



Barasa & another v Kenya Copyright Board & 2 others; Performers Rights Society of Kenya & 3 others (Interested Parties) (Petition E167 of 2024) [2024] KEHC 6150 (KLR) (Constitutional and Human Rights) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E167 OF 2024

LN MUGAMBI, J

MAY 30, 2024

BETWEEN

DAVID MABONGA BARASA 1ST PETITIONER

MAXWELL BARASA 2ND PETITIONER

AND

KENYA COPYRIGHT BOARD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY, MINISTRY FOR GENDER, CULTURE, THE ARTS AND HERITAGE 3RD RESPONDENT

AND

PERFORMERS RIGHTS SOCIETY OF KENYA INTERESTED PARTY

MUSIC COPYRIGHT SOCIETY OF KENYA INTERESTED PARTY

KENYA ASSOCIATION OF MUSIC PRODUCERS INTERESTED PARTY

PERFORMING AND AUDIO-VISUAL RIGHTS SOCIETY OF KENYA LIMITED INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of two applications, namely:
 - i. The Petitioners’ Notice of Motion application dated 25th March 2024 and;



- ii. The 2nd Interested Party's Notice of Motion application dated 15th May 2024.
2. In the Petitioners Notice of Motion Application dated 25th March, 2024, the Petitioners seek the following orders:
 - i. Spent.
 - ii. There be a temporary order prohibiting the 1st Respondent from receiving applications and issuing Certificates of Registration as Collective Management Societies to the Interested parties herein pending the hearing and determination of this application inter partes.
 - iii. There be a temporary order prohibiting the 1st Respondent from receiving applications and issuing Certificates of Registration as Collective Management Societies to the Interested parties herein pending the hearing and determination of this Petition.
 - iv. Given the demonstrated urgency, to wit, that the intended licenses would be issued for six months, the hearing of this Petition be expedited and directions for its disposal be issued at the earliest.
 - v. Costs be reserved.
3. The application is supported by the 1st Petitioner's affidavit sworn on even date and the grounds on the face of the application. I set out the parties positions in the above application first.

Petitioners Case

4. The Petitioners aver that on 5th March, 2024; the 1st Respondent requested the Interested Parties herein to submit their applications for extension of their registration and licenses as Collective Management Organizations (CMOs) for a further 6 months.
5. The Petitioners contend that the 1st Respondent's decision was in contravention of the [Copyright Act](#) and its Regulations. This is because the 1st Respondent is required to receive applications from all qualified applicants and not only from the Interested Parties. Consequently, they argue that the decision is in violation of the principle of competition and fair participation in that process.
6. Furthermore, that the 1st Respondent does not have a properly constituted Board of Directors to carry out its mandate, as such, cannot issue the licenses. The Petitioners state that this was the finding in Nairobi Petition No. E161 of 2023, Justus Manthi Ngemu vs. Kenya Copyright Board and 3 Others that was delivered by Hon. Lady Justice Hedwig Ong'udi.
7. In addition, the Petitioners contended that the law does not provide for extension of a provisional license as indicated by the 1st Respondent. They averred that the applications should first be considered and registration granted once the vetting process is conducted by the 1st Respondent's Board. Moreover, public participation carried out as set out under Articles 10(2)(a)(b)(c) of [the Constitution](#) and Regulation 11 of the Copyright (Collective Management) Regulations, 2020 and Sections 5, (b), 6 & 46 of the [Copyright Act](#).
8. The Petitioners state that the 1st Respondent in issuing the provisional licenses to the Interested Parties as adverted to would effectively authorize the bodies to collect money from the public. They take issue with this as [the Constitution](#) is clear that a person should not be deprived of their property unless the deprivation is authorized by the law.
9. It is the Petitioners case therefore that the 1st Respondent's directive is unlawful and unconstitutional as seeks to subvert constitutional principles and is ultra vires in view of Sections 46(1)(2)(3) (3A), (4)



and (5) of the [Copyright Act](#). Accordingly, the Petitioners urge the Court to grant the conservatory orders in light of these circumstances.

1st Respondent's Case

10. The 1st Respondent filed its Replying Affidavit through its Deputy Executive Director, George Nyakweba sworn on 25th April 2024. He deposed that the 1st Respondent as per the [Copyright Act](#) consists of 9 Member Board Members but presently it has 6 members of the Board and is the process of filing the vacant positions.
11. Be that as it may, he asserts that the 1st Respondent's operations are not affected by this for two reasons. First, the [State Corporations Act](#) provides that the 1st Respondent's quorum is 5 members. Second, the amendments made to the [Copyright Act](#) by the Copyright (Amendment) 2019 (Act. No.20 of 2019) provided that the Board should have 9 members. However, this amendment was never particularized and effected in the [Copyright Act](#) Schedule.
12. Regardless, the position is that the 1st Respondent is properly constituted to conduct its mandate in view of the [State Corporations Act](#) as the 1st Respondent's Board has the requisite quorum as stipulated therein.

2nd and 3rd Respondents' Case

13. The 2nd and 3rd Respondents' reply and submissions to the application and Petition are neither in the Court file nor in the Court's online portal (CTS).

1st Interested Party's Case

14. The 1st Interested Party's reply and submissions to the application and Petition are not in the Court file or the Court's online portal (CTS).

2nd Interested Party's case

15. The 2nd Interested Party in opposition to the application filed grounds of opposition dated 29th April 2024 on the premise that:
 - i. The orders sought precipitate a vacuum in regulation of intellectual property management and exploitation which is inimical to Article 40(5) of [the Constitution](#).
 - ii. The orders sought encourage violations of intellectual property rights.
 - iii. Failure on the part of the state to set up/compose regulatory agencies cannot be a basis to visit adverse actions on third parties.
 - iv. In any view the 2nd Interested Party's authority to administer its members' rights is based on the court order issued in Nairobi Court of Appeal Civil Appeal No. E888 of 2022.

3rd Interested Party's Case

16. The 3rd Interested Party's Chief Executive Officer, Maurice Okoth filed a replying affidavit sworn on 27th April 2024.
17. He states that according to Clause 3(4) of the First Schedule of the [Copyright Act](#), the requisite quorum for the conduct of the 1st Respondent's business is 7 Board members. Even so, he contends that two-thirds of the total members being 6, qualifies the current Board within the statutorily required



constitution of the Board. Furthermore, he asserts that Clause 3(7) informs that none of the Board's proceedings are invalidated due to a vacancy therein.

18. It is equally contended that the Orders sought are discriminatory to the Interested Parties. This is since the Orders will deny them a chance to file their applications for registration as CMO's yet the 1st Respondent will receive applications from other concerned parties.
19. Moreover, being that the 3rd Interested Party collects and distributes royalties on behalf of its over 1500 members, issuance of the sought orders is said will greatly disadvantage its members.

4th Interested Party

20. Similarly, Joseph Njagih, the 4th Interested Party's Chief Executive Officer filed a replying affidavit sworn on 29th April 2024. He states that by dint of Section 3(2)(a) of the [State Corporations Act](#), the 1st Respondent possess perpetual succession hence its existence is separate and distinct from its Directors.
21. Considering this, he notes that the Act under Section 8(e) provides that conduct of the 1st Respondent's business in view of its Board is supposed to be two – thirds of the total number. For this reason, the Board is said to be properly constituted as the 6 members form the two- thirds.

Petitioners' Submissions

22. The Petitioners' through Gitonga Mureithi and Company Advocates filed submissions dated 5th April 2024 and rejoinder submissions dated 30th April 2024.
23. Counsel relying on the Petitioners' averments submitted that the 1st Respondent as a regulatory body should not solicit applications from a select few, the interested parties herein, to the exclusion of others. For this reason and the brief periods issued for the licenses emphasized that these justify grant of the sought orders otherwise, the Petition will be rendered nugatory.
24. Reliance was placed in Kenya Electricity Transmission Co Limited (KETRACO) v Instalanciones Inabensa SA (Petition 17 (E024) of 2021) [2023] KESC 10 (KLR) (17 February 2023) (Ruling) where the Supreme Court held that:

“Is it in the public interest to grant the conservatory orders? A matter will qualify as one of public interest if it is one in which a class of the community has a pecuniary interest or some interest by which their legal rights or liabilities are affected. See Nubian Rights Forum & 2 others v Attorney General & 6 Others; Child Welfare Society & 8 Others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae), Consolidated HC Petition Nos. 56, 58 & 59 of 2019; [2019] eKLR. A matter is in the public interest if it is presented as a means of advancing human rights and equality, or raises issues of broad public concern.”

25. Counsel in rejoinder submitted that the responses had only dealt with the issue of quorum as opposed to the mandatory constitution of the Board which is crucial in vetting of the applications as noted in High Court Petition No, 161 of 2023 – Justus Ngemu v Kenya Copyright Board. Reliance was placed in Nairobi Petition No. E161 of 2023, Justus Manthi Ngemu vs. Kenya Copyright Board and 3 Others where the Court held that issuance of the licenses should not be done without a fully constituted Board of the 1st Respondent.
26. According to Counsel, the 1st Respondent's act of inviting all parties to make their application after the fact, demonstrates an acknowledgement of its unlawful act of only soliciting the Interested Parties.



1st Respondent's Submissions

27. Counsel Paul Kaindo in the submissions dated 26th April 2024, submitted that Section 3(1) of the [Copyright Act](#), establishes the 1st Respondent as a body corporate with perpetual succession. As such, it is separate from its members and continues its existence indefinitely, even if its members change over time or there is a vacancy in its membership. Reliance was placed in the decision in *Isaiah Biwott Kangwony v. IEBC & another* (Petition No. 212 of 2018) where it was held that:

“It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted.”

28. Counsel in this regard submitted that the 1st Respondent continues to exist and carry out its statutory mandate despite the Board's vacancy. Counsel likewise submitted that the [State Corporations Act](#) under Section 8 (e) which provides that the requisite quorum of the Board as two thirds, makes it clear that the current Board is properly constituted.

29. Counsel further argued that contrary to the Petitioners' allegation the call for applications had been made to all persons not just the Interested Parties.

1st, 2nd and 4th Interested Parties Submissions

30. These Interested Parties submissions are not in the Court file or Court Online Platform (CTS).

3rd Interested Party's Submissions

31. On 27TH April 2024, Mike Atieno and Company Advocates filed submissions for the 3rd Interested Party. Counsel sought to discuss whether the 1st Respondent's Board has the requisite quorum to conduct its business; whether the Orders sought by the Petitioners are discriminative against the Interested Parties; and whether the 1st Respondent excluded other members of the public from applying to be registered as CMO's.

32. On the first issue, Counsel relying in the First Schedule of the [Copyright Act](#), submitted that the Clause 3(4) and (7) provide that the quorum to conduct the Board's business is 7 members. Equally that no business of the Board shall be invalidated owing to a vacancy therein. Identical reliance was placed in Section 8(1) (e) of the [State Corporations Act](#) which provides that a Board's quorum ought to be two thirds while conducting its business.

33. According to Counsel the wordings of this provisions clearly indicate the legislator's intent in situations such as the one before the Court. Considering this, it is argued that despite the vacancy in the Board, its mandate remains unperturbed. Reliance was placed in *Hambardda Dawakhana v Union of India* Air (1960) AIR 554, where the Supreme Court of India observed that:

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of



common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”

34. Like dependence was placed in *Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another* (2018) eKLR.
35. Counsel in the second issue, answered in the affirmative. It was asserted that the Interested Parties just like all other persons have a right to lodge their application for consideration. It was further noted that the Interested Parties rightfully have the qualifications outlined under Section 46(2) and (4) of the [Copyright Act](#). For this reason, the orders sought by the Petitioners were deemed to be in violation of their right under Article 27 of *the Constitution*.
36. Finally, Counsel submitted that contrary to the Petitioners allegations, the Interested Parties have no control or power over the 1st Respondent’s vetting process and decision making. This is with reference to who may apply or be registered. As such it was argued that the 1st Respondent’s call to them for registration as CMO’s, was open to all members of the public. Moreover, it was contended that the Petitioners claim had been overtaken by events as the 1st Respondent duly advertised and called for applications on 9th April 2024.

2nd Interested Party’s Application

37. The 2nd Interested Party in its application seeks orders that:
 - i. Spent.
 - ii. Pending hearing and determination of this Application, inter parties, and so as to protect the intellectual property rights of authors, composers, arrangers and publishers of copyrighted musical works, this court be pleased to issue an order suspending the directive issued on 8th May 2024 by the Kenya Copyright Board that the Applicant, MCSK, ceases operation.
 - iii. Pending hearing and determination of the Petitioners’ Petition dated 25th March 2024 and so as to protect the intellectual property rights of authors, composers, arrangers and publishers of copyrighted musical works, this court be pleased to issue an order suspending the directive issued on 8th May 2024 by the Kenya Copyright Board that the Applicant, MCSK, ceases operation.
 - iv. Further/in the alternative to (2) and (3) above, this Court be pleased to issue an order directing the Applicant to render accounts to the 1st Respondent as condition for lawful operation pending hearing and determination of the Application dated 25th March 2024 and/or the Petition filed herewith.
 - v. This Court be pleased to issue any other order that it shall deem fit.
 - vi. Cost of this Application be provided for.

2nd Interested Party’s Case

38. The 2nd Interested Party through its Chief Executive Officer, Dr. Ezekiel Mutua in its supporting affidavit informs that it is a company limited by Guarantee that was incorporated in 1983. Its mandate revolves around the management, administration and enforcement of exploitation of performing and reproduction rights, in copyrighted musical works for over 15000 Kenyan and resident copyright holders.



39. Dr. Mutua depones that following this Court's order dated 2nd April 2024, the 1st Respondent in a directive dated 8th May 2024, instructed the 2nd Interested Party as well as the other CMO's to cease operations until the licenses were issued, once this Court determines this Petition.
40. This directive is impugned because it allegedly leaves copyright holders exposed, unprotected and thus susceptible to exploitation of their intellectual property. It is noted that it has not violation of intellectual property rights by bars and other establishments due to the absence of lawful regulation.
41. Furthermore, the Directive is said to be in sharp contrast to the Court of Appeal decision in Civil Application No. E395 of 2022, Music Copyright Society of Kenya v Kenya Copyright Board, where the superior Court issued an order that an undertaking be given as condition for operation pending hearing and determination of Civil Appeal No. 888 of 2022. It is noted that Petition No. 435 of 2022, Music Copyright Society of Kenya v Kenya Copyright Board in view of this appeal was heard and determined.
42. Likewise, that the High Court in JR No. 4 of 2019, Kisumu Bar Owners Association v Kenya Copyright Board & Another issued interim protection to copyright holders pending proper constitution of the 1st Respondent's Board.

Petitioner's Response

43. In opposition to the 2nd Interested Party's Application, the Petitioner filed its grounds of opposition dated 22nd May 2024 on the basis that:
 - i. The 2nd Interested Party is asking the court to take the 1st Respondent's mandate and issue it with a Certificate of Registration as a Collective Management Society.
 - ii. The 2nd Interested Party wants the court to sanction an illegal deal. The prayers sought are contra statute and would compromise the application and Petition pending before the court.
 - iii. The court should take Judicial Notice of the 2nd Interested Party's notoriety as the worst of the three Interested Parties and refuse to grant it the license sought. It is in breach of the law in the Copyright (Collective Management) regulations 2020, Sections 5 of the [Copyright Act](#) on distribution and it cannot ask the court to sanitize the illegality by sanctioning an illegal deal with the 1st Respondent. Courts do not award licenses nor sanction illegal agreements by an Applicant (the Interested Party) and the Regulator (the Respondent).
 - iv. The court should take Judicial Notice of the fact that the deal the 2nd Interested Party is relying on in Kisumu Bar Owners Association V Kenya Copyright Board & Another - JR No. 4 of 2019 was a deal that was breached by the 2nd Interested Party who was then denied a license by the last properly constituted Board of Directors that sat on 29th November 2022.
 - v. The application seeks to place the court in the position of the 1st Respondent by having it vet, consider and issue the Interested Party with a license. It would offend Section 5 of the [Copyright Act](#) and Regulation 11 of the Regulations. It would also defeat the constitutional ideals of public participation, transparency, governance and observance of the rule of law.

1st Respondent's Response

44. In reply the 1st respondent filed through its Deputy Executive Director, George Nyakweba an affidavit sworn on 20th May 2024. He begun by submitting that the 2nd Interested Party was misleading in relying in the cited authorities. First, the Court in Petition No. 435 of 2022, Music Copyright Society of Kenya



- v Kenya Copyright Board held that the 2nd Interested Party manages the rights of its members subject to the lawful regulation of the 1st Respondent.
45. Second that the cited authorities are unrelated to the issues raised herein and the matters strangers, to the highlighted constitutional issues. It was likewise noted that the 2nd Interested Party had refused to execute the undertaking in Petition E395 of 2022 as directed by the Court of Appeal.
 46. He asserts further that Section 46(1) of the [Copyright Act](#) prohibits commencement or carrying out of the business of a CMO except in accordance with the law, being a valid certificate of registration. In light of this, he argues that the 2nd Interested Party essentially seeks to subvert the CMO licensing process as outlined in the [Copyright Act](#).
 47. The 2nd Interested Party's act is also viewed as a violation of the principle of separation of powers which in this case provides that the licenses are to be issued by the 1st Respondent as the regulatory authority as empowered by the Executive through the [Copyright Act](#). Accordingly, in his view, granting the application will amount to allowing the 2nd Interested Party to operate without a license from the 1st Respondent.
 48. The 1st Respondent further alleges that the 2nd Interested Party has failed to adduce evidence that its members intellectual property has been exploited. Nonetheless, it is noted that copyright works pay is made annually at the beginning of each year. The payment is made through a self-licensing system managed by the Interested Parties jointly. As such, it is claimed that there is no ongoing threat or violation of intellectual property as alleged.
 49. It is deponed moreover that the 2nd Interested Party's 6 - month provisional license issued on 8th November 2023 lapsed on 4th May 2024. Following its call for applications, it received 5 applications including that of the 2nd Interested Party. In view of this, the 1st Respondent vide a public notice dated 8th May 2024 invited the public to participate in the process by issuing comments and views on the licensing of the listed applicants.
 50. The 1st Respondent contends that the 2nd Interested Party's function is not its sole preserve as purported. As such other interested organizations can apply for a license to manage the same rights. Furthermore, that the 2nd Interested Parties members have the freedom of association and so can join other CMOs. He further pointed out that the instant Petition had been instigated by two of its members. To this end, it is argued that allowing the application would not only be unlawful but also render the petition nugatory.

Other Parties Responses

51. The 2nd and 3rd Respondents' and the Interested Parties are yet to file their responses and submissions to the 2nd Interested Party's application.

Parties Submissions

52. All the Parties are yet to file their submissions to this application.

Analysis and Determination

53. Upon careful perusal of the parties' depositions in the affidavits and arguments made by counsel through their written submissions, it is clear to me that the singular issue that arises for determination in this application is whether the conservatory Orders sought should be granted.



54. Whether or not to grant a conservatory order is a matter of Court's discretion which must be exercised judiciously. The issuance is based on the Court's assessment of the matter at hand. If the court considers that there is a violation or a real danger is posed to the values and principles of our Constitution or the Bill of Rights, then a conservatory order should issue to ensure the status quo is maintained until the Petition is heard. In *Gatirau Peter Munya Vs Dickson Mwenda Kithinji (2014) eKLR*, the Supreme court held thus:

“conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”

55. The High Court in *Muslim for Human Rights (Muhuri) & 20 Others Vs Attorney General and 20 Others, Petition 7 of 2011* had earlier held as follows in regard to conservatory orders: -

What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory.

“A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”

56. My considered view is that at this level, the Court only needs to satisfy itself that there is a “a serious question for determination” as opposed to a mere arguable issue considering that ‘nearly everything can attract an contrary view’. It is thus incumbent upon the Court to examine the quality and intensity of the matter that the Petitioner raises in the petition. At the preliminary analysis stage; my view is that the applicant is not required to demonstrate that “the case is more likely to succeed than not” as that would mean delving into detailed analysis of the merits of the Petition.

57. Further, the applicant for conservatory order must also demonstrate that the substratum of the petition will be rendered nugatory unless the conservatory order is granted and; finally, that it is in public interest to grant the order.

58. The question that I must now ask is, whether the applicants’ have demonstrated “that there is a serious constitutional issue that calls upon this court’s intervention at this point in time?”

59. This Petition is premised on two major grievances, namely: one, that the Board of the 1st Respondent is improperly constituted and two, that the 1st Respondent invited only the Interested Parties named in this petition only to apply for provisional licenses leaving out all other applicants which amounted to discriminatory treatment of the applicants.



60. In response, the Respondents and the Interested Parties asserted that the 1st Respondents Board is properly constituted for it has the requisite quorum to transact the business of the Board of the 1st Respondent. That the issue of giving preferential treatment to the 4 interested parties does not arise.

61. The issue that the Petitioners raise is principally the issue of legality, which falls under the rule of law principle and also discrimination which is a violation under the Bill of Rights. In *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* (2018) eKLR the Court observed as follows:

“

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* and another where the court held as follows:-

“the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”[20]

8. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[21] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent's are constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its exercise of power. The Respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations.”

62. Turning now to the issue at hand, the Court has to examine the weight of twin issues pin-pointed by the Petitioners vis-vis the response by the Respondents. Is it really a substantial matter that warrants the Court intervention by way of a conservatory order?

63. The 1st Respondent is established under Section 3 of the *Copyright Act*. The functions of the Board are outlined as follows under Section 5 of the Act:

- a. direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and other rights recognized by this Act and ensure the observance thereof;
- b. license and supervise the activities of collective management societies as provided for under this Act;
- c. devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national, regional or international organisations concerned with the same subject matter;



- d. organise the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;
 - e. enlighten and inform the public on matters relating to copyright and related rights;
 - f. maintain an effective data bank on authors and their works; and
 - g. administer and enforce 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.
64. A properly constituted Board under Section 6 comprises of:
- a Chairperson appointed by the President; the Principal Secretary in the National Treasury or a designated representative; the Principal Secretary in charge of matters relating to culture and heritage or a representative; the principal secretary in the Ministry responsible for matters relating to information and communications technology or a designated representative; the Attorney-General or a representative; three persons each nominated by associations recognised by the Government as representing stakeholders in music, film and publishing respectively; and the Executive Director appointed under Section 11.
65. Furthermore Section 8(1) of the Act provides that the Conduct of business and affairs of the Board is as provided in the Schedule.
66. The relevant parts of the First Schedule provide thus:
3. Meetings
- i. The Board shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.
 - ii. Notwithstanding subparagraph (1), the chairman may, and upon requisition in writing by at least five members shall, convene a special meeting of the Board at any time for the transaction of the business of the Board.
 - iii. Unless three quarters of the total members of the Board otherwise agree, at least fourteen days' written notice of every meeting of the Board shall be given to every member of the Board.
 - iv. The quorum for the conduct of the business of the Board shall be seven members including the chairman or the person presiding.
 - v. The chairman shall preside at every meeting of the Board at which he is present but in his absence, the members present shall elect one of their number to preside, who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairman.
 - vi. Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of the votes of the members present and voting and in the case of an equality of votes, the chairman or the person presiding shall have a second or casting vote.
 - vii. Subject to paragraph (4), no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.



viii. Subject to the provisions of this Schedule, the Board may determine its own procedure and the procedure for any committee of the Board and for the attendance of other persons at its meetings and may make standing orders in respect thereof.

67. It is crystal clear from the above legal exposition that the 1st Respondent mandate includes licensing and supervising the activities of CMO's under Section 5(b) and to do so, it requires a quorum of not less than seven members including the chairman or the person presiding under the [Copyright Act](#).

68. However, the [State Corporations Act](#) in its preamble states that it is 'An Act of Parliament to make provision for the establishment of State corporations; for control and regulation of state corporations; and for connected purposes' provides at Section 8 (1) (e) as follows:

Meetings and procedure of Boards

(e) The quorum for the conduct of business at a meeting of a Board shall be two-thirds of the total number of members of a Board or the number nearest to but not less than two-thirds;

Provided that where within half an hour after the time appointed for the meeting a quorum is not present, the meeting shall be adjourned to the same day in the next week, at the same time and place, or at such time as the members may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be deemed to be a quorum;

69. Discussing the issue of quorum in *Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another* [2018] eKLR the Court observed as follows:

"Blacks Law Dictionary (10th Edition) defines quorum as "the smallest number of people who must be present at a meeting so that official decisions can be made"

In the case of *Katiba Institute & 4 Others vs. The Attorney General & 2 Others* [2018] eKLR, Mwita J. pronounced himself on the issue of the quorum of the commission as follows:

a. "Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of [the Constitution](#). I find that the Act must have been enacted on the assumption or hope that the Commission will be



constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because *the constitution* allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.

45. It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted. In any event, the vacancies ought to have been addressed through the immediate recruitment of new commissioners as I have already found in this judgment.”

70. Analogously, *Seruji Limited v Savannah Cement Limited; Savannah Heights Ltd (Interested Party) (Miscellaneous Application E445 of 2021)* [2021] KEHC 26 (KLR) (Commercial and Tax) (10 September 2021) (Judgment) the Court opined as follows:

“

“ 17. In *Radio Frequency Systems (EA) & Anor v. Simon Horner & 2 Others* [2020] eKLR, Tuiyot J, as he then was, held of this provision thus: -

“The substance of this provision is similar to section 371 of the English *Companies Act, 2015* 1985. In a Jersey case of *In the Matter of Inter-Channel Pharmaceuticals Ltd* [2002] JRC 116A (10 June 2002), the Court observed as follows, regarding the Courts power under that provision.

“We have been referred to three English Authorities namely, *In Re El Sombrero Limited* [1958] 3 WLR 900, *In Re H.R. Paul & Son Limited* [1974] 118SJ 166, and *In Re Opera Photographic Ltd*. *In Re El Sombrero* made it clear that the question raised by the word “impracticable” in the statutory provision is merely whether, in the particular circumstances of the case, the desired meeting of the company could as a practical matter be conducted. The case went on to hold that, if it is impracticable, a discretion then arose in the court as



to whether it should make an order as sought. In the *El Sombrero* case the applicant held 90% of the shares and the two respondents the remaining 10%. They were also the only directors. By absenting themselves from any meeting they were effectively preventing the majority shareholder from exercising the rights attaching to his 90% shareholding to change the board of directors. The court made an appropriate order to convene a meeting and allow it to proceed in the absence of the quorum required by the articles.

In all the three English decisions to which we have been referred the court in effect made it clear that the quorum provisions should not be regarded as a right vested in the minority to frustrate the wishes of the majority. The facts in *In Re Opera Photograph Limited* were very similar to those in the present case. The majority shareholder wished to dismiss a director, but was prevented from doing so because the director, who was also the other member, declined to attend the meeting of members so that the meeting was without quorum.

It would seem that the overarching purpose of section 280 is to provide an inexpensive and speedy procedural remedy to overcome technical difficulties in a company convening, holding or conducting a meeting. It aids in the proper management of a company in the face of technical obstacles. ...”

18. I do reiterate the foregoing here and add that, the provision was intended to enable company business which needs to be conducted at a general meeting of the company to be so conducted notwithstanding the impediment that might be there. The intention of the Legislature was that a company should be allowed to get on with managing its own affairs, and should not be frustrated by the impracticability of convening, calling and/or conducting a general meeting in the manner prescribed by the Articles or the Act.”
71. Going by the reasoning in the above authorities, it is my considered view that the business of the Board has to be conducted by a group that is considered sufficient to make decisions that bind an organization, which for practical reasons, courts have interpreted it to mean the simple majority of the total number of the members. The obsession on fixed number of members especially where vacancies are bound to occur and the responsibility of filling those vacancies does lie with to the organization has been frowned upon by courts as it is bound to cripple the operations of these Boards. As long as there are members constituting a majority of the total membership, the operations of the Board cannot be halted by reason of vacancies in the membership and the business of the Board has to go on.
72. The other issue that the Petitioners pegged their application for the conservatory order on was the fact that the 1st Respondent had invited only the interested parties to apply for the provisional licences leaving out the rest of the possible applicants. The Petitioners appears to acknowledge belatedly, that invitations were due after this Petition was filed. This ground cannot thus continue to be the basis for the subsistence of the conservatory order.
73. In the circumstances, the Court finds the basis upon which the interim conservatory orders were issued has sufficiently dissipated and hereby discharges the same.
74. As to whether the 1st Respondent’s directive should be suspended by this Court, I refer to Section 5 of the [Copyright Act](#) Section 5 (b) which specifies the mandate of the Board to include:
 - (b) license and supervise the activities of collective management societies as provided for under this Act;
75. The jurisdiction of this Court only extends to ensuring that all persons including the organs of state and public bodies abide by constitutional principles and values but not to assume or meddle with



the mandate that is assigned to any other person or body. The South African case of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 explicates this principle more clearly, the Court held:

“Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of *the Constitution*.”

76. The 2nd Interested Party has not shown how the 1st Respondent has contravened the provisions of the *Copyright Act* for this Court to intervene. The 1st Respondent issued a directive stopping operations of the bodies without a licence, a matter that squarely falls within its mandate. The 2nd Interested Party’s application is thus devoid of any merit and is hereby dismissed.

77. The Costs of the two applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY, 2024.

.....

L N MUGAMBI

JUDGE

