



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

**PETITION NO. 562 OF 2015**

**BETWEEN**

**GERALD M. OCHIENG .....PETITIONER**

**AND**

**THE COPYRIGHT BOARD OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Gerald M. Ochieng, in his Amended Petition filed on 18<sup>th</sup> December, 2014, states that he is the proprietor of Queen Bee Entertainment, registered under the **Registration of Business Names Act, Chapter 499 of the Laws of Kenya**, which business deals with the retail of video movies and related businesses at Plot No. 209/929, Gill House, Tom Mboya Street, Nairobi. He has filed the present Petition claiming various contraventions of his constitutional rights and freedoms under the **Constitution, 2010** by the 1<sup>st</sup> Respondent, the Copyright Board of Kenya, a statutory body established under the **Copyright Act of Kenya**, and the 2<sup>nd</sup> Respondent, the Director of Public Prosecutions, whose office is established under **Article 157** of the **Constitution**.

2. The Petition was brought under Certificate of Urgency through an Amended Notice of Motion dated 17<sup>th</sup> December 2015 and in a Ruling delivered on 3<sup>rd</sup> February, 2016, this Court granted orders staying the proceedings in **Senior Principal Magistrate's Court Criminal Case No. 1332 of 2014, Republic vs Philip Mwangale Sinja**, in which the Petitioner's employee had been charged under **Section 36 (6)** of the **Copyright Act**, pending the hearing and determination of the present Petition. The Petitioner in the Petition now challenges the continued prosecution of his employee and further alleges violation of his constitutional rights by the Respondents as will be detailed out herebelow.

**The Petitioner's Case**

3. In his Affidavit in support sworn on 17<sup>th</sup> December 2015, the Petitioner deponed that he began operating a video shop in the year 2011 to-date and during that period, he has always complied with all the requirements for operating his business and he has in his possession all the requisite licenses and receipts. It is his case however that his business has since been interrupted on several occasions by the 1<sup>st</sup>

Respondent's officers who have made and continue to make preposterous and outrageous demands for non-existent and or unavailable authentication devices. That the said officers, employees and or agents of the 1<sup>st</sup> Respondent do not carry any identification documents and always solicit and demand bribes from his employees and neighbouring shops operating similar businesses.

4. According to the Petitioner, whenever his employees decline the said demands, the said officers resort to confiscating compact discs, computers and arresting his employees. In that regard, it is his argument that the actions therein have occasioned huge losses to him as well as humiliation and embarrassment. Further, that the officers, as part of the scheme to scuttle his operations, arrested his employee and charged him in **Senior Magistrate's Court Criminal Case No. 1332 of 2014, Republic vs Philip Mwangale Sinja**, with the offence of offering for sale copyright works without authentication devices contrary to **Section 36 (5)** as read with **Section 36 (6)** of the **Copyright Act**. In that regard, the Petitioner contends that the charges therein are not only trumped up but also that the cash bail of Kshs.20,000/= which he was required to pay pending the trial and the confiscation of his (the Petitioner's) 1,656 Audio Visual Compact Disks, is punitive and extortionist in nature.

5. The Petitioner's position is further that he has visited the 1<sup>st</sup> Respondent's offices on several occasions with the aim of purchasing an authentication device but the 1<sup>st</sup> Respondent has always ignored and or refused to sell it to him despite his willingness to buy the same in a bid to comply with the legal requirements for operating his business. Despite his attempts at acquiring the authentication device, the 1<sup>st</sup> Respondent's officer keep harassing and embarrassing his employees in the unquenchable thirst for bribes.

6. The Petitioner has also taken the position that there is no legitimate reason to charge his employee in the said criminal case as he, the Petitioner, has complied with all the provisions of the law in regard to the matters leading to the charges preferred therein. That the refusal by the 1<sup>st</sup> Respondent to supply him with the authentication stickers has also caused him irreparable loss and damage as he has been prevented from effectively carrying on his business and as a result, he continues to suffer loss and damage. In that context therefore, it is his argument that he has sought the intervention of this Court as his demands to be supplied with authentication devices by the 1<sup>st</sup> Respondent have been met with resistance and threats.

7. In his Written Submissions dated 15<sup>th</sup> March 2016, the Petitioner asserted that in the month of August 2011, the 1<sup>st</sup> Respondent officially announced via twitter and on its website a reduction of the price of the Anti-Piracy Security Device, the authentication device in issue. That vide **Legal Notice No. 103**, the said device was to be sold by the Kenya Copyright Board pursuant to **Section 36** of the **Copyright Act** and according to him, under this Section, registration is mandatory for any person intending to sell audio-visual works or sound recordings.

8. His further contention was that he has never been informed by the 1<sup>st</sup> Respondent of the procedure for applying for the device or the necessary requirements in order to acquire the same and that he deals in the distribution of foreign material which do not qualify for protection under **Section 23** of the **Copyrights Act**. In addition, he has urged that and the works he deals with are not jointly authored and therefore the actions by the 1<sup>st</sup> Respondent are *ultra vires* the said law. That, by virtue of **Section 24** of the **Copyright Act**, the **Berne Convention** and Lusi Wilfred writings in *The Law Society Journal- 9(2) (2010)* at page 98, works which have not been first published in Kenya, do not enjoy copyright protection and the accompanying exclusive rights within Kenya.

9. The Petitioner has also submitted that pursuant to **Section 26 (1) (j)** of the **Copyright Act**, he obtained the requisite licenses to operate his business and in that regard, it is his argument that the 1<sup>st</sup> Respondent has acted in excess of its powers and mandate in a bid to protect works that have already been lawfully made accessible to the public in their countries of origin, which works were not first published in Kenya and therefore do not enjoy protection.

10. The Petitioner has maintained therefore that the 1<sup>st</sup> Respondent is bound by the **Constitution** and in

that regard, he has asserted that his basic rights have been and continue to be violated contrary to the provisions of the **Constitution** and the said rights have been violated since he registered and commenced his business. He has argued further that he has been arbitrarily deprived of his property under **Article 40** of the **Constitution** and that the confiscated audio-visual compact disks are still in the custody of the trial Court and thereby continuing the violation of his right to property aforesaid.

11. The Petitioner has further alleged that he has been denied and been deprived of information necessary for him to gain full benefit from the goods and services and protection of his economic interests as a result of the failure of the 1<sup>st</sup> Respondent to give him information on where to purchase the authentication devices. In addition, that he has been denied the right to fair administrative action in that his employee was charged with an offence under **Section 36 (6) and (5)** of the **Copyright Act** and yet he, the Petitioner, has on various occasions visited the 1<sup>st</sup> Respondent's office in an attempt at obtaining the aforesaid device unsuccessfully. In addition, that the decision by the 1<sup>st</sup> Respondent not to give him the device is not in any way justified and the criminal proceedings against his employee are uncalled for and unfair.

12. On the jurisdiction of this Court, the Petitioner has pointed out that this Court is vested with unlimited jurisdiction in criminal and civil matters by dint of **Article 165** of the **Constitution** and as such, the present Petition is properly before it and that the 1<sup>st</sup> Respondent has abused the powers conferred to it by **Section 35 (5)** as read with **Section 36 (6)** of the **Copyright Act** for the reasons set above.

13. For the foregoing reasons, the Petitioner therefore urges the Court to grant the following orders:

*a) That a mandatory injunction do issue compelling the 1<sup>st</sup> Respondent to issue the authentication devices to the Petitioner.*

*b) That a declaration do issue that the Petitioner's right to fair administrative action has been violated and will continue being violated unless and until the final determination of this Petition.*

*c) That a declaration do issue that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision to charge the Petitioner in Criminal Case No. 1332 of 2014 together with any charges presented to the 3<sup>rd</sup> Respondent be stayed pending the final determination of this Petition.*

*d) That in the alternative, a declaration do issue staying the decision by the Respondents from either continuing and or proceeding with Criminal Case No. 1332 of 2014, pending the determination of this Petition and further restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from interfering with the Petitioner's only source of livelihood in their farfetched and malicious prosecution pending the hearing and final determination of this Petition.*

*e) That a declaration do issue that the actions of the 1<sup>st</sup> Respondent are null and void as the said Copyright Board failed to sell and or issue the Petitioner with the authentication devices yet they turn around and prefer criminal charges based on their omission and wrong doing.*

*f) Exemplary damages and costs of and incidental to this suit.*

### **The Respondents' Case**

14. The 1<sup>st</sup> Respondent filed Grounds of Opposition on 2<sup>nd</sup> February 2016 and Written Submissions dated 11<sup>th</sup> April 2016 challenging the Petition on the grounds that **Article 157 (12)** of the **Constitution** mandates Parliament to enact legislation conferring prosecutorial powers on the office of the Director of Public Prosecutions and that **Section 43 (1)** of the **Copyright Act** gives the Prosecuting Authority powers to appoint Public Prosecutors for the purpose of prosecuting cases emanating from offences under the **Copyright Act**.

15. In the 1<sup>st</sup> Respondent's view, the orders sought in the Petition are therefore untenable since it is

legally mandated to carry out its statutory functions and that the accused in the aforesaid criminal case is not a copyright owner as defined under the **Copyright Act** and as such he cannot directly obtain authentication stickers.

16. The 1<sup>st</sup> Respondent has asserted further that the Petitioner has alleged violation of his constitutional rights without specifying or particularizing the manner in which the criminal proceedings will hamper the full enjoyment of those rights. It has also maintained that it was justified to conduct regular raids on businesses that sell copyrightable works so as to ensure that no infringement is perpetrated and as such, it at all material times acted in accordance with the **Constitution** and **Statute**. That it is also justified in preventing infringement of copyrights of foreign copyright owners locally by dint of the requirements of the **Berne Convention for the Protection of Literary and Artistic Works**.

17. Additionally, the 1<sup>st</sup> Respondent's position is that at the time of the Petitioner's employee's arrest, he did not provide any proof of ownership of copyrightable works that he was exhibiting for sale and has not provided the same to-date. Further, that the 1<sup>st</sup> Respondent is mandated under the **Copyright Act** to only issue the authentication devices to copyright owners and or parties that have procured consent to exploit the economic rights of copyrighted work owned by other copyright owners.

18. It is also the 1<sup>st</sup> Respondent's view that the Petitioner has failed to demonstrate that either he nor his employee had any ownership of the copyrightable audio-visual works that he was issuing for sale. As such, the sale without the authentication devices, made the employee culpable of criminal charges. In its further view, the Petitioner has failed to meet the criteria that warrants the grant of conservatory orders as outlined in the case of **Centre for Rights Education and Awareness (CREAW) and 7 Others vs Attorney General, Petition No. 16 of 2011** and that he has failed to outline the prejudice he would suffer if the conservatory orders sought herein are not granted.

19. Based on the foregoing therefore, the 1<sup>st</sup> Respondent has argued that the Petition lacks merit, is misconceived, frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs to it.

20. I should state that I do not seem to have seen any response by the 2<sup>nd</sup> Respondent. What was its response was expunged from the record on 12<sup>th</sup> January 2016.

### **Determination**

21. Based on the Parties' pleadings and respective submissions, the key question for determination is whether there has been any violation of the Petitioner's rights and fundamental freedoms and whether the orders sought in the Petition should be granted.

22. The Petitioner has in that regard alleged that his rights under **Articles 40, 46 and 47** of the **Constitution** have been infringed and further seeks a declaration nullifying the decision by the 1<sup>st</sup> Respondent to institute criminal proceedings against his employee for reasons of the violations aforesaid.

### **Violation of Article 40 on the Right to Property**

23. The Petitioner has in this regard contended that he has been arbitrarily deprived of his property namely, 1,656 Audio Visual Compact Disks, which were confiscated by the 1<sup>st</sup> Respondent despite him having complied with the legal requirements for operating his business.

24. In that regard, **Article 40** of the **Constitution** guarantees every person the right to own property in the following terms:

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

*(a) Of any description; and*

*(b) In any part of Kenya.*

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

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

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

*(3) ...*

25. In the present case, can it then be said that the confiscation of the Petitioner's 1,656 Audio Visual Compact Disks was arbitrary? My answer to that is in the negative and I say so because the confiscation of the said Disks was done by the 1<sup>st</sup> Respondent in the exercise of the powers conferred on it by the **Copyright Act**. In any event, the Disks were also confiscated for the purpose of being used as evidence in the criminal proceedings and as such, it cannot be said that the confiscation was arbitrary and in violation of the right to property. Further, if the criminal proceedings are determined in his favour, the same would obviously be returned to him and he can thereafter file separate proceedings, if need be, to challenge any losses occasioned to him.

26. In the circumstances I am unable to find any violation of the right to property under **Article 40** of the **Constitution**.

#### **Violation of Article 46 on Consumer Rights**

27. **Article 46** provides that;

*(1) Consumers have the right-*

*(a) To goods and services of reasonable quality;*

*(b) To the information necessary for them to gain full benefit from goods and services;*

*(c) To the protection of their health, safety, and economic interests; and*

*(d) To compensation for loss or injury arising from defects in goods or services.*

*(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.*

*(3) This Article applies to goods and services offered by public entities or private persons.*

28. According to the Petitioner, he has been denied and/or been deprived of information necessary for him to gain full benefit from the goods and services within his business realm and protection of his economic interests in that the 1<sup>st</sup> Respondent has deliberately and or maliciously declined to sell to him authentication devices or give him information on where to buy and/or obtain the same. That, omission according to the Petitioner, is in a bid by the 1<sup>st</sup> Respondent to continue harassing and embarrassing him in the operation of his lawful business.

29. In that regard, **Section 36** of the **Copyright Act** provides that:

*(1) Every sound and audio-visual recording made available to the public by way of sale, lending*

*or distribution in any other manner to the public for commercial purposes in Kenya shall have affixed on it an authentication device prescribed by the Board.*

*(2) The Board shall authenticate copyright works according to all required documents furnished to it by the applicant for that purpose and shall issue an approval certificate in the prescribed form to the applicant for authority to purchase an authentication device.*

*(3) The authentication device shall be issued to an applicant upon proof that the applicant has been authorized by the copyright owner to manufacture, reproduce, sell, import, rent or otherwise distribute the work.*

*(4) The authentication device shall be affixed to each copy of the copyright work made or published by the applicant.*

*(5) No person shall sell or exhibit for sale any copyright works that require an authentication device in any form without an authentication device affixed thereto pursuant to sub-section (4).*

*(6) Any person who knowingly sells or offers for sale any copyright work that require an authentication device without an authentication device affixed thereto is guilty of an offence and is liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding four years, or to both.*

*(7) Any work requiring an authenticating device and which is sold or exhibited for sale without the authentication device shall be presumed to be an infringing copy.*

*(8) Any person who, without permission of the Board;*

*(a) Is found to be in possession of or to have reproduced, a security device; or*

*(b) Is found to be in possession of any machine, instrument or contrivance intended to be used to produce or reproduce a security device, shall be guilty of an offence and liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both. (Emphasis added)*

30. The foregoing **Section** of the **Act** makes clear provisions in regard to the application for authentication devices. The effect thereof is that the Board is the statutory body mandated with the task of issuing an authentication device. It follows therefore that a person who wishes to acquire the device, applies to the Board for supply of the same and the Board is duty bound to issue an approval certificate in the prescribed form to enable such an applicant obtain the device if the conditions set out therein are met. Further, the same is issued on the pre-condition that the applicant has proved that he or she has been authorized by the copyright owner to manufacturer, reproduce, sell, import, rent or otherwise distribute the work. While the provision does not define who may apply for the authentication device, it sets a pre-condition for such an application in that an applicant must adduce evidence that he or she has been so authorized by the copyright owner to manufacture, reproduce, sell, import, rent or otherwise distribute the work.

31. In the present case, it is contested whether the Petitioner made an application to the 1<sup>st</sup> Respondent or that he was deliberately not supplied with the device. The Petitioner has also not rebutted the assertion by the 1<sup>st</sup> Respondent that at the time of his employee's arrest, he (the employee) did not provide any proof of ownership of the copyrightable works that he was exhibiting for sale and he has not exhibited the same before this Court. In that regard, the 1<sup>st</sup> Respondent has submitted that the Petitioner has never been issued with the authentication device because he did not provide any proof of ownership of any copyright of the works he was selling. That being the case, I am inclined to dismiss the Petitioner's contention that his right under **Article 46** of the **Constitution** was violated and in my view, the failure by the Petitioner to meet the qualifications to be granted the authentication device cannot form the basis of any violation of his consumer rights as alleged.

I must add that I make this finding based on the evidence before me and the said finding should not in any way prejudice the criminal proceedings if appropriate evidence is tendered to that Court.

### **Violation of the Right to Fair Administrative Action**

32. **Article 47** of the **Constitution** provides that:

*“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

*(3) Parliament shall enact legislation to give effect to the rights Consumer rights in clause (1) and that legislation shall—*

*(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*

*(b) promote efficient administration “.*

33. Pursuant to **Article 47 (3)** Parliament enacted the **Fair Administrative Action Act, 2015** and the same 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.*

34. The Petitioner’s contention in the above regard is that he has been denied the right to fair administrative action in that his employee was charged with a criminal offence and yet, he (the Petitioner), has on various occasions visited the 1<sup>st</sup> Respondent’s offices in a bid to obtain the authentication devices but the same have never been supplied to him. Can it then be said that the Petitioner’s right to fair administrative action has been infringed?

35. As I have stated elsewhere above, any person who wishes to acquire an authentication device applies to the 1<sup>st</sup> Respondent for the same and upon proving that he or she is a copyright owner or has been authorized by a copyright owner to manufacture, reproduce, sell, import, rent or otherwise distribute such works, the person is issued an approval certificate as authority to purchase the said device. For that reason and based on the uncontroverted submission that the Petitioner has not adduced any evidence as to proof of his ownership of copyright work or authorization from such copyright owners, I cannot fault the 1<sup>st</sup> Respondent for not issuing him with the device unless I see evidence to the contrary and I have said that I have seen none. The fact that the Petitioner did not meet the requirements to satisfy the issuance or the authentication device does not mean that the 1<sup>st</sup> Respondent acted illegally or in contravention of the Petitioner’s right to fair administrative action. I shall however repeat my caveat stated elsewhere above that my findings are limited to the proceedings before me and the evidence before me only. The trial Court must make its independent findings.

### **Whether the Court Should Halt the Criminal Proceedings**

36. **Article 157** of the **Constitution** vests prosecutorial powers on the Director of Public Prosecutions. **Sub-Article (6)** thereof provides that:

*The Director of Public Prosecutions shall exercise State powers of prosecution and may-*

*(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

*(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

*(c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

37. Sub-Article (10) thereon provides that:

*The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

38. In the present case, the prosecutorial powers were exercised pursuant to the **Copyright Act** and under **Section 43 (1)** of the said **Act** the Prosecuting Authority (the DPP) may, pursuant to the provisions of the **Criminal Procedure Code**, appoint Public Prosecutors for the purposes of prosecuting causes emanating from the offences created by the Act. In this case the Board is such Prosecutor.

39. The Petitioner in that regard seeks to have the criminal proceedings halted and it should be noted that the Court may, but on rare occasions, interfere with the powers of the Director of Public Prosecution where such powers have been exercised in disregard to **Article 157 (11)** of the **Constitution** which is to the effect that:

*In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

40. Furthermore, the circumstances under which the Court may interfere with the powers of the Director of Public Prosecutions was highlighted in **Gulam and Another vs Chief Magistrate's Court and Another [2006] eKLR** where the Learned Judge held that:

*"Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court... A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable... Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest. The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup." (Emphasis added)*

41. It therefore follows that while this Court has the powers and duty to prevent misuse of powers by the Director of Public Prosecutor, such a power is sparingly invoked. Has the Petitioner made out a case to warrant the stoppage of the criminal proceedings? My answer to the question is in the negative. In stating

so, my reasoning is guided by the fact that firstly, this is not the appropriate forum for the Petitioner to raise a complaint regarding the institution of the said criminal proceedings on the basis of the decline by his employee to give bribes to the 1<sup>st</sup> Respondent. I say so because, the solicitation of bribes is an offence under the **Anti-Corruption and Economic Crimes Act** and as such, any allegations of solicitation and demand for bribes by the 1<sup>st</sup> Respondent and its agents ought to be raised with the relevant authorities, for instance the **Ethics and Anti-Corruption Commission**, which is mandated by law to take further action such as investigation and recommendation for prosecution of persons involved.

42. In my view, it is also not for this Court to open an inquiry as to the allegations of any such solicitation. Further, I do not understand why the Petitioner has raised the argument before this Court at this time and yet he alleges that the solicitation and demand for bribes by the 1<sup>st</sup> Respondent's agents has been a frequent affair.

43. In addition, it should be borne in mind that it is not the duty of this Court to go into the veracity or otherwise of the evidence to be relied on at the trial Court and neither should this Court examine the indictments that a person is facing before the trial Court. That, in my view, is the mandate of the trial Court which is vested with such powers including the power not to put an accused person on his defence where no *prima facie* case has been established. Further, **Article 50** of the **Constitution** guarantees every accused person the right to a fair hearing and the right to be presumed innocent until the contrary is proved and the trial Court is well versed with that fundamental principle.

44. The other contention by the Petitioner is that the 1<sup>st</sup> Respondent acted *ultra vires* its powers as it does not have the mandate to protect foreign works. In that regard, I note that in the present case, the Petitioner's employee has been charged with committing an offence under **Section 36 (6)** of the **Copyright Act** which states that:

***“Any person who knowingly sells or offers for sale any copyright work that require an authentication device without an authentication device affixed thereto is guilty of an offence and is liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding four years, or to both.”***

45. As far as the present Petition is concerned therefore, the constitutionality or otherwise of that provision has not been challenged and it remains in our statute books. The **Copyright Act** gives the 1<sup>st</sup> Respondent the mandate to oversee the implementation of the Act and to take such necessary action in regard to the Act which includes prosecution of offences committed therein. It is therefore the duty of the trial Court to ascertain whether an offence has been committed based on the facts that shall be placed before it and it will also then determine the innocence or otherwise of an accused person. It is obvious therefore that it would be premature for this Court to encroach on the mandate of the trial Court in the circumstances of the present case.

46. Further and turning back to the contention that the 1<sup>st</sup> Respondent does not have the mandate to deal with foreign works, I can do no better than to reproduce the provisions of **Section 5** of the **Copyright Act** which outlines the functions of the Copyright Board as follows:

***The functions of the Board shall be 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;*

*(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.*

47. It follows therefore that one of the mandates of the Board is the implementation of the various laws in regard to copyright, including international law. I must therefore dismiss the Petitioner's contention that the 1<sup>st</sup> Respondent does not have the mandate to protect foreign copyright works. Additionally, it will be noted that the **Berne Convention for the Protection of Literary and Artistic Works** mandates the Kenyan Government to protect such foreign works against any infringement and the proper body to do so is the Board.

### **Conclusion**

48. Having found no justification or basis for stopping the criminal proceedings it follows that the Petition herein must fail. As I conclude, I must further state that even if an accused person has a good defense, that in itself is not a basis for stopping his prosecution as it is the duty of the trial court to evaluate the materials before it and satisfy itself as to the suitability of a charge or otherwise. In that regard I must reiterate the dictum by the Court in **Michael Monari and Another vs Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011** where the Learned Judge rendered himself thus:

***"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."*** (Emphasis added)

49. In agreeing with the above exposition of the Law, it is worthy of note that whereas the Petitioner herein has alleged violations of his various constitutional rights i.e to property and consumer protection rights, he did not seek any orders in that regard and the main order he has sought is in regard to the violation of his right to fair administrative action only. I note further that the Petitioner has also sought interim orders in Prayers (b), (c), and (d). The same cannot obviously issue at this stage and as regards orders compelling the 1<sup>st</sup> Respondent to issue the Petitioner with the authentication device, I must reiterate that it is not the mandate of this Court to usurp the powers of the 1<sup>st</sup> Respondent which is vested with the powers of issuing the same to persons who qualify for such issuance under the provisions of the **Copyright Act**. It therefore follows that the Petitioner is obligated to apply for the same as per the **Copyright Act** and the 1<sup>st</sup> Respondent is to consider the same as per the said Act. Additionally, having found no violation of the Petitioner's rights, Prayer (5) and (f) must fail. With those findings the Petition has collapsed.

### **Disposition**

50. Based on my findings above, I am not satisfied that the Petitioner has made out a case to warrant the

stoppage of the criminal proceedings or to grant any orders sought in the Petition. It is therefore my holding that the Petition is unmerited and I hereby dismiss the same.

51. The orders granted by this Court on 3<sup>rd</sup> February 2016 are hereby vacated.

52. Let each Party bear their own costs of this Petition.

53. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Miss Ewang holding brief for Mr. Odero for Petitioner

No appearance for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**