

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E212 OF 2023

MOSMAX MEDIA LIMITED.
.....**PLAINTIFF**

-VERSUS-

BETTY MUTEI KYALLO.....1ST
DEFENDANT

EUGENE MBUGUA.....2ND
DEFENDANT

DOCUMENTARY AND REALITY LIMITED.....3RD
DEFENDANT

MEDIOS LIMITED.....4TH
DEFENDANT

RULING

The Preliminary Objection

1. This Ruling relates to a Preliminary Objection (PO) dated 4th June 2025 raised by the 1st Defendant on the following grounds:

- (i) That the Civil Suit herewith, is fatally and incurably defective for failing to properly invoke this Honourable Court’s jurisdiction, in as far as it seeks a declaration that the 1st Defendant has infringed the copyrights of the Plaintiff without exhausting all the adequate avenues for remedy in violation of Section 5(g) and Section 21(1) of the Copyright Act Cap. 130***

Laws of Kenya which expressly provides that Kenya Copyright Board has the powers to administer and enforce all matters of copyright and related rights in Kenya and if a person is aggrieved by the decision of the Kenya Copyright Board, the person can appeal to the Copyright Tribunal.

(ii) THAT the Civil Suit herewith, is fatally and incurably defective for failing to properly invoke this Honourable Court's jurisdiction, in as far as it seeks a declaration that the 1st Defendant has infringed on the copyrights of the Plaintiff and the pecuniary claim as assessed by the Plaintiff is Kenya Shillings Five Million (Kshs. 5,000,000) which violates Section 7(e) of the Magistrates' Courts Act Cap. 10 Laws of Kenya which expressly provides that a Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject does not exceed five million shillings, where the court is presided over by a resident magistrate.

(iii) THAT the continued pendency of this Civil Suit before this Honourable Court is a misguided and premature abuse of the processes of this Honourable Court.

(iv) THAT this Honourable Court lacks the requisite jurisdiction to entertain the said Civil

Suit prior to the exhaustion of all remedies available to the Plaintiff.

(v) THAT the Civil Suit is misconceived, misdirected and misled and ought to be dismissed in limine with costs.” sic

2. The background of this case is that **Mosmax Media Limited** (hereafter the Plaintiff) instituted the present suit against **Betty Mutei Kyallo, Eugene Mbugua, Documentary and Reality Limited** and **Medios Limited** (hereafter the 1st, 2nd, 3rd and 4th Defendants respectively) jointly and severally through a Plaint dated 20th November 2023 seeking various reliefs arising out of a claim for violation and/or infringement of the Plaintiff's rights under the Copyright Act, Cap. 130 Laws of Kenya.
3. Subsequently, the suit against the 2nd and 3rd Defendants was withdrawn with no order as to costs, vide a consent dated 5th June 2020, adopted as an order of this court on 6th June 2024.
4. The Plaintiff thereafter filed an application dated 2nd March 2025 seeking leave of the court to amend its plaint as per the draft amended plaint annexed thereto. The application was allowed by this court on 1st April 2025.

5. Parties were directed to argue the PO by way of written submission. The 1st Defendant's submissions are dated 11th August 2025. Four issues have been raised and argued, namely:

(i) Whether the instant Plaintiff's suit is fatally defective for failing to exhaust avenues for remedies available under the Copyright Act, Cap. 130 Laws of Kenya?

(ii) Whether the Honourable Court lacks requisite jurisdiction to hear and determine the suit as filed?

(iii) Whether the Notice of Preliminary Objection dated 4th June 2025 is merited?

(iv) Whether the suit should be dismissed with costs to the 1st Defendant?

6. In respect to the 1st issue, the 1st Defendant relied on a number of authorities including **Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslim for Human Rights & 2 others (Interested Parties) [2020] eKLR**, all discussing the doctrine of exhaustion. The common thread running through all the cited authorities on this issue is that ***"Where there is a clear procedure for***

redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”.

7. The 1st Defendant argued that the Plaintiff has not met the criteria set out in the authorities relied on to qualify an exception to the doctrine of exhaustion and therefore the suit before the court is premature and fatally defective and that the jurisdiction of this Honourable Court is ousted by sections 5(g) and 21 of the Copyright Act.
8. In support of the 2nd, 3rd and 4th issues, it has been argued, while relying on **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** and **Attorney General & another v Andrew Maina Githinji & another [2016] KECA 817 (KLR)**, the PO raises pure points of law as set out in the above decision and other cited authorities, and is therefore merited. The 1st Defendant has urged that the PO be dismissed with costs.
9. The Plaintiff has opposed the PO through its written submissions dated 5th August 2025. He has raised five (5) as follows:

- (i) ***Whether the PO meets the threshold established under Kenya law?***
- (ii) ***Whether the Plaintiff was required to exhaust administrative remedies before approaching the High Court?***
- (iii) ***Whether the High Court lacks jurisdiction due to the claim being below the Kshs 5 million pecuniary threshold?***
- (iv) ***Whether the present suit is premature and constitutes an abuse of court process?***
- (v) ***Whether the claim for breach of contract can independently support the Court's jurisdiction?***

10. The Plaintiff's submission on the 1st issue are based on the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** and the case of **Oraro v Mbaja [2005] KEHC 3182 (KLR)** which authority captures the definition and principles of a PO. It was submitted that in the present instance, the PO does not meet the threshold for what constitutes a PO, as it is grounded on disputable facts that require evidence.

11. On the doctrine of exhaustion, the Plaintiff has argued that while it may be true that the Copyright Act provides for dispute resolution mechanisms, the same are not exclusive and exhaustive in nature. It is the Plaintiff's argument that

the present suit involves causes of action pertaining to infringements of copyright and breach of contract; whereas the functions of the Board under Section 5 of the Copyright Act, are limited. That, in addition, neither the Board nor the Tribunal has powers to determine private commercial disputes or to award the reliefs sought herein. That in the circumstances, the suit is competently before this court. The Plaintiff based his submission on **Oraro v Mbaja [2005] eKLR** where the court observed that: ***“A preliminary objection cannot be raised if any fact has to be ascertained.... or if what is sought is the exercise of judicial discretion.”***

12. On the 2nd issue, the Plaintiff submitted that the Plaintiff acknowledges the administrative mechanisms under the Copyright Act but, according to it, these mechanisms are not exclusive and do not offer the full range of reliefs sought in the present suit; that the Kenya Copyright Board’s functions are limited to policy enforcement, licensing and certain forms of regulatory action and that the Copyright Tribunal only hears appeals from decisions of the Board. It was submitted that neither the Board nor the Tribunal is

empowered to determine private commercial disputes and award damages or issue injunctive orders.

13. On the issue concerning the pecuniary jurisdiction, it is the Plaintiff's contention that contrary to the arguments brought forth by the 1st Defendant, the monetary reliefs sought in the plaint are likely to exceed a sum of Kshs. 5,000,000/- thereby surpassing the pecuniary jurisdiction of the Magistrates' Courts and that no specific claim has been made for a sum of Kshs. 5,000,000/- as alleged by the 1st Defendant.

14. The Plaintiff has similarly rebutted the ground raised in the PO that the present suit is an abuse of the court process. It has maintained that the suit is competently before this court and has consequently urged that the preliminary objection be dismissed with costs.

Analysis and Determination

15. I have carefully considered the PO and the rival arguments thereof. I have also considered the authorities cited by the parties to support their respective positions. I agree with the definition of what constitutes a PO as defined in the case of **Mukisa Biscuit Company v West End**

Distributors Limited (1969) EA 696, which definition was affirmed in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** where the Supreme Court stated that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

16. In this case, the 1st Defendant has raised a PO challenging the jurisdiction of this court to entertain the present suit on the basis of the doctrine of exhaustion and pecuniary jurisdiction. I hold the view that the question of jurisdiction of a court to determine a matter constitutes a pertinent issue of law, thereby making the preliminary objection competently before this court. Where a court lacks jurisdiction to entertain a matter, it has no business handling that matter, thereby making such a matter untenable before the court.

17. The legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter was re-affirmed by the Court of Appeal in various

decisions including **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not

possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

18. Further, the Supreme Court of Kenya in the case of **Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR)** stated that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

19. The doctrine of exhaustion, upon which the 1st Defendant based this PO, is defined in **Black’s Law Dictionary 10th Edition** as follows:

The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain

comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”

20. The Court of Appeal considered the doctrine of exhaustion in the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)**, cited in the submissions by the 1st Defendant, where that Court pronounced itself in the following manner:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely."

21. See also **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)** on the same doctrine.

22. The general legal principle under the doctrine of exhaustion is that where separate dispute resolution

mechanisms are in place, those ought to be exhausted before a party can consider taking the next steps.

23. The 1st Defendant's has contended that the Plaintiff ought to have firstly sought redress from the Board and Tribunal, pursuant to **Sections 5(g)** and **21** of the **Copyright Act Cap. 130 Laws of Kenya**, before moving the High Court. **Section 5** of the Copyright Act generally sets out the functions of the Board. **Section 5(g)** referenced in the PO provides the functions Board to include:

...

(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.

24. **Section 21** of the aforesaid Act which is also referenced in the PO makes provision for appeals, by expressing that anyone who is aggrieved by the decision of the Board may lodge an appeal to the *competent authority* within 60 days of the decision (**sub-section 1**), and that such *competent authority* shall render its decision within 30 days of lodging of the appeal, which decision shall be final (**sub-section 3**).

25. The 'competent authority' is provided for under **Section 48** of the aforesaid Act, in the manner hereunder:

(1) There shall be a competent authority appointed by the Cabinet Secretary for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.

(2) Subject to subsection (3), in any case where it appears to the competent authority that—

(a) the Board is unreasonably refusing to grant a certificate of registration in respect of a collecting society; or

(b) the board is imposing unreasonable terms or conditions on the granting of such a certificate; or

(c) a collecting society is unreasonably refusing to grant a licence in respect of a copyright work; or

(d) a collecting society is imposing unreasonable terms or conditions on the granting of such a licence; or

(e) the competent authority may direct that as respects the doing of any act relating to work with which the collecting society is concerned or with

respect to the granting of a certificate to operate as a collecting society, a licence or a certificate shall be deemed to have been granted by the collecting society or the Board at the time the act is done or the application is made, provided the appropriate fees are paid or tendered before the expiration of such period or periods as the competent authority may determine.

(3) Where a dispute has been referred to the competent authority under this section, the competent authority shall, in accordance with such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives, both orally and in writing.

(4) In this section—

...

“competent authority” means an authority of not less than three and not more than five persons, one of whom shall be a person qualified as an advocate of the High Court of Kenya of not less than seven

years' standing or a person who holds or has held judicial office in Kenya who shall be the chairman, appointed by the Cabinet Secretary for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.

26. Upon a perusal of the record, specifically the Plaintiff's pleadings, I have noted that the claim herein is founded on an infringement of the Plaintiff's copyright. From the court's further reading and understanding of the foregoing statutory provisions, there is nothing therein to indicate that the powers of the Board and/or the Tribunal or other competent authority would extend to matters pertaining to the infringement of copyright.

27. **Section 35** of the Act which provides for matters touching on infringement of any right under the Act, stipulates that:

...

(4) Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for infringement the following reliefs shall be available to the plaintiff—

(a) the relief by way of damages, injunction, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights;

(b) delivery up to the plaintiff of any article in the possession of the defendant which appears to the court to be an infringing copy, or any article used or intended to be used for making infringing copies;

(c) in lieu of damages, the plaintiff at his option, be awarded an amount calculated on the basis of reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned;

(d) for the purpose of determining the amount of damages or a reasonable royalty to be awarded under this section or section 33(2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiries as the court considers necessary; and

(e) before the owner of the right institutes proceedings under this section, he shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he may have suffered as a result of the infringement concerned or a reasonable royalty to which he may be entitled.

28. I understand the above provisions to mean that a party is at liberty to move the court by way of a suit, in a cause of action arising from an infringement of copyright.
29. From my perusal of the provisions of the Copyright Act, I have not come across any provision to indicate that a claim for infringement of copyright ought to first be lodged before the Board and/or the Tribunal before the court's jurisdiction can be invoked, in order for the doctrine of exhaustion to become applicable.
30. I am therefore satisfied, and I agree with the Plaintiff/Respondent, that the present claim is properly before this Court. Consequently, I find that *grounds (1), (3), (4) and (5)* of the PO cannot stand and must automatically fail.
31. The second facet of the PO relates to the pecuniary jurisdiction of this court to entertain the present suit, under **Section 7(e) of the Magistrates' Courts Act Cap. 10 Laws of Kenya**, which sets the pecuniary jurisdiction of a court presided over by a resident magistrate at Kshs. 5,000,000/-. The highest pecuniary jurisdiction for a

Magistrates' Court is set at Kshs. 20,000,000/- for a court presided over by a chief magistrate **(Section 7(a))**.

32. From the pleadings, I have observed that in addition to seeking declaratory and injunctive reliefs as well as orders requiring the Defendants to furnish their accounts and for delivery of copies of the Plaintiff's copyright works, the Plaintiff also seeks general and punitive damages for infringement of its copyright, plus costs of the suit and interest thereon.

33. From the foregoing, the extent of the damages sought by the Plaintiff cannot be ascertained at this stage. Nevertheless, the court is of the view that the 1st Defendant has not tendered any cogent material to support her arguments that the damages sought automatically fall below the pecuniary jurisdiction of this court. As a result, *ground* (2) of the PO is unsustainable.

34. In conclusion, the PO dated 4th June 2025 lacks merit. It is hereby dismissed with costs to the Plaintiff.

35. Orders shall issue accordingly.

Dated, signed and delivered this 26th November 2025.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Ms Mulongo for Mr. Karanja for the Plaintiff/Respondent
2. Mr. Oyoo for the 1st Defendant
3. N/A for the 4th Defendant

ORIGINAL