



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 161 OF 2015**

**JOHN WAFULA MUKHWANA.....1<sup>ST</sup> PLAINTIFF**

**EDWIN OMONDI AOKO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUSIC COPYRIGHT SOCIETY OF KENYA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE REGISTRAR OF SOCIETIES.....2<sup>ND</sup> DEFENDANT**

**HENRY MUNGAI NJENGA.....3<sup>RD</sup> DEFENDANT**

**ALBERT GACHERU KIARIE.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. This is a ruling on two Notices of Motion dated 23/4/15 and 4/5/15 respectively and the Preliminary Objection dated 12/5/15. The Motion of 23/4/15 is by the Plaintiffs seeking that the election of Henry Muigai Njenga on 21<sup>st</sup> April, 2015 as a Nairobi Region Representative of the 1<sup>st</sup> Respondents Governing Council be declared a nullity, or staying him from taking office or discharging his duties as a member of the 1<sup>st</sup> Respondents Governing Council. The Motion of 4/5/15 is by the Interested Party seeking various orders including the setting aside of the interim order of 29/4/15 and to allow his election as a Nairobi Region Representative to be published by the 1<sup>st</sup> Respondent. The Preliminary Objection is by the 1<sup>st</sup> and 3<sup>rd</sup> Respondent and it challenges the jurisdiction of this court to hear the dispute herein.

2. The Motion of 29/4/15 contended that the elections of the 1<sup>st</sup> Respondent held on 21/4/15 were irregular; that the 3<sup>rd</sup> Respondent was irregularly nominated and consequently elected as director representing the Nairobi Region. That the candidatures of the 3<sup>rd</sup> Respondent and of one James Getanda who was not a member from the Nairobi region was against the Memorandum and Articles of Association of the 1<sup>st</sup> Respondent and their participation thereon diluted or affected the entire elections of the Nairobi Region.

3. As regards the Motion of 4/5/15, the Interested Party contended that he was not a party in these proceedings yet the order of this court of 29/4/15 had the effect of affecting his election as a member of the 1<sup>st</sup> Respondent's Governing Council; that his election had not been disputed yet it could not be adopted at the 1<sup>st</sup> Respondent's AGM as a result of the order of 29/4/15. That the said order should be

lifted so that he can assume office and discharge his duties. That as a result of the said order, the more than 4000 members of Nairobi Region had been affected. He prayed that his application be allowed.

4. Both applications were opposed. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed a Replying Affidavit on 29/4/15 opposing the Plaintiff's motion of 29/4/15. It was deponed that the impugned elections were held in a most transparent and open manner in accordance with the Memorandum and Articles of the 1<sup>st</sup> Respondent; that the only complaint was the endorsement of the 3<sup>rd</sup> Respondent by one Nellias Wamuyu who was erroneously indicated to have been a delegate from the Central Region; that the error of the said endorser had been dealt with and settled. That the issues and complaint about James Getanda who was from the Nyanza Region had not been raised at the election or even soon thereafter until the court papers were served upon the officers of the 1<sup>st</sup> Respondent. It was urged that the application be dismissed. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent however supported the Interested Party's Motion of 4/5/15.

5. The Plaintiffs opposed the Motion of 4/5/15 vide their joint affidavit sworn on 21/5/15. They contended that although there were no direct allegations against the Interested Party, serious questions had been raised about the manner in which the elections had been conducted which invariably affected the returns made by the 1<sup>st</sup> Respondent; that this had been confirmed by this courts interim ruling dated 29/4/15, on prayer No. 2 of the Plaintiffs Motion, that the wrongful acts of the 1<sup>st</sup> Respondent had affected the election of the Interested Party. That to accede to the application of 4/5/15 would be a miscarriage of justice. To the Plaintiffs there were no good reasons or grounds that had been advanced to warrant the grounds sought in the motion of 4/5/15. They urged that the application be dismissed.

6. As regards the Preliminary objection by the 1<sup>st</sup> and 3<sup>rd</sup> Defendant the same stated:-

***“TAKE NOTICE that at the hearing of the Plaintiff/Applicant application dated 23<sup>rd</sup> April 2015 the 1<sup>st</sup> and 3<sup>rd</sup> Defendant shall raise a preliminary objection on the ground that this Honourable Court lacks jurisdiction to entertain this suit by virtue of Article 78 of the Memorandum and Articles of Association of the 1<sup>st</sup> Defendant/Respondent and section 10 of the Arbitration Act.”***

7. All these three (3) were argued together by way of written submissions which were ably highlighted by the respective learned counsel and the Interested Party. I have considered the affidavits on record, the written submissions the oral hi-lights thereon and the authorities relied on by the parties. I think it is important to start with the Preliminary Objection as it goes to the root of this matter. It touches on the jurisdiction of this court to entertain the entire suit.

8. In the case of **The Owners of Motor Vessel Lilian “s” – vs –**

**Caltex Kenya Ltd (1989) KLR 1** the Court of Appeal held at page 14 as follows:-

***“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

.....  
***....It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before court. It is immaterial that the evidence is scanty or limited... As soon as that is done, the court should hear and dispose of that issue without much ado.”***

This court must therefore determine the issue of jurisdiction before delving into the two applications.

9. It was submitted for the 1<sup>st</sup> and 3<sup>rd</sup> Respondent that by dint of Article 78 of the Memorandum and Articles of Association of the 1<sup>st</sup> Respondent, there was a binding contract between the 1<sup>st</sup> Respondent and its members; that the said Article stipulated that any and all disputes between any member and the 1<sup>st</sup> Respondent should be referred to Arbitration. That under Section 10 of the Arbitration Act, this court is barred from entertaining matters that are arbitral. On their part, it was argued on behalf of the Plaintiffs that the dispute before the court was about election of members of various positions within the 1<sup>st</sup> Respondent which does not fall under the purview of Article 78 of its Memorandum and Articles. The cases of **Milkah Nanyokia Masungu – vs – Robert Wekesa Mwembe & 2 others (2013) eKLR** and **John Kairie Waweru – vs Beth Wambui Mugo & others(2008) eKLR** were relied on in support of that contention.

10. Article 78 of the Memorandum and Articles of the 1<sup>st</sup> Respondent provides: -

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

11. In their plaint of 23<sup>rd</sup> April, 2015, the Plaintiffs pleaded in paragraphs 6, 7, 8 and 9 as follows

**“6. The Plaintiffs have at all material times prior to the commencement of this suit been active and fully paid up members of the Music Copyright Society of Kenya (Nairobi Region), which is the 1<sup>st</sup> Defendant/Respondent herein and thus I am well versed with the facts of this case.**

**7. On or about the 21<sup>st</sup> April, 2015 the Music Copyright Society of Kenya held an election for its Governing Council for the Nairobi Region and one Henry M Njenga and one Alert Gacheru garnered the most votes and were subsequently confirmed as the representatives to the governing Council from Nairobi Region by the Returning Officer;**

**8. The said election was a nullity ab initio as the nomination and subsequent election process was done contrary to the Society’s Memorandum of Articles of Association;**

**9. The nomination of Henry M Njenga was contrary to Clause (e) of the Election rules for Governing Council Members as among the 10 persons required to nominate him as a candidate eligible to vie in the elections, one by the name Nellas Wanjiru Wamuyu was not a registered voter within the Nairobi Region and her name does not appear on the Nairobi region voter register thus she is not eligible to vote in Nairobi Region polls.” (Emphasis added)**

12. From the foregoing, it is clear that the Plaintiffs are not only members of the 1<sup>st</sup> Respondent, but they are challenging the elections conducted under the Memorandum and Articles as well as the statutes of the 1<sup>st</sup> Respondent. This in my view is covered by the wording of Article 78 that:

**“In differences..... between the society on the one hand and any of the members..... touching anything then or thereafter done executed, omitted or suffered in pursuance of these articles, or the statutes .....”**

13. By dint of Article 78, such differences are to be referred to arbitration. It is trite law that a Memorandum and Articles of a company constitute a binding contract between the company and its

members. None of them can seek to act in breach of its stipulations or act outside the Articles. Once Article 78 of the 1<sup>st</sup> Respondent directed that disputes between it and its members are to be settled by way of Arbitration, that is binding on both the 1<sup>st</sup> Respondent and its members. Section 10 of the Arbitration Act provides: -

***“Except as provided in this Act, no court shall intervene in matters governed by this Act”***

14. Can the Plaintiffs’ suit be saved? I am aware of Section 7 of the Arbitration Act which allows the court to grant an injunction before a matter is referred to arbitration. In this case however, the Plaintiff seeks final orders. There is no prayer for injunction pending reference to Arbitration. In the circumstances, the suit is incompetent. To the extent that the application dated 29/4/15 is predicated upon an incompetent suit, it cannot succeed. The Preliminary Objection hereby succeeds and I make the following orders:

- 1. The motion dated 29/4/15 is hereby struck out with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondent and the Interested Party.***
- 2. All the orders made herein to-date are hereby vacated and set aside.***
- 3. I make no orders on the application dated 4/5/15.***
- 4. Consequently, the application dated 19/6/15 by the 1<sup>st</sup> Respondent is hereby marked as spent with no order as to costs.***

It is so ordered.

**DATED and DELIVERED** at Nairobi this 10<sup>th</sup> day of July 2015.

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**A. MABEYA**

**JUDGE**