



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.176 OF 2013

BETWEEN

PETER GICHUKI MWANGI.....1ST PETITIONER
SIMON WAITHAKA WANGARI.....2ND PETITIONER
PETER WAINAINA NG'ANGA.....3RD PETITIONER

AND

THE COPYRIGHT BOARD OF KENYA.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT
THE CHIEF MAGISTRATE'S COURT- NAIROBI.....3RD RESPONDENT
ANTHONY KIAI.....4TH RESPONDENT

JUDGMENT

Factual Background

1. Prior to the filing of the present Petition, the 1st Petitioner had been required to appear in Court to take a plea on Nine Counts of alleged infringement of Copyright in **Chief Magistrate's Court Criminal case No.295 of 2013** at Nairobi.
2. The 1st Petitioner, a week earlier, had been presented before Court and charged together with the 2nd and 3rd Petitioners with other alleged offences related to infringement of Copyright in **Nairobi CM's Court Criminal Case No.224 of 2013** and in **Criminal Case No.225 of 2013** where he was facing charges similar to all the other alleged offences. The 1st Petitioner was then released on free bond but is still required to take plea in **Criminal Case No.295 of 2013** aforesaid. He filed this Petition touching on the same subject and charges preferred against him in all the above criminal cases which have since been stayed pending the hearing and determination of this Petition.

3. It is not denied that the 1st Petitioner and the 4th Respondent have published various books under a copyright known as “**High Flyer Series**”, whose ownership is in dispute and the same is yet to be determined by the High Court in **NBI HCCC No. 45 of 2011**. It is also not in dispute that the 1st Petitioner and the 4th Respondent were at one point business partners in the publishing venture aforesaid but the partnership collapsed hence the civil suit above.

The Petitioners’ Case

4. The Petitioners’ case is contained in the Petition and the Supporting Affidavit of Peter Gichuki Mwangi, sworn on 25th March 2013. Mr Mwangi, Learned Counsel, also filed and made submissions on his behalf and on behalf of the other Petitioners.
5. It is their argument that the 1st, 2nd and 4th Respondents have no prima-facie case against them in the aforesaid criminal cases and the charges cannot be supported both in fact and in law.
6. It is also their argument that their livelihoods are at risk of being taken away in circumstances that are contested; their fundamental rights that have been breached will continue being breached and aggravated, and the Petitioners will be placed in a situation of having to defend themselves in a case that has no prima-facie criminal culpability and in a situation of the trial being motivated by ulterior motives that have no nexus with the duty of the 1st and 2nd Respondents to pursue criminal justice.
7. Further that the issue of ownership of “**High Flyer Services**” Limited is disputed and is pending in **HCCC No. 45 of 2011** and that, the actions of the 1st and 2nd Respondents, instigated by the 4th Respondent, to prosecute the Petitioners on alleged infringement of Copyright in a matter that is still pending in another Court is premature and an abuse of Court process. And more so, that it is an aggravation of impunity in their discriminative manner and their conduct of psychologically torturing, harassing and acting not only blindly but unreasonably towards the Petitioners, especially the 1st Petitioner who has been a partner with the complainant (4th Respondent) and who has no prima-facie criminal culpability in criminal law.
8. That the Respondents’ actions as aforesaid are therefore an attempt at either embarrassing or crippling the 1st Petitioner emotionally and financially, notwithstanding the following facts;
 - a. *That the 4th Respondent has tried all he can to threaten, intimidate and induce the 1st Petitioner to negotiate an out of court settlement regarding the use and ownership of the **High Flyers Series** in which they have equal rights to the usage thereof but the 1st Petitioner because of such earlier intimidation and harassment is not in a position to do so.*
 - b. *That the 1st Petitioner has been summoned to take a plea on nine counts of infringement of copyright in **Criminal Case No.295 of 2013**, and yet he is innocent of those charges.*
 - c. *All necessary components and ingredients to necessitate the Petitioners’ arrest and to be charged, by the acts of the 1st, 2nd and 4th Respondents, while there is a dispute pending before the High Court touching on the same issues of the authorship, proprietorship or ownership of **the High Flyers Series** trademark and or the Copyright, is premature, an affront or misuse of well laid criminal procedure and the charges preferred against the Petitioners cannot thereby stand.*
9. The Petitioners further submit that the 1st Petitioner is required to take plea yet he has not been availed all witness’ statements, documentary evidence and all other material that the

Prosecution intends to rely on, to enable him take an informed plea. That he needs the same materials to respond to the charge and cautionary statement but the 1st and 2nd Respondents have stated that they will not supply the said documents unless a plea is taken. The 1st Petitioner maintains in that regard that the use of the word “*trial*” in the Constitution includes plea taking and therefore invites this Court’s interpretation in that regard.

10. The Petitioners also submit that their fundamental rights have been breached and continue being breached, for instance that;

a. *they have been treated in an inhuman and degrading manner in the style of their arrest and more so the 2nd and 3rd Petitioners who were in no way related to the Copyright dispute as they are neither Respondents in **HCCC No. 45 of 2011**, employees of the 1st Petitioner nor were they related in any way in the alleged infringement of copyrighted materials but that the 1st, 2nd and 4th Respondents’ intention was to utterly punish and embarrass the 1st Petitioner by arresting his visitors who were seated outside his offices at the time of their arrest.*

b. *There is unreasonable delay in the commencement and conclusion of the criminal cases and that the 4th Respondent, who is the complainant in the criminal cases, lodged his civil suit in February 2011 and at the time did not find it necessary to file the alleged criminal case at the time he approached the High Court for Anton Pillar orders pursuant to the provisions of Section 37 of the Copyright Act which orders were denied by the court in a Ruling delivered by Musinga, J. on the 31st October 2011. That the 1st and 2nd Respondents were thereafter engaged by the 4th Respondent to intimidate, create a hostile environment in a scheme to forcefully and illegally bully the 1st Petitioner into accepting the proposal of buying him out of the business which proposal the latter refused and thus the only alternative was to hoodwink and try to abuse the criminal process by having the Petitioners arrested.*

(c) *The Petitioners have been discriminated against in the election to charge them and that the 1st and 2nd Respondents have opted to find culpability which the High Court in **HCCC No. 45 of 2011** was unable to find in the year 2011 to date which mandate they don’t have and assuming that they had it, which is denied or which under the law cannot stand, the same is unconstitutional and ought to be exercised in a manner that upholds the Constitutional rights of all parties concerned. Mr. Mwangi for the Petitioners further submitted in that regard that the rights of the Petitioners under Article 27, (equality before the law) is being violated and he relied on the case of ***Meme v Republic and Another (2004) 1 KLR 637*** to support that submission.*

d. *The Petitioner’s right to be presumed innocent until proven guilty has been violated. This has done by the fact that the determination of who is the lawful or legal owner of the disputed Copyright is yet to be made but the 1st, 2nd and 4th Respondents have rushed to use unconstitutional means to prefer charges against the Petitioners while that fact is in their knowledge.*

11. It is the Petitioners’ further submission that they are entitled to challenge the decision by the 1st, 2nd and 4th Respondents to present charges against them and especially against the 1st Petitioner when there is no prima-facie case against them for instance because;

i. *In **HCCC 45 of 2011**, in an application to issue Anton Pillar Orders, the High Court found that unless the matter was heard and determined to its conclusion, no party had the right to lay any claim over the ownership of the names and title, “**High Flyer Series**”, and so the Application for Anton Pillar Orders by the 4th Respondent was dismissed pending hearing and final*

determination of the suit.

- ii. *The charges, particularly in **Criminal case No. 295 of 2013** in Counts 1 to 9 are based wholly on speculation, opinion and suspicion. That Counts 1-9 are also premised on the assumption that the 1st Petitioner was not caught in the act but on the speculation and opinion of the 1st Respondent that he was found with the alleged items and this, in the opinion of the Respondents, constitutes a crime.*

12. It is further submitted that the 1st and 2nd Respondent have commenced the criminal cases aforesaid for ulterior motives and that the charges presented by the 1st and 2nd Respondents are prima-facie vain and void in fact, equity and law and should not be allowed to obtain in limine. Mr Mwangi in that regard relied on **Githunguri v Republic {1986}KLR1** and **Modevao V Department of Labour [190] INZLR 464**

13. For all the above reasons the Petitioners pray that;

“Prayer 1

(1) A declaration do issue, declaring as null and void the decision by the 1st Respondent the KENYA COPYRIGHT BOARD to present all the counts and charges dated 14th February 2013 and 28th February 2013 against the Petitioner to the effect that:-

For CriminalCase No. 295 of 2013:

Count I:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38(4) of the Copyright Act Cap 130 Laws of Kenya”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at Care and prime general printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of three (3) infringing lots comprising of incomplete High Flyer Series Standard One Combined while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count II:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of seventeen (17) infringing lots comprising of incomplete High Flyer Series Standard Three Combined while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count III:

“Being in possession of contravences used or intended to be used for the purpose of making infringing copies contrary to Section 38 (1) (f) as read with Section 38 (5) of the Copyright Act.”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one complete infringing offset plates titled “High Flyer Series Standard Three” combined used or intended to be used for the purpose of making infringing copies while the copyright subsists in the name of High Flyer Services and Publishers Limited.

Count IV:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one complete infringing offset plates titled “High Flyer Series Standard Six (6)” combined used or intended to be used for purpose of making infringing copies while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count V:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one (1) complete infringing offset plates titled “High Flyer Series Standard One (1)” combined used or intended to be used for purpose of making infringing copies while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count VII:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one (1) complete infringing offset plates titled “High Flyer Series nursery class and pre-unit” used or intended to be used for purpose of making infringing copies while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count VIII:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one (1) complete infringing offset plates titled “High Flyer Series Standard four (4)” combined used or intended to be used for purpose of making infringing copies while the copyright subsists in the names of High Flyer Services and Publishers Limited.

Count IX:

“Making of infringing copies contrary to Section 38(1) (a) as read with Section 38 (4) of the Copyright Act”

Particulars of the offence

Peter Gichuki Mwangi on the 28th day of February 2013 at 2013 at Care and Prime General Printers Africastle building 2nd floor along river road within Nairobi area province jointly, with others not before court was found in possession of one (1) complete infringing offset plates titled “High Flyer Series Chemistry Form One to Four” used or intended to be used for purpose of making infringing copies while the copyright subsists in the names of High Flyer Services and Publishers Limited.

For Criminal Case 224 of 2013

Count I:

“Being in possession of infringing copies contrary to Section 38(1) (d) as read with Section 38 (5) of the Copyright Act Cap 130 Laws of Kenya.”

Particulars of the offence

1. Peter Gichuki Mwangi
2. Simon Waithaka Wangari

On the 14th day of February 2013 at Lizzie Hotel along Munyu Road in Nairobi within Nairobi Area Province jointly with others not before court were found in possession otherwise than for private and domestic use nine hundred and fifty seven (957) infringing copies of books titled “HIGH FLYER SERIES KCSE Revision in Chemistry Books Form 1-4 by David Macharia” while the copyright subsists in the name of High Flyers Services and Publishers Ltd.

Count II:

“Being in possession of infringing copies contrary to Section 38(1) (d) as read with Section 38 (5) of the Copyright Act Cap 130 Laws of Kenya.”

On the 14th day of February 2013 at Lizzie Hotel along Munyu Road in Nairobi within Nairobi Area

Province jointly with others not before court were found in possession otherwise than for private and domestic use One Thousand (1000) infringing copies of unfinished printed parts of the books titled "HIGH FLYER SERIES COMBINED ENCYCLOPAEDIA CLASS SIX by Charles Mbugua Mburu" while the copyright subsists in the name of HIGH FLYERS Services and Publishers Ltd.

Count III:

"Being in possession of contrivances used or intended to be used for the purpose of making infringing copies contrary to Section 38 (10 (f) as read with Section 38 (4) of the Copyright Act 2001"

On the 14th day of February 2013 at Lizzie Hotel along Munyu Road in Nairobi within Nairobi Area Province jointly with others not before court were found in possession otherwise than for private and domestic use One Thousand (1000) incomplete books titled "HIGH FLYER SERIES KCSE Revision in Chemistry Books Form 1-4" intended to be used for the purpose of making infringing copies while the copyright subsists in the name of HIGH FLYERS Services and Publishers Ltd.

Count IV:

Being in possession of contrivances used or intended to be used for the purpose of making infringing copies contrary to Section 38 (10 (f) as read with Section 38 (4) of the Copyright Act 2001"

On the 14th day of February 2013 at Lizzie Hotel along Munyu Road in Nairobi within Nairobi Area Province jointly with others not before court were found in possession of Nine Hundred and Ninety Five covers titled "HIGH FLYERS SERIES COMBINED ENCYCLOPAEDIA CLASS SIX" intended to be used for the purpose of making infringing copies while the copyright subsists in the name of HIGH FLYERS Services and Publishers Ltd.

Particulars of the offence

1. Peter Gichuki Mwangi
2. Peter Wainaina Ng'ang'a

On the 14th day of February 2013 at Menengai House Room Number C13 within Nairobi area Province jointly with others not before court, were found in possession of thirteen infringing copies of books titled "High Flyers Series Combined Encyclopedia Std 4 Fifth Edition by High Flyer Publishers" while copyright subsists in the name of High Flyer Services and Publishers Limited.

(ii) Prayer 2 - that a declaration do issue, declaring as null and void the decision by the 1st respondent and 2nd respondent seeking that the 1st petitioner be summoned to take plea, as captured in the charge sheet in Criminal Case No. 224, 225 and 295 of 2013 pending hearing and final determination of this petition.

iii. Prayer 3 – to prohibit the 3rd respondent, the Chief Magistrate Nairobi, and any other Magistrate from receiving and or continuing to entertain the counts and charges in criminal cases 224, 225, and 295 of 2013 which charges are dated 14th February 2013 and 28th February 2013 respectively as against the petitioner alleging criminal culpability.

iv. Prayer 4 – that an order do issue prohibiting and restraining jointly and severally the 1st

respondent, Copyright Board and the 2nd respondent, DPP and the 3rd respondent, the Chief Magistrate, Nairobi on Chief Magistrate and Criminal Cases No. 224, 225 and 295 of 2013 from presenting to court and or accepting into court, any counts and or charges relating to copyright to publish the HIGH FLYER SERIES as against the petitioner, and or requiring the petitioner to take plea and or stand trial on any counts and or charges relating to the afore-stated copyright in relation to HIGH FLYER SERIES.

- v. Prayer 5 – that declaration do issue that the fundamental rights of the 1st petitioner, to have details and reasonable access to the case against him were and are likely to continue being breached by requiring him to (i) Answer to a charge and cautionary statement: (ii) and to take a plea without full details of all witness statements, documentary evidence and prosecution materials.**
- vi. Prayer 6 -that a declaration do issue that the fundamental rights of the petitioners to fair trial that is commenced and concluded within reasonable time have been violated in being compelled to stand trial in a matter which the lawful or legal owner of copyright is still pending in High Court HCCC No. 45 of 2011 and stand in for crimes allegedly committed if at all in the period since February 2011 when the complainant filed the Civil Suit seeking for Anton pillar Orders which was denied.**
- vii. Prayer 7 – that a declaration do issue that the petitioners’ right to a fair administrative action has been violated and will continue being violated unless and until the final determination of HCCC No. 45 of 2011 is finalized when the lawful or legal owner will be established.**
- viii. Prayer 8 - that a declaration do issue that the 1st respondent and 2nd respondent’s decision to charge the petitioners in Criminal Cases 224, 225 and 295 of 2013 together with any charges presented to the 3rd respondent be stayed pending the final determination of HCCC No. 45 of 2011 to determine the lawful or legal owner of the copyright in relation to HIGH FLYER SERIES.**
- ix. Prayer 9 – that in the alternative, a declaration do issue staying the decision by 1st, 2nd and 3rd respondents from either continuing and or proceeding with criminal cases No.’s 224, 225 and 295 of 2013 pending the determination of this petition and further restraining the 1st and 2nd respondents from interfering with the petitioners only source of livelihood in their farfetched and malicious prosecution pending the final determination of this petition.**
- x. Prayer 10 – that a declaration do issue that the actions of the 1st respondent are null and void as the said Copyright Board failed to acknowledge the joint rights of an invention by shareholders in a business established by both and the hierarchy of our judicial system and that there being a pending suit HCCC No 45 of 2011 which court is well seized in determining the lawful or legal owner of the copyright, the 1st respondent had no right to interfere with the well laid mandate of the judicial process and thus find that their decision to charge the petitioner is not proper and they lack the capacity to institute criminal proceedings while the final determination of who is the owner of the copyright is still pending before the High Court.**
- xi. Prayer 11 - that a declaration do issue that the counts and charges against the 1st petitioner are excessive and unjust more so all the counts added altogether having the same charges preferred against the petitioner in the three cases that is Criminal Cases,**

224, 225 and 295 of 2013 are 14 counts that violate the 1st petitioner's Constitutional right and the charges are null and void.

- xii. **Prayer 12 – that a declaration do issue that the 2nd and 1st respondent were and are motivated by ulterior motives unrelated to the cause of criminal justice in its election and zeal to charge and prosecute the petitioners.**
- xiii. **Prayer 13 -that a declaration do issue that the decision and election to charge the petitioner was selective and discriminative, informed by ulterior motives, wholly and unrelated to any cause for criminal justice.**
- xiv. **Prayer 14 – that the court can be pleased to issue any other or further orders and or directions as it may deem fair and just.**
- xv. **Prayer 15 – that the Kenya Copyright Board and the Director of Public Prosecution be condemned to pay costs.”**

The 1st and 2nd Respondents' case

- 14. The 2nd Respondent, The Copyright Board of Kenya in response to this Petition filed a Replying Affidavit sworn on 25th April 2013 by Ephraim Ndiritu on his behalf and also on behalf of the Kenya Copyright Board. The Replying Affidavit is dated 25th April 2013 and Mr. Ndege, learned Prosecution Counsel also made submissions on behalf of the 1st and 2nd Respondents.
- 15. They deny each and every allegation contained in the Petition and it is their case that on the 6th February 2013, at around mid-day, one Juma Kamwenji, an employee of the High Flyer Services and Publishers Ltd reported to the Kenya Copyright Board (KCB) that there was another publishing Company by the name High Flyer Publishers that was publishing and infringing copies of a book titled “**High Flyer Series Class 4 Combined Encyclopedia**” and that one of the KCB officers, PC Kennedy Kitui had booked the complaint in the Complaint's Register.
- 16. That on 14th February 2013, he, together with other officers accompanied by Juma Kamwenji aforesaid proceeded to Lizzie Hotel, Room number 2, along Munyu Road in Nairobi and that upon entering the said room they found six men attending to different stages of preparing books for publishing.
- 17. That they identified themselves to the six men and told them about the purpose of the visit after which they inspected the room and discovered copies of the books titled, “**High Flyer Series KCSE Revision in Chemistry**”. One of the six men, Solomon Waithaka, identified himself as a Supervisor of the others and he said that he had been hired by Peter Gichuki Mwangi, the 1st Petitioner, to work at the said place. Later on Peter Gichuki Mwangi appeared before they had left the premises and he identified himself as the owner of the confiscated items upon which he was arrested.
- 18. It is also the 1st and 2nd Respondent's case that on the same day about 11.30 a.m. together with other officers, Juma Kamwenyi and the 4th Respondent proceeded to Menengai House, Room C13, where it was suspected that infringement of copyright was taking place. On arrival, they found the 3rd Petitioner. On inspecting the said room, they found thirteen copies of books entitled “**High Flyer Series Combined Encyclopedia Standard 4, Fifth Edition**”, published by High Flyer Publishers. They thereafter arrested the other two Petitioners, prepared an inventory of

items suspected to have been used in the alleged crimes and later charged them in Court.

19. That on the 28th February 2013, the 4th Respondent received a call from a client who informed him that his books were in the process of being printed by somebody he suspected was infringing on the Copyright of the books and so he sent his office manager, a Mr. Wanjie, to the place which was within Africa Castle building, 2nd floor at a premise named, Care Prime General Printers. Upon arrival he confirmed that printing of copyrighted material was ongoing and upon interrogating the proprietor of the Printing Press, one, Rodah Nyarwayi Nderi, it was revealed that the books belonged to the 1st Petitioner. She availed an invoice which she had prepared and then called the 1st Petitioner through her mobile phone and when the 1st Petitioner arrived, he admitted that he had contracted the Printers to do the work but denied infringing any copyright. He was then arrested and copies of the books being printed were seized.
20. The 1st to 3rd Respondents contend that investigation and prosecution is within the mandates of the Kenya Copyright Board as set out in Section 5 of the Copyright Act.
21. They also claim that the prayers sought in paragraphs 1, 2, 4 and 10 of the Petition are also unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising his mandate as provided under **Article 157** of the **Constitution** and that the prayers if granted, would be a great injustice to the criminal justice system and public interest.
22. In any event, they submitted that none of the Constitutional Rights of the Petitioners have been violated as alleged or at all.
23. That **High Court case No. 45 of 2011** in which trademark is at issue, has no direct relevance to the cases before the Magistrate's Court and that **Section 193A** of the **Criminal Procedure Act** allows concurrent criminal and civil proceedings and so the Petitioners' argument in that regard has no basis.
24. It is finally their submission that, the Petitioners have not adduced reasonable evidence to show that the said criminal proceedings were mounted for an ulterior motive and for the above reasons. The Petition should be dismissed with costs.

The 4th Respondent's case

25. The 4th Respondent, Anthony Kiai in response to this Petition filed 2 Replying Affidavits; one sworn on 27th May 2013 by Charles Mbugua Mburu and another one of the same date sworn by himself. Mr Nyaaga, Learned Counsel for the 4th Respondent relied on those Affidavits during his submissions.
26. It is the 4th Respondent case that the Petitioners, in violation of copyright and with intent to deceive, had photocopied, rebranded and reproduced, word by word, the books marked "**AK-1,2,3 and 4**" as 5th editions of those books and were offering the same for sale and the 1st Petitioner has indeed sold numerous copies thereof. That the acts of the Petitioners were at all material times calculated to deceive, mislead and confuse the trading and business world and the general public into the belief that the books they were selling were genuinely printed.
27. Regarding **HCCC No.45 of 2011** which is premised on infringement of trademark rights, relating to Trademark No. 60247, the 4th Respondent has argued that the cause of action in that case is different from the one in this Petition and that case has nothing to do with copyright infringement

which is the subject matter of the criminal cases. That therefore, this Petition is vexatious, frivolous, unmeritorious and an abuse of the Court process and the same ought to be dismissed since the persons charged are truly guilty of what they are charged with.

28. He claims that in any event, the Petitioners Constitutional rights have not been infringed in any way nor will they be infringed when they undergo a trial for what they are legitimately accused of doing. He therefore urged the Court to dismiss the Petition with costs.

Determination

29. I have deliberately reproduced the charges that the Petitioners are facing and their submissions in substanso for the reasons that it is important to juxtapose those charges with the single issue that triggered those charges i.e. alleged breach of copyright.

30. It is not disputed in that regard that the 1st Petitioner and the 4th Respondent were business partners and/or directors of High Flyer Publishers Ltd and associated with the business of that company was a copyright to school books under the title “**High Flyer Series**”. Upon disagreements arising between the two, **HCCC No. 45 of 2011** was filed and the 4th Respondent sought certain orders from the court pending the hearing and determination of that case. One of the issues in contest was the ownership of the copyright aforesaid. In a Ruling delivered by the Court in an interlocutory application, the Court expressed itself partly as follows:

“Notwithstanding the fact that there is no evidence that any trademark was registered in the name of the company, High Flyer Services Limited, it is obvious that there is an issue regarding the validity of the registration of the 1st applicant as the exclusive owner of the trademark bearing the disputed phrases and flying bird.... At this stage, it is difficult to state who between the applicants and the respondents have a better right to the trademark, nor can it be concluded that the applicant has demonstrated a right which has been infringed by the respondent.”

The Court went on and stated that;

“... the applicants’ complaint relating to passing off, is predicated on the applicant’s claim to the exclusive use of the trademark. The right has not been sufficiently demonstrated...in my view, what has been demonstrated is that the 1st and 2nd respondents who were business partners have fallen off, leading to a dispute regarding the use of the common phrases that they were using as partners... it is true that the publications by the 2nd applicant and 2nd respondent appears similar, but in a situation where the respondents have demonstrated that they have been using the same phrase even before the registration of the applicant’s trademark; it cannot be said that the respondent’s intention is to deceive... if this court were to issue an anton-pillar order, or an order of injunction such as sought by the applicants, the business of the 1st respondent may be paralyzed when it may be the bona-fide use of its trade name... the upshot of the above is that the applicant has not established the elements upon which a prima-facie case can be founded. This is a dispute which can only be resolved by the determination of the respondent’s objection to the registration of the 1st applicant’s trademark, and a full hearing of this suit. This application fails. It is accordingly dismissed.”

31. The above part of the Ruling is important because some of the orders that the 4th Respondent was seeking were the following:

“(iv) Applicants being permitted to enter the respondents’ business and/or printing premises

and seize and remove therefrom, for safe custody all books and/or phrases “High Flyer, High Flyer Series, High Flyer Publishers” or any..... and/or inspect all purchases and sales records for the past one year, and such other documents, copies and/or any items of whatever nature which constitute or could constitute evidence of this cause of action and preserve the same.

v. That pending the hearing and determination of this suit and/or further orders, the defendants whether by themselves, their servants and/or agents or otherwise howsoever be restrained from doing the following acts or any of them, that is to say, publishing, issuing, promoting, advertising, printing, selling, offering for sale, hiring, supplying, distributing and/or displaying for sale or promotion books, volumes, works, titles, paper backs, hardbacks, folios, editions copies, writing and/or encyclopedias bearing the following phrases and/or combination thereof as titles or otherwise... that is to say “High Flyer, High Flyer Series, High Flyer Publishers.”

vi. ...

vii. (VII) That the defendant/respondents, whether acting by themselves, directors, officers, servants and or agents or any one of them or otherwise howsoever be restrained from infringing the plaintiff/applicant’s copyrights and trademark No. 60247 registered on the 28th Nov 2006, until the determination of this application and suit.” (emphasis mine)

32. The above orders must be read with the charges that the Petitioners are facing and it should be noted that it was only after failing to obtain the above orders and others, including specifically the Anton Pillar orders to search the premises and seize evidence without warning, that the 4th Respondent enlisted the support of the Copyright Board of Kenya in storming certain premises where the 1st Petitioner was publishing some of the books whose copyright remains contested. The criminal charges set out elsewhere above were thereafter instituted. It is also not contested that prior to these actions, **HCCC 107 OF 2013** which also involves the disputed copyright had already been filed and was pending determination.

33. With the above background, prayers 1, 2, 10, 11 and 12 in the Petition all revolve around the issue whether the arrest and presentation of the Petitioners before the Chief Magistrate’s Court to face charges relating to alleged infringement of copyright was lawful. The answer to that issue is not complicated because answered without prejudice to what I shall say later, the **Copyrights Act, Cap 130, at Section 42** provides that:

“Any police officer may arrest, without a warrant, any person whom he suspects upon reasonable grounds of having committed any offence under this Act and any officer of the Board who at the time is wearing a visible badge of office and authorized thereto in writing by the Board, may arrest, without a warrant, any person who, in his presence, commits any such offence and may detain such person until he can be delivered into the custody of a police officer to be dealt with according to law.”

34. To the extent only that the Board, acting within its mandate, can arrest, detain and later have an alleged offender charged for *inter-alia*, infringement of copyright, the Board and the Police cannot be faulted for undertaking statutory duty.

35. But that is not the end of the matter because Nyamu J. in **Republic vs Kiambu Land Control Board ex parte Burnaby Properties Limited Misc App 1488 of 2005** had this to say regarding statutory bodies and their decisions:

“A Statutory body has the duty to understand and give effect to the law empowering its decision making. A body entrusted with discretion or power must direct itself properly in law. Where a body fails to do so, it steps out of its jurisdiction. Thus where it asks the wrong questions... or where it takes into account matters which it was not directed by law (or Parliament) to take into account, this court would be perfectly entitled to intervene and quash the decision.”

36. In the above context and while I agree with the Learned Judge, the Petitioners in support of Prayers 5, 6, 7, and 13 of the Petition alleged that the Respondents and specifically the Copyright Board of Kenya and the Director of Public Prosecutions (DPP) have breached the Constitution by bringing forth malicious charges well knowing that the copyright forming the subject of the criminal charges is contested and the Court in **HCCC No. 45 of 2011** and **HCCC No. 107 of 2013** is yet to make a determination of the issue.

37. In addressing the above matter, the first issue to address is the prosecutorial power conferred on the DPP by **Article 157** of the **Constitution** which provides as follows;

“(1) There is established the office of Director of Public Prosecutions.

(2)

(3)

(4)

(5)

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or

functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

(12) Parliament may enact legislation conferring power of prosecution on authorities other than the Director of Public Prosecutions.”

38. The Courts have over the years interpreted **Article 157 (11)** and previously **Section 26** of the **Repealed Constitution** in a very consistent manner. In the celebrated Case of **Githunguri (supra)** for example, the High Court in interpreting, **Section 26** aforesaid which gave the Attorney General similar features as the DPP presently has, stated as follows;

“The AG in Kenya by Sec 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers desirable so to do”..... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy.....”

The Court also noted instances when the Courts may interfere with the Attorney General's powers to prosecute including;

- i. *Where a criminal prosecution is an abuse of court process*
- ii. *Where a prosecution is in contravention of a person's Constitutional freedom and rights*
- iii. *Where the prosecution is contrary to public policy or interest.*

39. Kuloba J. went further and stated in, **Vincent Kibiego Saina v AG. High Court Misc Civil Appl. No. 839 of 1999 (unreported)** at pages 20, 21 that;

“If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it. This power to prevent such prosecutions is of great Constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court, the court will unhesitatingly step in to stop it.”

40. In **Paul Ng'ang'a Nyaga and 2 Others v AG and 3 Others. Pet 518 of 2012**, the Court held that;

[38] “There is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g. unless there is some countervailing reason not to prosecute..... if the petitioners or any other party for that matter, are charged with a penal offence, they have the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.”

41. In England, the Court in **D.P.P v Humphreys (1976) 2 All ER 497** however expressed the caution that:

“A judge has not and should not appear to have any responsibility for the institution of criminal prosecution to proceed merely because he considers that as a matter of policy it ought not to

have been brought. It is only when the prosecution amounts to an abuse of the process of Court and is oppressive and vexatious that the judge has power to intervene.

42. In that regard, in *Meme v Republic and another (2004) 1 klr 637*, at page 678, the Court described the phrase ‘abuse of Court process’ in the following terms;

“An abuse of the Court’s process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes; that is to say, process is being misused.”

43. As regards the conduct of proceedings by the DPP and to avoid abuse of Court process, in *Rosemary Wanja Mwagiru and 2 Others v the AG and 3 Others Petition No.165 of 2011* the Court while acknowledging the powers of the DPP under **Article 157** stated that;

“The office of the DPP is an independent office and the Court will in ordinary circumstances be reluctant to restrain the exercise of its powers. That notwithstanding, the process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”

44. Majanja J in *Investments and Mortgages Bank Limited (I \$M) v Commissioner of Police and the Director of Criminal Investigations Department and 3 Others, Nairobi Petition No. 104 of 2013* also noted as follows:

“I agree with the Respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The office of the DPP established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the Constitutional dictates. One such dictate is that in the exercise of their powers, it is to “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” Article 244 enjoins the National Police Service to amongst other things “comply with Constitutional standards of human rights and fundamental freedoms.”

45. The learned Judge in quashing criminal proceedings in the Magistrate’s Court in the case of *Peter George Antony D’Costa v Attorney General and Another, Nairobi Petition No. 83 of 2010*, had observed that;

“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioner’s fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system.”

46. As for the need to use other avenues than the criminal process to settle disputes the Court in *Mohammed Gulam Husseign Fazal and Ano v The Chief Magistrate’s Court and Anor Misc*

App No. 367 of 2005 agreed with the principle established in the **EXPARTE FLORICULTURE INTERNATIONAL LTD H.C. Misc 144 of 1997** case to the effect that;

“Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of the criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies. The existence of other remedies which have either have already been unsuccessfully sought or which may be open and are less drastic and stigmatic than the criminalization of an otherwise civil dispute is indicative of improper and ulterior purpose.

It is an abuse of criminal process for a person to launch criminal proceedings against the other, in civil matters which are genuinely disputed on substantial grounds by that other person and the civil dispute cannot be reasonably ventilated and decided with a fair finality in the criminal process.”

47. All the above authorities would persuade me to the conclusion that whereas the High Court should be slow to intervene in situations where the DPP has found reason to institute criminal proceedings, where a genuine case of abuse of the judicial system has been presented before it, then the High Court must, and without any hesitation whatsoever, step in and allow the complaining party before it respite. I say so well aware that **Section 193A** of the **Criminal Procedure Code** provides that **“the fact that any matter in issue in any criminal proceedings is also in directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”** In saying so, I am also aware that the Respondents have relied on that Section to argue that the pendency of **HCCC No. 45 of 2013** and **HCCC No. 7 of 2013** is not a factor in the present proceedings. That blanket assertion is not shared by this Court and I agree with the holding in **R vs Attorney General and Another Ex parte Hussein Mudobe HC Misc App No. 898 of 2003** that;

“Notwithstanding the provisions of Section 193A of the Criminal Procedure Code the court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants... in the context of criminal proceedings, there are two fundamental policy considerations in which the court must take into account in dealing with the abuse of process. Referring to the two considerations in MODEVAO V DEPARTMENT OF LABOUR [190] INZLR 464 at 481 in a passage which Manson CJ quoted in JAGO (1989) CLR at 30 RICHARDSON J, reproduced the two policy considerations as follows;

“The first is that the public interest in the administration of justice requires that the court protects its ability to function as a court of law ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice... the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes...that the court processes are being employed from ulterior purposes or in such a way... as to cause improper vexation and oppression”.

48. I agree with the above holding because in the instant case, the High Court in **HCCC 45 of 2013** clearly stated that the ownership of the copyright, **“High Flyer Series”** is contested and declined to grant the 4th Respondent orders to restrain the 1st Petitioner from publishing any books under that title. Similarly, the High Court declined to grant the 4th Respondent any Anton Pillar orders to

enter into the 1st Petitioner's premises and conduct a search and retrieve any material that was being published unlawfully. Instead of pursuing an appeal against those orders or seeking a review thereof or pursuing the civil suit to conclusion, the 4th Respondent enlisted the help of the Copyright Board of Kenya and the Kenya Police to achieve that which he had failed to achieve at the High Court. The result of his efforts was the arrest of the Petitioners and their arraignment in Court. One of the policies jealously guarded by the Courts is the need to ensure that there is no abuse of court process to harass, intimidate and coerce another party to settle a purely civil matter. It is obvious to me that where the issue of copyright is contested, the Police, the DPP and the Copyright Board cannot convert themselves into the High Court, settle that issue and declare that the 1st Petitioner has violated any part of the Copyright Act. Their actions are premature, malicious and unlawful and that is what is called abuse of Court process to settle personal scores and this Court cannot sit idly and watch them do so.

49. Having so held, in Prayers 5, 6 and 7, the Petitioners have argued that their fundamental rights to a fair trial and fair administrative action have been violated by the actions of the 1st, 2nd and 4th Respondent aforesaid. In that regard, **Article 50(2)** of the **Constitution** provides as follows;

"(1) ...

(2) Every accused person has the right to a fair trial, which includes the right—

- (a) to be presumed innocent until the contrary is proved;**
- (b) to be informed of the charge, with sufficient detail to answer it;**
- (c) to have adequate time and facilities to prepare a defence;**
- (d) to a public trial before a court established under this Constitution;**
- (e) to have the trial begin and conclude without unreasonable delay;**
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;**
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**
- (i) to remain silent, and not to testify during the proceedings;**
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**
- (k) to adduce and challenge evidence;**
- (l) to refuse to give self-incriminating evidence;**
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;**

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

i. an offence in Kenya; or

ii. a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

50. In invoking the above Sub-Article of the Constitution, the Petitioners have argued that; they were required to answer to a charge and cautionary statement and to take a plea without full details of all written statements, documentary evidence and all other materials that the Prosecution intends to rely on.

51. My view is that the above claim is unfounded for reasons that it is now settled that access to witness statements and all other evidence to be tendered by the Prosecution is not a one-off event but continues throughout the trial. I therefore agree with the decision in Dennis Edmond Apaa and 2 Others v Ethics and Anti-corruption Commission and Another, Petition No.317 of 2012 where the Court observed as follows;

“The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of R v Ward cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Art 50 (2) (j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and the right of disclosure is protected by the accused being informed of the evidence having reasonable access to it. This right is to be read together with other rights that constitute the right to a fair trial.”

52. The holding in Thuita Mwangi and 2 Others v Ethics and Anti-corruption Commission and 3 Others (2013) Petition 153 of 2013 consolidated with Petition 369 of 2013 is also persuasive as the Learned judge stated as follows:

“The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”

53. From all the above, I hereby hold that the Petitioners' right to a fair trial has not been breached and furthermore, they have been charged in a competent court of law which has the mandate to conduct the criminal trial.

54. Regarding the aspect of fair trial in the context of the existence of **HCCC No. 45 of 2011** and the fact that the 4th Respondent was denied Anton Pillar orders but used the criminal process to get the same orders, I have already addressed the issue elsewhere above and I reiterate my findings in that regard.

55. On the alleged breach of the right to fair administrative action under **Article 47** of the **Constitution**, the said Article provides as follows:

“(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 Consumer rights in clause (1) 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 “.

56. I have combed the record and the submissions made in the context of the evidence before me, it is unclear how this right was violated and I shall say no more regarding it.

Remedies Sought

57. Turning to the 15 Prayers that have been reproduced above (and I must deprecate the manner in which the prayers were framed as they were inelegant), they can be categorized as follows;

a. Declarations regarding the arrest, detention and charging of the Petitioners.

b. Declarations regarding alleged violation of the Constitution and breach of fundamental rights

*c. Orders to stay the pending **Criminal Cases Nos. 224, 225 and 295 of 2013** pending the determination of **HCCC No. 45 of 2011**.*

d. Costs.

58. I have deliberately left out the issues specifically raised in Prayers 11, and 13 of the Petition because they are otherwise addressed in the context of either of the above categories of prayers.

59. Having so said, I have held that whereas the Copyright Board of Kenya and the DPP have certain statutory and Constitutional mandates which they are lawfully entitled to exercise in the context of the law, the actions taken against the Petitioners were an abuse of Court process. I have also held that no fundamental right to which the Petitioners are entitled to save to, the protection of

the law, has been violated.

60. I have also held that since the issue of breach of copyright is still being contested in the High Court, that issue should be settled before a decision whether any party may be guilty of such breach can be addressed.

61. In the event, it follows that having held as above, the proper orders to be made in this Petition would be those contained in Prayer 8 of the Petition which is rephrased as follows;

“An order do issue that the 1st Respondent and 2nd Respondent’s decision to charge the Petitioners in Criminal Cases Nos.224, 225 and 295 of 2013 together with any charges presented to the 3rd Respondent be stayed pending the final determination of HCCC No. 45 of 2011 as to the lawful or legal owner of the copyright in relation to HIGH FLYER SERIES.”

62. Those are the final orders of this Court as regards this Petition.

63. As to costs, let each party bear its own costs as the dispute is far from being settled and costs will only convolute matters at this stage.

64. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Mwangi for Petitioners

Miss Kithiki holding brief for Mr. Ndege for Respondents

Order

Judgment duly read.

Copies of the judgment to be supplied to Parties.

ISAAC LENAOLA

JUDGE



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