Music Copyright Society of Kenya v Kenya Copyright Board & 2 others (Civil Appeal E888 of 2022) [2024] KECA 1172 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E888 OF 2022

SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

MUSIC COPYRIGHT SOCIETY OF KENYA ..... APPELLANT

AND

KENYA COPYRIGHT BOARD ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF ICT INNOVATION AND YOUTH AFFAIRS ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal against the judgment of the High Court at Nairobi (A.C. Mrima, J.) dated 30th September 2022 in Const. Petition. No. E435 of 2020)

JUDGMENT

1. In a Petition dated 24th December 2020 brought before the High Court, Music Copyright Society of Kenya (MCSK or the appellant herein) describes itself as an association of authors, composers, arrangers and publishers. It boasts of over 14,000 members, some of whom are residents in Kenya while others are not. Its wide and diverse membership is enviable and it administers a rich collection of work; controls catalogues of over 100 million copyrights, musical works together with details of over 10 million, audiovisual productions from over its 14,000 members through Exclusive Deeds of Assignment and Exclusive Reciprocal Agreements with over 150 affiliate societies from across the world.

2. MCSK avowed that it was not a Collective Management Organization (CMO) within the meaning of section 46 of the *Copyright Act* and lamented the insistence of the Kenya Copyright Board (KECOBO or the 1st respondent) to license it as a CMO as a precondition for it to administer and exploit rights of its members. MCSK contended that it had executed Exclusive Deeds of Assignment as well as Exclusive Reciprocal Agreements and did not therefore require a license to administer and enforce rights it owns.

MCSK complained that KECOBO had often whimsically purported to withhold/withdraw/qualify the license to it as if it was a CMO and to suspend its officials and purported to re-organize it in the name of enforcing the *Copyright Act*.

3. Related to the foregoing grievance, MCSK contended that KECOBO had forcefully and arbitrarily appropriated its intellectual property rights and vested them in third parties without any contractual or commercial relationship; forced it to enter into contractual obligations with third parties to its disadvantage; and all thereby allowing massive violation of intellectual property rights of resident and non-resident authors, composers, arrangers and publishers of musical works.

4. Citing various constitutional violations MCSK sought the following prayers:-

> " a) A declaration that section 46, 46A-G of the *Copyright Act* offends Article 40 of *the Constitution* to the extent that it perpetuates infringement of intellectual property rights by requiring a rights holder to seek license before exercising/ exploiting/administering its own rights;
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> b. A declaration that section 46A of the *Copyright Act* is unconstitutional and offends Article 27 and 40 of *the Constitution* to the extent that it allows the Respondents to arbitrary peg value of music/tariff to a percentage of business permit/liquor license;
>
> c. A declaration that section 46A of the *Copyright Act* perpetuates discrimination and violates the right to property by imposing a flat rate tariff on broadcasters of musical works.
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> d. A declaration that the Music Copyright Society of Kenya does not require a collecting license to administer/enforce/collect royalties in respect of its resident and non-resident authors, composers, arrangers and publishers of musical works who are its members.
>
> e. Costs of this petition be in the cause."

5. The response to the petition by KECOBO was through a replying affidavit of George Nyakweba sworn on 1st February 2021. KECOBO has the statutory mandate to license and regulate CMOs in Kenya. The supervising and regulatory framework was created through the *Copyright Act* 2001 and strengthened through an amendment to the statute in 2019. KECOBO's position is that statute does not permit CMOs to be recognized as self-regulatory organizations and that CMOs must be licensed. It contended that the Deeds of Assignments that are signed between a CMO and its members are merely membership contracts between them and do not amount to a license for a collective management of copyright works. KECOBO asserted that without a license issued by it, no person or entity can collect royalties from the public on behalf of the artists.

6. Taking issue with MCSK, KECOBO stated that its Memorandum and Articles of Association declared its objective is to perform activities that fall within the meaning of collective management or administration of copyrights works. Further, that MCSK had voluntarily submitted its application for annual license for the year 2021.

7. Regarding tariffs charged, KECOBO stated that they are negotiated annually within a process supported by public participation, are published in the Kenya Gazette and their validity can be challenged before the Copyright Tribunal.

8. On his own behalf as the 2nd respondent, and on behalf of the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs (the 3rd respondent), the Attorney General filed grounds of opposition dated 1st November 2021 in which the Attorney General identified substantially with KECOBO on the germane issues and it is needless for us to rehash them.

9. Pending the hearing of the petition and at the urging of MCSK, the trial Court on 9th February 2021 made the following order:-

> " .. so as to preserve the subject matter and to avert infringement of rights, pending the hearing and determination of this application inter-parties, a conservatory order be and is hereby issued restraining the 1st respondent from interfering with the Music Copyright Authority's administration/ enforcement/collection and distribution of royalties in respect of assigned/ owed performing and reproduction rights."

10. MCSK alleged that one Mr. Edward Sigei, the Executive Director of KECOBO had disobeyed these orders and took out a contempt motion dated 22nd July 2021.

11. On the direction of the trial court, the main petition and the contempt motion were heard together and a composite judgment delivered, dated and signed on 3rd September 2011 by A.C. Mrima, J. dismissed both with an order that the petitioner bears the costs of the petition. The judgment aggrieved MCSK, which at the hearing of the appeal collapsed the grievances into, four assailing the trial court as erring in:-

    a. failing to find section 46 and 46(A-G) of the *Copyright Act* as unconstitutional;

    b. holding that the MCSK was a CMO;

    c. failing to consider and therefore to hold that valuation of Music by KECOBO was arbitrary and discriminatory as against MCSK;

    d. failing to find that Mr. Sigei was guilty of contempt of court.

12. On the issue of constitutionality of sections 46 and 46 A-G of the *Copyright Act*, the appellant submits that the licensing scheme enforced through those sections is premised on arbitrary, unfounded and rights unfriendly assumptions. Although Article 40(5) of *the Constitution* requires the state to promote, respect and protect intellectual property rights, it does not impose an obligation on them to exploit intellectual property rights through licenced organizations only and should be subject to strict state regulation. The appellant contends that the Act does not provide for a fund that is made use of by authors, composers, arrangers or publishers of musical works and they therefore have to either do it themselves or through support of associations like the appellant to champion for their rights. The appellant argues that what the impugned sections demand is that when private individuals associate, they must seek a license under section 46 and this deflates the freedom of association under Article 40. The appellant cites the case of United States Supreme Court Murdock v Commonwealth of Pennsylvania 319 U.S.105 (1943) where the court in determining the constitutionality in the actions of the state of Pennsylvania in seeking to apply an enacted Ordinance to members of Jehovah Witness vis-à-vis the First Amendment contained in the American Constitution which bars congress from making any law which infringes on the right to religion, freedom of speech and press and sought to impose licensing on the petitioners who went about from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets, found that a person cannot be compelled to purchase through a license fee or a license tax the privilege freely granted by *the Constitution*. The appellant therefore submits that the impugned sections deprive the creators of musical work and

copyright in them the right to enforce property rights in the manner that they please and also deflate their right to associate.

13. The appellant asserts that though the learned judge found that a rights holder does not require a license to exploit his rights and thus the impugned sections are not unconstitutional, he did find that the appellant was not a rights holder but a mere CMO. The appellant contends that the learned judge failed to consider the deeds of assignment executed between itself and its members through which the appellant argues it is a rights holder. The appellant submits that samples of some of these deeds of assignment were annexed to the affidavit of Milka Kulati and so was a list of its members with whom it has signed deeds of assignment. The appellant further contends that if the Act was to be used to determine the rights and obligations in the relationship between its members and itself, then, given section 33 of the Act that recognises assignments, the deeds of assignment should be taken as making the appellant a rights holder. In failing to do so the learned judge instead examined the relationship between the appellant in terms of its Memorandum and Articles of Association, the definition of a CMO and previous descriptions of the appellant in previous suits which resulted in it using the Memarts made in 1983 to interpret legislation enacted in 2001 and ignoring the deeds of assignment and reciprocal agreements. The appellant relies on the principles in Joram Mungai Kiberenge & 5 others v Peter Gikonyo Chiuga (Legal Representative of Jennifer Njoki (deceased)) & another [2020] eKLR and urges this court to interfere with the factual finding of the trial court that there was no evidence to show that the appellant is a rights holder.

14. Lastly, the appellant submits that in the course of the proceedings before the Superior Court the 1st respondent sought to (a) dictate and interfere with elections of the appellant and (b) denied the appellant access to funds in an account to which it was a signatory which made the appellant to file contempt proceedings. All these happened at a time when conservatory orders were in place restraining the 1st respondent from interfering with the appellant's administration of copyright as well as collection and distribution of royalties. The trial court is faulted for declining to punish the 1st respondent for contempt because the appellant had been described in the Order as 'Authority' and not 'Society'. The trial court's reasoning was that the error was attributed to the appellant's framing of its prayer no. 2 in the application of which a conservatory order was issued which however the appellant contends to be incorrect as the appellant had not used the word 'Authority' in place of 'Society'. That failure to punish the 1st respondent CEO because of an error on the part of the court, which error is not a material defect on the order, is not justifiable or supported in law.

15. In response, the 1st respondent submits that though the appellant argues that the learned judge erred in finding the impugned sections were not unconstitutional, the appellant does not sufficiently identify any error or errors made by the court and any compelling basis in principle or authority for that claim. The 1st respondent submits that the purpose of collective management of copyright is to ensure effective licensing and management of copyright works where it is impractical or unrealistic to individually manage the rights. It is also not practical for a user of copyright work to seek specific permission from every copyright owner. CMOs facilitate rights clearance in the interest of both the right holder and the users and economic reward for rights holders. The 1st respondent argues that the licensing and supervision of CMOs is intended to promote accountability, transparency and efficiency in the activities of CMOs. It regulates the relationship between CMOs and copyright owners and between CMOs and users of copyright works. The licensing therefore is intended to protect the interests of the copyright holders as well as the public who are the users of copyright. The impugned sections do not provide for the alleged licensing of an intellectual property rights holder but rather provide for the licensing and supervision/regulation of CMOs. The 1st respondent concludes that the Act does not in any way deflate the freedom of association and where one chooses to manage his/her right collectively with others, he/she submits to the legislative provisions under the Act. That

membership to a CMO is purely for administrative purposes and does not compel anyone to be a member.

16. On the issue of whether the appellant is a rights holder, the 1st respondent submits that an appellate court cannot interfere with a finding of fact by a first instance judge. The evidence relied on did not in any way transfer the copyright to the appellant and simply authorized the appellant to license the copyright on behalf of the assignee. As such, the appellant does not become a right holder but an agent of the right holder by virtue of a deed of assignment. Cited is the case in Civil Appeal No. 74 of 2011 Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015] eKLR. Regarding the deeds of assignment, the 1st respondent points to section 33(3A) which provides that an assignment is only valid if it is lodged at the Board and a certificate of recordal issued to the applicant; no certificate of recordal was produced by the appellant. In addition, the assignments are licenses and are not intended to transfer rights to the appellant. There is no evidence that the proprietor has been paid any consideration for the assignment and the appellant is required to pay periodic royalties to the right holder which it has always refused to do so.

17. The 1st respondent further submits that the appellant's claim that the state imposed a value on music is unsupported by evidence. The lack of evidence to prove the arbitrariness displayed by the respondents shows that the allegations are mere apprehensions. That said, before music tariffs are published by the Cabinet Secretary they are negotiated between the users and CMOs and what are published are negotiated tariffs which the Cabinet Secretary does not interfere with. The 1st respondent submits that it has no role in negotiating or publicizing the tariffs other than supportive or administrative and that CMOs negotiate directly with users.

18. Lastly, the 1st respondent submits that the learned judge correctly found that the order of contempt sought and granted related to a non-party. The appellant was aware of this and was given a chance to amend the order but opted not to. The error was not an error on the part of the trial court and as such the purported error could only be corrected by properly approaching the trial court and seeking leave to amend. The appellant did not find it necessary to move the trial court for review.

19. This is a first appeal and is therefore akin to a de novo hearing.

    On this occasion, we do not suffer any handicap that would ordinarily come without hearing and seeing witnesses testify as the trial proceeded on the basis of affidavit evidence all of which is before us.

20. So as to understand the nature of the argument fronted by the MCSK regarding the unconstitutionality of the provisions of the *Copyright Act*, 2001, it is necessary to revisit the pleadings filed by MCSK in paragraphs 43 – 47 of the petition in which it pleads:-

> " 43. Through these unconstitutional and unlawful acts, omission and collusion, the 1st respondent has allowed massive violation, losses, damages, infringement and devaluation of the intellection Property Rights of the applicant's controlled catalogue (repertoire) over 100 million copyrighted musical works together with details over 10 million audiovisual productions from over 14,000 authors, Composers, Arrangers and Publishers of Copyright Musical works (songwriters/Musicians) through exclusive Deeds of Assignments and Exclusive Reciprocal Agreements with over 150 Affiliate (Associate) Societies from across the world.
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> 44. Section 46 and 46 A-G of the *Copyright Act* and/or its enforcement by the 1st respondent perpetuates violation of articles (sic) 27 and 40(1) and (5) of *the Constitution* to the extent that it imposes a flat rate tariff on broadcasters for

exploiting musical works/imposes the value of music/tariff to a percentage of business permit/liquor license and in (sic) abrogates the right to own and use one's priority.

45. Section 46 of the *Copyright Act* is unconstitutional to the extent that it deflates the right to association enshrined under article 36 of *the Constitution*.

46. Section 46 of the *Copyright Act* perpetuates violation of the obligation under section (sic) 40 (5) of *the Constitution* to protect the intellectual property of the people of Kenya.

47. The actions of the 1st respondent of imposing licence requirement on the Petitioner to exploit rights that it owns constitute violation of the right to property set out under article 40."

21. We turn to examine each specific grievance.

22. For starter, it is the contention of MCSK that sections 44 and 46A-G of the Act and its enforcement perpetuates violation of Articles 27 and 40(1) and (5) of *the Constitution* in that it imposes a flat rate tariff on broadcasters for exploiting musical works. Looking at the impugned provisions, it is section 46A which deals with approvals for imposition and collection of levy as follows:-

> "46A. Approval for imposition and collection of levy Notwithstanding any other provision of this Act, no collecting society shall—
>
> a. impose or collect royalty based on a tariff that has not been approved and published in the Gazette by the Cabinet Secretary in charge of copyright issues in the Gazette from time to time; or
>
> b. levy royalty on users exempted by the Cabinet Secretary by notice in the Gazette."

23. As evidence of the arbitrariness on the part of KECOBO, MCSK produces the Legal Notices No. 107 and 39 in which the 2nd respondent gave a schedule of approved joint collection tariffs. What that evidence does not tell us is how the tariffs are arbitrary. For example, it has not been demonstrated that imposition of a flat rate in itself is arbitrary. And while MSCK stated that the trial court did not consider the evidence in the legal notices, we cannot find fault in the eventual finding of the learned trial judge:-

> "In this case, the allegation that Section 46A of the *Copyright Act* violates Article 27 of *the Constitution* to the extent of allowing the Respondents to arbitrarily peg value of music/ tariff to a percentage of business permit and by further perpetuating discrimination in violating the right to property by imposing a flat rate tariff on broadcasts of musical works is only, but illusionary.
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> For the Petitioner to succeed in such a matter, there is need for proof of the arbitrariness and discrimination on the part of the Cabinet Secretary, the Petitioner has not even disclosed any single approved tariff by the Cabinet Secretary as a basis of the allegation.
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> There is no Gazette Notice of any approved tariff on record.
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> The upshot is, hence, that there is no evidence to prove the allegation of arbitrariness on the part of the Respondents. The Petitioner has, on an equal footing, failed to demonstrate any

form of discrimination in imposing an alleged flat rate tariff on broadcasts of musical works. The Court is only called upon to decide on an imaginary issue."

24. Next, we are told that section 46 of the Act is unconstitutional as it depletes the right to association assured by Article 36 of *the Constitution*. Article 36 reads:-

> " 36.
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> (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
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> 2. A person shall not be compelled to join an association of any kind.
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> 3. Any legislation that requires registration of an association of any kind shall provide that—
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> a. registration may not be withheld or withdrawn unreasonably; and
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> b. there shall be a right to have a fair hearing before a registration is cancelled."

25. Narrating the evolution of the Collective Organisation in an article by International Confederation of Societies of Authors and Composers (CISAC) entitled "The History of Collective Management" the author states;

> " On 3rd July 1777, famous author Beaumarchais called together a group of 22 other authors to formulate a response to the under-remunerated use of their works by the Théâtre-Français. A number of the authors present on that distant summer's evening, including Beaumarchais himself, had previously complained in writing about their treatment at the hands of the powerful theatrical institution. In the case of Beaumarchais, the complaint centred on the poor remuneration he received from the Comédie Française for the use of his play "Le Barbier de Séville". Although not immediately successful, action by the group of authors – supported in no small part by Beaumarchais' strong political connections – did eventually lead to change. In 1791 France passed the first law on authors' rights. After a struggle lasting fourteen years, authors obtained the vote on the law of 13th January 1791, ratified on 19th January 1791 by Louis XVI, which recognised the concept of authors' rights for the first time anywhere in the world. The year 1829 saw the creation of the Society of Dramatic Authors and Composers (SACD) combining two earlier societies created in 1791 and 1798 respectively.
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> The first collective licensing body (or Collective Management Organisation – "CMO") in the music area, dates from 1851 when the French society SACEM (Society of Authors, Composers and Music Publishers) was established to administer public performance rights in musical works. The date is significant because it predates the adoption of the Berne Convention for the Protection of Literary and Artistic Works in 1886.
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> SACEM, like SACD, was born of the frustration and indignation of authors. The story goes that in 1847 the French composer, Ernest Bourget, visited Les Ambassadeurs, a Paris café where live music was being performed. When he heard some of his own compositions being played, he was naturally angry that his permission for their use had not been sought

and that he was not being paid either (while he, of course, had to pay the restaurant for his dinner). Subsequently, together with a lyric writer, Paul Henrion, and a publisher, Victor Parizot, he brought an action against the owner of the café, asking the court to either forbid the performance of their works in the café or to hold that they, the creators of the works, should be paid for every performance of their works. The court found in their favour and, following appeal decisions in 1848 and 1849 upholding the original verdict, the principle was established that authors and composers had a performing right in their works which entitled them to be paid whenever and wherever their works were performed in public.

Acknowledging that in practice it was difficult to monitor and enforce the performing right on an individual basis, the authors and composers of France set up SACEM two years later.

When the Berne Convention was signed in 1886, it recognised – for the first time under international law – the public performance rights of authors and composers (along with a number of other basic rights) as a principal feature of the protection to be afforded to all authors. Over the course of time, CMOs were established in many other countries in Europe as well as in other parts of the world to administer the rights of authors and composers of musical works. GEMA, the German CMO managing performance rights in musical works, was founded in 1903 and its United Kingdom counterpart - the Performing Rights Society (PRS) – was established in 1914.

It was very soon established that the new process of collective rights management through a CMO could achieve efficiencies in administration and licensing which direct management of rights by individual rights owners could not."

26. In the same article, the author explains the rationale for the CMOs to be:-

> " CMOs thus developed to meet the needs of rights owners in respect of particular forms of use of their work by collecting from rights users the fees due for such use and distributing them. Generally, the collective administration of rights came to be required in circumstances where there was a need to manage the interaction of a multitude of copyright owners, a variety of authors' rights/copyright user, and numerous instances of use requiring a licence. These were usually also situations where the possibility of conducting individual licence negotiations was absent."

27. Kenya has embraced the concept of CMOs and in section 2 of the *Copyright Act* defines a CMO to be:-

> " ..... an organisation approved and authorized by the Board which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights."

28. Essential in this definition is that for an organisation to qualify as a CMO then it must be approved and authorised by KECOBO.

29. We have, at some length, set out the history of CMOs, their rationale and worldwide acceptance as a devise for protecting diverse and large groups of authors. Borrowing as well from the rendition of the raison d'etre of the CMO system from the World Intellectual Property Organization (WIPO) (2022) Collective Management of Copyright and Related Rights, third edition, we understand it to be as follows. Ordinarily, right holders fully enjoy and exercise their exclusive rights if they exercise that right individually. This ideal and traditional model of exercising rights still exists over certain works, for example protection of copyrights in books. Regarding music and musical works, technological advancement has made it almost impossible or impracticable for right owners to exercise their rights

individually. This is because musical works are used by a great number of users at the same time but at different places and also at different times. The resources required to monitor the proliferation of use, negotiate with all users and to collect all the remuneration for the use of the works would be beyond the individual right holders as would be the logistical horror. The collective management system evolved as the inevitable model of exercising those rights effectively, a system in which the right holders exercise their rights indirectly through CMOs. A bonus that the system brings is to users. As a user can access works through few sources, and negotiations, monitoring and collection of remuneration simplified, the lower transaction costs will benefit the user.

30. There is Article 24(1) of *the Constitution* on the limitation of rights and fundamental freedoms. Article 36 on Freedom of Association and Article 40 on Right to Property, which includes, right to intellectual property, are among the rights that can be limited. For good measure Article 24(1) reads;

> " 24.
>
> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> a. the nature of the right or fundamental freedom;
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> b. the importance of the purpose of the limitation;
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> c. the nature and extent of the limitation;
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> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
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> e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

31. We entertain no doubt whatsoever that the rationale for the collective management framework for protection of copyrights, and which was not debunked by MSCK, which has found worldwide acceptance is a reasonable and justifiable limit to the freedom of association. On the basis of that finding, there can also be no violation of the right to property simply because the system has been embraced in Kenya as suggested by MSCK. Also, MCSK has not demonstrated through any evidence that its right to property has been abridged.

32. Having dealt with issues of the constitutionality of the impugned provisions then it is much easier to deal with the question as to whether MCSK is a CMO. Declared in its own Memorandum of Association, the objects why MCSK was established include:-

> " 3(a) To exercise and enforce on behalf of members of the Society, being the composers of musical works or the authors of many literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (herein after called "the proprietors") all the rights, economic or moral, and remedies of the proprietors by virtue of the *Copyright Act*, or otherwise in respect of any exploitation of

their works and in particular, to administer all the rights relating to the public performance, broadcasting, communication to the public by wire or wireless including transmissions to subscribers to a diffusion and/or any digital service, graphic or mechanical reproduction, translation, adaptation, photocopying or similar reproduction (such as digital copying) and any form of use of such works.

a. To exercise and enforce on behalf of foreign proprietors of copyright works, by virtue of reciprocity or other agreements, all their rights under the *Copyright Act* within Kenya.

b. In the exercise or enforcement of such rights and remedies to make and from time to time to rescind, alter or vary any arrangements and agreements with respect to any such exploitation of such works in regards to the mode, periods or extent in for or to which and the terms of which any such exploitation of such works may be made or employed, and to collect and receive and give effectual discharge for all royalties, fees and other monies payable under any such agreements or arrangements or otherwise in respect of any such exploitation by all necessary actions or any other proceedings, and to recover such royalties, fees and any other monies, and to restrain and recover damages for the infringement by means of any such exploitation as aforesaid of the copyrights of such works or any other rights of the proprietors or of the Society on their behalf in respect of such works, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relations to the premises.

c. To obtain from the proprietors such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the Society to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient by the Society of such rights and remedies aforesaid."

33. On its own admission, MCSK has over 14,000 members, resident and non-resident in Kenya. Given its specific mandate and wide membership, it is a natural fit of a Collective Management Organisation as defined in section 2 of the *Copyright Act* and then formally becomes a CMO once sanctioned, approved and authorised by KECOBO under the provisions of section 46 of the Act. It is also not lost on us that some core features of MCSK are those required of a CMO under section 46(4) of the Act and we very much doubt this to be a happenstance;

"(4) The Board may approve a collective management organisation if it satisfied that-

a. The body is a company limited by guarantee and incorporated under the *Companies Act* (Cap. 486);

b. It is a non-profit making entity;

c. It rules and regulations contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of members of the collecting society are adequately protected;

d. Its principal objectives are the collection and distribution of royalties; and

e. Its accounts are regularly audited by independent external auditors elected by the society."

First, MCSK is a company limited by guarantee and incorporated under the *Companies Act*. Next, in clause 4 of its Memorandum of Association it declares itself to be non-profit making. Then as just alluded to, the stated objects of the company repeatedly emphasise its mandate of collecting and distributing royalties on behalf of its members. We take this to be evidence of the centrality of that function and can only conclude the subscribers of MSCK must have known that they were creating a CMO.

34. In addition, and not to be overlooked, is that MCSK has been unable to surmount this profound finding by the trial Court:-

> " 100. Buttressing the foregoing, this Court notes that the Petitioner has in previous proceedings acceded to and vehemently defended the position that it is a CMO and why CMOs are essential in the realm of copyright property rights. An example at hand is in Xperia Management Limited & 4 Others vs Attorney General & 5 Others (2016) eKLR where the Court summed up the instant Petitioner's position as follows: -
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> > " 123. I am satisfied that, as submitted by MCSK, [the Petitioner herein] the individual management of rights is virtually impossible with regard to certain types of use for practical reasons. MCSK illustrates this point by submitting that a right-holder is not materially capable of monitoring all uses of his works as he cannot, for instance, contact every single entertainment establishment, radio or television station to negotiate licenses and remuneration for the use of his works. Conversely, it is not practical, as submitted by MCSK, for a user to seek specific permission from every right owner for the use of every copyrighted work. Indeed, as the Court observed in the case of Cellulant *Kenya Ltd vs Music Copyright Society of Kenya Ltd Civil Case No 154 of 2009*.
>
> The necessity of a Copyright Collecting Society such as the defendant [MCSK] is imperative on account of the fact that such society has the expertise and means of monitoring copyright users for the purposes of assessing royalties that is required to be paid to individual copyright owners. It would be impossible for an individual artist, like in the instance case relating to music, to monitor the various media that exploit the copyright of such artists to

determine the level of royalty that should or ought to be paid." (Emphasis added)"

35. We now, in closing, turn our attention to the contempt proceedings. The trial court found that the order said to have been disobeyed related to a non-party, the music copyright authority instead of MCSK and that the record showed that MCSK was aware of the error and sought its correction. However, the correction had not been effected at the time of the alleged disobedience. It is for this reason that the trial Court held:-

> " 138. In such circumstances, proceeding with the matter further will be an act in futility since a party can only be cited for disobeying a Court order if the order, in a defined way, related to such a party. In this case the order did not. Judgment – Nairobi High Court Constitutional Petitions No. E435 of 2020 Page 50 of 51.
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> 139. As the Petitioner had the opportunity to amend the order, but opted not to, it can only be fair that the contempt proceedings are instituted against Music Copyright Authority and not the Petitioner."

36. The order said to have been disobeyed was made in response to a Notice of Motion dated 24th December 2020 by MSCK and specifically prayer 2 which we reproduce:-

> " 2) THAT so as to preserve the subject matter and to avert infringement of rights, pending hearing and determination of this application inter parties (sic), a conservatory order be and is hereby issued restraining the 1st respondent from interfering with the Music Copyright Society's administration/ enforcement/ collection and distribution of royalties in respect of assigned/owned performing and reproduction rights."

37. The order was granted by trial court on 9th February 2021. Of significance is that it was granted in the presence of Mr. Okubasu appearing for MCSK and Mrs. Mwesao for Ms. Ogosso for the 2nd and 3rd respondents. There was no appearance on behalf of KECOBO.

38. It is common ground that the body of the Order extracted thereafter erroneously referred to MCSK as Music Copyright Authority. The bigger issue, however, would be whether Mr. Sigei was aware of the order issued in court on 9th February 2021 and that the order, notwithstanding the error was in favour of MSCK.

39. We have gone through the court record and although it is apparent that Mr. Sigei swore a replying affidavit on 22nd July 2021 stating that he was unaware of the orders, that affidavit is not part of the record. That said, regarding whether or not Mr. Sigei was aware of the orders, MSCK submitted as follows before the High Court in support of its contempt application:-

> " The fact that the 1st respondent was represented clearly demonstrates that he had notice of the orders. His counsel was in court on the day the orders were issued and therefore under a responsibility to explain the same to the 1st Respondent. Clearly, he did so even though the orders were never served personally. This satisfies the requirement of notice."

40. The truth of the matter is that, contrary to what was stated by counsel for MSCK, there was no appearance for KECOBO on the day the order was made and even if the order had been served it would be an order protecting the Music Copyright Authority and not Music Copyright Society of

Kenya. In those circumstances MSCK was never able to muster the standard required for proof of contempt, to wit standard of proof higher than on a balance of probabilities, almost but not exactly beyond reasonable doubt. (Mutitika -vs- Baharini Farm Ltd [1985] eKLR.)

41. The appeal fails on all limbs and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR