



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 335 OF 2013**

**IN THE MATTER OF AN APPLICATION BY THE PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA (PERAK) FOR LEAVE FOR ORDERS OR PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE KENYA COPYRIGHT ACT, CHAPTER 130 OF THE LAWS OF KENYA**

**REPUBLIC.....APPLICANT**

**=VERSUS=**

**KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP).....1<sup>ST</sup> RESPONDENT**

**PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK).....2<sup>ND</sup> RESPONDENT**

**KENYA COPYRIGHT BOARD .....3<sup>RD</sup> RESPONDENT**

**DR. BEN SIHANYA, SUED IN HIS CAPACITY AS THE CHAIRMAN,**

**THE COMPENTENT AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**EXPARTE PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA (PERAK)**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 8<sup>th</sup> October, 2013, the ex parte applicants herein, **The Pubs, Entertainment and Restaurants Association of Kenya (PERAK)**, seek the following orders:
  1. That this Honourable Court be pleased to grant an order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from arbitrarily imposing and collecting high tariffs/license fees and other levies from the Applicant's members' business premises using a wrong tariff structure and generally harassing, intimidating and confiscating their business equipment throughout the Republic of Kenya.
  2. That this Honourable Court be pleased to grant an order of mandamus compelling and directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to hear and determine the dispute between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in relation to the high license fees charged and /or tariffs charged/levied using a wrong tariff structure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  3. The costs of this Application be provided for.

### **Ex Parte Applicant's Case**

4. The application is supported by a verifying affidavit sworn by **Lilian Mshai Kalela**, the Chief Executive Officer of the Applicant on 13<sup>th</sup> September, 2013.
5. According to the deponent, the Applicant was registered on 13<sup>th</sup> April 2004 under the **Societies Act** as a Welfare Organization and as per its Constitution and Rules, the Applicant represents members who run and manage Restaurants, Pubs and Entertainment venues and its main objective is to bring together operators with a view of resolving common problems in the hospitality industry, developing a code of conduct for its members, engage in social responsibility activities such as fighting drug abuse and generally to help members comply with various regulations governing the hospitality industry.
6. According to the deponent, the third Respondent had licensed the Music Copyright Society of Kenya (MCSK) under section 46(2) of the **Copyright Act** Cap 130 Laws of Kenya (hereinafter referred to as the Act) to represent all classes of rights in the music industry to ensure that users meet their legal obligation to pay for licenses for music played in Pubs, Entertainment joints and Restaurants. The Applicant and its entire membership, it was deposed, to date have had a cordial relationship with the MCSK and have had no problem and they continue to pay the MCSK license fees without a hitch. However, after the amendment of the **Copyright Act**, two new Collective Management Organizations within the music industry being the 1<sup>st</sup> and 2<sup>nd</sup> Respondents under section 46(2) were licensed to represent different classes of rights. Firstly, is the group of Composers, Authors and Music publishers of musical works – represented by MCSK; secondly is the group of Producers of sound recordings –represented by Kenya Association of Music Producers (KAMP); and thirdly, Performers (singers, musicians, instrumentalists) represented by Performers Rights Society of Kenya (PRISK).
7. According to the deponent, the licensing of the 1<sup>st</sup> and 2<sup>nd</sup> respondents brought with it a lot of confusion and uncertainty to the Applicant as to the mode of tariff structure arbitrarily adopted and sought to be implemented by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. According to her, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to use the parameter of measuring the size in square feet of each establishment for purposes of imposing license fees; that the use of size in establishments as parameter vis-à-vis the consumer price Index resulted in huge amounts as license fees being levied or charged on major Pubs and Restaurants yet most of the space is either for parking vehicles, children play grounds or for aeration purposes. In a nut shell, a bigger size did not and does not constitute more sales to the members of the Applicant.
8. It was further deposed that as per the Kenya Gazette issue no.4 of 2010 under the **Alcoholic Drinks Control Act**, there are over ten thousand (10,000) Pubs and Restaurants in Nairobi's Starehe District alone and over forty thousand (40,000) in the whole of Nairobi alone yet the 1<sup>st</sup>

and 2<sup>nd</sup> Respondents only target for heavy licensing and harassment those deemed to be popular, famous or doing well hence making their actions discriminatory. To the deponent, if the 1<sup>st</sup> and 2<sup>nd</sup> Respondents tariff structure was to be harmonized, negotiated and agreed upon by all stakeholders into a fairly reasonable license fee applicable or payable by all gazetted Pubs, Entertainment joints and Restaurants, no doubt the license fees charged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will be lower and thus earn more license fees across the country without targeting only a few.

9. According to her, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' functions have now been devolved to County Governments and some county governments such as Kiambu have already taken over those functions. As such, the continued arrest, harassment and confiscation of the Applicant's members' equipment by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents using goons and the Kenya Police is misconceived, illegal and untenable.
10. To her, the Applicant has for the last three years tried to engage the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in negotiations but the latter have failed to provide a full description of the proposed tariff structure that incorporates the Applicant's proposals and is transparent and throughout the three year period that the Applicant has engaged the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in negotiations, the latter's proposal have remarkably remained the same and they do not take cognizance of the nature of the Applicants' industry as a fluctuating market industry that is seasonal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent, however, continue to issue invoices to the Applicants' members in total disregard of the ongoing negotiations and dispute referred to the Competent Authority on an acceptable tariff structure.
11. On 30<sup>th</sup> January, 2012 after protracted negotiations, the Applicants' chairman, Nairobi Region **Mr Patrick Muya** wrote to the 3<sup>rd</sup> Respondent referring their dispute for determination and vide their letter dated 14<sup>th</sup> February, 2012 the 3<sup>rd</sup> Respondent instructed the said Applicants' Chairman, Nairobi Region, **Mr Patrick Muya**, to address his letter to Competent Authority Chairman with copies to all the relevant bodies concerned. Pursuant thereto the Applicants' Chairman, Nairobi Region, **Mr Muya**, duly referred the dispute to the Competent Authority Chairman, **Dr. Ben Sihanya**, the 4<sup>th</sup> Respondent.
12. However, to date, the 4<sup>th</sup> Respondent is yet to convene a single meeting or put in place any mechanisms to resolve the dispute herein despite several reminders, phone calls and representations by the deponent and other Applicants' representatives yet the Applicants' members continue to suffer undue hardship and injustice at the hands of the Respondents.
13. The deponent was therefore of the view that unless checked or restrained by this Honourable Court, the actions of all the Respondents will greatly affect the growth of the hospitality industry in Kenya and most likely lead to huge job losses hence it is only fair and just that the sought prayers be given.

### **1<sup>st</sup> Respondent's Case**

14. On behalf of the Respondent, a replying affidavit was sworn by **June Kathoni Gachui**, the General Manager of the Kenya Association of Music Producers (KAP) the first Respondent herein.
15. According to the deponent, the 1<sup>st</sup> Respondent is a company Limited by guarantee and regulated under Section 46 of the **Copyright Act** Cap 130 of the Laws of Kenya; whose objectives are to collect and fairly distribute public performance royalties earned by the makers of sound recordings; to administer the broadcasting and public performance rights in sound recordings of its members and those of affiliated societies; and to grant licenses to all users for broadcasting or playing in public sound recordings on any electronic media device.
16. According to her, the duty of entering legal compliance and licensing of sound recordings communicated to the public is granted to collective Management Organizations such as the 1<sup>st</sup>

Respondent under Section 46 of the Act and that at no time whatsoever have the 1<sup>st</sup> Respondent or its employees instructed a private person or police to harass and or intimidate the applicants members and all inspectors have at all times complied with the provisions of Section 39, 40, 41 and 42 of the Act.

17. It was further deposed that the tariff structure used by the 1<sup>st</sup> Respondent whereby the license fee is determined by the square footage of the premises is among one of the international standards used by other collective management organizations worldwide and that the various categories of tariffs, background use and specially featured use of music, are based on the essentiality of the music to the business premises as well as the area of the premises within which music is communicated to the public hence the 1<sup>st</sup> and 2<sup>nd</sup> Respondent proposed a per square foot tariff to the applicant and a series of consultative meetings followed in which representatives of the applicant's members were able to contribute to the process and this ultimately resulted in the graduated tariff structure currently in use since 2011.
18. In her view, if the orders for prohibition are granted then the applicants members would arbitrarily infringe of the copyright and related rights in the sound recordings owned by the 1<sup>st</sup> Respondents rights holders and as a result deny them their economic rights. Further, an order of prohibition would effectively deny the 1<sup>st</sup> Respondents members their rights and fundamental freedoms under the constitution of Kenya and in particular Chapter 4 part 1 Article 37(1)(b) which guarantees each individual the freedom of artistic creativity and Chapter 1 part 4 Article 40(5) which guarantees that "the state shall support, promote and protect the intellectual property rights of the people of Kenya".
19. To her, the 1<sup>st</sup> Respondent has no objection to the issue of an order for mandamus issued to the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein for the Competent Authority to arbitrate on the issue of the 1<sup>st</sup> respondent's tariff structure under its mandate under section 48(2)(c) and (d) of the Act.

## 2<sup>nd</sup> Respondent's Case

20. The 2<sup>nd</sup> Respondent opposed the application by way of a replying affidavit sworn by **Angela Ndambuki**, its Chief Executive Officer on 20<sup>th</sup> January, 2014.
21. According to her, the proceedings herein are defective for the reasons that the ex-parte Applicant herein is an organization registered under the *Societies Act*, Cap 108, Laws of Kenya as a welfare organization and hence is not a juristic person capable of suing or being sued in its own name and therefore lacks the requisite *locus standi* to sustain the proceedings herein. Similarly, the leave to institute the present proceedings obtained by the *ex-parte* Applicant herein on 25<sup>th</sup> September 2013 is a nullity in law as it was obtained by an entity which lacked the *locus standi* to do so hence the proceedings herein are therefore incurably defective as they are premised on leave granted to an entity that was not endowed with the legal personality to institute the *ex-parte* proceedings in the first instance. It was deposed further that the *ex-parte* Applicant cannot purport to represent all pubs, entertainment joints and restaurant without demonstrating to this Honourable Court that it has *locus standi* to present the present proceedings on behalf of the said establishments.
22. In her view, prayer 1 of the Notice of Motion herein is incapable of being issued against PRISK for the reasons that PRISK is a private company limited by guarantee which is registered under the ***Companies Act*** and is authorized to collect royalties on behalf of performers which collection is not a public duty but a task of a private nature which is undertaken on behalf of individuals who have acquired private rights over their artistic works and it is trite law that orders of Judicial Review are issued against public bodies performing public functions and not private companies. In so far as the dispute herein is in the nature of a commercial dispute concerning tariff structures, these proceedings are inappropriate for a commercial dispute between two private entities.

23. Therefore in view of the foregoing, the deponent deposed that that PRISK is non-suited for this judicial review matter hence it ought to be struck out from these proceedings with costs.
24. It was further submitted that a background on the evolution and importance of Collective Management Organizations was necessary before going into the merits. In the deponent's view, copyright as a form of intellectual property, is the legal protection extended to the owner of the rights in an original work that he or she has created though there are other rights known as "related rights" or "neighbouring rights" which concern other categories of owners of rights, namely, performers, the producers of phonograms and broadcasting organizations. Copyright law however, protects the rights of the owners of copyrights and related rights (both categories hereinafter referred to as "the owners") and both economic rights and the moral rights accrue to the right owners. With respect to the economic rights, the right owner has a right to receive financial compensation for any use of his or her work. Therefore, in order for a person to utilize the intellectual property of a right owner, the person must obtain a licence from the right owner or a duly authorized representative who licenses persons and establishments which intend to utilize the right owner's intellectual property rights and in return the right owner earns royalties from such persons or establishment which utilize his/her works for economic gain.
25. To the deponent, the individual management of rights is virtually impossible with regard to certain types of use for practical reasons, such as 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 and conversely it is not practical for a user to seek specific permission from every right owner for the use of every copyrighted work. In view of the aforesaid difficulty, right owners have also suffered under the hand of unscrupulous business persons who use their intellectual property for economic gain while either underpaying the right owners or blatantly refusing to pay the right owners for use of their work.
26. It was deposed that the very impracticability of managing their rights individually, both for the rights owners and for the users, has created a need for collective management organizations, whose role is to bridge the gap between right owners and the right users which collective management is the exercise of copyright and related rights by organizations acting in the interest and on behalf of the owners of rights.
27. The deponent averred that there is now a well-established global network of collective management organizations, which are also members of their international umbrella bodies such as the *Societies' Council for the Collective Management of Performers' Rights (SCAPR)*, *International Confederation of Societies of Authors and Composers (CISAC)*, *the International Federation of Reprographic Reproduction Organisations (IFRRO)*, and at the European level, *the Association of European Performers Organizations (AEPO)* and to her, collective Management Organisations have therefore strengthened the bargaining power of right owners and streamlined collection of royalties on behalf of right owners thereby enabling right owners to make a living out of their work, which is their tool of trade.
28. The deponent's position was that section 46(2) of the Act allows right owners in similar classes to form Collective Management Organizations for purposes of collecting royalties on behalf of right owners who fall in the classes that they represent and currently, under the Act there are three (3) Collective Management Organisation within the music industry which are licensed annually by the Kenya Copyright Board under section 46 of the Act to represent different classes of rights such as the MCKS represents composers, authorities and Music publishers; the Kenya Association of Music Producers, the first Respondent herein, represents producers of sound recordings; and Performers Rights Society of Kenya, the 2<sup>nd</sup> Respondent herein, represents performers who include musicians and actors.
29. To her, the Performers Rights Society of Kenya (PRISK), the 2<sup>nd</sup> Respondent herein, is a Collective management Organization, licensed to collect license fees from users who broadcast

or communicate sound recordings and audio visual works to the public. Pursuant to the mandate granted to it in law by the said registration, PRISK collects license fees to enforce the rights of Performers' (musicians, singers, instrumentalists, actors) in any sound recording or audio visual works whenever such works are broadcast or communicated to the public. In carrying out its mandate and in enforcing the rights of performers arising from the use of sound recordings and audio visual works, PRISK, the 2<sup>nd</sup> Respondent herein, jointly with the Kenya Association of Music Producers ("KAMP"), the 1<sup>st</sup> Respondent herein, charges license fees and issues an annual Communication to the Public Licence to users of the said rights. The royalties collected by PRISK are distributed to right owners in accordance with PRISK's distribution Rules.

30. While admitting that PRISK is a licensed collecting society on behalf of performers, she deposed that the tariff structures imposed by PRISK in collaboration with KAMP are not arbitrary but have been obtained using equitable considerations and international best practises where proportionate tariffs are imposed on different users to ensure fairness; that there have been consultations between PRISK, KAMP and PERAK and therefore the Applicant is stopped from claiming that there have been no negotiations between the parties; that the licence fees charged by PRISK are paid annually and are not in any way exorbitant; that no material has been placed before this Honourable Court to prove that indeed that the tariffs imposed by PRISK and KAMP have rendered the business operations of the members of the Applicant 'unprofitable and unsustainable' due to the formula employed in the determination of the tariffs; that unprofitability or unsustainability of a business is not a matter of conjecture but is a factual matter to be proved by way of evidence.
31. It was further deposed that no provision of law prohibits the Kenya Copyright Board from licensing collective management organizations as alleged nor does any provision of law devolve the functions of the Kenya Copyright Board to the county governments; that the ex-parte Applicant has not cited the provision of law which it believes entitles the county governments to licence collective management organizations or to collect royalties on behalf of performers or at all; that no evidence has been brought before this Honourable Court that the Kiambu County Government is now undertaking the functions of the Kenya Copyright Board or the functions of PRISK and KAMP; that this ground is therefore premised on a gross misconstruction of the law on the part of the ex-parte Applicant.
32. To the deponent, PRISK is a law abiding entity and has never employed the unscrupulous tactics and the said allegation are offensive to PRISK; no evidence has been brought to prove to this Honourable Court of the alleged 'confiscation of business equipment' or 'arbitrary arrests' or 'destruction of property' or any conduct inconsistent with lawful enforcement of rights of performers in copyright by PRISK and hence the Court ought to find that the said allegations are unfounded; the allegation that PRISK has employed 'goons' to harass members of the applicant, without any evidence to support such an allegation, is scandalous and the same should be struck out; that Sections 38 to 42 of the Act, 2001 allow inspection of business premises to confirm compliance with the law and inspection officers may be assisted by police officers in enforcement of copyright under the Act; that section 38(2) of the Act specifically allows enforcement action against persons who are found to infringe the copyrighted works of rights owners hence the action taken under the said provisions cannot be characterized as illegal.
33. The deponent, further deposed that the tariffs imposed by PRISK and KAMP apply across the board for all establishments; that no evidence has been tendered before this Honourable Court to prove that there has been discrimination in the imposition of tariffs by PRISK and KAMP and on the contrary, there was a public notice issued by both PRISK and KAMP to all users of sound recordings and audio visual works and not selected users as alleged; that further no evidence has been brought before this Honourable Court to prove the alleged harassment of only a few establishment deemed as popular in the eyes of the public and a mere production of selected receipts issued to some establishments is not proof of discrimination; that the tariff structure

imposed by PRISK and KAMP is equitable and no evidence has been brought before this Honourable court to prove that the tariff structure employed by PRISK and KAMP is unconscionable or that PRISK and KAMP are jointly attempting to defraud the members of ex-parte Applicant. The said allegations are therefore scandalous and should be struck out; that no material has been brought before this Honourable court to show that most of the space in pubs and restaurants is ether for parking vehicles, children play grounds and for aeration purposes as alleged; that PRISK specifically ensures that the areas specified in the tariffs are areas where the sound recording or audio visual works are rendered audible within an establishment. In some instances here the specific dimensions of the area where the work is rendered audible cannot be properly determined, PRISK's officers physically measure the area to ensure fairness; that no member of the ex-parte Applicant has brought any financial statements or disclosed its earnings vis-à-vis the said tariffs in order to prove the alleged disproportion of the tariff structure.

34. It was contended that the allegations that if all gazetted pubs, entrainment establishments and restaurants paid equal tariffs the license fees charged by PRISK and KAMP would go down is inaccurate. If a flat rate was used, it would entail smaller establishments being forced higher tariffs while larger establishments would pay lower tariffs; that the application herein does not represent all the members of the ex-parte applicant but is in fact intended to further the cause of the perceived 'famous and well to do pubs, entertainments joints and restaurants' which would rather pay lower tariffs and is therefore an abuse of court process; that further license fees paid by members of the ex-parte Applicant to the government, such a Hotel Licence fees, are also charged on a graduated scale based on factors such as the size of the establishment and the members of the ex-parte Applicant have not challenged those structures or argued for a flat rate when obtaining licences from the government.
35. It was averred that this Honourable Court is not the appropriate forum to determine how tariff structures should be determined and that the existence of negotiations between the parties does not in any way bar PRISK and KAMP from collecting royalties on behalf of their members during the intervening period. To her, PRISK has not in any way refused to participate in any legally established dispute resolution forum and if called upon to participate in any such forum, it shall do so. To the deponent, it is erroneous and misleading to this Honourable Court for the applicant to state that its members continue to suffer undue hardship at the hands of the Respondents as claimed yet no material has been brought before this Court to prove the same. On the other hand however, the members of the ex-parte Applicant continue to benefit from utilization of the works of performers.
36. Contrary to the allegations made in the verifying affidavit, this Honourable Court in its Order of 23<sup>rd</sup> September 2013 did not issue any orders barring PRISK or KAMP from collecting licensing fees from the ex-parte Applicant's members. There is therefore nothing precluding PRISK from undertaking its mandate of issuing licenses and collecting licence fees on behalf of performers and that surcharged invoices bearing the said 24 hours payment notice are issued to establishments which have absconded payment of the licence fee despite previous notices. To her, it is important for this Honourable Court to note that surcharged invoices are served as a third notice on establishments that have failed to honour at least two previous notices and as such the issuance of the 24 hour notice cannot be deemed unreasonable. The allegations made in Paragraph 2 of the said Affidavit that failure to pay licensing fees leads to vandalism of an establishment was denied as the Petitioner had not presented any material in support of the said allegation and the same was merely intended to be alarmist and to mislead this Honourable Court. To her, the Alcoholics Drinks Licence is an annual licence and therefore the licence exhibited simply proves that the said 'Frankies Lounge' was licensed to sell alcohol in 2013 but does not prove that the establishment started its operations in 2013 as alleged. Further, the ex parte Applicant is misleading this Honourable Court by claiming that the surcharge appearing on the attached notice is for the year 2012 the invoice clearly indicates that the surcharge is for the

year 2013 and that no material has been presented concerning the said 'Mang Restaurant' and therefore the allegations therein are unsubstantiated.

37. It was contended that the above averments confirm the need for collective management organization as it illustrates the difficulties and opposition encountered by rights owners in obtaining payment for their works and if the orders of prohibition sought by the ex-parte Applicant are issued PRISK will be hard pressed to pay royalties to performers in Kenya yet the performers' intellectual property will have been utilized by the members of the ex-parte Applicant for commercial gain and that this Honourable Court it will be perpetrating an illegality as it will enable members of the ex parte Applicant not to pay royalties to performers and will effectively defeat the legislative intent of Sections 30A and 46 of the Act.
38. In her view, the ex-parte Applicant has failed to discharge its legal burden to provide data and/or statistical material to this Honourable court in support of its contentions and therefore it is not entitled to the orders sought hence the Court ought to find that the Application herein lacks merit and dismiss the same with costs.

### **3<sup>rd</sup> Respondent's Case**

39. On behalf of the 3<sup>rd</sup> Respondent, a replying affidavit was sworn by **Edward Sigei**, its Chief Legal Counsel on 8<sup>th</sup> January, 2014. According to the deponent, the Kenya Copyright Board, hereinafter referred to as the Board, was established for the better administration of all matters of copyright and related rights in Kenya as set out in the Act. It was averred that one of the functions of the Board is to license and supervise the activities of collective management societies as provided for in the Act and in exercising this function, the Board licensed three collective management societies namely the Kenya Association of Music Producers, the Performers Rights Society of Kenya and the Music Copyright Society to collect and distribute public performance royalties on behalf of three classes identified in the music sector. The deponent stated that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are therefore properly licensed by the board to collect and distribute royalties on behalf of their members. In the deponent's view, intellectual property rights under which copyright falls within, is a function of the national government and is not one of the devolved functions under the Constitution and though the Act provides for the establishment of a Competent Authority the same is yet to be operationalized owing to budgetary and administrative challenges and hence the same is not functional presently. It was averred that the initial members of the competent authority were appointed in the year 2009 but one of them subsequently resigned. Following the resignation of that member, the authority was later reconstituted and its members were appointed in the year 2012 but due to the fact that the authority is yet to be operationalized, the members have never met formally to perform their functions as provided for under the Act. To the deponent, presently, the Board has no statutory power to set royalty tariffs and to direct, control or manage the Competent Authority and hence issuance of an order of mandamus against the Board will be futile.

### **Submissions In Support of The Ex Parte Applicant's Application**

40. On behalf of the applicant, it was submitted while reiterating the contents of the verifying affidavit that from a reading of section 48 of the Act, the applicant has established that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have declined to perform a public duty for which they are legally obligated to do and have defied service of the process herein and refused to respond to the application.
41. Since the Respondent has admitted the existence of a dispute as to the tariff structure adopted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and has supported the issuance of the order of mandamus, no prejudice will be suffered if the order of prohibition is similarly issued as this will not infringe on the economic rights of the members of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It was submitted that the

rights of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' members must be balanced with the applicant's rights.

### **1<sup>st</sup> Respondent's Submissions**

42. On behalf of the 1<sup>st</sup> Respondent it was submitted while reiterating the contents of the replying affidavit that the application is an attempt to deny the 1<sup>st</sup> Respondent's members their economic rights.
43. The 1<sup>st</sup> Respondent being a company limited by guarantee and regulated under section 46 of the Act and the orders sought would arbitrarily infringe the copyright and related rights in the sound recordings owned by the 1<sup>st</sup> Respondent's rights holders and deny them their fundamental rights. It was however submitted that the 1<sup>st</sup> Respondent has no objection to the issuance of the order of mandamus sought herein.

### **The 2<sup>nd</sup> Respondent's Submissions**

44. On behalf of the 2<sup>nd</sup> Respondent, it was submitted while reiterating the contents of the replying affidavit that the applicant not being a juristic person cannot institute these proceedings and **Apex Finance International Limited & Another vs. Kenya Anticorruption Commission [2012] eKLR** and **Simu Vendors Association vs. The Town Clerk, City Council & Another [2005] eKLR** were cited in support of this submission.
45. It was further submitted based on **St Patrick Hill School Limited vs. Permanent Secretary Ministry of Foreign Affairs [2008] eKLR**, that judicial review, being a public law remedy can only be invoked if the 2<sup>nd</sup> Respondent was performing a public duty and does not apply if the source of power is contractual. In this case it was submitted that the 2<sup>nd</sup> Respondent is not a public body performing a public duty but a private company limited by guarantee registered under the Companies Act. Based on **Cellulant Kenya Ltd vs. Music Copyright Society of Kenya Ltd HCCC No. 154 of 2009** and **Trustees of Kenya Budget Hotel Association & Another vs. Music Copyright Society of Kenya Ltd [2010] eKLR**, it was submitted that pursuant to the mandate granted in law, the 2<sup>nd</sup> Respondent collects licence fees to enforce the rights of performers in any sound recording or audio visual works whenever such works are communicated to the public while the applicant is under a duty to pay royalty to copyright owners through their legal representative hence the charges are neither arbitrary nor discriminatory.
46. It was further submitted that the allegations made by the applicant are not supported by any evidence.

### **The 3<sup>rd</sup> Respondent's Submissions**

47. On behalf of the 3<sup>rd</sup> Respondent, it was submitted that the applicant has not annexed any evidence to demonstrate the alleged discrimination by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as those of harassment and destruction of property.
48. It was therefore submitted that based on **Republic vs. Judicial Service Commission Ex Parte Pareno [2004] KLR 2203** and **Chief Constable of North Wales Police vs. Evans [1982] WLR 1155** that the application does not meet the threshold for grant of judicial orders since the application seeks to challenge the merits of a decision and not the decision making process and ought not to be entertained.
49. It was further submitted that since the Competent Authority is yet to be operationalised owing to budgetary and administrative challenges, and yet to start functioning, the issuance of an order of mandamus against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents would just be an academic exercise. On the authority of **Republic vs. Minister of Agriculture and 2 Others ex parte Equatorial Nuts Processors Limited and 3 Others [2013] eKLR** it was submitted that the court would not issue

orders in vain.

### **Determinations**

50. The first issue for determination in this application is the competency of the application. It was contended that ex-parte Applicant herein is an organization registered under the *Societies Act*, Cap 108, Laws of Kenya as a welfare organization and hence is not a juristic person capable of suing or being sued in its own name and therefore lacks the requisite *locus standi* to sustain the proceedings herein. Consequently, it was contended that the leave that was granted herein was granted to the wrong “person”. That brings into question the issue of who is competent to apply for judicial review remedies. The jurisdiction of the High Court to grant judicial review remedies is underpinned by Article 165(6) and (7) of the Constitution which provides as follows:

***(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration.***

51. Article 47(1) and (2) of the Constitution, on the other hand provides that:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

52. Article 260, however defines a person as including ***“a company, association or other body of persons whether incorporated or unincorporated.”***

53. Long before the promulgation of the current Constitution, it was held on 11<sup>th</sup> March, 1970, in *Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board* **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

**“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word**

“individual”. “Individual” seems to be any legal person who is not the general public.”

54. The issue of standing was recently dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others.....Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.....The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.....Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest.....In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the

clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

55. The applicant herein describes itself as welfare society registered under section 10 of the **Societies Act** Cap 108 Laws of Kenya with membership throughout the Republic of Kenya. In my view, under the aforesaid provisions of the Constitution, the applicant has locus to institute these judicial review proceedings if as it is claimed, the Respondents’ actions or inactions have adversely affected them or are likely to adversely affect them.

56. The next issue for determination is whether judicial review remedies can issue against the 1<sup>st</sup> Respondent. The first Respondent, Kenya Association of Music Producers is described as a Collective Organisation by the applicant. However, the Respondents contend that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are private companies limited by guarantee. This contention does not seem to have been seriously contested. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others** (supra), the Court expressed itself as follows:

“The other reason why the claim must fail is that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5<sup>th</sup> and 6<sup>th</sup> respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient, beneficial, or effectual.”

57. It therefore follows that judicial review orders cannot be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the manner in which they are sought in the present application. Accordingly, prayer 1 of the instant application fails.

58. Apart from that, the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive

remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

60. In ground 2 in the statement of facts, it is stated that “the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have arbitrarily imposed their own tariff structure without the participation of the entire membership of the Applicant.” Yet in this application the applicant is seeking in prayer 1 an order prohibiting the said Respondents from arbitrarily imposing and collecting the said tariffs. The said decision having been imposed, an order of prohibition cannot stand without seeking to have the said decision quashed.

61. With respect to the second payer for mandamus, section 48 of the Act provides as follows:

**48. (1) There shall be a competent authority appointed by the Minister for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.**

**(2) Subject to subsection (3), in any case where it appears to the competent authority that -**

**(a) the Board is unreasonably refusing to grant a certificate of registration in respect of a collecting society; or**

**(b) the board is imposing unreasonable terms or conditions on the granting of such a certificate; or**

**(c) a collecting society is unreasonably refusing to grant a licence in respect of a copyright work; or**

**(d) a collecting society is imposing unreasonable terms or conditions on the granting of such a licence;**

**(e) the competent authority may direct that as respects the doing of any act relating to work with which the collecting society is concerned or with respect to the granting of a certificate to operate as a collecting society, a licence or a certificate shall be deemed to have been granted by the collecting society or the Board at the time the act is done or the application is made, provided the appropriate fees are paid or tendered before the expiration of such period or periods as the competent authority may determine.**

**(3) Where a dispute has been referred to the competent authority under this section, the competent authority shall, in accordance with such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives, both orally and in writing.**

**“collecting society” means an organization 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 copyright works or performer’s rights; and**

**“competent authority” means an authority of not less than three and not more than five persons, one of whom shall be a person qualified as an advocate of the High Court of Kenya of not less than seven years’ standing or a person who holds or has held judicial office in Kenya who shall be the chairman, appointed by the Minister for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.**

**(5) No person shall be appointed under this section, nor shall any person so appointed act as a member competent authority, if he, his partner, his employer, ly body (whether statutory or not) of which he is a member has a pecuniary interest in any matter which requires to be determined by the authority.**

2. From the foregoing, it is clear that once a dispute is referred to the Competent Authority, the Authority is obliged to give both parties an opportunity to present their respective cases. In **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

**“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment.”**

60. The only reason advanced by the 3<sup>rd</sup> Respondent why the 4<sup>th</sup> Respondent cannot fulfil its said statutory duty is that the Competent Authority is yet to be operationalized owing to budgetary and

administrative challenges and hence the same is not functional. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 21(1) of the Constitution on the other hand provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. It is therefore upon the State to facilitate the 4<sup>th</sup> Respondent so that the 4<sup>th</sup> Respondent can undertake its statutory duties. To fail to do so amounts to abdication of the Constitutional duties imposed upon the State and in applying a provision of the Bill of Rights this Court is enjoined by Article 20(3)(b) of the Constitution to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

61. Adopting the said approach, this Court is not satisfied that the reason advanced by the 3<sup>rd</sup> Respondent warrants the state being absolved from the performance of its statutory duties taking into account the fact that the 4<sup>th</sup> Respondent is already in the office.
62. In the premises, I find merit in prayer 2 of the Notice of Motion dated 8<sup>th</sup> October, 2013 and grant an order of mandamus compelling and directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to hear and determine the dispute between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in relation to the high license fees charged and /or tariffs charged/levied using a wrong tariff structure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
63. As the prayer was not opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and as prayer 1 of the motion has been disallowed, there will be no order as to costs.

**Dated at Nairobi this day 28<sup>th</sup> day of March 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Musundi for the applicant***

***Ms Kegeni for Mr Okulo for the 1<sup>st</sup> Respondent***

***Miss Maina for Miss Ndegwa for the 2<sup>nd</sup> Respondent***



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