

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E022 OF 2025

**IP ADVISORY AND MANAGEMENT
SERVICES LIMITED.....
PLAINTIFF**

VERSUS

**SAFARICOM
PLC.....DEFENDANT/APPLICANT**

JACOB OTIENO

**ODHIAMBO (Alias JACKY B).....INTERESTED
PARTY**

**BENARD BULIMWA (Alias TEDDY B)..... 2ND INTERESTED
PARTY**

**BRIAN OTIENO (Alias BIZZY B)3RD INTERESTED
PARTY**

BEHAJI ENTERTAINMENT LIMITED.... 4TH INTERESTED PARTY

JOHN KAGIMBI

**(Alias PRODUCER TOTTI 5TH INTERESTED
PARTY**

RULING

1. There are two applications in this suit for determination. The 1st **application is dated 3/02/2025** brought by the Plaintiff; and the 2nd **application dated 18/02/2025** filed by the

Defendant. The parties agreed that the 2nd application be determined first.

2. The Defendant's Safaricom PLC by this application seeks an order for striking out the suit with costs and is premised on provisions of **Order 2 Rule 15 (i) (d) of the Civil Procedure Rules** as well as **Sections 1A, 1B and 3A of the Civil Procedure Act**, along side grounds stated at its face and supporting affidavit sworn by one Daniel Ndaba senior counsel in the Defendants enjoyment.
3. The grounds for the application are stated thus; the Plaintiff lacks Locus standi to institute the suit hence an abuse of court process, and amplified by the depositions at the supporting affidavit. Here a short background of the skiza tunes will suffice for better understanding of the subject of the suit.
4. The Plaintiff instituted the suit on behalf of the Interested Parties alleging infringement of copyright rights for the upload of songs on the skiza tunes Platform; whereas the Defendant is the registered proprietor of the skiza platform which is stated as a virtual web and wireless connection - based portal operated by the defendant, which is marketed sold and distributed to its subscribers.
5. It is posited that the skiza tunes are therefore customized ring back services where subscribers can customize the ring tones on their safaricom lines, and therefore it qualifies as a sound

recording within the meaning of the Copyright Act, Cap 130, Laws of Kenya which it is required to enter into agreements with the various artists, but which, due to big numbers of artists it is challenging for the defendant to individually contract all the copyright owners to obtain their permissions.

6. It is further posited that as a consequence, the Defendant entered into contracts with third parties known as Content Service Providers (SCPs) who are licensed by the Communication Authority of Kenya to carry out the services of a CPS, with rights from the copy right holders for the use of their copyright works on the Skiza Platform; for which they share the skiza code with the Artists to market their tunes.
7. On competency of the suit; the Defendant posits that the Plaintiff has not provided any agreement with the Interested Parties giving it authority to institute the suit, on behalf of the copyright owners nor prove to show the interested parties are copyright owners, and lastly that the Plaintiff seeks orders to compel it (Defendant) to enter into a licence agreement with it when it is neither a licensed content service provider nor a registered Collective Management Organization (CMO) and therefore has urged that the suit be struck out for being incompetent.
8. In opposition to the application, the Plaintiff/Respondent filed a Replying Affidavit sworn by Bernard Kioko Maweu, a Director of the Plaintiff on 10/03/2025.

9. On the matter of Plaintiff's locus Standi and authority to sue, the deponent posits that it has binding and valid agreements with the Interested Parties establishing an agency relationship that expressly authorizes the plaintiff to sue on its belief; annexed hereto as "BKM - 1" which agreement he states allows it to protect and enforce the interested parties intellectual property rights.
10. The deponent further posits that it does not have to be a registered Collective Management Organization to lodge the suit as according to the copyright Act, CMOs cater to performer's rights, whereas the suit concern reproduction and mechanical rights, which fall outside the scope of CMOs mandate.
11. On ownership of the copyrights, the Respondent/Plaintiff avers that the copyright in sound recording covers the recording of a performance of the melodies, notes and lyrics written down or recoded and therefore the interested parties have exclusive composers right, which can only be exercised with their permission or licence.
12. On abuse of court process, it is posited that the suit as filed is not an abuse of court process as valid claims of copyright infringement has been adequately pleaded; whereas on public interest considerations, the Respondent urges that striking out the suit would effectively undermine administration of justice and reward the defendant for its attempt to evade accountability.

13. Parties were directed to file submissions, which they did and opted not to highlight.

Defendant/Applicants Submissions.

14. In its submissions dated 26/08/2025, the defendant submits on 3 issues, on plaintiffs locus standi, whether the interested parties own composers copyright in their songs; and whether public interest considerations can be a basis for sustaining the suit.

15. Citing the case of **Alfred Njau & 5 Others v. City Council of Nairobi [1983] KEDA 56 [KLR]** submits that despite the allegation that the plaintiff has contracts with the Interested parties, it does not have locus to bring the suit citing Court of Appeal case **Music copyright Society of Kenya V. Kenya Copyright Board & 2 Others [2024] eKLR** for holding that only a CMO approved and authorized by the Board can qualify to act as a CMO under Section 2 of the Copyright Act.

16. It is further submitted that under the Copyright Act establishment of CMOs was established and tasked with protecting the intellectual property rights of the Interested parties for the same reasons stated by the Plaintiff – lack of resources by content Creators and expertise or capacity citing the case of **Xpedia Management Limited & 4 Others v AG & 5 Others [2016] eKLR.**

17. Further, it cited the holding in the case of **Michael Branham Katana t/a Harsutak Bar & 4 Others vs. Kenya**

Association of Music Producers [Kamp] & 3 Others [2016] eKLR that CMO's are organizations formed or appointed by copyright owners to administer the licensing of rights collect royalties and enforce those rights on behalf of copyright owners.

18. The Applicant further submits that the Plaintiff, is neither approved for authorized by the Kenya Copyright Board to collect royalties or grant licences in respect of the use of copyright works or related copyright and licensing citing the Court of Appeal case of **D. Njogu & Co. Advocates vs. National Bank of Kenya Limited Civil Appeal No 165 of 2007** wherein it was rendered that any contract that contravenes a statute is illegal and the same is void ab initio and therefore unenforceable;
19. In addition, case of **Julian Adoyo Ongunga & Another v Francis Kiberenge Bondera [2016] eKLR** wherein the court stated that **Locus Standi** is so cardinal in civil matters since it runs through the heart of the case, that a party without locus standi lacks the right to institute and/or maintain the suit.
20. In the matter of Public Interest, the case of **Ndoro Kayuga & Another V Mike Sonko Mburi & Others (unreported); Odilia v. Kenyatta university [2022] eKLR** were cited.

21. For the above, the Applicant submits summarily that the Plaintiff lacks locus standi to bring the suit and it should be struck out with costs.

Plaintiffs/Respondents - Submissions Dated 23/09/2025

22. On locus standi, it is submitted that the Copyright Act defines who may bring infringement rights under the Act as the owner, and defines the owner of a copyright to include the first owner an assigned or an exclusive licensee, and therefore registration of a CMO gives a body statutory authority to collect and distribute royalties for a class of works, in particular that the plaintiff having been appointed by the Copyright owners as their copyright administrator, the plaintiff falls under the class of persons who may sue by virtue of the agreements.

23. It further submits that the role of an Administrator is distinct from that of a CMO and its role is derived not from statute but from its agreements with the Copyright owners.

24. On matter of ownership of copyright in musical works, it is submitted that copyright in sound recording covers recording of a performance while copyright in composition covers the melodies, note and lyrics written down or recorded and therefore has urged that the interested parties have exclusive composers rights in sound recording which can only be exercised with that permission licence.

25. Additionally the plaintiff submits that whereas registration of a CMO is useful, the Act does not make it the sole route to an action for infringement, citing case of **Solut Technology v. Safaricom (civil case No. E352/2019) [2024] eKLR** where the court held that under the Act, ownership of copyright is not solely established through registration.
26. Further, the Plaintiff submits that the records are publicly available and they identify and acknowledge the composers of the musical works in question, as well as direct, independent, and industry-recognized proof of authorship and ownership.
27. The plaintiff therefore rubbishes the Defendant's argument that the interested parties must first register their works before claiming ownership or enforcement rights.
28. The Plaintiff submits that its case as lodged does not invoke public interest nor is it a public interest litigation and that it sues as the duly appointed administrator to enforce the proprietary rights of specific authors and composers who have entrusted it with the mandate.
29. Ultimately the Plaintiff submits that the Defendant's application does not meet the threshold for striking out its suit; that it discloses a reasonable cause of action, it is not hopeless nor is it weak as the requirements stated in the

Court of Appeal case of **D.T. Dobie & Co. (Kenya) Ltd v Joseph Mbaria & another (1980) KECA 3(KLR)**.

30. In summation, the plaintiff urges the court to ignore the Defendant's submission and dismiss the application with costs.

Issues for Determination.

a) Whether the Plaintiff has locus standi to bring the suit on behalf of the Interested Parties.

b) Whether proof of ownership of copyright in musical works requires mandatory registration under the Collective Management Organizations (CMOs)

c) Whether the suit should be struck out.

d) Who bears costs of the application.

Whether the Plaintiff has locus standi to bring the suit on behalf of the Interested parties.

31. The interested parties are the copyright owners of musical works and artists whose rights are alleged to have been infringed as defined under the **Copyright Act (Cap 130, Laws of Kenya)** they are entitled to their intellectual proper rights subsisting in their works as composition rights which confer to them exclusive rights to reproduce, distribute and modify their original works as granted under **Section 26** of the **Copyright Act**.

32. There is no dispute as to whether the Interested Parties are the owners here the Interested Parties of their musical works. Once the musical owners deem that their rights have been violated, it is logical that they approach the court for protection. Do these artists in their numbers have a choice of representation as provided at **Article 50 of the Constitution?**
33. The Interested Parties chose to engage the services of the plaintiff by way of a Copyright Administration Agreement dated 27th September 2024 - Exh. BKM-1. Under the agreement, the parties agreed to engage the plaintiff to manage and enforce their Copyright Administration including taking action against the infringing parties, upon payment of a percentage for any revenue they would recover from the infringers.
34. Thus it cannot be faulted that the Plaintiff was duly appointed by the copyright owners to protect their interests, in this case, by filing the instant suit on their behalf. A list of the copyright owners is attached to the agreement. The agreement binds the copyright owners who are privy to the contract.
35. **Section 2 (1) of the Copyright Act of Kenya** established the Kenya Copyright Board (KECOBO) and Collective Management Organizations (CMOs).

36. Of relevance here is the functions of CMOs. Section 2 of the Act defined CMO as:-

“...an organization approved and authorized by the Board which has its main object to negotiate for the collection and distribution of royalties and granting of licences in respect of the use of copyright works or related rights....”

37. **Regulation 4 of the Copyright Act** provides that where a CMO has not been established in respect of a category of rights, of the licence for a CMO has been revoked, the Board shall invite fresh application for registration of the CMO for that category of rights.

38. The Defendant in urging that the Plaintiff, by virtue of not being a registered CMO cannot advance the Interested parties interests in court, cites the case of the Court of Appeal, **Music Copyright Society of Kenya v Kenya Copyright Board & 2 others (2024)** for the proposition that, only a CMO approved and authorized by the Board (KECOBO) can qualify to act as a CMO.

39. The Interested parties agree with the Defendant that individual party management of its rights under the copyright Act is not possible due to their huge numbers hence opted to enter into the agreement with the plaintiff as held in the case **Cellulant Kenya Ltd v Music Society of Kenya Ltd in Case No. 154 of 2009.**

40. Whereas the statutory opposition is that only registered and approved CMO's and authorized qualify as CMOs, the question arises as to whether private arrangements contracts with individual or groups are precluded from entering into contracts or copyright administration agreements with their choice of administrators.
41. That brings me to the question as to whether the above position precluded all copyright owners that may enter into private administration agreements with copyright owners are barred from representing them and bringing suits on their behalf with their authority and or permissions.
42. The court in the **Solut Technology v Safaricom Ltd (Civil Case No. E352/2019) [2024] eKLR** held that under Copyright Act, Ownership of copyright is not solely established through registration, further noting that whereas registration as a CMO is useful, the Act does not make it the sole route to an action for infringement.
43. Additionally, the above position was amplified by the court in **Mercy M. Kingoo & another v Safaricom Ltd & another** wherein the court discussing the import of **Section 30(A)** of the **Copyright Act** recognized performer's rights to enter into binding agreements and authority to appoint their representatives of their choice, stating that if artists have existing contracts with their service providers, they need not abandon them and proceeded to declare **Section 30A of the**

Copyright Act as unconstitutional as it gives Copyright owners no choices as to who should represent them.

44. It is also evident that copyright administrator's roles are distinct from those of CMOs, as they only apply to those who have privity of contract with the copyright owners as, is the case in this suit.
45. The court in the **Mercy Kingoo case above** further on Section 30A held that the Section illegalizes the payment of royalties to any other person other than CMO's licences by KECOBO.

Section 29 (1) of the Act provides that copyright in sound recording shall be the exclusive right to the owner, and it does not expressly prohibit a party (owner) from entering into individual contracts with a third party, as is the case in this case whereof the Interested parties chose the Plaintiff.

See also **Arika & 2 Others v Tamasha Corporation Ltd. & 8 others (2021) eKLR; Omare v Safaricom Ltd & another and Music Copyright Society of Kenya (2024) eKLR.**

46. The Plaintiff further submits that the case as filed does not involve the public nor is it a public interest litigation. The appointed administrator (Plaintiff) was by the agreement to enforce the proprietary rights of specific authors and

composers and therefore possesses **locus standi** to bring the suit for and on behalf of the parties to the agreement.

47. On the matter of striking out the suit on grounds stated by the Defendant, upon careful consideration, the court is not convinced that the Applicant (Defendant) meets the threshold as stated in **D.T. Dobie & Co. (Kenya) Ltd Vs Joseph Mbaria & Another (1980) KECA KLR.**

A close interrogation of the plaint shows and discloses a reasonable cause of action, being infringement of the interested parties Copyright rights. It cannot, prima facie be seen as being weak or so hopeless that it cannot be sustained.

48. It is now settled and trite that striking out a case is draconian, and the court should always strive to sustain it, if possible as held in In the case of **D.T. Dobie & Co (Kenya) Ltd v Muchina (1982) KLR**, whereof principles for striking out a suit were duly stated thus-

a) The court should not strike out suit if there is a cause of action with some chance of success.

b) The power to strike but a suit should only be used in plain and obvious cases and with extreme caution.

c) The power should only be used in cases which are clear and beyond doubt.

d) If a suit shows a sentiment.... of a cause of action, provided it can be infected with real life by amendment, it ought to be allowed to go forward.

See also **Patel v E.A. Cargo Handling Services Ltd (1974) EA 75** for the same holding.

49. For the foregoing, it is this court's considered view as expressed above that the plaintiff has locus standi to bring the suit by virtue of the Copyright Administration Agreement entered into between the copyright owners (Interested Parties) and the plaintiff, and that the suit raises and discloses reasonable cause of action that necessitates being heard on its merits.

50. **In the end, the court finds the Defendants motion dated 18/2/2025 to be devoid of merit. It is dismissed with costs to the plaintiff.**

Orders accordingly.

Delivered Dated and Signed at Nairobi this 13th day of November, 2025.

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JANET MULWA.

JUDGE