



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 4 of 2011 & 9 of 2010

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER SECTION 22 OF THE CONSTITUTION**

AND

IN THE MATTER OF SECTION 33, SECTION 35 AND SECTION 40 OF THE CONSTITUTION

BETWEEN

THE TRUSTEES KENYA BUDGET HOTEL ASSOCIATION.....1ST PETITIONER

KENYA NATIONAL CHAMBERS OF COMMERCE AND INDUSTRY.....2ND PETITIONER

VERSUS

THE MUSIC COPYRIGHT SOCIETY OF KENYA LTD.....RESPONDENT

RULING

High Court Petition No.4 of 2011 and No.9 of 2010 were heard together as they raise similar issues. The petitioners have averred that:

- i) the requirement by the respondent that the petitioners pay for airing broadcasts from national radio and television sets is an infringement of the latters' right to access to information and *ultra vires* the Copyright Act, illegal and unconstitutional;
- ii) the respondents conduct of invading the petitioners' members business premises in the company of the Administration Police officers to collect levies for royalties and the seizures or threatened seizure of television, radio sets and other end-user devices of the petitioner's members who fail to pay the legal fees is an infringement of the latters' rights to privacy and equal protection by the law and the right to property guaranteed under Article 31, 33, 35 and 40 of the Constitution.

Pending the hearing and determination of the petitions, the petitioners seek that the respondents be restrained from demanding fees for licences for playing broadcasts at the members' business premises.

It is important to set out briefly the grounds upon which the applications and the petitions are premised. The petitioners' members and the petitioner in Petition No.9 of 2010 are traders running hotel and restaurant businesses. In their business premises, they have installed radio and television sets broadcasting national programmes, more particularly, transmitted from the Kenya Broadcasting Corporation and FM radio stations.

It is the petitioners' contention that officers representing the respondent have been visiting the petitioners' members' premises in the company of armed Administration Police officers and demanding payments for the installation of radio and television sets.

According to the petitioners, this action is not backed by any law as the content broadcasted in these premises are not copyrighted; that the petitioners do not play sound recordings or musical works independent of the broadcasts. The petitioners maintain that the respondent's role is limited to collecting royalties for authors, composers, publishers and performers which royalties do not extend to broadcasts; that broadcasts attract a distinct and independent protection; that where musical works are incorporated in a broadcast such incorporation is deemed to be authorized by the owner of the copyright or the owner is entitled to claim compensation from the broadcasting entity.

The petitioners therefore argue that it amounts to an infringement of their constitutional rights to privacy and property for the respondent to enter their premises to demand payment of fees and to seize end-user devices and arrest those who fail to comply; that the action of the respondent also constitutes a violation of the petitioners' right to receive and impart information.

In reply to these arguments, the respondent has deposed that the petitioners have failed to demonstrate how the acts of the respondent complained of have infringed their rights; that there is no evidence that the petitioners represent all the 27 businesses listed in paragraph 2 of the chamber summons dated 11th March, 2011 or paragraph 4 of the affidavit in support thereof, since only three are stated to have renewed their membership with the 2nd petitioner; that the petitioners have not established that their personal rights have been violated; and further that their goods were seized.

The respondent maintains that in discharging its statutory function, it is empowered to seize and detain any substance or article believed to be an infringement of any work; that they are accompanied by police purely for security reasons and not to harass anyone. In brief, the foregoing constitutes the dispute in this matter.

I have carefully considered the able submissions filed by counsel for the parties together with all the authorities cited.

The petitioners having obtained *ex parte* (interim) order on presentation of this application, it is the duty of the court at this stage to determine whether or not, from the averments and pleadings the petitioners have a *prima facie* case with a likelihood of success. It is only after that is established that the interim orders can be confirmed and file forwarded to the Chief Justice under **Article 165(4)** of the **Constitution**.

In the result, the burden is on the petitioners to prove, *prima facie*, that:

- i) their members' rights under **Articles 33 (1)(a)** – (freedom to seek, receive or impart information or ideas) have been infringed
- ii) their members' rights and fundamental freedoms under **Article 35** of the **Constitution** (right to information) have been violated.
- iii) **Article 40** has also been breached.

Although the application is premised only on **Articles 33, 35** and **40** of the **Constitution**, there is reference elsewhere in the application to violation of the petitioners' rights to privacy (**Articles 31**),

Article 33(1)(a) provides that:

“33(1) Every person has a right to freedom of expression, which includes:

(a) freedom to seek, receive or impart information or idea,”

According to the petitioners, by the respondents insisting that the petitioners pay fees for installed radio and television sets, the latter's right and freedom to "receive" information or ideas have been curtailed, amounting to a violation. The petitioners, in this regard must also show that their premises are exempted from the application of the Copyright Act; that this notwithstanding, the respondent is insisting on their paying fees and; that as a matter of fact that each one of their members has been affected by the violation.

It is common ground that in terms of **Section 46** of the Act, the respondent is a collecting society as defined in **Section 48(4)** to mean an organization which negotiates for the collection and distribution of royalties and grants licenses in respect of copyright works or performer's rights.

The scope of powers vested in the respondent is defined in its Memorandum of Association to include the enforcement on behalf of its members, i.e. composers of musical works or authors of any literary or dramatic works, all the rights and remedies by virtue of the Copyright Act or otherwise in respect of any exploitation of their works and in particulars:

".....to administer all the rights relating to the public performance, broadcasting, communication to the public by wire or wireless....."

By virtue of their Memorandum of Association, the respondent's are also mandated to recover royalties and fees for the exploitation of the copyright of any works on behalf of the artists.

Section 22 enumerates what constitutes copyrights and other related rights and includes broadcasts. Broadcasts, on the other hand, means:

".....the transmission. by wire or wireless means or sounds or images or both or the representation thereof in such a manner as to cause such images or sounds to be received by the public and includes transmission by Satellite."

(See Section 2)

Broadcast, from the above definition, can only be transmitted by the broadcasting authority, namely the radio and television stations and not the owners of the premises where such radio and television sets are installed, even if the premises are public places. Again in a situation where the owner of the copyright in any musical or artistic work authorizes a person to incorporate the work in audio-visual works and a broadcasting authority broadcasts such works, then by virtue of **Section 27(1)** and **(2)** such broadcast is deemed to be with the authority of the artist in which case the artist would only be entitled to receive fair compensation.

The rationale for this provision can only be based on the fact that an end-user device such as a radio or television set broadcasts a combination of items, educational, news, religious and other items but in the process may incorporate musical work; and indeed there are people who may only be interested in the news, educational or religious aspects of the broadcasts and there are also those interested only in the musical works and a third category who are interested in both.

In situations like those, various interest cannot be isolated, hence the requirement that the artist be compensated by the originator of the item - the broadcasting authority. To hold that both the broadcasting authority and the owners of end-user devices pay fees and/or compensation to the artist would be to legitimate the unjust enrichment of the artists.

It would be logical, in the circumstances for the broadcasting authority to charge fees on the end-user devices and issue licences to TV and radio owners. Of course, in public premises where artistic or musical works are performed independent of a broadcast such as disco, piped recorded music or video/DVD, the owners of the premises, would be required to be licensed.

I hold, in this regard, that in the absence of any specific agreement to the contrary, musical or

artistic works incorporated in audio-visual broadcasts are deemed transmitted with the permission of the artist.

This brings me to the next question, whether *prima facie* **Articles 31, 33(1)(a) and 40** of the **Constitution** have been violated. In other words, have the petitioners shown that, *prima facie* their rights to privacy and property have been violated and whether their rights to freedom to seek, receive or impart information or ideas have been infringed. It is now settled that an applicant who brings a constitutional reference must:

- i) set out with precision what right has been violated and;
- ii) in what manner the said right has been violated.

See **Prof. Julius Meme V. Republic**, (2004) 1KLR 637 where the case of **Anarita Karimi Njeru V. Republic** (No.1) was cited with approval. In that case, the court said:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

I have observed earlier that although the petition is brought pursuant to **Articles 33, 35 and 40** of the **Constitution**, the petition also alleges that there are violations to **Article 31**. Secondly, in considering an application based on the Bill of Rights where other parties rights are also concerned, (e.g. **Article 33(1)(b)** guarantees the respondents’ members freedom of artistic creativity), the court must ensure that the applicant raises real and not theoretical questions in which he has a real interest.

Apart from the sole petitioner in Petition No.9 of 2010, there is no evidence that any of the 27 hotels and businesses listed in paragraph of 4 of the supporting affidavit are members of the petitioner. But more importantly the petitioners have not demonstrated how the respondent has violated their freedom of expression or how the respondents have stopped them from seeking, receiving or imparting information or idea.

Article 35 in my view has no application as regards the matters complained of in the petition. There is no claim that the petitioners have been prevented by the respondents from accessing information held by the State or from doing any of the things enumerated in **Sub-Articles (1), (2) and (3)**. Likewise the petitioners have not specified how their right to property has been infringed by the respondents.

For instance, there is no specific property of the petitioners that have been arbitrarily seized, save for the seizure in respect of an item from Eldorado Lodge. The seized item is not described as a radio or television set or shown to relate to matters raised in the application. As stated earlier any musical equipment (disco, DVD and sound recordings) can be seized. There is no evidence of invasion of the petitioners’ premises. For instance, the date and time of such invasion.

Inspectors appointed under **Section 39(1)** or police officers are authorized by law, at any reasonable time and on production of certificate of authority, to enter any premises for purposes of inspection. Both the police and an authorized member of the Kenya Copyright Broad can effect an arrest, with or without a warrant in accordance with the provisions of **Section 42** of the Act. It is not alleged that any of the above have been breached. For these reasons, I come to the conclusion that the petitioners have not established a *prima facie* case with a probability of success; that **Article 165(4)** of the Constitution has not been satisfied.

In the result the application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 11th day of October, 2012.

W. OUKO
JUDGE