



**REPUBLIC OF KENYA**

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

**Coram: D. K. Kemei J**

**PETITION NO. E4 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 29, 36, 40, 47 OF  
THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS IN  
THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF INFRINGEMENT OF SECTION 46 OF THE COPYRIGHT  
BETWEEN**

**FRANCIS NZIOKI KAVUU .....PETITIONER**

**AND**

**KENYA COPYRIGHT BOARD .....1<sup>ST</sup> RESPONDENT**

**ROLANDS LLP .....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF ICT,  
INNOVATION AND YOUTH AND YOUTH AFFAIRS .....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT**

**KENYA MUSIC COPYRIGHT SOCIETY OF KENYA .....1<sup>ST</sup> INTERESTED PARTY**

**PERFORMERS RIGHTS SOCIETY OF KENYA .....2<sup>ND</sup> INTERESTED PARTY**

**KENYA ASSOCIATION OF MUSIC PRODUCERS .....3<sup>RD</sup> INTERESTED PARTY**

## JUDGEMENT

1. The Petitioner herein has described himself as a Kenyan citizen and resident of Machakos County and is a member of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. He further pleaded that his sound recording rights are administered by a licence issued by the interested party and that the said interested parties are private companies limited by Guarantee whose mandate is to administer copyright works and to collect and distribute royalties. He further pleaded that the 3<sup>rd</sup> interested party is a collective management organization that had been licenced to collect royalties in 2017 and 2018.
2. The Petitioner went ahead to describe the Respondents *inter alia*: that the 1<sup>st</sup> Respondent is a statutory body established under the provisions of the Copyright Act and responsible for regulating, collective management societies (CMOS); The 2<sup>nd</sup> Respondent is a limited liability partnership established under the provisions of the Partnership Act; the 3<sup>rd</sup> Respondent is the Cabinet Secretary responsible for matters of copyright protection and under whom the 1<sup>st</sup> Respondent operates; the 4<sup>th</sup> Respondent is the legal adviser to the government and represents it in legal proceedings.
3. The Petitioner pleaded that he has brought the petition on his own behalf, on behalf of members constituting the interested parties

and proceeded to claim that the petition is grounded under the provisions of the Constitution of Kenya 2010 namely Articles 2(1), 3(1) 10, 19, 20, 21, 22, 23, 25, 27, 36, 40, (5), 47, 165(3), 258 and 259.

4. The Petitioner filed an affidavit in support of the petition sworn on 28/09/2020 where he presented his gravamen *inter alia*: that he is aware that the 1<sup>st</sup> Respondent in 2020 appointed the 2<sup>nd</sup> Respondent to conduct a forensic audit on the nature and extent of fraudulent malpractices that might have occurred” for the period 2017 to 31<sup>st</sup> December, 2019 over the interested parties which are collective management organizations under the provisions of the copyright Act; that being a member of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, he was unaware like other members and were not involved or notified of the audit by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; that in 2017 the 1<sup>st</sup> interested party was not operating as a licensed CMO; that no members of the interested parties petitioned the 1<sup>st</sup> – 3<sup>rd</sup> Respondents to activate section 46(e) of the copyright Act; that the copyright Act was amended in 2019 to which the 1<sup>st</sup> – 3<sup>rd</sup> Respondents acted retrospectively which actions are ultra vires; that the 2<sup>nd</sup> Respondent vide a press conference purported to adopt the draft audit report as a final report and threatened to implement it by restructuring the interested party, reviewing the memorandum and articles of association of interested parties notwithstanding their private nature, overhauling of management of interested parties bodies and submitting the audit report of law enforcement agencies for

*prosecution of interested parties officials; that the acts and omissions of the Respondents are unlawful and violate his rights, those of other members and interested parties; that the proposed actions and measures have far reaching implications unless the said report is suspended as there is likely to be prejudice; that restructuring the organizations and sending others on leave/stepping aside will result into crippling of the activities of the CMOs and may precipitate their closure.*

5. The Petitioner pleaded that he is aggrieved by the initiatives of the Respondents which are unlawful and violates his fundamental rights and freedoms. He proceeded to plead the violations complained of as follows:-

- (i) *By initiating an audit of the interested parties without the involvement of members of the interested parties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the principle of the rule of law as well as section 46 of the copyright Act.***
- (ii) *By initiating an audit of the interested parties which are private member bodies without the knowledge or involvement of the members themselves, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated Article 47 of the constitution.***
- (iii) *By failing to take into account the response of the interested parties in the audit report, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the rules of natural justice and the provisions of Article 47 of the Constitution.***

- (iv) By bypassing members, the laid out internal rules of the interested parties, the Respondents acted in violation of article 47 of the constitution.**
- (v) Through restructuring of a private body's memorandum of association, the 1<sup>st</sup> respondent violated the principle of legality and rule of law set out in article 47 of the constitution and contemplated by article 2 and with article 10 of the constitution.**
- (vi) The act of relying on a report without taking into consideration the responses of the interested parties countermands the provisions of article 47 of the constitution.**
- (vii) In effect the freedom of association set out under article 36 of the constitution has been encroached upon by the 1<sup>st</sup> Respondent which proposes to restructure the organization of the interested party contrary to the organization's memorandum and articles of association as well as the will of its members expressed through periodic elections.**
- (viii) The actions of the 2<sup>nd</sup> respondent fell outside its scope and thus ultra vires.**

6. The Petitioner therefore sought for the following reliefs:-

- (a) A declaration that the Respondents have violated articles 10, 36 and 47 of the constitution read with section 46 of the copyright Act.**
- (b) A judicial review order quashing the (draft) forensic report dated 4/09/2020 and subsequently adopted on 21/09/2020**

***as the final report and all the consequential decisions of the 1<sup>st</sup> Respondent made on reliant on the said forensic audit report based on the press release issued on 22/09/2020 by the 1<sup>st</sup> Respondent.***

***(c) Costs of this petition.***

7. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties entered appearance but filed no responses to the petition. However, it was indicated by learned counsel for the 1<sup>st</sup> interested party that it supports the petitioner's petition.
8. It is only the 1<sup>st</sup> Respondent who filed a response to the petition vide a replying affidavit of George Nyakweba the Deputy Executive officer of the 1<sup>st</sup> Respondent sworn on 22/10/2020 where he averred inter alia: that pursuant to a court order vide **Kakamega High Court Petition No. 3B of 2017 Laban Toto Juma –vs- Kenya Copyright Board & Others** the 1<sup>st</sup> Respondent appointed the 2<sup>nd</sup> Respondent to conduct a forensic audit for the period between January, 2017 to 31<sup>st</sup> December, 2019 on 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties after the 1<sup>st</sup> interested party declined to obey the court order; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were duly notified by the 1<sup>st</sup> Respondent of the forensic audit exercise conducted by the 2<sup>nd</sup> Respondent and that they were invited to respond or raise any objections raised in the audit report which were duly considered but found to be unsatisfactory, that the 1<sup>st</sup> respondent pursuant to the forensic audit made suggestions on possible

solutions and reforms to straighten the copyright sector; that the audit conducted was lawfully and professionally carried out and did not violate the constitution or any other legislation; that the exercise was conducted in good faith and in the public interest and those of the petitioner and other rights holders; that the audit was necessary so as to enable the 1<sup>st</sup> Respondent regulate the issue of licensing; that the audit is necessary in ensuring the interested parties have proper structures and processes and thereby promote good governance, transparency and accountability.

9. The parties agreed to canvass the petition by way of written submissions. Upon perusal of the file it is noted that it is only the 1<sup>st</sup> Respondent who has filed submissions dated 8/01/2021. The submissions filed by the petitioner dated 17/11/2020 relates to the interlocutory application dated 28/09/2020 that has already been determined.
10. Mr. Wycliffe Jaketch, learned counsel for the 1<sup>st</sup> respondent raised two issues for determination namely: firstly, whether the impugned Forensic Audit amounts to retrospective application of the copyright Act 2001 (as amended in 2019) and secondly, whether the 1<sup>st</sup> Respondent has violated Articles 10, 36 and 47 of the constitution of Kenya, 2010 or any other law. On the first issue, it was submitted that the audit conducted on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties did not amount to retrospective application of the copyright Act 2001 (as amended in 2019) since the 1<sup>st</sup>

Respondent is mandated under section 5(b) of the said Act to supervise and licence the activities of the collective management organizations which comprise the interested parties herein. Counsel added that an audit is mandated under section 46(4) and 46(9) of the Act so as to inform the 1<sup>st</sup> Respondent as to whether or not to licence or revoke such licence of a Collective Management Organization based on the information revealed in such an audit. It was submitted that inspection and control of collective management organizations is provided for under section 46(E) of the copyright (Amendment) Act 2019 and that the period between which inspection of books, accounts and records can be done is not restricted and is thus necessary for any meaningful audit to be conducted and therefore it does not amount to retrospective application of the law. Reliance was placed in the case of **Municipality of Mombasa Vs Nyali limited (1963) EA 371**. It was the view of counsel that the intention of introducing section 46E was to improve the collective management of copyright works by enhancing the procedure through which the 1<sup>st</sup> Respondent can play a more proactive oversight role on CMOs so as to ensure that the best interest of its members is achieved. It was further submitted that parliament enacted section 46 E in order to enable the 1<sup>st</sup> Respondent sort out decisively the endemic problems bedeviling the CMOs. Still on the issue of retrospective legislation, reliance was placed in the case of **Samuel Kamau Macharia &**



**another -vs- Kenya Commercial Bank Limited & Another [2012] eKLR** and learned counsel submitted that section 46 E is not a criminal provision and hence can be applied retrospectively in the present circumstances which is not unconstitutional as the provision is not in the nature of the bill of retainer. Further reliance was placed in the case of **Yew Bon Tew -vs- Kenderaan Bas Mara [1982] ALL ER 833** and it was submitted that reliance on section 46 E to carry out a forensic audit on the interested parties does not take away a vested right acquired under the previously existing copyright Act nor does it create new obligations and duties within the management of the CMOs since the vested right of the Petitioner therein is how his copyright works are managed and royalties due from them and which is to be realized from the forensic audit that has revealed that the interested parties are mismanaged, plundered and captured by individuals whose interest are not for members including the petitioner. It was submitted that though the CMOs are expected to self-regulate under section 47 of the Copyright Act there has been no such thing thus warranting parliament to enact section 46 E to cure the problems and that the 1<sup>st</sup> Respondent who has already conducted an audit should be allowed to put in remedial measures so as to save the copyright sector and creativity industry in the country.

11. On the second issue, counsel submitted that the 1<sup>st</sup> Respondent has not violated articles 10, 36 and 47 of the constitution of Kenya 2010

or any other law since the forensic audit was supported by provisions of the law which meet the threshold of constitutionality. It was submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were duly informed and were aware of the forensic audit as confirmed by the correspondences marked as **GN3"**, **GN4"** **GN6"**, **GN7"**, **GN8a"** and **GN8b"** and were duly given fair opportunity to participate and contribute their views in the audit process in compliance with principles of natural justice. Counsel posited that the petitioner or interested parties did not controvert the evidence by filing a further affidavit. It was therefore the contention of counsel that the 1<sup>st</sup> Respondent complied with Article 47 of the constitution and it has gone ahead to make recommendations for the betterment of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> interested parties and its members.

It was submitted that the Petitioner's claim that the 1<sup>st</sup> Respondent has changed the memorandum and articles of association of the CMOs is false since the Petitioner's freedom of association has not been interfered with in any way by the audit as the audit does not challenge his membership in the CMO but to the contrary it makes his freedom of Association meaningful in the CMO. It was further submitted that the audit process does not restructure any legal document of a CMO and in any case section 46 and 46E of the Copyright Act 2001 (as amended in 2019) does not provide for instances where members of CMO should be engaged directly and individually by the 1<sup>st</sup> Respondent and in any case the Board of

Directors and management of the CMOs were responsible to communicate to its stakeholders and members about the forensic audit called by the 1<sup>st</sup> Respondent.

It was also submitted that the 1<sup>st</sup> Respondent is mandated by Article 11(2) and 40(5) of the constitution to promote the intellectual property rights of the people of Kenya one of whom is the petitioner from some unscrupulous entities by regulating and supervising them as the CMOs are the ones who have violated articles 10, 11 and 40 (5) of the constitution in that there is rampant bad governance, lack of integrity, transparency and accountability. It is on this basis that the interested parties should be managed by enabling the 1<sup>st</sup> Respondent discharge its supervisory duties one of which is the forensic audit. Finally, learned counsel urged the court to dismiss the petition with costs.

12. I have considered the petition and the rival affidavits as well as the submissions presented by counsel for the 1<sup>st</sup> Respondent. The genesis of this petition seems to stem from the judgement in **Kakamega Constitutional Petition no. 3B of 2017 Laban Toto Juma & 4 others -vs- Kenya Copyright Board & 2 others as well as 7 interested parties** wherein the Music Copyright Society of Kenya was directed to account for all the licence fees and royalties collected from 1<sup>st</sup> January, 2017 to date within thirty (30) days from the date of delivery of the Judgement (13/07/2018) and that the accounts were to be delivered to the Kenya Copyright Board which

was to be at liberty to issue any further orders and directions. It was on the above basis that the 1<sup>st</sup> Respondent herein in compliance with the said court order that it appointed the 2<sup>nd</sup> respondent herein to conduct the forensic audit now complained of. It is not in dispute that the said audit was conducted on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties which are Collective Management Societies (CMO). It is not in dispute that the 1<sup>st</sup> Respondent is established under section 3 of the Copyright Act No. 12 2001 (as amended in 2019) and that one of its functions is to license and supervise the activities of collective management societies as provided for under the Act. It is also not in dispute that pursuant to the amendment of the Act in 2019, section 46E was enacted by parliament and which gave the 1<sup>st</sup> Respondent powers to inspect and control collective management organizations and as a result the forensic audit now complained of came about. It is the contention of the petitioner that the said audit amounts to retrospective application of the copyright Act 2001 (as amended in 2019) as it called for audit from 1<sup>st</sup> January, 2017 to 31<sup>st</sup> December, 2018 and is thus unconstitutional since it has infringed upon his rights. Having made the following deductions, I find the following issues necessary for determination namely: -

- (i) ***Whether the Forensic Audit called for by the 1<sup>st</sup> Respondent amounts to retrospective application of the copyright Act 2001 (as amended in 2019).***

**(ii) Whether the 1<sup>st</sup> Respondent has violated articles 10, 36 and 47 of the constitution of Kenya, 2010 or any other law.**

**(i) Whether the Forensic audit conducted by the 2<sup>nd</sup> Respondent upon instructions of the 1<sup>st</sup> Respondent amounts to retrospective application of the Copyright Act 2001 (as amended in 2019):**

13. It is noted that the 1<sup>st</sup> Respondent instructed the 2<sup>nd</sup> respondent to conduct a forensic audit on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties for the period 2017 – 2019 pursuant to the Copyright Act 2001 (as amended by Act No. 20 of 2019). It is the contention of the petitioner that the application of the said Act to cover a previous period amounts to retrospective application of the law which is unconstitutional. I must begin by pointing out that section 5(b) of the Copyright Act 2001 provides for the licensing and supervision of the activities of collective management societies as provided for under the Act as one of the functions of the 1<sup>st</sup> Respondent. Hence, even without the amendment No. 20 of 2019 the 1<sup>st</sup> respondent still plays a supervisory role on the collective management organizations which comprise of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Interested parties herein. The relevant sections of the Act are section 46(4), (9) and the new amendment brought about in section 46E. It is proper to reproduce the same herein in order to understand the role played

by the 1<sup>st</sup> Respondent in relation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties:-

**S.46 (4)** – The board may approve a collective management organization if it is satisfied that:-

- (a) *the body is a company limited by guarantee and incorporated under the companies Act, 2015;***
- (b) *it is a non-profit making entity;***
- (c) *its rules and regulations contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of members of the collective management organization are adequately protected;***
- (d) *its principle objectives are the collection and distribution of royalties and;***
- (e) *its accounts are regularly audited by independent external auditors elected by the society.***

**S. 46(9)** of the Act provides as follows:-

(9) The Board may, by notice in the gazette and two daily newspapers of national circulation de-register a Collective Management Organization if it is satisfied that the collective management organization –

- (a) *is not functioning adequately as a Collective Management Organization;***

- (b) is not acting in accordance with its memorandum and Articles of Association or in the best interest of its members,**
- (c) has altered its roles so that it no longer complies with section 4 of this section; and**
- (d) it has refused or failed to comply with any provisions of this Act.**

**S.46 E inspection and control of Collective Management**

**Organization:**

- (1) The executive director may authorize a person, in writing to inspect the books of accounts and records of a Collective Management Organization.**
- (2) When an inspection is made under subsection (1), the collective management organization concerned and every officer and employee thereof shall produce and make available to the person making the inspection all the books, accounts records and other documents of the organization as the person making the inspection may require and within seven days or such longer times as he may direct in writing.**
- (3) A person who willfully fails to produce any books, accounts, records, documents, correspondences, statements, returns or other information within the period specified under sub- section (2) commits an offence under the provision of this Act and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three (3) months or to both such fine and imprisonment.**

- (4) The person authorized to inspect a collective management organization shall report to the Board on:-**
- (a) Any breach or non-observance of the requirements of this Act;**
  - (b) Any irregularity in the manner of conduct of the business of the organization;**
  - (c) Any apparent mismanagement or lack of management skills in the organizations; or**
  - (d) Any other matter warranting remedial action or a forensic audit.**
- (5) The Executive director of the Kenya Copyright Board shall by notice in writing, and after giving the collective management organization reasonable opportunity of being heard, require the inspected organization to comply by such date or within such period as may be specified therein, with such directions as he considers necessary in connection with any matter arising out of a report made under this section.**
- (6) The powers conferred by subsection (1) may be exercised the following circumstances:-**
- (a) Where a petition for inspection has been made by not less than forty five percent of the membership specifying breach of instruments establishing the entity, the regulations or the Act;**
  - (b) Failure by a collective management organization to account for monies to at least twenty percent of its members;**



- (c) Failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it;**
- (d) Where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed;**
- (e) Where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business;**
- (f) Where a Collective Management Organization has persistently failed to adhere to its set administrative budget without a reasonable cause; or**
- (g) Where a collective management organization has failed to comply with a request for information or records from its members or the Board.**

From the above provisions it is clear that the 1<sup>st</sup> Respondent vide its supervisory role is entitled to call for audits of the collective management bodies so as to satisfy itself that they are acting within the law and in the best interest of its members. It is instructive to note that during the forensic audit now complained of, the collective management organizations comprising of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties herein were duly notified and that they gave their representations and hence they were not condemned unheard as alleged by the petitioner. The new amendment (section 46E) does not restrict the period within which the audit is

to be conducted. I agree with the submissions by learned counsel for the 1<sup>st</sup> Respondent that records, books of account in their very nature contain history of transactions requiring the audit to extend to a previous period. Indeed, for a forensic audit to have any meaningful purpose the same must look into the past history of the documents in question. The forensic audit in question was meant to streamline the Collective Management Organizations so as to inform the 1<sup>st</sup> Respondent to consider the issues of licences and further a proper functioning collective management organization is beneficial to its members such as the petitioner herein as their interests will be taken care of.

14. As the petitioner has claimed that the impugned forensic audit amounts to retrospective operation of the law and is thus unconstitutional, there is need to have a look at some case law regarding the issue. In Halsbury's Laws of England 4<sup>th</sup> Edition volume 44 paragraph 1433 the authors thereof expressed themselves regarding the issue of retrospective application of laws as follows:-

***“It is a principle of legal policy that an amending enactment should be generally presumed to change the relevant law only from the time of the enactments commencement.”***

It is noted that the Copyright Amendment Act No.20 of 2019 indicates the Date of Assent as 18<sup>th</sup> September, 2019 and the date

of commencement as 2<sup>nd</sup> October 2019. The said amendment Act introduced the amendment (Section 6E) through which the actions were said to be justified. In the case of **Yew Bon Tew -vs- Kenderaan Bas Mara [1982] 3 ALL ER 833** the Privy Council held as follows:-

***“Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”***

Looking at the above authority in juxtaposition with the previous provisions of the Copyright Act 2001, I find that none of the petitioner's existing rights or obligations have been impaired in any way since the collective management organizations (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties) wherein the Petitioner is a member have an obligation to provide accounts by dint of section 47 of the Copyright Act 2001 that provides as follows:-

- (1) A collecting society shall as soon as reasonably practicable after the end of each financial year submit to the Board:-
  - (a) *A report of its operations during that year (b) a copy of its audited accounts in respect of that year.*
- (2) *This section shall apply without prejudice to the obligations of a collecting society under the provisions of the companies Act (Cap. 486).*

In the case of **Municipality of Mombasa -vs- Nyali** [1963] EA 371 – 4 Newbold J sitting in the Court of Appeal for Eastern Africa held as follows:-

***“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention:”***

**“(60) Most constitutions in common law jurisdiction almost invariably flow upon retroactive or retrospective criminal statutes. This general prohibition finds expression in article 50(2) (h) of the constitution. That article provides that:-**

**‘Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.**

**(61) As for non-criminal legislation, the general rule is that the statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express mention of the legislative. A retroactive law is not unconstitutional unless; i) it is the nature of the bill of retainer; ii) impairs the obligation under contract; iii) divests vested rights; or iv) is constitutionally forbidden.”**

Being guided by the above authority, the amendment and introduction of section 46E of the Copyright Act which is not a criminal provision could safely be applied retrospectively by 1<sup>st</sup> respondent as the circumstances warranting the forensic audit were legislative. Hence, I find section 46E of the Act is not in the nature of the bill of retainer and that it does not interfere with any

Being guided by the above authority, it can be discerned that the intention of parliament in introducing section 46E of the Copyright Act was to give the 1<sup>st</sup> Respondent a wide latitude in managing the Collective Management Organizations so as to streamline them for the benefit of its members one of whom is the Petitioner herein. The Petitioner's rights will be properly taken care of if the interested parties are brought to heel regarding their operations. The 1<sup>st</sup> Respondent could only look deep into the activities and operations of the Collective Management Organizations by conducting the forensic audit so as to establish whether or not to grant or renew licences to them. The retrospective operation of the statute related to matters of procedure which is permissible in the circumstances of the 1<sup>st</sup> Respondent. The forensic audit could only be relevant if the past history of the collective management organizations is looked into. If the audit aforesaid is meant to help streamline the interested parties for the benefit of its members then the retrospective application of the Copyright Act was not unconstitutional in any way.

15. Still on the issue of retrospective legislation, the decision of the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank limited & Another [2012] eKLR** resonates well with the present circumstances. The court held as follows:-

vested interest of the petitioner which lie in the collective management organization namely collection and payment of royalty. The petitioner is not at all prejudiced by the audit carried out as it is in his best interest as a member since his copyright works will be properly managed and royalties realized. As the new section 46E only provides for the procedures on inspection and forensic audit, the same meets the constitutional threshold of retrospective application of a legislation. Hence, I come to the conclusion that that the impugned forensic audit did not amount to retrospective application of the Copyright Act 2001 (as amended in 2019).

(ii) **Whether the 1<sup>st</sup> Respondent has violated Articles 10, 36 and 47 of the Constitution of Kenya, 2010 or any other law.**

16. The petitioner in his petition made a raft of accusations against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents touching on violations of articles 10, 36 and 47 of the Constitution as follows:

- (i) ***By initiating an audit of the interested parties without the involvement of the members of the interested parties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the principle of the rule of law as well as section 46 of the copyright Act.***
- (ii) ***By initiating an audit of the interested parties, which are private member bodies without the knowledge or involvement of the members themselves, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated Article 47 of the Constitution.***

- (iii) ***By failing to take into account the response of the interested party in their audit report, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the rule of natural justice and the provisions of Article 47 of the Constitution.***
- (iv) ***By bypassing members, the laid out internal rule of interested party, the respondents acted in violation of Article 47 of the Constitution.***
- (v) ***Through restructuring of a private body's memorandum and articles of association, the 1<sup>st</sup> Respondent has violated the principle of legality and rule of law as set out in article 47 of the Constitution and contemplated by article 2 read with article 10 of the Constitution.***
- (vi) ***The act of relying on a draft report without taking into consideration the responses of the interested party countermands the provision of article 57 of the constitution.***
- (vii) ***In effect, the freedom of association set out under article 36 of the Constitution has been encroached upon by the 1<sup>st</sup> Respondent which proposes to restructure the organisation of the interested party contrary to the organisation's memorandum and articles of association as well as the will of its members expressed through periodic elections.***

As the petitioner has pinpointed the specific provisions of the Constitution that have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, it is appropriate to reproduce them and are as follows:

**Article 10- National Values and Principles of Governance.**



- 1) **The national values and principles of governance in this Article binds all state organs, state officers, public officers and all persons whenever any of them-**
  - a) **applies or interprets the Constitution;**
  - b) **enacts, applies or interprets any law; or**
  - c) **makes or implements public policy decisions.**
  
- 2) **The national values and principles of governance include-**
  - a) **Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
  - b) **Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and provocation of the marginalised;**
  - c) **Good governance, integrity, transparency and accountability, and**
  - d) **Sustainable development.**

**Article 36: Freedom of Association**

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

## **Article 47- Fair Administrative Action**

- 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.**
- 3) Parliament shall enact legislation to give effect to the rights in clause (i) and that legislation shall-**
  - a) Provide for the review of administrative action by a court or, if appropriate an independent and impartial tribunal; and**
  - b) Promote efficient administration.**

It is noted that the petitioner herein had sought for conservatory order pending determination of the petition and vide this court's ruling dated 9-12-2019 it held that a public authority will be bound to have acted unlawfully and or unconstitutionally if it has made a decision or done something without the legal power to do so or so unreasonable that no reasonable decision maker could have come to the same decision or done the same thing or without observing the rules of natural justice. The conservatory order was indeed granted pending the determination of the petition. The 1<sup>st</sup> Respondent has denied violating the petitioner's right under

articles 10, 36 and 47 of the Constitution and maintained that it followed due process and duly engaged the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties as confirmed by the various correspondences annexed to the 1<sup>st</sup> Respondent's Deputy Executive Officer's replying affidavit namely "GN3", "GN4", "GN6", "GN7", "GN8 a & b". It is noted that the petitioner or the interested parties failed to controvert the said assertions by filing affidavits in response thereto thereby implying that they were in agreement with the 1<sup>st</sup> Respondent that the forensic audit conducted duly complied with the constitutional provisions. Suffice here to add that the said annexures confirm that the interested parties did present their responses to the said audit thereby indicating that they were given a right of hearing and hence the claim that their rights under article 47 of the constitution were violated are not convincing at all.

The petitioner has claimed that the 1<sup>st</sup> Respondent's actions has interfered with members of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties as well as changing the memorandum and articles of association of the collective management organizations. However, the 1<sup>st</sup> Respondent's replying affidavit gave a good explanation as to why the forensic audit was called for namely to promote, protect and support intellectual property rights belonging to members of the collective management organizations. The petitioner being an artist deserves to be protected from manipulative entities who may

fail to remit the royalties. The 1<sup>st</sup> Respondent has a duty to promote the intellectual property rights of all Kenyans who include the petitioner herein pursuant to articles 11 (2) and 40 (5) of the Constitution. From the evidence availed by the 1<sup>st</sup> Respondent, the forensic audit conducted was absolutely necessary in order to streamline the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties so as to protect and promote the interest of the members of the said organization. It is public knowledge that majority of artists have been rendered destitute and driven into penury due to the failure of collective management organization to pay their royalties as the said entities are mirred in bad governance, lack integrity, lack transparency and accountability. I have perused the impugned audit report and note that the same has unearthed several irregularities such as non-payment of royalties to artists running into millions of shillings. The said audit should be seen as a godsend by members of the CMO's who include the petitioner herein as the CMO's will now be called to account for monies recovered on behalf of the members. I am satisfied that the impugned audit report conducted by the 1<sup>st</sup> Respondent duly complied with the provisions of articles 10, 36, and 47 of the Constitution. The membership of the collective management organization has not been interfered with at all by the said audit since the same does not challenge the petitioner's membership in such organization but that the same is merely meant to enable him enjoy the fruits of his association therein as the

CMO's will be monitored in their activities to see to it that they promptly pay royalties to its members. Hence the petitioner's freedom of association under Article 36 of the Constitution is still intact. The interested parties were duly given an opportunity to present their views which they did leading to the audit report and thus their rights under Article 47 were not interfered with at all. The petitioner's claim that he should have been contacted directly by the 1<sup>st</sup> Respondent appears to me to lack any basis since a proper reading of section 46E of the Copyright Act 2001 (as amended in 2019) does not provide for a situation where members of collective management organizations are to be conducted directly and individually by the 1<sup>st</sup> Respondent. It is a requirement of the copyright Act that all artists should be members of collective management organization who will in turn be managed and supervised by the 1<sup>st</sup> Respondent. I found it rather curious that the interested parties had come up with a stratagem where one of its members was used as a smoking gun to take on the 1<sup>st</sup> Respondent over the impugned forensic audit. The forensic audit in my view was necessary and it complied with the provisions of articles 10, 36 and 47 of the Constitution. It seems the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are reluctant and not ready to subject itself to scrutiny and this is the more reason why I find the forensic audit ordered by the 1<sup>st</sup> Respondent to be the right antidote to such an opaque conduct exhibited by the collective management organizations. The

interested parties appear to have used the petitioner herein as a shield with a view to hiding from being subjected to scrutiny by the 1<sup>st</sup> Respondent. I find such kind of conduct to be mischievous. The audit supports the national values and principles of good governance, integrity, transparency and accountability and was meant to benefit the petitioner and other artists wherein the collective management organizations will be obliged to ensure prompt payment of royalties to its members. I am satisfied that the forensic audit complained of did not violate the petitioner's rights and those of the collective management organizations under articles 10, 36, and 47 of the constitution or any other law.

17. The upshot of the foregoing observations is that the Petitioner's petition dated 28/09/2020 lacks merit. The same is dismissed with no order as to costs. Conservatory orders earlier granted are hereby vacated and/or discharged.

It is so ordered.

Dated and delivered at **Machakos** this *2nd* day of *February* 2021.

  
**D. K. Kemei**  
**Judge**

**In the presence of:**

*N/A* .....for Petitioner

*Fachetch* .....for 1<sup>st</sup> Respondent

*N/A* .....for 2<sup>nd</sup> Respondent

*N/A* .....for 3<sup>rd</sup> Respondent

*N/A* .....for 1<sup>st</sup> Interested Party

*N/A* .....for 2<sup>nd</sup> Interested Party

*N/A* .....for 3<sup>rd</sup> Interested Party

*N/A* .....for 4<sup>th</sup> Interested Party

*Josephine* .....Court Assistant

