

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. MISC. APPLICATION NO. E274 OF 2024

BETWEEN

REPUBLIC

APPLICANT

VERSUS

KENYA COPYRIGHT BOARD **1ST**

RESPONDENT

THE C. S. GENDER, CULTURE, ARTS &
HERITAGE.....**2ND**

RESPONDENT

THE ATTORNEY GENERAL **3RD**

RESPONDENT

AND

SAFARICOM **1ST INTERESTED**

PARTY

AIRTEL KENYA **2ND INTERESTED**

PARTY

SMITH MWATIA **3RD INTERESTED**

PARTY

CHRISTINE AKOTH OTIENO **4TH INTERESTED**

PARTY

JOHN GITHAE KAMITA 5TH INTERESTED PARTY

MERCY MASIKA..... 6TH INTERESTED PARTY

NICKY ALON 7TH INTERESTED PARTY

GILBERT KO..... 8TH INTERESTED PARTY

ABIGAEEL JOY 9TH INTERESTED PARTY

MARGARET N. WA..... 10TH INTERESTED PARTY

**COLLINS KIPTOO AKA
COMMANDER ART..... 11TH INTERESTED PARTY**

MOSES NYAGA12TH INTERESTED PARTY

JOSPHAT MACHARIA 13TH INTERESTED PARTY

JOSPHAT TANUI AKA JOSH.....14TH INTERESTED PARTY

..... 15TH INTERESTED PARTY

FLORENCE A. OTUKHO16TH INTERESTED PARTY

XPEDIA MANAGEMENT LTD..... 17TH INTERESTED PARTY

NERISSAH CHEPKEMOI KIRUI..... 18TH INTERESTED PARTY

**ENOCK MMBAYA MITANLO..... 19TH INTERESTED PARTY
GODWILL KIPCHUMBA..... 20TH INTERESTED PARTY**

JOHN NGURE WANJIRU..... 21ST INTERESTED PARTY

AND

JUSTUS NGEMU 1ST EXPARTE APPLICANT

SAUL ESIKURI 2ND EXPARTE APPLICANT

RULING

1. The Application that forms the subject of this ruling is the one dated 28th January 2026 by the 3rd to 13th Interested Parties who seek orders that:

1) Spent.

2) Pursuant to clause (4) of the Judgment delivered herein on 14th August 2025 an extension of time for further six (6) months be granted for purpose of compliance as directed by the court.

3) The 1st and 2nd Interested Parties do continue releasing funds held by them as previously done to all affected artists within the extended period as sought in prayer (2).

- 4) Such other further orders as the Honourable Court shall deem fit to grant.
2. On 14th August 2025 the court rendered judgment in this matter. Directive No. 4 and 5 of the Judgment provided as follows:
- “4) The 1st Respondent is directed to develop and maintain an effective data bank of all the artists and their works within 6 months of today's date. This shall be done taking into account the stakeholder input.*
- 5) The revenue that is payable to the artists shall in the intervening period continue being paid in the form that subsisted before the filing of this suit.”*
3. The 1st Respondent Kenya Copy Right Board (KECOBO) was directed and mandated to comply with the said directive by collecting, putting up a database of all artists in order to comply with requirements of the law on issue of payments by SKIZA Tune Safaricom PLC (2nd Respondent).
4. The Kenya Copy Right Board has not taken any steps so as to comply with judgment of the court.
5. Over 8000 artists are stranded and without guidance from Kenya Copy Right Board the Applicants are unable to know way forward.

6. The six (6) months period given in the judgment has lapsed without any action being taken by 1st Respondent thus prejudicing the thousands of artists who solely rely on payments from Safaricom PLC (2nd Respondent).
7. Safaricom PLC sent a template to the Applicants PRSP requiring them to supply it with the Applicant's personal data. This is contrary to Data Protection Act and a violation of principles of privacy.
8. Further Safaricom demanded for registration Certificates of all the artists. Kenya Copy Right Board is yet to issue those certificates.
9. In default of artists supplying personal data and the said Certificates, Safaricom has now threatened to withhold our payments effective 31/1/2026.

The Exparte Applicants' Case;

10. In opposing the Application, they argue that this court is functus officio having delivered its judgment on 14.8.2025.
11. The Application filed by the Applicant is misconceived and contains unsubstantiated allegations.
12. It is their case that if there is non-compliance with orders of the court a party ought to file for contempt of court proceedings and not an Application as the instant Applicant before this court.

13. The Applicant is speculative in order to purport that the Applicant serves the interests of over 8000 musicians.
14. The orders of this court never stopped the 1st interested Respondent from paying any artist including the Applicant herein.
15. There is no evident legal or equitable basis for the Honourable court to grant the prayers sought and that the same should be ipso facto struck out with costs.

The 1st Interested Party's Case;

16. The 1st Interested Party is still compliant with the law and is actively looking to comply with the law.
17. Further, it still continues to pay out the paying ring back tune net revenue share as it still awaits the effective data bank of all artists from the 1st Respondent.
18. This Honourable Court is functus officio.
19. The Applicants also purport to plead on behalf of the 1st Respondent i.e. The Kenya Copyright Board by seeking to request for an extension to enable the 1st Respondent to comply with the terms of the Judgment while the 1st Respondent has not responded to this instant Application.
20. If the 3rd to 13th Interested Parties were genuine in trying to ensure that the 1st Respondent proceeds to comply with the Judgment of this Honourable Court, they should have

taken out alternative proceedings before this Honourable Court such as seeking to find the officials of the 1st Respondent in contempt of the Honourable Court's Judgment.

- 21.** The Application is fatally defective and as such should be dismissed with costs to the 1st Interested Party.

Analysis and Determination;

- 22.** On 14th August 2025 the court rendered judgment in this matter. Directive No. 4 and 5 of the Judgment provided as follows:

“4) The 1st Respondent is directed to develop and maintain an effective data bank of all the artists and their works within 6 months of today's date. This shall be done taking into account the stakeholder input.

5) The revenue that is payable to the artists shall in the intervening period continue being paid in the form that subsisted before the filing of this suit.”

- 23.** The judgment was directed at the Respondent who has not filed a response to the Application.
- 24.** The Applicants lack the locus standi to seek for the enlargement of time on behalf of the 1st Respondent.
- 25.** The Exparte Applicant who is a principle party in this case has not initiated contempt of court proceedings.

26. According to the Exparte Applicants the Application as filed by the Applicant is misconceived and contains unsubstantiated allegations.

27. In **Beatrice Wanjiku & Another v Attorney General & Another [2012] eKLR**, the High Court observed:

“Litigation is driven by the party who invokes the jurisdiction of the court. Where that party expresses an unequivocal intention to discontinue, the court cannot compel it to proceed against its will.”

28. It is settled that the Exparte Applicant being the dominus litis (master of their case), has the right to control the proceedings they have commenced, including the discretion to discontinue or withdraw them.

29. The Supreme Court in **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR** (para. 37) defined an Interested Party as:

“A person who has a stake in the proceedings, though not a party to the cause. An Interested Party may not frame its own issues for determination by the court.”

30. The Supreme Court in **Methodist Church in Kenya v Mohamed Fugicha & 3 Others [2019] eKLR** reinforced this point:

“An Interested Party cannot continue to prosecute or sustain proceedings in its own name once the main cause has been withdrawn or determined.”

- 31.** The Applicants have no independent cause of action before this Court. Their involvement cannot extend to the level of taking over the 1st Respondent/judgment debtor's duties.
- 32.** The 1st Respondent will explain to the court why it has not complied with the judgment as and when called upon.
- 33.** The 1st Respondent has not moved the court for purposes of the enlargement of time. Another party cannot do so on its behalf.
- 34.** The Applicant further sought that an order do issue that the 1st and 2nd Interested Parties do continue releasing funds held by them as previously done to all affected artists within the extended period as sought in prayer (2).
- 35.** This court finds that this order cannot issue since the same will amount to reviewing the judgment.
- 36.** The Supreme Court in the case of **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling)** held as follows on the doctrine of *functus officio*:

"18. We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept: "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

"19. This principle has been aptly summarized further in Jersey Evening Post Limited v Al Thani [2002] JLR 542 at 550: "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its

decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

- 37.** This court is functus officio and incapable of issuing such an order.
- 38.** In any event the 1st Interested Party advanced an argument that it still continues to pay out the paying ring back tune net revenue share as it still awaits the effective data bank of all artists from the 1st Respondent.
- 39.** The court finds that the two reliefs as sought in the Application are interdependent as a result of which the 2nd prayer cannot be granted since the 1st prayer was declined.
- 40.** The Application lacks merit.

Costs;

- 41.** In the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR**, it was held that Mr. Justice (Rtd.) Kuloba writes in his work, *Judicial Hints on Civil Procedure*, 2nd ed. (Nairobi: Law Africa, 2011), p. 94:

"Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs

v. Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973."

42. The Applicant is not entitled to costs.

43. In **Musaina v General & another; Salaries and Remuneration Commission & 3 others (Interested Parties) (Petition E019 of 2023) [2024] KEHC 8239 (KLR)**, the High Court cited with approval the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd Judicial Review Application no 6 of 2014** where the court held as follows:

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

44. The Applicants shall bear the costs.

Orders;

The Application is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 5th Day of March 2026.

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J. CHIGITI (SC)
JUDGE