REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITON NO. 5 OF 2016

IN THE MATTER OF ARTICLES 3, 10, 22 (10, 23 (1), 36, 40, 118, 165 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF COPYRIGHT ACT CAP 130

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL FREEDOMS) PRACTICE RULES, 2013

BETWEEN

MERCY MUNEE KINGOO.....1ST PETITIONER

LYDIA NYIVA KINGAI.....2ND PETITIONER

VERSUS

SAFARICOM LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Introduction

The petitioners are composers, producers and performing artists of musical and audio-visual works. They contracted Premium Rate Service Providers (PRSPs) to digitize their musical work and download in the 1st respondent's Skiza Tunes Portal. The 1st respondent has been paying royalties to the petitioners and other artists through their contracted PRSPs since 2008. In December, 2012 parliament passed the Statute Law (Miscellaneous Amendments) Act which introduced section 30A into the Copyright Act Cap 130. From 2015 the 1st respondent started to remit the royalties through collective management organizations (CMOs) which are not contracted by the petitioners. The 1st respondent, a private limited liability company, maintains that the decision to change the payment procedure is due to the provisions of section 30A of the Copyright Act. The 2nd respondent is the Attorney General of the Republic of Kenya and he

is being sued in his capacity as the Principal Legal Advisor to the Government.

The 1st and 2nd interested parties applied to be enjoined in this matter and they support the petitioners. The 2nd and 3rd interested parties also applied to be enjoined in the petition as parties. Their interest was to have their royalties that was being held by the 1st respondent to be released.

The Petitioner's Case

The petition is dated 21.3.2016. It seeks the follow5ing orders: -

a) A permanent injunction restraining the 1st respondent from remitting artists' royalties from the Skiza Tunes Portal to CMOs;

b) A declaration that the august 2015 Agreement between the 1st respondent and CMOs was irregularly and unlawfully obtained due to lack of public participation;

c) A declaration that the August 2015 Agreement between the 1st respondent and CMOs was irregularly and unlawfully obtained as it infringes on the petitioners and other artists'' constitutional rights;

d) A declaration that the Statute Law Miscellaneous Amendment Act of 2012, that introduced Section 30A of the Copyright Act, Cap. 130 was irregularly and unlawful enacted for want of public participation and therefore unconstitutional;

e) Costs of this petition; and

f) Any other relief that the court may deem for to grant.

The petition is supported by the affidavit of the 1st petitioner. It is the petitioner's case that they are artist who engage in music. They have composed several songs. They appointed a duly licensed Premium Rate Service Provider (PRSP) to digitize and manage the music content. The 1st respondent has since 2008 operated a portal called Skiza Tune which is used to download the digital music content by its subscribers. The music works are normally uploaded in form of caller ring back tones (CRBTs) through the Skiza Tune Portal. The 1st petitioner has composed songs such as Dhoruba, Nakungoja, Ebenezer and Nimekubali on the Skiza Tunes Portal. The 2nd petitioner on her part has composed such songs as Munga Wa Ajabu, One Thing, Hadi Lini, Baba Naja and Iko Jibu on the Skiza tunes Portal.

It is the petitioner's case that they entered into agreements with PRSPs on how artists' respective exclusive rights in their music works have to be handled and how royalties have to be paid. They have contracted Liberty Africa Technologies Limited, a PRSP provider, to manage their exclusive composition, performance, production and related artistic rights and have received royalties on their behalf. Thereafter the royalties have been forwarded to them. Since 2008 the petitioners have had no complaint against the 1st respondent or their PRSP provider until August 2015 when the 1st respondent without consulting them signed an agreement with third parties namely the Music Copyright Society of Kenya limited (MCSK) and other entities that have styled themselves as Collective Management Organizations (CMOs) whereby the 1st respondent purports to bind itself to henceforth channel artists' royalties through the CMOs.

The petitioners maintain that the music Copyright Society of Kenya was deregistered in 2011. The 1st respondent breached the petitioners' constitutionally guaranteed intellectual property rights. The 1st respondent failed to engage artists in the control and distribution of the royalties inform of public participation and this is a breach of constitutional national values and principals. The petitioners are not members of CMOs and do not intend to join any one of them. The caller ring back tones are in the category of the performance rights for which the CMOs are not allowed to handle. The 1st respondent's

decision to channel the royalties through CMOs is ill motivated and is intended to cause a breach of contract between the artists and their contracted PRSPs. The CMOs are ill equipped to deal with digital contends and are not licensed under the Kenya Information Communication Act Cap 411A to handle digital contents such as the Skiza Tunes contents. The 1st respondent's act of entering into an agreement with third parties is forcing the artists to become members of the CMOs and is a violation of their rights provided under Article 36 of the Constitution. Their rights risk being infringed as a result of the implementation of the agreement between the 1st respondent and third parties.

It is contended that the 1st respondent purports to be enforcing section 30A of the Copyright Act Cap 30 of the laws of Kenya and allied amendments brought in through Statute Law (Miscellaneous Amendments) Act, of 2012. The said amendment was not subjected to public participation in total contravention of Article 118 of the Constitution. Stakeholders' views especially those of the artists were not sought before the amendments introducing section 30A were enacted. According to the petitioners, unless section 30A of the Copyright Act is struck down, its continued use and implementation will continue perpetuating infringement of artists' constitutional rights to their intellectual property rights. The affidavit of Mercy Munee King'oo explains the petitioner's case in those terms. It is upon that basis that the petitioners are seeking the orders stated herein above.

Miss Ruto, counsel for the petitioners relies on the case of **ROBERT N. GAKURU & OTHERS V GOVERNOR KIAMBU COUNTY & 3 OTHERS [2014) eKLR**. The court held that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. Counsel also maintain that the petitioners have their duly licensed Premium Rate Service Providers. They have signed agreements with PRSPs on how their respective exclusive right in their musical works have to be handled and how royalties are to be paid. Since 2008 their royalties have been paid through the PRSPs.

The 1st and 2nd Interested Parties' Case

The two interested parties filed an application dated 7.4.2016 seeking to be enjoined as parties to this suit. Their request was granted. They filed two affidavits in support of the petition. Their counsel Mrs. Kipsang filed her written submissions in support of the petition. The interested parties maintain that there was no public participation in the enactment of section 30A of Cap 130 through the Statute Law (Miscellaneous Amendments) Act, 2012. Article 10 of the Constitution recognizes national values one of which is public participation when legislation is being enacted. Article 27 of the Constitution provides for equal treatment of all persons and that every person is equal before the law. Article 35 provides for the rights to access information while Article 118 emphasizes on public participation in the legislative process.

According to the two interested parties, public participation is at the core of the legislative process with a mandatory requirement that stakeholders and interest groups be involved where substantive contents of the proposed legislation are debated. Counsel for the two parties rely on the case of **ROBERT GAKURU AND OTHERS VERSUS GOVERNOR KIAMBU COUNTY AND 3 OTHERS [2014] eKLR** where the court stated as follows:-

> ***"That public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilling constitutional dictates…"***

The statute law miscellaneous amendment Act, 2012 was presented before parliament for the first reading on 19.12.2012 and proceeded for its second reading on the same day. The third reading was done on 21.12.2012. The law was assented to on 31.12.2012. The Act contain several amendments and was passed within such a short time. The petitioners have therefore established a prima facie case that there was no public participation in effecting the amendments to section 30A of the Copyright Act. Counsel maintains that the dispute herein is not res judicata since Nairobi High Court Petition No. 317 of 2015 only dealt with the issue of the constitutionality of the effects of section 30A but the legality of the process was not considered. The issue of public participation was not dealt with in the Nairobi petition. Further, the learned judge relied upon the decision of a Canadian case which has since the delivery of

judgement in Petition No. 317 of 2015 been overturned on appeal.

The 1st Respondent's Case

Ms Muriu, Mungai & Co. Advocates appeared for the 1st respondent. A replying affidavit sworn by Daniel Ndaba on 7.9.2016 was relied upon. According to the 1st respondent it is the registered proprietor of Skiza Tunes platform. This is a platform that enables telephone end users to select and download ring back tones to their phones. The ring back tone is personalized by the recipient of a call so that all his callers will hear the ring tone instead of the standard ring tone bought with the phone. The 1st respondent entered into an agreement with the Kenya Association of Music Producers (KAMP), Performance Rights Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK) who are all CMOs licensed under section 46 of the Copyright Act by the Kenya Copyright Board (KECOBO) to collect license fees and distribute royalties in the respective categories in which they are licensed.

It is the 1st respondent's case that the agreement it signed with the three CMOs is in line with the requirement of section 30 A of the Copyright Act which requires that rights users pay a single equitable remuneration to performers and producers of sound recordings offered to the public. The section is mandatory and all payments have to be made to the CMOs and no one else. The petition herein is res judicata as the issues being raised were determined in **Nairobi High Court Constitutional Petition number 317 of 2015; XPEDIA MANAGEMENT LIMITED & 4 OTHERS V ATTORNEY GENERAL & 5 OTHERS [2016] eKLR.**

To the 1st respondent the petition raises three issues to be determined by the court, namely whether the petition is res judicata, whether there was lack of public participation in the enactment of the Statute Law (Miscellaneous Amendments) Act, 2012 and whether section 30A of the Copyright Act violates the petitioners' rights under Article 36 and 40 of the Constitution. Lastly, whether the reliefs sought should be granted.

On the issue of res judicata it is stated that the petition is res judicata. section 7 of the civil procedure act provides as follows: -

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

In the case of **THERESA COSTABIR V ALKA ROSHANLAL HARBANSLAL SHARMA &ANOTHER [2015] eKLR** the Court of Appeal expounded on section 7 of the Civil Procedure Act in the following words: -

> ***"... section 7 aforesaid raise four pre-requisites to be met for a matter to be deemed res judicata. These were defined in the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR to mean that there has to be:***
>
> ***1. A previous suit in which the same matter was in issue***
>
> ***2. The parties are the same or litigating under the same title***
>
> ***3. A competent court heard the matter in issue and determined***
>
> ***4. The issue has been raised once again in a fresh suit."***

According to the 1st respondent the petitioners have conceded that they contracted Liberty Africa Technologies in the management of their artistic rights as indicated in their petition and supporting

affidavit. Liberty Africa Technologies Ltd was the 2nd petitioner in Nairobi Petition No. 317 of 2015. It brought the suit on its own behalf and on behalf of 5,000 of its members. The court delivered its judgment on 11.5.2016 and held that section 30A of the Copyright Act is constitutional. No appeal has been filed against that decision. Therefore, Liberty Africa represented the interests of the petitioners in the Nairobi suit. Counsels rely on the case of **JOHN NJUE NYAGA V ATTORNY GENERAL & 6 OTHERS (2016) eKLR**. The court had the following to say on res judicata: -

> ***"… makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Further that "a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit"***

It is further contended that the petitioners herein were aware of the Nairobi petition and could have applied to be enjoined in the Nairobi petition. Liberty Africa argued that section 30A of the Copyright Act was unconstitutional and opposed its application in the payout of royalties to CMOs. The current petitioners also think that the section is unconstitutional. The issues are substantially the same as they relate to section 30A of the Copyright Act. Reference is made to the case of **JOHN FLORENCE MARITIME KSERVICES LTD &ANOTHER V CABINET SECRETAY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS [2015] eKLR** where the court stated as follows: -

> ***"Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged."***

The 1st respondent submit that a law may be declared as unconstitutional if either the constitutional process was not followed or even where the process was followed, the implementation, application or effect is unconstitutional. Liberty Africa challenged the law but its petition was dismissed. The petition herein is therefore res judicata and the courts should not be called upon to dwell on issues that have already been dealt with by a similar court taking into account the fact that the courts are already clogged and overwhelmed by the number of cases pending determination.

It is submitted that the burden of proving whether there was public participation or not lies with the petitioners. This was held in the case of **SAMOW MUMIN MOHAMED & 9 OTHERS V CABINET SECRETARY, MINISTRY OF ITNERRIOR SECUIRTYAND CO-ORDINATIN & 2 OTHERS [2014] eKLR** where the court stated: -

> ***"This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse actar-all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."***

The process of enacting legislation is quite clear. The bills are published before they are debated in parliament. The bills are also subjected to the committee stage where members of the public are invited to give their views. The allegations of lack of public participation are hollow. Parliament followed its standing orders and the petitioners have not proved that there was no public participation. Counsel relies on the case of **LAW SOCIETY OF KENYA V ATTORNEY GENERAL & 2 OTHERS (2013) eKLR** where it was stated that: -

> ***"The burden of showing that there has been no public participation or that the level of public participation within the process does not meet the constitutional standards is on the petitioner."***

According to the 1st respondent there was no violation of the petitioners' rights under Article 36 and 40 of the Constitution. The petitioners are not saying that they have been denied their royalties paid to CMOs. They have not also alleged that the CMOs have insisted on membership as a prerequisite to the payment

of royalties paid to the CMOs by the 1st respondent. What section 30A has done is to illegalize the payment of royalties to any person other than CMO duly licensed by KECOBO. Section 30A does not say that only members of a CMO can receive the royalties. There has been no infringement of the petitioners' intellectual property rights. The agreements entered between the 1st respondent and their CMOs are private between those parties and the petitioners are strangers thereto. The petition lacks merit and cannot be granted.

2nd Respondent's Case

The 2nd respondent filed grounds of opposition on 2.8.2013. It is indicated that the petition is res judicata as a decision was made in Nairobi Petition No. 317 of 2015 (supra). The petition is therefore scandalous and an abuse of the justice system. It is also stated that the relief sought by the petitioners are in itself unconstitutional as the petitioners' rights should not interfere with the rights of other artists who ought to enjoy the fruits of their judgment in Petition No. 317 of 2015. Section 30A of cap 130 does not contravene Article 36 of the Constitution. Parliament discharged its constitutional mandate by enacting section 30A of the Copyright Act.

Mr. Waigi Kamau, State counsel, submit that the issue for determination raised by the petition involves the constitutionality of section 30A of the Copyright Act. All the issues being raised were dealt with by the Nairobi Petition. The Nairobi High Court analysed all the challenges brought against section 30A by the petitioners in that suit and dealt with them. Mr. Waigi submit that the issues being raised have been settled. The only new issue involves public participation. Article 10 and 118 of the Constitution on Public participation were duly complied with. There is no infringement on the petitioners' constitutional rights.

3rd and 4th Interested Parties' Case

The two parties filed an application dated 19.4.2016 seeking to be enjoined as interested parties to this suit. This court issued interim orders which stopped the release of the royalties by the 1st respondent. The two interested parties sought to have the royalties released by the 1st respondent. They filed a replying affidavit opposing the petition sworn by Peterson Ngethah Githinji on 4.5.2016. They contend that the petitioners have not annexed their purported agreements with PRSPs or provided any proof that they have been receiving royalties from the 1st respondent. Collection and distribution of performers' royalties including those accruing on Skiza Portal Tunes is a preserve of Collecting Societies/Management Organizations as licensed by KECOBO pursuant to section 5 (b) and 46 of the Copyright Act. The interested parties aver that they are not opposed to the petitioners'' contention that their royalties accruing on Skiza Portal be paid to them through PRSPs. All what they have opposed to is the petitioners'' allegation that all artists whose musical works are on Skiza Portal appointed PRSPs and that they should be paid through PRSPs. Their demand on the mode of payment should be limited to them only and should not be applied to other artists.

Analysis and Determination

The petition raises the following issues: -

i. Whether the petition is res judicata.

ii. Whether the amendment of the Copyright Act and introduction of section 30A observed the principles of public participation or whether section 30A is unconstitutional.

iii. Whether the reliefs sought should be granted.

Whether the Petition is res judicata

The respondents maintain that the petition is res judicata. The basis for this is that there is the judgment

in Nairobi Petition Number 317 of 2015 where the issue of the constitutionality of section 30A of the Copyright Act was determined. It is further submitted that the parties in that petition are similar as the petitioners were represented by Liberty Africa Ltd.

I have had the advantage of reading the judgement of Mumbi Ngugi J in Nairobi Petition No. 317 of 2015. The issues for determination in that petition were whether the court had jurisdiction to hear the petition, whether section 30A is unconstitutional and a violation of the petitioners' rights under Articles 36, 40 and 47 and whether the 3rd, 4th and 5th respondents in that petition were exceeding their mandate under section 30A of the Copyright Act in collecting royalties from users. The court summarized its findings as follows: -

> ***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 organizations 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.***

Section 30A of the Copyright Act 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 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.***
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> ***(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 fiftieth calendar year following the ear 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 purposes.***

The Court of Appeal in the case of **COUNTY GOVERNMENT OF NYERI & ANOTHER V CECILIA WANGECHI NDUNGU [2015] eKLR** held as follows: -

> ***"the cardinal rule for construction of statute is that a statute should be construed according to the intention expressed in the statute itself."***

Halsbury's Laws of England 4th edition Vol 44 states the following on interpretation of statutes: -

"It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in on part of the Act is by implication modified by another provision elsewhere in the Act…"

Section 7 of the Civil Procedure Act prohibits courts from hearing disputes which have already been determined by other courts. Once a pronouncement has been made on an issue, then the same should not be the subject of litigation before another court and between the same parties. The final determination in Petition No. 317 of 2015 does not make any pronouncement on the constitutionality of section 30A of the Copyright Act. The court held that the section did not violate the petitioners' rights. It can well be concluded that it was determined that section 30A is not unconstitutional. However, that determination is in relation to the parties to that petition as well as the core issue as to whether the section violates freedom of Association under Article 36 of the constitution. That issue was determined in Petition No. 317 of 2015. In the case of **ZURICH INSURANCE COMPANY PLC V COLIN RICHARD [2011] EWCA CIV 641**, the court explained the principal of res judicata in the following terms: -

"Estopple by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word "res judicata" mean simply "a thing judicially determined." <u>They may apply to the claim as a whole (usually referred to as "cause of action estoppel"), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as "issue estoppel</u>" …. The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect."

My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alledged to be in contravention of the Constitution, similar cases can be brought to court but based on a different dimension. A petitioner can say that a certain provision of a statute is unconstitutional as it violates a certain Article of the Constitution. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violates another Article of the Constitution. In other words, res judicata cannot be applied generally in relation to interpretation of the Constitution or a statute. There is also the simple fact that one judge can declare a certain statutory provision as unconstitutional while another judge declares the same provision as constitutional. In such a case, res judicata cannot apply. A good example is the issue relating to section 40 (3) of the County Governments Act, 2012. In the case of **STEPHEN NENDELA V COUNT ASSEMBLY OF BUNGOMA & 4 OTHERS [2014] eKLR** Justice Mabeya declared that section as unconstitutional. Justice Byram Ongoya dealt with the same issue in two case namely **GEORGE MAINA KAMAU V COUNTY ASSEMBLY OF MURANGA & 2 OTHERS [2016] eKLR and RICHARD BWOGO BIRIR V NAROK COUNTY GOVERNMENT & 2 OTHERS [2014] e KLR**. The judge did not declare section 40 (3) of the County Governments Act as unconstitutional. I also dealt with the same issue in the case of **AMINA RASHID MASOUD V THE GOVERNOR, LAUMU COUNTY & OTHERS Malindi Constitution Petition No. 10 of 2016** and I held that section 40 (3) was not unconstitutional. All these cases were based on similar facts and involved the constitutionality of section 40 (3) of the County Governments Act. The **RICHARD BWOGO BIRIR CASE ended in the Court of Appeal (Nyeri Civil Appeal No. 74 of 2014)**. The Court of Appeal did not deal on the issue of the constitutionality of the section.

The petitioners herein were not parties to Petition No. 317 of 2015. The contention that they were represented by their Premium Rate Service Provider – Liberty Africa Technologies Ltd – cannot stand. That party litigated on the position of a Premium Rate Service Provider while the petitioners are artists. The freedom of association of the PRSPs is different from that of the artists.

I do find that the petition is not res judicata. The petitioners can challenge the provisions of Article 30A on the grounds that it was passed without public participation or that it violates their constitutional rights. They can also challenge the section on the ground that its implementation is leading to infringement of their constitutional rights.

Whether there was public participation in enacting section 30A of the Copyright Act

Section 30A was brought in through the Statute Law (Miscellaneous Amendments) Act, 2012. The 1st and 2nd interested parties submitted that the Statute Law (Miscellaneous Amendments) Act, 2012 was introduced in parliament on 19.12.2012 for the first reading. It went through the second reading on the same date and was referred to the relevant committee. It was brought back to parliament on 21.12.2012 for 3rd reading and was passed. It was assented to on 31.12.2012. the Act covered several other statutes and its preamble indicate that it is **"AN ACT OF PARLIAMENT TO MAKE MINOR AMENDMENTS TO STATUTE LAW"**. The amendments on the Copyright Act related to section 15 that was deleted, section 30 had some amendments, section 30A was introduced, sections 36 and 42 were also amended.

The petitioners contend that there was no public participation before the introduction of section 30A. It is also deponed that the stake holders were not involved. Ordinarily, a Statute Law (Miscellaneous Amendments) Act would only deal with minor amendments to certain statutes. Such amendments involve rectification of drafting mistakes or delating provisions which have been affected by other new legislation among others. There would be no need for extensive public participation if the intention is to do minor amendments as the same Act suggests.

However, where the new introductions alter the original Act to a great extent and introduces new substantive provisions that were not in place before, then such amendments ought to be subjected to public participation. Of late, parliament has made drastic amendments to old statutes through the avenue of Statute Law (Miscellaneous Amendments) Act. A case in point is the amendment of the Judicial Service Act and introduction of a requirement that three names for the position of the Chief Justice and Deputy Chief Justice be forwarded to the president for him to appoint one nominee for each respective position in place of the original position which required that only one name be forwarded by the JSC. The amendments were done through the Statute Law (Miscellaneous Amendments) Act, 2015. The same Act introduced drastic changes to the Employment and Labour Relations Act, the Environment and Land Court Act, the High Court (Organization and Management) Act and the Magistrates' Court Act. There could be some form of public participation while passing the Statute Law (Miscellaneous Amendments) Acts but a great deal of consultation is required.

The issue of public participation has been litigated upon in several forums. Unfortunately for this case, the report of the relevant parliamentary committee was not brought to the attention of the court for it to know what transpired when the bill was referred to the committee. We can make presumption that the committee called for memorandums and comments in relation to the proposed amendments on all the affected statutes. Article 10 (2) (a) on National Values and Principles of Governance calls for participation of the Kenyans in all spheres of life. Similarly, Article 118 calls for parliament to conduct its business and the business of its committees in an open manner and facilitate public participation.

In the case, of **LAW SOCIETY OF KENYA V ATTORNEY GENERAL AND THE NATIONAL ASSEMBLY (2016) eKLR,** the court had this to say on public participation: -

> ***"… the law is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, the law does not require the proposed legislations be brought to each and e very person wherever that person might be. What is required is that reasonable steps be taken to facilitate the said participation…."***

It is not expected that all Kenyans will participate in the enactment of legislation. Indeed, our representative democracy whereby each constituency elects a member of parliament each year to represent the residents of a particular constituency implies that Kenyans are fully represented in the

legislative process. However, by enacting the 2010 Constitution, Kenyans still felt that they should be engaged once again when parliament is conducting its affairs. That is why Article 118 was placed in the Constitution. Such Article calls for engagement with the stakeholders of each particular sector affected by a specific legislation whenever such legislation is amended or where a new legislation is enacted. The stakeholders affected by the Copyright Act includes all Kenyans generally and in particular the producers, performers, artists, mobile phone operators, broadcasting corporations among others. There is no evidence that the stakeholders were engaged before the introduction of section 30A of the Copyright Act. The section is not a minor Amendment. Indeed, if the contentions of the 1st and 2nd interested parties on the timelines taken to pass the bill it will be noted that there was no time for public participation. The committee only had three days from 19.12.2012 to 21.12.2012 to present the bill back to parliament. That period was not sufficient to engage the stakeholders.

The use of collective management organizations to receive royalties seems to be the core issue which led to the dispute. Prior to this, the petitioners had contracted a Premium Rate Service Provider to manage their affairs including the collection and disbursements of the royalties. The position prior to the enactment of section 30A seems to be that each artist was represented by a Premium Service Rate Provider. These providers were not licensed as CMOs. Section 5 of the Copyright Act provides for functions of the Kenya Copyright Board, KCOBO. One of its functions under section 6 (b) is to license and supervise the activities of Collective Management Societies as provided for under the Act. Section 46 (5) of the Act states as follows.

> ***"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."***

It is clear that only one collecting society can be licensed in respect of the same class of rights or category of works. Section 30 (3) recognizes a performer's right to enter into a binding authorization and appoint a representative. Section 30A calls for payment to producers and performers of the single equitable remuneration through the respective Collective Management Organizations and the remuneration shall be paid by the user to the CMO. The remuneration shall be shared equally between the producer of the sound recording and the performer.

On the issue of public participation before the introduction of section 30A, it is my finding that there was no public participation. The stakeholders were not engaged. The section does not introduce minor amendments to the Act and ought to have been subjected to public participation. The assumption was that the amendments on the affected statutes were minor. However, drastic changes were made to the Copyright Act.

I do reiterate that the dispute herein relate to the point of payment for royalties earned by the artists and other produces through the Skiza Tunes. According to the petitioners, they are satisfied with their current arrangement with the Premium Rate Service Providers (PRSPs) who are licensed by the Communication Authority of Kenya. They were not involved in the change of paying point from the PRSPs to the Collective Management Organizations (CMOs). I do agree with the findings of Justice Mumbi Ngugi that there is no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyright works. Section 30A does not make it mandatory for the 1st respondent to channel the royalties only through the CMOs. The argument that it would be difficult to deal with each individual artist is not tenable as the 1st respondent has been paying dividends to its shareholders through their mobile phones. Further, the 1st respondent has over twenty million subscribers and is able to manage all their affairs which are not limited to phone calls but include m-pesa transactions, purchase of bundles, accumulation of points through the use of phones, use of internet and crediting airtime. The 1st respondent's technology is quite advanced and has been of great service to Kenya. Between 2013 and 2015, the 1st respondent has been paying the royalties through the PRSPs and has not been charged in curt for violating the law.

I do not agree with the position taken by the 1st respondent that all the royalties have to be paid through

the CMOs. The 1st respondent was a party in Nairobi Petition Number 317 of 2015. The court held that it is not mandatory for the artists and producers to be members of the CMOs for them to receive their remuneration for the use of their copyright works. The effect of that is that the CMOs can only pay those registered with them. Since the PRSPs are also legally licensed, they can still continue to receive the royalties of those artists who are contracted with them. PRSPs are not amorphous or illegal organizations. Section 30A of the Copyright Act does not illegalize payment of royalties to any person other than CMOs. If that is the case, then the section would be violating the petitioners' right of freedom of association as well as freedom not to be compelled to join any kind of association. If all royalties are to be paid through CMOs, the effect would be that an artist cannot receive his/her royalties until he/she joins one of the three CMOs. The dispute is about payment point and each artist should be at liberty to be paid through the point of his choice. Receiving royalties for an artist who is not your member is unconstitutional. It is therefore clear to me that the manner in which section 30A of the Copyright Act is implemented is unconstitutional. Artists who already have existing contracts with their Premium Rate Service Providers are being called upon to abandon those agreements and join any one of the three Collective Management Organizations. The right to choose where one's royalties are to be paid is being infringed. The 1st respondent, safaricom, insists that section 30A did illegalize payment of royalties to other organizations not registered as CMOs. During the pending of the suit, over Kshs.200 million due to artists was being held as the 1st respondent insisted on releasing the money through the CMOs.

The petitioners are seeking orders of injunction among other prayers. They contend that they are being forced to get their royalties through the CMOs yet they have existing contracts with their PRSPs. Since 2008 upto 2015, they were receiving their royalties through their duly contracted PRSPs. It is clear from the stand taken by the 1st respondent that the petitioners will not get their royalties until the same is paid through the CMOs. It is not clear to me whether any fees or charges are levied by the CMOs. Although they are described as non-profit making organizations, that does not mean that they are charitable institutions. They are private bodies. What would be the need of them receiving the royalties and thereafter passing the payment over to the artists without any fee. If that is the case, which I find is not, then the royalties ought to be paid directly to the artists without any involvement of the CMOs.

I am satisfied that the petitioners have established a prima facie case. They were not consulted when section 30A of the Copyright Act was passed. Their pre-existing contracts are being trampled upon. It is evident that the 1st respondent is not the only user of the petitioners' works. There are other mobile phone operators. There are also television and radio stations who could be using the petitioners' works. Some of the users may not be using the digitized ring tones but by the end of the day royalties have to be paid. I believe those royalties are not paid through the three CMOs.

I do find and hold that the petitioners' rights to associate with their PRSPs are being infringed. The petitioners are involved in an industry which involves the youths as well as well established artists. It takes time, money and hard work to produce the artistic works. The law should not way-lay the artists at the very end of the process and order them to receive their royalties through three Collective Management Organizations. What is so special with these three organizations? Such an arrangement is tantamount to obstructing an employee or anyone not to get his salary or payment through any other bank other than the one preferred by the employer or paying body. This is unconstitutional. The 2010 Kenyan Constitution has pumped fresh air and freedom into the Kenyan society. No Kenyan should have his options of how he would like his payments to be made after his/her hard work limited to a specific paying point. This amounts to tethering one's freedom of association and right to choose where to be paid and limiting such fundamental rights and freedoms to only three CMOs is unconstitutional. That cannot be allowed in a democracy like ours based on equality, human dignity and the rule of law.

In the end, I do find that to the extent that section 30A of the Copyright Act, Cap 130 Laws of Kenya limits the artists' right to choose how their royalties are to be paid, that section is unconstitutional as its effect is to limit the petitioners' freedom of association. Further, taking into account the fact that section 30A of the Copyright Act was enacted without public participation and its effect is to be applied retrospectively without regard to existing arrangements between artists and their contracted Premium Rate Service Providers, that section is unconstitutional.

The 1st respondent entered into an agreement in 2015 with the three CMOs whose effect is to channel their royalties through those CMOs. The 1st respondent's positon is that the agreement is a private arrangement and the petitioners are strangers to it yet at the same time contends that section 30A illegalizes payments to other institutions other than the three CMOs. Such arrangement is unconstitutional as it indirectly bind third parties who are not privy to the contract.

The upshot is that the petition dated 21.3.2016 is merited as is hereby granted as prayed. The manner in which section 30A is implemented is unconstitutional. An injunction shall issue in terms of prayers (a) of the petition. Section 30A of the Copyright Act is unconstitutional as it was enacted without public participation and it is being retrospectively applied. It also limits artists' freedom not to be compelled to join an association of any kind as provided under Article 36 of the Constitution. The petitioners are being forced to receive their royalties through Collective Management Organization yet they have no dealings with them. This is unconstitutional.

It is hereby declared that the august 2015 agreement between the 1st respondent and the CMOs is irregular, unlawful and infringes on the petitioners' constitutional rights.

Each party shall meet their own costs.

Dated and delivered in Malindi this 3rd November, 2016.

S.J. CHITEMBWE

JUDGE