

**REPUBLIC OF KENYA**

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT COMMERCIAL PETITION NO. E006 OF 2025

IBRAHIM YUSUF.....1ST PETITIONER JALINGA  
EKAI ALFRED.....2ND  
PETITIONER

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE MUSIC  
COPYRIGHT SOCIETY OF KENYA LIMITED(MCSK)

-VERSUS

KENYA COPYRIGHT BOARD.....1ST  
RESPONDENT/APPLICANT THE BOARD CHAIRMAN,  
KECOBO.....2ND RESPONDENT

THE EXECUTIVE DIRECTOR, KECOBO.....3RD  
RESPONDENT

**RULING**

1. At the time of filing the petition, the petitioner contemporaneously filed a Notice of Motion dated 4th November 2025, which was considered by the court ex-parte, having been certified urgent and the court granted interim conservatory orders in terms of prayer 1,2 and 5.
2. When served with the said order, the respondent felt aggrieved and thus filed not only a notice of Preliminary Objection against the petition but also the Notice of Motion dated 10th November 2025, seeking to set aside, discharge, or stay the interim conservatory orders granted on 5th November 2025.
3. When parties attended court on the 5.12.2025, and after the applications for joinder of other parties was disposed of, the court directed that the petitioner and the respondents, file submissions respecting the two applications. By those directions, the court took the

view that the latter application could be argued and treated as an opposition to the former application. In that scheme of things, there being a preliminary objection on the competence of the petition and the jurisdiction of the court to entertain it, the court must ascertain that it has jurisdiction in the matter before it goes to the merit of all else including the interlocutory application seeking conservatory orders.

4. The parties have duly complied with the directions by the court by filing respective submissions. The petitioner filed the submissions dated 17th December, 2025, respecting both applications the respondent filed two sets, both dated 11.12. 202; one on the preliminary objection to the entire petition and seeking its striking out and, the other in support of the Notice of Motion for setting aside the interim conservatory orders.
5. Because the court's jurisdiction has been challenged, the Preliminary objection takes precedence. However, the context must be found in the summary of the foundational facts pleaded.

**Outline of the facts in the petition and the preliminary objection.**

6. The petition is funded on the contention that, Music Copyright society of Kenya Limited, an organisation with a membership of about 16,000 artists, has always operated as a silenced collective Management organisation responsible for the collection and distribution of royalties, till January 2025, when the respondent unilaterally, and without notice, declined to renew the operating license for the year 2025/2026. It was thus contended that the decision was made without regard to the right to fair hearing nor consultation and thus contrary to the provisions of article 47 of the Constitution of Kenya as read with section 4(3) of the Fair administration Actions Act. As a consequence, the petitioner contends, is to constructively close and paralyse the operations and ability of the MCSK to collect royalties on behalf of its members thus resulting in losses to the company and its general membership by way of violation of right to property under article 40 of the constitution. It is

the further violation of the enumerated rights that the conservatory orders are intended to forestall and mitigate.

7. In opposition, the respondent contends, in the Preliminary objection and the Notice of motion that the petition lies not and is barred by the doctrine of exhaustion in that section 48(4)(b)(i) of the Copyright Act mandate that appeals against the 1<sup>st</sup> respondent's refusal to grant a certificate of registration to a collective management organisation shall lie before the Copyright Tribunal. On the basis that the statute creates a forum for challenging the 1<sup>st</sup> respondent's decision, the court's jurisdiction is constricted from being at large, and the court must thus defer to the legislative authority on choice of forum.

#### **Submissions on the Preliminary objection.**

8. For the respondents, it is a straight forward that every decision on refusal to grant registration to a collective management organization is only challengeable by an appeal to the statutory Tribunal created by the Act and that to mount such a challenge before this court every by a constitutional petition is untenable.
9. The respondents cite the decision in **Re Lilian "S" (1989) eKLR** for the trite position of the law that jurisdiction is everything hence where a court determines that it lacks jurisdiction, it must down its tool before making an extra step in such a matter. Article 159(2)(c) is then cited to be the constitutional underpinning of the doctrine of exhaustion and for the consisted rendition by the superior court of Kenya, that where there exists an alternative method of dispute resolution established by legislation, the court is obliged to exercise restraint and observe deference to the statutorily established body for resolution of that dispute. The respondents therefore cited to court the decisions in **Suleiman Mwmlole Warrakah vs Mwamlole Tchappu Mbwana (2018) eKLR**, **United Millers Ltd vs Kenya Bureau of Statistics (2021) eKLR** and **Music Copyright Society of Kenya Ltd vs Kenya Copyright Board (2025) KEHC 1423 (KLR)** to dictate that the doctrine of exhaustion deprives the court of its jurisdiction, even where

the same is vested by the constitution, till after the alternative method of resolution is exhausted. That position of the law when applied to the circumstances and facts of this case, the respondents contend, show that the petitioner has the very body the legislature had preferred for the resolution of the dispute pleaded, hence the court has not been properly approached.

10. It was then reiterated that the law as laid by the Court of Appeal and the Supreme Court were of a definite binding nature upon this court which thus had no alternative but to down its tools by striking out the petition.
11. On its part, the petitioner refutes the assertion by the respondent by pointing out that the jurisdiction donated to the tribunal by Section 48 of the Act is limited to statutory compliance and licensing disputes as specifically conferred by the statute. It is added that the tribunal has not been vested with jurisdiction to address the constitutionality of the board's regulatory conduct, violation of rights and freedoms under the bill of rights and whether or not the board had acted unconstitutionally or in an ultra vires manner which disputes the constitution reserves for this court. The petition is asserted to invoke the court's jurisdiction under article 165(3)b and d and interrogates the alleged violation of specific provisions of the constitution.
12. Additionally, it submitted that the doctrine of exhaustion is never absolute or dogmatic but has known exceptions especially where the statutory forum is incapable of granting the reliefs sought to address constitutional grievances. The decisions in **Republic vs National Environment Management Authority, ex parte Sound Equipments Ltd 92011) eKLR**, **Geoffrey Muthinja Kabiru vs Samuel Munga Henry (2015) eKLR**, **Right Rose Cosmetics (1972) Ltd vs Nairobi County Government (2018) eKLR** and **Mwanzia vs Rhodes (2023) KEHC 2688 (KLR)** for the propositions that; the doctrine is not applicable to bar access to the High Court where the statutory mechanism lacks the jurisdiction to address constitutional grievances and grant appropriate constitutional reliefs,

where the dispute transcends the competence of the statutory forum or raises pure constitutional questions suited for judicial determination, that exclusion clauses must be construed restrictively, and, where the High Court finds that to apply the doctrine would not serve and observe the values enshrined in the constitution or a statute.

13. In sum, the resistance to the doctrine of exhaustion is that the court in Kenya have acknowledged that the doctrine has its exceptions and is never applied in a *carte blanche* fashion. It is thus concluded that the statutory tribunal under the copyright Act has no jurisdiction over the pleaded dispute and therefore the objection is improperly taken and should thus be dismissed, the petition allowed to proceed on the merits.
14. It is not in doubt that jurisdiction is everything to a court of law and that wherever it is raised as a question before the court, it must be dealt with *in limine*, before all else.
15. Whether or not this court has the jurisdiction to handle the petition is determinable by looking at what is pleaded and the remedies sought as against the jurisdictional mandate vested by the statute upon the Copyright Tribunal.
16. The court reads the petition to allege violation of constitutional rights then seeks; a declaration that the refusal to renew the operational license was unlawful, null and void, an order of certiorari quashing of the decision not to renew the operational license and an order of mandamus compelling the 1<sup>st</sup> respondent to forthwith reinstate/issue the operational license. The allegations of violations and the remedies as fashion would easily and readily pass as genuine a constitutional dispute, until one interrogates the outcome and consequences of issuing orders in terms of prayers (i), (iii) and (iv). That possible outcome will be nothing different from the expected outcome of an appeal.
17. The court thus reads the petition and its prayer to be a clever way of a framed bill of rights language of a matter that questions the discretion given to the tribunal to process operational licenses, as a

pretext to vest in the court a jurisdiction which otherwise belong to the tribunal.

18. While it is true that the tribunal's jurisdiction is circumscribed by the statute and limited to hearing of appeal against the decisions of the board refusing to grant certificate of registration to a collective management organization, it is also true that the board has a statutory function to perform and the same statute prescribes how to challenge the performance of the statutory duty by the board.
19. The court entertains no doubt over the propriety and adequacy of the statutory remedy availed to challenge a decision declining to grant a certificate or registration to administer royalties. It is equally satisfied that the objects of the statute are best met by the established tribunal to imbue expertise on matter copyright which jurisdiction should be exhausted before this court is approached.
20. Of course, had there been no craft in seeking to mount an appeal otherwise than as prescribed by the statute, if the petition was to stay clear on vindication of rights, without seeking to have the court direct the board on its mandate, it would, to court be appropriate to deal with such petition.
21. Here, the court is being asked to compel the reinstatement of an expired annual operational license/ issuance of a fresh license to a non-party to the suit without the compliance with the statutory processes.
22. Lastly, the tenure of the disputed certificate has come to an end and it would be moot to litigate over a matter whose life has come to an end by operation of the law. Instead of pursuing this petition better energy would be fruitfully employed in applying and pursuing a certificate of registration to administer royalties for the current year.
23. The court has said enough to reach the conclusion that as pleaded the dispute is a disguised appeal against the decision of the board declining to grant a certificate of registration to administer royalties. Such fall for determination by the tribunal and not this court. The court thus find the Notice of Preliminary objection to have been properly mounted and allows it.

24. The consequence is that the court is bereft of jurisdiction to entertain the petition which is therefore struck out.
25. The court makes no orders as to costs.

Dated, signed and delivered Virtually, this 21<sup>st</sup> day of January, 2026



Patrick J O Otieno  
Judge

ORIGINAL