings, broadcasting and other related intellectual property rights. It also recognizes, at section 30A (1), the rights of performers and producers of sound recordings in the creation of recorded music or sound recordings or audio visual works. Section 30(A) further specifically recognizes the right of performers of sound recordings and audio-visual works and producers of sound recordings to a single equitable remuneration to be paid by the user of such sound recording and audio-visual works. Such single equitable remuneration is payable through the respective CMO, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, who are mandated to distribute the remuneration equitably between the performer and producer.

48. Ms. Ndambuki further avers that currently, three CMOs within the music industry have been licensed annually by the KECOBO under section 46 of the Copyright Act to represent different classes of rights.

As a result, any person or establishment that uses sound recordings commercially is required to obtain licences from the three duly licensed CMOs to cater for the different right holders, namely the composer, performer and producer.

49. Accordingly, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, being the licensed CMOs representing the performer and producer respectively, are the only entities with the statutory mandate to collect royalties on behalf of the right holders of the specific class of rights they represent. In conformity with the requirements of the Copyright Act and for ease of both the CMOs and the user during collection, the 3<sup>rd</sup> and 4<sup>th</sup> respondents issue a joint license.

50. Ms. Ndambuki therefore avers that the petitioners' case is based on a misapprehension of the law on copyright.

51. Mr. Adipo's affidavit contains averments similar to those made by Ms. Ndambuki. With respect to the agreements purported to have been entered into by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for the collection of royalties on behalf of right holders in the class of the copyright holders in the class represented by KAMP, his averment is that they are illegal in light of section 46 of the Copyright Act. They therefore run afoul of the legal principle *ex turpi causa non ortur action* which is to the effect that no action may be founded on illegal or immoral conduct. Their contention therefore was that this Court cannot give effect to agreements made contrary to an existing law.

52. It is also his averment that the petition is not brought in the public interest as alleged as copyright is a specific category of rights enjoyed by specific right holders. In the absence of specific authority from the specific right holders, the petitioners cannot purport to institute the present proceedings on their behalf. The 3<sup>rd</sup> and 4<sup>th</sup> respondents aver that the Deeds of Assignment relied on by the petitioners are not admissible in evidence as they do not bear any stamp denoting payment of stamp duty or exemption from the payment of the duty and are in breach of section 19 of the Stamp Duty Act, Chapter 480 of the laws of Kenya.

53. Mr. Adipo avers that in any event, the 1<sup>st</sup> and 2<sup>nd</sup> petitioner appear to have been assigned mechanical rights in musical works; that there is a clear distinction between a musical work, a sound-recording and audio-visual work; and therefore the rights assigned to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners through the alleged Deeds of Assignment are those encompassed in musical works which do not concern the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

54. According to these respondents, if the said Deeds did dispose any right(s) to the petitioners from the original owners of the works, then it was only the right(s) held in the musical work(s) and not the rights held in the sound-recordings or audio-visual works. Their deposition was that mechanical rights are distinct from the right to a single equitable remuneration granted to producers and performers as against users of sound recordings and audio-visual works under section 30A of the Copyright Act, and consequently, the said Deeds do not in any way assign to the petitioners the right to collect such royalties from users of sound recordings and audio-visual works on behalf of the right holders they represent.

55. The respondents argued that while the petitioners have a right to lodge a petition alleging violation of constitutional rights, they also have the onus to demonstrate with reasonable precision the manner in which the constitutional provisions have been infringed, which, in the respondents view, the petitioners had failed to do.

56. It was further deposed on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents that their mandate is not dependent on membership. Rather, their mandate is to collect and distribute royalties to members and non-members in their specific class of rights, and right holders in the specific class of rights that they represent are not required to become members to receive their royalties.

57. According to Mr. Adipo, section 30A of the Copyright Act domesticates the provisions of the **WIPO Performances and Phonograms Treaty (WPPP)** and it is fashioned around similar provisions of the

law in South Africa and countries in the European Union. Their contention is that traditionally, it has proved harder for a producer and a performer to collect royalties, and that collection through a CMOs is not only easier but also the most prudent way to get users of copyright to remunerate the producers and performers. They argue further, that the collection of royalties through CMOs is specifically meant to give the rights holders greater bargaining power through the non-profit making CMOs as opposed to individually engaging profit making entities. Their contention is that CMOs do not in any way fetter the rights holders' right to ownership and disposition of property.

58. The 3<sup>rd</sup> and 4<sup>th</sup> respondents further contend that the petitioners have failed to appreciate that prior to 2012, though the rights of producers were recognized under section 28 of the Copyright Act, there was no provision that would allow the producers to collect royalties, and the rights of performer were not recognized at all prior to 2012. Their contention therefore was that considering the number of artists who are producers and performers, it is completely untenable to require that each and every one of them finds and negotiates with each user of sound recording and audio-visual work.

59. It is further averred for the 3<sup>rd</sup> and 4<sup>th</sup> respondents that the petitioners have failed to show the manner in which they have infringed on the petitioners' rights. In their view, section 30A was enacted with the intention of protecting the economic rights of tens of thousands of producers and performers in Kenya, who, although granted rights to royalties under sections 28 and 30 of the Copyright Act were unable to collect the said royalties. They urged the Court to be alive to the effect that the declarations and prayers sought by the petitioners would have on the thousands of producers of sound recordings and performers of sound recordings and audio-visual works who are not parties to this petition, and it was their prayer that the petition be dismissed.

### **The 5<sup>th</sup> Respondent's Case**

60. In an affidavit sworn on its behalf by its Chief Executive Officer, Maurice Okoth, on 28<sup>th</sup> August, 2015, MCSK opposed the petition and urged the Court to dismiss it with costs.

61. Mr. Okoth described MCSK as a duly registered CMO 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, it has established and created several structures to collect and administer royalties on behalf of its members.

62. Mr. Okoth deposes that jointly with other registered CMOs with similar mandates, MCSK approached Safaricom with a view to configuring means of collecting royalties for their members whose works were being used on various platforms of Safaricom such as the Skiza Tunes Portal. It was his averment that the 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; and that the petitioners are not privy to the said contract. According to MCSK therefore, the orders sought by the petitioners violate the doctrine of privity of contract since it is only parties to a contract that can enforce rights stemming from that contract.

63. MCSK further argued that the pleadings and documents filed by the petitioners in this matter have not demonstrated the relationship they have with Safaricom with respect to the Skiza Tunes. They have also failed to show how they have been affected by MCSK entering into agreements with Safaricom for collection of members' royalties. According to MCSK, it has a catalogue containing hundreds of thousands of works of its members, and has the authority of its members and the law to exploit the said works for commercial purposes. Its argument is that the arrangement it has with Safaricom is strictly and exclusively with respect to the said catalogue that does not include the 4<sup>th</sup> and 5<sup>th</sup> interested parties.

64. MCSK urged the Court to strike out the averments by the petitioners that MCSK is untrustworthy and has mismanaged royalties, terming the said allegations fabrications and falsehoods with intent to mislead the Court because MCSK has never been deregistered by the KECOBO.

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

65. Safaricom sets out its case in an affidavit sworn by its Product Manager, Carol Njagi on 9<sup>th</sup> October 2015. Ms. Njagi deposes that prior to the introduction of section 30A of the Copyright Act, there existed Content Service Providers who would contract with rights owners for the use of their copyright works on the Skiza Tunes platform. The Content Service Providers would take the music, digitize it and convert it into ringtones and ring-back tones. Payment for such usage of copyright works would be made through the Content Service Providers, who in turn would pay the rights owners.

66. Safaricom confirms that it entered into an agreement with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, who at all material times were CMOs licensed by KECOBO. The agreement was to enable it to pay the licensee 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 distribute royalties to the respective right owners, thereby enabling the money received from the Skiza platform to be channeled to the rights' owners.

67. Ms. Njagi deposes that 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. 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 copyright work. It is also her averment that the music in the Skiza platform is not a private transaction since, 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.

68. Safaricom further averred 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. 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. In its view, 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 contract all the rights owners to obtain permission as well as to monitor the usage of the said copyright works.

69. Ms. Njagi contended that none of the petitioners' rights have been infringed or are threatened with infringement. Neither, in her view, have they been precluded or denied 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.

70. It was also her deposition that it was not feasible to deal with individual rights that accrue from public use hence the need for the CMOs which are in essence supposed to receive authorisation from rights owners to grant rights in, exploit such rights and distribute the remuneration for the uses made.

71. According to Safaricom, 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 which bridge the gap between the rights owners and the rights users, and the petitioners are at liberty to collect their respective portion of the negotiated licences from the registered CMOs.

72. Ms. Njagi avers that upon the introduction of section 30A of the Copyright Act, Safaricom did everything to ensure compliance with the law. It varied its agreement with content service providers 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. Accordingly, contracts entered into by the petitioners prior to the amendment of the law must adapt to the change in the law, and not vice-versa.

73. Safaricom argues that the petitioners have not stated or specified how section 30A has led to the CMOs overcharging users of copyrights and thereby infringing the provisions of Articles 40 and 47 of the Constitution. It states that section 30A provides for a single equitable remuneration for the performer and

the producer of the sound recording, which single equitable remuneration is not a one off payment for copyrights but payment of royalties which has to have a proper balance between the interests of performing artists and producers in obtaining remuneration for the Skiza Tunes, and the interests of third parties. It was its position that section 30A was intended to have CMOs collect in areas where owners of copyright had difficulty in collecting such royalties themselves.

## **Determination**

74. I have read and considered the respective pleadings and submissions of the parties which I have set out above. I have also considered the issues that the parties have set out in their submissions as falling for determination in the matter. In my view, and taking into account the pleadings and submissions, the said issues can be condensed into three main issues:

*i. Whether this is the appropriate forum for the determination of this matter;*

*ii. Whether section 30A of the Copyright Act is unconstitutional and a violation of the constitutional rights of the petitioner under Articles 36, 40 and 47;*

*iii. Whether the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are exceeding their mandate under section 30A of the Copyright Act in collecting royalties from users.*

*iv. Whether this is the appropriate forum for the determination of this matter*

75. It is useful to summarise the parties' respective arguments on this point. The respondents have challenged this petition on the basis that it raises purely commercial issues, and should therefore have been lodged as a civil suit. KECOB submitted, in reliance on the decision in **Renne vs The Attorney General of Trinidad and Tobago, Claim No. CV 2012-04245**, that before filing a petition, an applicant must consider whether, having regard to all the other circumstances of the case, some other procedure either under common law or pursuant to statute might not more conveniently be invoked. Its submission was that not every issue for determination by courts of law is a constitutional issue, and the petitioners had not met the standard set in **Anarita Karimi Njeru vs Attorney General [1979] KLR 54** which requires that they demonstrate the provisions of the Constitution violated, and the manner of violation.

76. According to KECOBO, section 48 of the Copyright Act provides for a competent authority which is capable and competent enough to hear and determine disputes similar to the present petition, and in its view, this petition is an abuse of the court process.

77. KAMP and PRISK agree substantially on this point with the position of KECOBO. Their submission was that the petitioners have not provided particulars of violation of their constitutional rights. In their view, any actions that they have taken in accordance with section 30A or any other provision of law cannot be impugned unless it is demonstrated that such action is *ultra vires* their statutory mandate.

78. They further argue that while the petitioners are making claims on behalf of unnamed copyright holders, copyright is a private right and claims thereon can only be prosecuted by the individual owners or CMOs. They rely for this submission on the case of **Music Copyright Society of Kenya vs Tom Odhiambo Ogowl, Civil Appeal No. 17 of 2014**. They urge the Court to invoke the principle of avoidance as stipulated in **Uhuru Muigai Kenyatta vs Nairobi Star Publications Ltd [2013] eKLR** and uphold the holding that the Constitution is not a substitute for litigating ordinary civil disputes. In their view, this petition is an abuse of the court process as the matters raised are a preserve of the Commercial and Admiralty Court as provided under section 34 of the Copyright Act.

79. MCSK submits that this Court has the jurisdiction to interpret the Constitution, but in exercising that jurisdiction, it must allow only such persons as have a genuine constitutional cause deserving interpretation of the Constitution, and must ensure that its process is not abused. In its view, the present dispute is grounded on the law of contract and only the two parties to the contract have the right to address any issue arising from the performance or otherwise of that contract. They rely for this

proposition on the decision in **Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro and Another [2014] eKLR** and submit that this Court lacks the jurisdiction to determine the issues raised in this petition.

80. Safaricom underscores the importance of jurisdiction by citing the decision of Nyarangi JA in **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1** and the Supreme Court decision in **Samuel Kamau Macharia vs Kenya Commercial Bank and 2 Others [2012] eKLR**. It submits that the Court has the jurisdiction to determine whether the petitioners’ rights have been denied, violated, infringed or are threatened, and whether the impugned provision of the Copyright Act is inconsistent with or in contravention of the Constitution.

81. In its view, however, the substratum of this petition is the management of MCSK, and none of the orders sought refer or relate to the Constitution, its interpretation or the interpretation of an Act of Parliament vis-à-vis the Constitution and as a result therefore, the issues raised herein are best determined in an ordinary civil suit. Further, that the orders sought do not touch on the Constitution or its interpretation as they seek a statutory interpretation of the Copyright Act without any reference to the Constitution and as such, this Court does not have the jurisdiction to interpret Acts of Parliament, decipher their meaning and determine whether anything done under the authority of an Act of Parliament is inconsistent or in contravention of the said Act of Parliament because that falls outside the ambit of the Constitutional Court.

82. In response to the arguments with respect to the appropriate forum, the petitioners submit that where the alternative remedy does not provide an efficacious and satisfactory answer to the litigant’s grievance, the Court should not exercise restraint in determining a matter before it. They relied on the decisions in **Muiruri vs Credit Bank Ltd and Another, [2006] 1KLR 385**, **Four Farms Limited vs Agriculture Finance Corporation [2014] eKLR** and **Bernard Murage vs Fineserve Africa Limited and 3 Others [2015] eKLR** to submit that the petition raises very clear constitutional issues and therefore the proper forum for adjudicating the issues that they raise is this Court.

83. The dictum by Nyarangi JA. in **Owners of Motor Vessel ‘Lillian S’ (supra)** with regard to jurisdiction offers the best starting point in determining whether a Court should continue to deal with a matter before it. The Learned Judge expressed the importance of jurisdiction in the following terms:

***“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.”***

84. The High Court has very wide jurisdiction conferred on it by Article 165(3) of the Constitution. This provision of the Constitution, so far as is relevant for present purposes, is to the effect that 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. ....

85. As I understand it, the respondents and Safaricom's main argument is not so much that the Court does not have the jurisdiction to deal with this matter. Rather, their argument is that not every dispute raises a constitutional issue. Where an appropriate forum has been provided under the Constitution or legislation, that is the forum that should be utilized for the resolution of the dispute- see the decision in **Francis Gitau Parsimei & 2 Others vs The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012; Kones vs Republic and Another ex-parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005; and Speaker of the National Assembly vs Karume (2008) 1 KLR (EP) 425** in which the Court of Appeal expressed itself as follows:

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.***

86. There is also the danger that if every issue is labeled a constitutional issue and litigated as such under the constitutional jurisdiction of the High Court, then the importance of that jurisdiction will be diminished. This is what the Privy Council warned about in the case of **Kemrajh Harrikissoon vs Attorney General of Trinidad and Tobago, (1979) 3WLR 63** when it stated as follows:

***“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress than any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....The mere allegation of a human right or fundamental freedom of the applicant has been is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*”**

87. In the present dispute, the petitioners' core grievance relates to the provisions of section 30A of the Copyright Act. They allege that it is unconstitutional and in violation of their rights, and those of other copyright holders, guaranteed under Articles 36, 40 and 47 of the Constitution.

88. In light of the provisions of Article 165(3) of the Constitution which I have set out above, it cannot be disputed that this Court has the jurisdiction to determine whether a provision in legislation is inconsistent with or in contravention of the Constitution.

89. Secondly, Article 22 entitles a party who alleges violation of his or her constitutional rights, or the rights of others who cannot lodge a petition in their own name, to approach the Court on the basis that ***“a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened or infringed, or is threatened.”*** Where such a petition is brought before the Court, Article 23 of the Constitution grants the High Court the jurisdiction to:

***“...hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”***

90. It may well be that the petitioners do have commercial grievances which could have been properly determined in a civil court. Indeed, this Court is of the view that where a constitutional question arises in a commercial matter, the Court seized of the matter has the jurisdiction, granted to it under Article 165(3),

to determine that constitutional question as it deals with the commercial elements of the dispute.

91. However, in light of the constitutional questions raised regarding the constitutionality of section 30A of the Copyright Act and the alleged violation of the petitioners' constitutional rights as a result of its application, notwithstanding that issues of copyright are also mixed up in and are a core part of the dispute, I believe that the petition merits hearing and determination before this Court, rather than dismissal out of hand. Whether indeed such constitutional violations are made out is another matter altogether, which I now turn to consider.

### **Whether section 30A of the Copyright Act is unconstitutional**

92. Before entering into an analysis and determination of this issue, it is useful to consider the principles on the basis of which I will do so, which are to be found in the Constitution itself, as well as local decisions and decisions from other jurisdictions which are persuasive in nature.

93 I believe that there is no dispute that any provision of law that is in violation of the Constitution is null and void. Article 2(1) is clear that the Constitution is the supreme law of the land, while Article 2(4) of the Constitution is clear that:

***(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***

94. Similarly, it is I believe undisputed that every Act of Parliament is presumed to be constitutional. As was held in the case of **Ndyanabo vs Attorney General of Tanzania [2001] EA 495**, there is a general presumption that every Act of Parliament is constitutional and the burden of proving the contrary rests upon any person who alleges otherwise.

95. In determining whether an Act of Parliament is unconstitutional, the question of its validity in cases such as is presently before me turns on whether or not it limits the rights and fundamental freedoms set out in the Bill of Rights. Once it is established that an Act of Parliament does limit fundamental rights and freedoms, then the burden falls on the state, in accordance with the provisions of Article 24 of the Constitution, to show that the limitation is reasonable and justifiable in a free and democratic society.

96. In considering the limitation, the Court is enjoined to consider the object and purpose of the impugned statute. The object and purpose of legislation can be discerned from the legislation itself- see **Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011**. In the case of **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295**, the Canadian Supreme Court enunciated the said principle 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.”***

97. The Indian case of **[Reserve Bank of India vs Peerless General Finance and Investment Co. Ltd. and Others, 1987 AIR 1023, 1987 SCR \(2\) 1](#)** also offers some guidance on the interpretation of statutes vis a vis the Constitution. In that case, Justice Reddy observed that:

***“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when the object***

*and purpose of its enactment is known. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses the court must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place...”*

98. Finally, I am alive to the fact that it is not the business of the Court to determine whether or not legislation enacted by the legislature is wise, or the best in dealing with the matter at hand. The function of the Court is to consider whether or not it is in accord with the Constitution, and to declare it unconstitutional if it is not. As was observed in the case of **U.S vs Butler, 297 U.S. 1[1936]**:

*“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”* (Emphasis added)

99. The petitioners have alleged that section 30A of the Copyright Act is unconstitutional and violates their rights under Articles 36, 40 and 47 of the Constitution. As required by the principle enunciated in the case of **Anarita Karimi Njeru (supra)** and **Trusted Society of Human Rights vs Mumo Matemu High Court Petition No. 290 of 2012**, the petitioners have a responsibility to demonstrate, with a reasonable degree of precision, the manner in which their rights under the provisions of the Constitution have been or are threatened with violation.

100. The petitioners’ case, as it emerges from their pleadings and submissions, is in three limbs. They challenge, first, the constitutionality of section 30A of the Constitution. Secondly, they are aggrieved by the manner in which the CMOs, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent, are applying and implementing the provisions of the section, which they claim is unconstitutional. Thirdly, they contend that the manner in which the 2<sup>nd</sup> respondent, KECOBO, is licensing and supervising CMOs contravenes Article 47 of the Constitution.

101. Enacted in 2012, section 30A of the Copyright Act which is titled ‘**Right to equitable remuneration for use of sound recordings and audio visual works**’ provides as follows:

- 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 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.*
- 2. If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organization.*

3. *The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fifth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30.*
4. *For the purposes of this section, 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 purpose.*

102. From the petitioners' submissions, it thus appears that they are unhappy about the **content** of section 30A and the manner of its **application** and **implementation** by the 3<sup>rd</sup> - 5<sup>th</sup> respondents. They are also unhappy about the manner of **licensing** and **supervision** of the CMOs by KECOBO.

103. The core of the petitioners' grievance, as I see it, is that section 30A, in its content and manner of implementation, violate their rights under Articles 36 and 40 of the constitution. These are the two provisions that I will first examine in relation to the impugned section before considering the claim against KECOBO in relation to the licensing and supervision of CMOs.

### **Violation of Article 36**

104. The petitioners allege that section 30A contravenes their freedom of association guaranteed under Article 36 of the Constitution and international treaties to which Kenya is a party. They contend that the right to freedom of association covers every person and any kind of association and can only be limited by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. While section 30A does not expressly state that music copyright owners must join CMOs, its effect is that copyright owners are compelled to do so.

105. The petitioners argue further that since section 46(5) of the Copyright Act does not permit the existence of more than one CMO for the same category of works and the same category of rights, there should not be two or more CMOs, which therefore limits the rights of copyright holders and compels them to remain in a CMO even if they are unhappy with it. In their view, this is a violation of Article 36 of the Constitution and international instruments that guarantee the right to freely associate.

106. KECOBO disputes these arguments and submits that the section does not in any way take away the petitioners' freedom of association. While membership of CMOs is encouraged, it is not mandatory under the Copyright Act. Its position is that CMOS represent specific classes of copyright owners who may or may not be members of the CMO. Further, one does not need to become a member of a CMO in order to receive remuneration as the CMOs collect and remit payment to members and non-members.

107. The 3<sup>rd</sup> and 4<sup>th</sup> respondents agree with KECOBO that there is nothing that has been placed before the Court to demonstrate that section 30A creates a mandatory obligation on copyright holders to join CMOs. They further submit that the rights under Article 36 are not absolute and do not form part of the non-derogable rights under Article 25 of the Constitution.

108. The right to freedom of association is guaranteed under Article 36 of the Constitution in the following terms:

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. ...

109. This right thus encompasses the right not only to join any association, but also **not** to join an association. Consequently, any legislation that compels a person to join an association against his will

would derogate from this right, and the responsibility would then be on the state to justify the derogation.

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.

112. The petitioners have cited the provisions of section 46(5) as the basis for their argument that copyright holders are compelled to join associations. Section 46 is found in Part VII of the Act titled “**Collective Administration of Copyright**”. It provides as follows:

*(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).....*

*(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.*

*(6) ....(Emphasis added)*

112. Taking all matters into consideration and the above provisions of the Copyright Act, I am unable to find a violation of the petitioners’ right to freedom of association. As submitted by the KECOBOO, the intention behind section 30A was to enhance the collection of royalties for copyright holders through the use of CMOs. In practical terms, it would be impossible for copyright users to go to each individual user to collect royalties, which is certainly the case in respect of the Skiza Tunes platform which is at the centre of this petition. I therefore find that section 30A of the copyright Act does not derogate from the right guaranteed under Article 36 of the Constitution.

**Violation of Article 40**

113. The petitioners have also alleged violation of Article 40 of the Constitution. Article 40 guarantees to everyone the right to own property and prohibits the enactment of legislation that would allow for compulsory acquisition of property without just compensation. At Article 260, the Constitution defines property as “*any vested or contingent right to, or interest in or arising from-*

- a. *Land, or permanent fixtures on, or improvements to, land;*
- b. *Goods or personal property;*
- c. *Intellectual property; (Emphasis added)*

114. Thus, the right to intellectual property, of which copyright in artistic works is a component, is protected under Article 40, sub-article (5) of which imposes on the state an obligation with respect thereto as follows:

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

115. The petitioners have contended that section 30A of the Copyright Act contravenes Article 40 since, under sections 26, 28 and 30 of the Copyright Act, the exclusive control of the exploitation of copyright works is vested in the owners. They have also cited several international covenants which have similar provisions with respect to the rights of copyright holders. Their contention therefore is that section 30A derogates from sections 26, 28 and 30 of the Copyright Act and related treaties and as a result contravenes Article 40. This is because, in their view, section 30A (1) and (2) prevents owners from directly receiving remuneration for their works as the section requires that the payment of royalties is made to CMOs, thereby limiting the ability of copyright owners to directly receive remuneration for their works.

116. They also contend that the section is in conflict with sections 26, 28 and 30 of the Act which grant exclusive control to copyright holders which section 30A takes away and gives to CMOs. They also allege violation of the right to property in that the copyright holder cannot, as section 33 of the Copyright Act permits, transfer rights by assignment, licence, testamentary disposition, or by operation of law as moveable property.

117. The response from KECOBO is that section 30A does not take away the power of a copyright owner to exercise management powers over his intellectual property rights in any way. Its submission is that CMOs monitor the use of copyright work and collect payments on behalf of copyright owners but do not take away the rights of copyright owners. The purpose of the section, according to KECOBO, is to guarantee equitable remuneration for use of sound recordings and audio-visual works whether one is a member of a CMO or not.

118. KAMP and PRISK agree with KECOBO on this point also, in their view, the section does not violate the right to property as the copyright holder still retains that right. The section, as I understand their submission, now fills a vacuum that existed in the law, and allows performers and producers to earn for the use of their work.

119. As is evident from the petitioners’ pleadings, their case is not that they are not receiving their remuneration. Rather, they are aggrieved that they will not be receiving their remuneration directly, but through CMOs. I pause here to observe that given the relationship that the 1<sup>st</sup> and 2<sup>nd</sup> petitioner have with the artists with whom they have entered into contracts, this does not seem like a legitimate complaint for them to raise. As I understand it, and indeed as submitted by KECOBO, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners are in effect operating as a CMO, though not licensed under section 46 of the Copyright Act. Thus, the artists whom they have contracted do not receive remuneration directly, but the payment is made to the 1<sup>st</sup> and 2<sup>nd</sup> petitioner, who then remit it to the artists. The artists thus receive remuneration, but indirectly.

120. What is the distinction then between the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and artists whom they have signed on, and the CMOs and their members? With the exception that the CMOs are required to be companies limited by guarantee, non-profit making and to work in the interests of their

members, while the 1<sup>st</sup> and 2<sup>nd</sup> petitioner are limited liability companies working with the artists for profit, I can see none in relation to the collection of remuneration for copyright holders, and the indirect receipt thereof by the copyright holders.

121. I have considered the provisions of sections 26, 28 and 30 of the Copyright which provide for the rights of copyright holders, the gist of which is that copyright in literary, musical, artistic or audio visual work, in respect of artists, owners of sound recordings and performers, is the exclusive right to control, inter alia, the reproduction, translation or adaptation, and the distribution to the public of the said work.

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

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. Indeed, as the Court observed in the case of **Cellulant Kenya Ltd vs Music Copyright Society of Kenya Ltd Civil Case No 154 of 2009**

**“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.”** (Emphasis added)

124. It is therefore my finding and I so hold that section 30A does not in any way limit the right of copyright owners to property as guaranteed under Article 40(5) of the Constitution.

#### **Violation of Article 47**

125. The petitioners have alleged that the manner of licencing and supervision of the CMOs by KECOBO violates Article 47, which guarantees to all administrative action that is **“expeditious, efficient, lawful, reasonable and procedurally fair”**. They contend that while issuing licences, KECOBO has failed in its duties as the licences issued do not define the class of rights or the category of works for which each CMO is licenced to undertake collection, which in their view is a violation of Article 47 of the Constitution.

126. KECOBO argues in response that all its actions are at all times conducted in an expeditious, efficient, lawful, reasonable and procedurally fair manner. It observes that the petitioners have not demonstrated how its licencing and supervision is in any way in violation of the requirements of Article 47. Its contention is that the form of certificates issued to CMOs is expressly provided for under the First Schedule of the Copyright Act and the law does not require it to insert other details in the certificate as to do so would result in the certificate being invalid for failing to conform to the prescribed form.

127. MCSK submits that as a CMO, it has endeavoured to comply with the terms set forth by KECOBO pursuant to its supervisory mandate to ensure that it continues to operate as a licensed and valid CMO. It observes that KECOBO is mandated to issue licences to CMOs by section 46 of the Copyright Act,

which section the petitioners have not challenged. In MCSK's view, no material has been placed before the Court to show how KECOBO has failed in its mandate of licencing and supervising CMOs.

128. Section 2 of the **Fair Administrative Actions Act, No. 4 of 2015** defines "administrative action" to include-

- i. *The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
- ii. *Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.*

129. I have considered the provisions of the Copyright Act and the mandate granted to KECOBO thereunder. Section 5 of the Act sets out the mandate as including to:

- a. *direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and other rights recognised by this Act and ensure the observance thereof;*
- b. *license and supervise the activities of collective management societies as provided for under this Act;*
- c. *devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organisations concerned with the same subject matter;*
- d. *organise the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness; and*
- e. *enlighten and inform the public on matters relating to copyright and related rights;*
- f. *maintain an effective data bank on authors and their works; and*
- g. *administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.* (Emphasis added)

130. With respect to the performance of its licencing function, section 46(2) provides that:

*“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.”*

131. With regard to the nature of licenses and the numbers of CMOs to be licensed, I have set out above the provisions of section 46(5), the effect of which is that, for as long as a duly licenced collection society meets all the requirements of its license and *“functions to the satisfaction of its members”*, KECOBO shall not *“approve another collecting society in respect of the same class of rights and category of works.”*

132. From the material before me, I am unable to find a violation of the provisions of Article 47 of the Constitution. Given that the provision contains a guarantee of a fundamental right, it would have been useful if the petitioners had placed material before the Court on the basis of which it could have found that their rights, or those of any other person, have been violated in the manner of licencing and supervision of the CMOs by KECOBO. On the material before me, I am constrained to find that no violation of Article 47 has been made out.

### **Exercise of Mandate by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents**

133. The petitioners have alleged that the licenced CMOs, KAMP, PRISK and MCSK, are exceeding their mandate under section 30A in the manner in which they are collecting royalties from users.

134. The petitioners argue that section 46 of the Copyright Act prohibits these CMOs from collecting levies and charges under the Act unless and until such levies and charges are approved and gazetted by the relevant Cabinet Secretary. The petitioners' contention is that none of the CMOs has had its levies approved or gazetted as required, and the charges that they levy on Safaricom have neither been approved nor gazetted by the Cabinet Secretary.

135. The petitioners have also alleged that the interpretation, application and implementation of section 30A by CMOs is contrary to section 33 of the Copyright Act. They contend that the agreement between the CMOs and Safaricom is contrary to the authority given under section 30A in that their quest to collect royalties on a monthly basis for the same works runs contrary to section 30A (1) and (2) of the Copyright Act. It is also their contention that CMO's attempt to collect royalties from Safaricom prior to gazettment of the charges to be levied would be illegal, and further, that the CMOs are charging multiple levies on users for the same work. The petitioners have also made various submissions with respect to the 1<sup>st</sup> and 2<sup>nd</sup> petitioner being profit –making entities, the relevance of which to present purposes is not evident.

136. In response, KECOBO has submitted that the Attorney General has, vide **Gazette Notice No. 192 of 2015**, recently approved and gazetted the tariffs to be used by KAMP and PRISK to collect royalties from various categories of users including broadcasters, telecommunications companies, service providers, business premises and vehicles both public as well as corporate.

137. I have elsewhere in this judgment made some observations with respect to the roles and functions of CMOs. However, I must emphasise that the complaints with regard to the manner in which the CMOs are conducting their functions is not a matter that properly falls for determination as a constitutional issue. Once it is found, as I have, that the provisions of section 30A are constitutional, then the proper use of the powers under the section are constitutional. Should, however, the bodies in which the powers are vested abuse those powers, then the mandate lies in the bodies established under the Act to inquire into the allegations of misuse of the mandate. This is where the supervisory role of KECOBO comes in. Should a licenced CMO fail to carry out its mandate in accordance with the provisions of the Act, then its members have a right to complain to the Board, which has the mandate to take appropriate action, including cancelling the licence or registering another CMO that will carry out its functions in the best interests and to the satisfaction of members.

138. In this regard, KECOBO has the duty to ensure that CMOs account to members and non-members whose royalties they collect from Safaricom, and that they remit the amounts collected to the rights holders.

139. In my view however, it is not the mandate of this Court, but of KECOBO, to inquire into the manner in which the licenced CMOs are carrying out their functions. Should the CMOs be acting outside their mandate, then the petitioners should lodge their concerns with the 2<sup>nd</sup> respondent which has the jurisdiction and duty to licence and supervise CMOs under the Act.

## **Disposition**

140. As is evident from the analysis set out above, I have not been able to find a violation of the petitioners' rights under any provision of the Constitution. To summarise:

- i. ***Section 30A of the Copyright Act does not violate the petitioners' freedom of association. This is in light of the fact that there is no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyrighted works.***
- ii. ***Section 30A of the Copyright Act does not violate the intellectual property rights of petitioners. Its only requirement is that there should be collective management organisations which collect royalties for use of copyrighted works and distribute such royalties to the copyright holders;***
- iii. ***No violation of Article 47 of the Constitution has been demonstrated. However, KECOBO has***

*the statutory duty to ensure that collective management organizations account to members and non-members whose royalties they collect, and remit such royalties to the rights holders.*

141. With regard to costs, which are within the discretion of the Court, I direct that each party bears its own costs.

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

**MUMBI NGUGI**

**JUDGE**

**Mr. Kiingati instructed by the firm of Kairu Mbuthia & Kiingati & Co. Advocates for the petitioners.**

**Mr. Kuria instructed by the State Law Office for the 1<sup>st</sup> respondent.**

**Mr. Okiror instructed by the firm of Paul Kaindo & Co. Advocates for the 2<sup>nd</sup> respondent.**

**Ms. Okimaro instructed by the firm of Sisule Munyi Kilonzo & Associates Advocates for the 3<sup>rd</sup> and 4<sup>th</sup> respondent.**

**Mr. Maloba instructed by the firm of Conrod Maloba & Associates Advocates for the 5<sup>th</sup> respondent.**

**Ms. Karanu instructed by the firm of Muriu Mungai & Co. Advocates for 1<sup>st</sup> interested party.**