



**Kavuu v Kenya Copyright Board & 2 others (Petition E11 of 2020)
[2024] KEHC 1832 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION E11 OF 2020
MW MUIGAI, J
FEBRUARY 26, 2024**

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21,
22, 23, 24, 27, 36, 40 AND 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF VIOLATIONS OF ARTICLES 27,
40 AND 47 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

FRANCIS KAVUU PETITIONER

AND

KENYA COPYRIGHT BOARD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF ICT, INNOVATION AND YOUTH

AFFAIRS 3RD RESPONDENT

RULING

1. *vide* a Petition dated and filed in Court on 24th December, 2020 the Petitioner herein sought the following prayers from the Court;
 - a. A declaration that the decision of the Kenya Copyright Board to suspend Music Copyright Society's License for 2020 and to refuse to review it/consider its application for license for 2021 is unreasonable and unlawful and constitutes a violation of Articles 10, 40 (5) and 47 of the Constitution of Kenya 2010.



- b. A judicial review order of certiorari quashing the decision dated 10th December,2020 to revoke the Music Copyright Society of Kenya's 2020 license, deny access to funds, refuse to consider and grant operating license for the year 2021.
- c. A judicial review order restraining the 1st Respondent from interfering with administration/ collection of royalties in respect of performing and broadcasting as well as mechanical reproduction rights of resident and non-resident authors, composers, arrangers and publishers of musical works.
- d. Costs of this petition be in the cause.

Background

2. The Petitioner averred that around 30th September 2020, the Applicant herein filed a petition being Machakos E004 of 2020 against inter alia, the 1st Respondent impugning a series of adverse decisions made in September 2020 based on forensic report prepared in utter breach of Article 47 of the [Constitution](#).
3. The Petitioner argued that orders issued on 30th September,2020 and subsequently confirmed in a ruling dated 9th December,2020, Hon. Justice Kemei, issued orders suspending the report and the measures taken on account of the report.
4. It was further stated that the 1st Respondent instructed the Director of Criminal investigations to raid the Music Copyright Society of Kenya and to cart away documents in enforcement of the forensic report.
5. On 10th December,2020 just a day after the decision of Hon. Justice Kemei granting conservatory orders in favour of the Applicant and since the Music Copyright Society is perceived to have sponsored cases against the 1st Respondent, the 1st Respondent has arbitrarily reacted by withdrawing MCSK'S License for the year 2020 with immediate and restrict MCSK from accessing funds to run its activities.
6. The petitioner argued that the decision to revoke MCSK'S license is arbitrary, unlawful, unreasonable and amounts to violation of Article 47 of the [Constitution](#) of Kenya.
7. It was the Petitioner's position that the decision to revoke a license/refuse to consider an application for license based on unreasonable justifications threatens and indeed violates the obligation set out under Article 40 (5) of the [Constitution](#) towards protection of intellectual property rights of the people of Kenya.
8. Further the Petitioner averred that the decision to peg the reconsideration of adverse measures on withdrawal of cases perceived to be filed by MCSK is unreasonable/unlawful and amounts to a violation of Article 47 of the [Constitution](#), and that the decision to revoke the license/impose other measures contravenes the principles of natural justice and is irrational.
9. That the decision to revoke MCSK's license is disproportionate and the reasons given as preconditions for reconsiderations of the decision is unlawful.

Supporting Affidavit To The Petition

10. By Supporting Affidavit dated and filed in court on 24th December,2020, sworn by Francis Kavuu the Petitioner herein wherein, he deposed that sometime around 30th September,2020 he filed a Petition being Machakos E 40 of 2020 against inter alia the 1st Respondent impugning a series of adverse decisions made in September 2020 based on forensic report prepared in utter breach of Article 47 of the



- Constitution (annexed herewith and marked FK- 1 is a copy of the Petition). Deposing that he inquired as a member of the MCSK and was informed that notwithstanding the suspension of the report, the first Respondent instructed the Director of Criminal Investigations to act on the report and raided the Music Copyright Society of Kenya's and to cart away documents in enforcement of the forensic report. (Annexed and marked copy of a letter sent prior to the raid).
11. He deposed that On 10th December, 2020 just a day after the decision of Hon. Justice Kemei granting conservatory orders in favour of the Applicant and since the Music Copyright Society is perceived to have sponsored cases against the 1st Respondent, the 1st Respondent has arbitrarily reached by withdrawing MCSK'S License for the year 2020 with immediate and restrict MCSK from accessing funds to run its activities. (Annexed and marked copy of the letter communicating the decision).
 12. Further he deposed that the 1st Respondent has to the detriment of the MCSK demanded that it would only review the adverse actions unless and until court cases sponsored by the society are unconstitutionally withdrawn. That he is informed by the Chairman of MCSK, Mr. Lazarus Muli that the MCSK had provided a register of its members a fact that is being cited for the deregistration and adverse measures (Annexed and marked letter forwarding the list of members).
 13. He lamented he is informed by the Chairman of MCSK, Mr. Lazarus Muli, the data allegedly not provided by MCSK is actually held by the 1st Respondent in the National Rights Register. Further, he is aware that the decision of the 1st Respondent violates intellectual property rights being performing and broadcastings as well as mechanical reproduction rights of himself and over 13,000 resident and non-resident authors composers, arrangers and publishers of musical works.
 14. Deposing that he believes that the reasons given for revoking the license and for the adverse actions are spurious as MCSK, had nevertheless complied with the requirements imposed in January, and had provided for a list of its members.
 15. He deposed that for the meantime he filed an application seeking conservatory orders to prevent the 1st Respondent from interfering with MCSK'S collection and distribution of royalties for the year 2020 and 2021 and against other adverse decisions taken against it.

Replying Affidavit

16. The petition was opposed by the 1st Respondent vide a replying affidavit dated 18th July, 2022 and filed in court on 25th July, 2022, sworn by George Nyakweba, the Deputy Executive Director of the 1st Respondent, wherein he deposed that the 1st Respondent is a statutory body established by the Kenya Copyright Act No. 12 of 2001 with the mandate of licensing and supervising the activities of the Collective Management Organizations (CMO) in which the Petitioner is a member.
17. Deposing further that sometimes in 2019 the 1st Respondent appointed Rolands LLP to conduct a forensic audit on Collective Management Organizations in Kenya following numerous complaints from members of the CMO'S. He lamented that the forensic report by Rolands LLP dated 24th September, 2020 found glaring mismanagement and misuse of copyright holders' royalty collected by the CMO's. (Attached and marked copy of the forensic report)
18. He deposed that as result of the adverse findings of the forensic report, the 1st Respondent suspended the license of the MCSK of which the Petitioner herein purports to be a member. Further that the Petitioner herein moved to court challenging the decision to appoint the auditor and the 1st Respondent's decision to suspend the license MCSK and filed Petition No. E004 of 2020.



19. It was his position that the issues relating to the forensic report and subsequent decisions based on the report by the 1st Respondent were litigated in Petition No. E4 of 2020 and judgment delivered by Hon. D.K Kemei on 2nd February,2021 (attached and marked copy of the judgment).
20. According to the deponent, the judgment of the Petitioner's Petition was found to lack merit and was dismissed and conservatory orders which are the subject of this petition were vacated and/or discharged and that the Petitioner herein, who was also the Petitioner in Petition No. E004 of 2020 has not appealed the judgment in Petition No E004 of 2020.
21. He deposed that the instant petition has been overtaken by events as the conservatory orders which are the subject of this Petition were vacated and/or discharged. Further, he opined that the instant petition lacks merit and is an abuse of the court process and should be dismissed with costs against the petitioner.
22. The matter was canvassed by written submissions.

Submissions

Petitioner's Submissions

23. The submissions filed by the Petitioner had no nexus to the Petition herein. Issues canvassed in the filed petitioner's submissions dated 20th June, 2023 and filed in court on 21st June,2023 are at variance with the contents of the Petition.

2nd and 3rd Respondents' Submissions

24. The 2nd and 3rd Respondents in their submissions 12th October,2022 and filed in court on 28th October,2022 wherein state counsel raised the following issues for determination:
 - a. Whether the Petition has been pleaded with specific particularity thus meeting the set threshold how the 2nd and 3rd Respondents have violated his rights.
 - b. Whether the Petition offends the Provisions of Sections 107 and 108 of the *Evidence Act* on the burden of proof.
 - c. Whether this petition properly before this court since the action complained about by the Petitioner has been extinguished.
25. On Whether the Petition has been pleaded with specific particularity thus meeting the set threshold how the 2nd and 3rd Respondents have violated his rights, counsel submitted that the Petitioner had pleaded that the Respondents have violated the Petitioner's rights and fundamental freedoms on Articles 10, 40 (5) of the *Constitution* but failed to prove how these rights and fundamental freedoms had been violated, infringed or contravened by the 2nd and 3rd Respondents. To buttress this averment, reliance was made on the cases of *Anarita Karimi Njeru* [1976-1980]1 KLR 1272, *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR, *Kamal Jadvia Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR and *Daniel Chacha Muriri v Attorney General* [2012] eKLR.
26. As to Whether the Petition offends the Provisions of Sections 107 and 108 of the *Evidence Act* on the burden of proof, reliance was made to Section 107 and 108 of the *Evidence Act* to substantiate on the burden of proof. Equally, credence was placed on the cases of *Evans Nyakwama Vs Cleophas Bwana Ongaro* [2015] eKLR and *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another* [2014]



- eKLR and submitted that the Petitioner had not produced before this court any tangible evidence that assist the court to grant him the orders sought.
27. Regarding Whether this petition properly before this court since the action complained about by the Petitioner has been extinguished, it was argued that this petition is not properly before this court as the matter deals with the 2020 MCSK CMO license allegedly revoked in contravention of the Petitioner's rights by the 1st Respondent. According to counsel, issuing the orders sought in the petition will be in vain. To support this position counsel quoted the cases of *Jocinta Wanjiru Raphael v William Nangulu- Divisional Investigation Officer, Makadara and 2 Others* [2014] eKLR, *Republic v Chairman Evurore Land Disputes Tribunal and 2 Others Ex-Parte Njeru Kirimo* [2014] eKLR and *Republic v Judicial Service Commission Ex-Parte Pareno* [2004] 1 KLR 203-209.
 28. It was submitted that the year for the licensing is well passed and the MCSK is currently in operation for the year 2022 thus issuing an order compelling the issuance of a CMO license for MCSK 2020 while the same is well extinguished due to lapse of such time will be exposing the court to issue an order in vain.
 29. As regards whether the rights pleaded can be limited, it was submitted that any right other than right under Article 24 of the *Constitution* can be Limited as long as the limitation is reasonable and justifiable. Contending that the forensic report dated 24th September, 2020 found glaring mismanagement and misuse of copyright holders' royalties collected by the CMO and as a result of the adverse findings, the 1st Respondent Suspended the license of the MCSK. Reliance was made on the case of *Ngunjiri Wambugu Vs Inspector General of Police & 2 Others* [2019] eKLR, to buttress the point of limitation of rights.
 30. On whether the Petitioner is entitled to orders as sought, it was contended that the power to grant orders in judicial review are discretionary in nature. Averring further that the petitioner is not entitled to costs. To substantiate this contention reliance was placed on the Cases of *Kenya Human Rights Commission & Another v Attorney General & 6 Others* [2019] eKLR and Jasbir Singh Rai.
 31. Submitting that the petition lacks merit and the same is a waste of precious judicial time and it ought to be dismissed with costs.

Determination/analysis

32. The Court considered the pleadings and submissions by parties through respective Counsel and the issue(s) for determination is whether there is a valid petition for hearing and determination.
33. The Court's jurisdiction is provided by Article 165 (3) (b) & (d) of *Constitution* of Kenya. In the Supreme Court of Kenya in Petition No. 7 of 2014, *Mary Wambui Munene v Peter Gichuki Kingara and Six Others* [2014] eKLR; the jurisdiction of the high court to determine the question whether a right or fundamental or freedom in the Bill of Rights has been denied, violated, infringed or threatened and/or in interpretation of the *Constitution*.
34. The Courts have expressly set out on the manner in which Petitions ought to be presented to Court. the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (commonly referred to as '*the Mutunga Rules*') provide for the contents of Petitions. Rule 4 of *the Rules* allows for filing of Petition in terms of Rule 10 thereof which provides seven key contents of a Petition.



35. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR provided the following as regards Constitution Petition;

Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

36. In *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR Mrima J observed;

The legal burden of proof: -The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Petitioner’s Case

37. The thrust of Petitioner’s petition filed on 30/9/2020; is that contrary to Art 19, 20, 21, 22 & 258 of Constitution of Kenya 2010 to the extent that the Petitioner seeks redress for violations of fundamental rights and freedoms under Article 38 & 47 of the *Constitution*. He also based the Petition on Art 2(1), 3(1) & 10 of the *Constitution*.
38. The Petitioner’s case is that the initiation of an audit by 1st & 2nd Respondents without involvement of members of interested parties was in violation of Section 46 of the *Copy right Act*.
39. By failing to take into account the responses of the interested party in their Audit Report was contrary to Article 47 of the *Constitution*.
40. By relying on the audit Report and proposing restructuring of the organization of the interested party contrary to its memorandum & articles of association as well as will of its members through periodic elections was violation of Article 36 of *Constitution*.

Respondents Case

41. The Respondents vide Replying Affidavit of 18/7/2022 and Grounds of Opposition of 1/8/2022 stated that the 1st Respondent appointed Auditor to conduct forensic audit on CMOs(Collective management Organizations) following numerous complaints from members.
42. The Petitioner moved to Court to challenge the decision to appoint Auditor, withdrawal of MCSK’s license and restriction from access to its funds in Machakos Petition E004 of 2020. The Petition was heard and determined and judgment delivered on 2/2/2021 by Hon Justice D.K. Kemei dismissing the Petition. Hence this Court lacks requisite jurisdiction to entertain this Petition.



43. The cause of action complained of by the Petitioner was extinguished since the 1st Respondent's revocation of license of Music Copyright Society license was for Year 2020 and as such it expired.

Disposition

1. From the above, the Court finds that there is no dispute pending for determination by this Court because;
2. Machakos Petition E004 of 2020 on the same subject matter was heard and determined by a Court of similar equal and competent jurisdiction and no appeal has been preferred; and
3. The subject matter of the dispute was/is overtaken by events.
4. The Petition herein is dismissed.

RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 26TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Okubasu Munene & Co. Adv - For The Petitioner

Wanjiru - For The 2nd & 3rd Respondents

Paul Kaindo - For The 1St Respondent

Geoffrey/patrick - Court Assistant(s)

