

IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM
(KADURI, BONGOLE AND MWANDAMBO, JJ)
CONSTITUTIONAL PETITION NO. 10 OF 2014

THE TANZANIA AUDIO VISUAL DISTRIBUTORS
ASSOCIATION..... 1ST PETITIONER

SHIRIKA LA KUTETEA HAKI

ZA WASANII TANZANIA..... 2ND PETITIONER

JACKLINE ARINGO ODHIAMBO

alias JACK AKINYI..... 3RD PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

COPYRIGHT SOCIETY OF TANZANIA..... 2ND RESPONDENT

TANZANIA REVENUE AUTHORITY 3RD RESPONDENT

JUDGMENT

This petition seeks to challenge the constitutionality of the **Films and Music Products (Tax Stamps) Regulations**, Government Notice No.

244 of 2013 (hereinafter referred to as the Regulations). The Respondents who are represented by the Hon. Attorney General denies the Petitioners' have been infringed rights in the manner contended and pray that the Court dismisses the petition for being baseless.

According to the amended petition, the first and second Petitioners are registered entities having the objectives of protecting interests of artists and distributors of artistic works in Tanzania. The two Petitioners boast themselves as defenders of artists and artistic works in Tanzania. In particular, the 1st Petitioner claims to be a company limited by guarantee drawing its membership from artists in Tanzania. The 3rd Petitioner describes herself as an artist/musician claiming to have been affected by the acts of the 2nd Respondent through the 3rd Respondent in the course of enforcement of the Regulations.

By and large, the basis of the petition is founded on the enforcement of the Regulations by the 3rd Respondent. In accordance with Regulation 4 (1) and 23 of the Regulations, it is a mandatory requirement for all persons engaged in the importation, exportation, production or distribution of films or music products to register and obtain an approval from licensing any of the prescribed activities. In accordance with Regulation 4(1), the licencing authority is the 2nd Respondent who is mandated to issue certificates of approval to dealers who include duly registered producers, authors, distributors, importers or exporters of films and music products which must be furnished to an authorized officer of the 3rd Respondent before issuing of tax stamps as required by Regulation 23. The Petitioners contend that in

the process of carrying out statutory duties in accordance with the laid Regulations, the 2nd Respondent compels persons who approach her for certificates of approval to register with her as members contrary to their wishes. It is contended further that the requirement to register as members against their wishes violates Article 20 (4) of the Constitution of the United Republic of Tanzania, 1977 (as amended) [hereinafter to be referred to as the Constitution] which bars amongst others, compulsory registration of any association, organization or political party. The Petitioners claim further that by reason of compulsory membership with the 2nd Respondent, the dealers fail to obtain certificates of approval and in consequence fail to obtain tax stamps and hence the inability to do business. It is the Petitioners' contention that failure to do business by reason of the 2nd Respondent's acts infringes upon the dealers' right to work which is protected by Article 22 (1) and receive just remuneration guaranteed by Article 23 (1) and (2) of the Constitution. The Petitioners' case does not end there. They complain further that the acts of the 2nd and 3rd Respondents offend the provisions of Article 29(5) of the Constitution which imposes a duty on all persons to conduct themselves in a manner that does not infringe upon the rights and freedoms of others.

Finally, the Petitioners argue that the manner in which the 2nd and 3rd Respondents treat international audio visual works in the same footing is *ultra vires* the provisions of section 3 (1) of the Copyrights and Neighbouring Rights Act, Cap 218 [R. E-2002]. As to the direct effect on the alleged infringement by the 2nd and 3rd Respondents, it is contended that the 1st and 2nd Petitioners' memberships have significantly dropped

from 3,000 in the year 2011 to 500 members in December 2013 and the trend is on the increase.

As indicated earlier on, the Respondents' reply is a complete denial of all of the complaints in the petition. The Respondents have, in consequence invited the Court to dismiss the petition in its entirety.

Consistent with Rule 13 of the *Basic Rights and Duties Enforcement (Practice and Procedure) Rules*, GN No. 304 of 2014 (the Rules) Counsel filed their respective written submissions for and against the petition within schedule. Due to supervening events after the filing of the submissions and the interlocutory application in between, judgment has taken longer than usual to be composed and delivered. Mr. Stephen Masha learned Advocate for the Petitioners submitted with significant force against the 2nd Respondent for compelling members of the 1st Petitioner to register with her as members as a condition for obtaining licences before being issued with tax stamps. The learned Advocate criticized the 2nd Respondent's approach as unconstitutional for violating the Petitioners' right to freedom of association guaranteed under Article 20 (4) of the Constitution. On the other hand, the learned Advocate submitted that by reason of the 2nd Respondent's acts, the 1st Petitioner's members have been denied approvals and in turn failed to obtain tax stamps from the 3rd Respondent and distribute their artistic works to earn a living. According to the learned Advocate, the act was violative of the right to work guaranteed by Article 22 (1) and 23 (1) and (2) of the Constitution. In another breath, the learned Advocate challenged the 2nd Respondent's acts as *ultra vires* the

provisions of section 47 of the Copyright and Neighbouring Rights Act which lists its functions but none of them relates to recruitment of members in collaboration with the 3rd Respondent. On the foregoing submissions, the learned Advocate invited the Court to allow the petition and grant the reliefs set out therein.

Ms. Sylvia Matiku learned Principal State Attorney kicked off her submissions by providing a background and objectives behind the promulgation of the Regulations made under section 122 of the Excise Management and Tariff Act, Cap 147 (R.E 2002). In essence, the learned Principal State Attorney argued that contrary to the submissions by the learned Advocate for the Petitioners there is nothing in Regulation 4(1) compelling members of the 1st Petitioner to register with the second Respondent. Submitting in relation to the bond between the 2nd and 3rd Respondents, Ms. Matiku impressed upon the Court to find that the same was healthy aimed at preventing issuing tax stamps to distributors/artists without copyrights. According to the learned Principal State Attorney, the bond fell within the functions of the 2nd Respondent for the promotion and protection of all artists both foreign and local within the ambit of the Copyright and Neighbouring Act supplemented by **Berne Convention for the Protection of Literary and Artistic works of 1886** to which Tanzania is a signatory together with the **Agreement on Trade Related Aspects on Intellectual Rights 1999**. Expounding on the said convention, the learned Principal State Attorney referred the Court to a decision of the Supreme Court of Canada in **Circle Film Enterprises Inc. V. Canada Broadcasting Corporation [1957] S.C.R 602** to reinforce

an argument that registration of a copyright is permissive rather than compulsory aimed at providing evidence of its ownership to a holder of a certificate of its registration. From the said decision, the learned Principal State Attorney urged the Court to hold that mere requirement for a copyright registration and in turn issue of tax stamps to its owner had nothing to do with compelling anybody to become a member of the 2nd Respondent neither did it infringe upon artists'/distributors' right to work and receive just remuneration guaranteed under Article 23 (1) and (2) of the Constitution.

In rebuttal, the learned Advocate for the Petitioners reiterated his submissions in chief maintaining that the artists'/ distributors' duty to obtain tax stamps from the 3rd Respondent was conditional on only one requirement that is to say; registration of their artistic works with the 2nd Respondent rather than being compelled to become its members which was what the 2nd Respondent was doing in practice. The learned Advocate argued that in so far as registration is not compulsory, there was no need to require artists/distributors to register with the 2nd Respondent before being issued with tax stamps by the 3rd Respondent because the international conventions to which Tanzania is a signatory have done away with registration formalities as a means of protection of copyrights.

We have examined the petition, reply thereto and the submissions for and against in the light of the constitutional provisions on the basis which we are asked to peg to determine the petition. We think it is necessary to state at this juncture that in determining a petition such as

this one, the court does so on established principles. One of such principles requires the Court to adopt a generous approach to the interpretation of fundamental rights and freedoms enshrined in the constitution. This is in line with the decision of the Court of Appeal in **Zakaria Kamwela and 126 Others V. Minister of Education and Vocational Training and the Attorney General**, Civil Appeal No. 3 of 2012 [reported as TLS LR 198. Reiterating that position, the Court of Appeal expressed in no uncertain terms that:

"Each and every person in Tanzania has the right to enjoy the fundamental rights engraved under part II, BASIC RIGHTS AND DUTIES, of the constitution and expressly provided for under Article 12 to 28..."(at page 13)

To the extent relevant to this judgment, the right to work and receive just remuneration is a fundamental right guaranteed under Article 23 (1) and (2) of the Constitution. The other principle we find important to mention is the presumption of constitutionality of legislation until a contrary is proved expressed in **Jullus Ishengoma Francis Ndyanabo V. Attorney General** [2004] TLR 14.

It is glaring that the Petitioners' cause of action is founded on the alleged compulsory registration of membership with the 2nd Respondent as a condition for obtaining approvals to artists'/distributors' works before being issued with tax stamps by the 3rd Respondent. The 2nd Respondent denies having compelled members of the 2nd Petitioner to register with her as members let alone the 3rd Petitioner. There is no gainsaying that any provision in a statute or regulation requiring any person to become a

member of an association, organization or political party without his consent will constitute contravention of the Constitution resulting in this Court declaring it as unconstitutional. Regulation 4(1) and 23 which are being challenged for being unconstitutional provide thus:

Reg. 4(1) Any person who is engaged in or intends to import, export, produce or distribute films and, or music products prescribed by the Regulations shall register and issued approval by the Licencing Authorities before importing, exporting, producing or distributing the same as the case may be.

Reg. 23. The dealer shall furnish a certificate of approval and any other relevant documents from the licencing authority to an authorised officer and when the authorised officer is satisfied that all requirements have been complied with shall issue tax stamps to the dealer"

Our examination of Regulation 4 (1) and 23 of G.N. No. 244 of 2013 has not resulted in any conclusion that they or any of them impose any requirement for compulsory registration with the 2nd Respondent thereby infringing upon the right to freedom of association guaranteed by Article 22 (1) of the Constitution neither do we agree that the requirement to require dealers to furnish certificates of approval and any relevant documents from licencing authorities, the 2nd Respondent in particular as violating the right to work and earn just remuneration engraved in Article 23 (1) and (2) of the Constitution. Indeed, Mr. Mosha learned Advocate conceded in his submissions that compulsory registration is not a

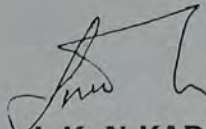
requirement of the Regulations but a practice created by the 2nd Respondent in the course of issuing certificates of approval to artists and distributors/dealers of artistic works before obtaining tax stamps from the 3rd Respondent. In the circumstances, since the alleged violation is not sanctioned by any regulation, upholding the petition in the manner the Petitioners have asked us to do would require them furnishing sufficient particulars to prove compulsory registration as a requirement for obtaining certificates of approval and ultimately the tax stamps. It is glaring that the Petitioners have not gone beyond making allegations of compulsory registration. They have not annexed any document to back up the complaint on compulsory membership neither has the 3rd Petitioner who has specifically made that allegation under para 13 of the amended petition has furnished any particulars.

Whilst we take cognizance of the matters to be contained in a petition per section 6 of the Basic Rights and Duties Enforcement Act, Cap 3 [R.E 2002] (hereinafter referred to as BRDEA), we do not think the restriction imposed by that provision against facts relied on by the Petitioners was intended to mean that a petitioner need only make allegations on the infringement in support of his rights without giving sufficient particulars in support the complaint. We say so because it is our considered view that in the absence such particulars, it will be asking too much by the Petitioners and expect the court to uphold their complaint alleging as they do that the 2nd Respondent compels artists/distributors to become its members in the course of its licencing duties for the purposes issuing certificates for presentation to the 3rd Respondent for the purposes

of obtaining tax stamps. We are unable to see any merit in the complaint establishing that the Petitioners' rights are infringed, likely to be infringed within the meaning of section 3 of BRDEA.

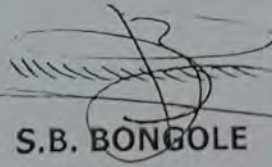
In the event and for the foregoing reasons we find the petition wanting in substance and we accordingly dismiss it. Since there is nothing on record to indicate that the petition was brought for a purpose other than seeking the enforcement a fundamental right, we order that each party bears his own costs. It is so ordered.

Dated at Dar es salaam this ^{27th} day of March, 2018



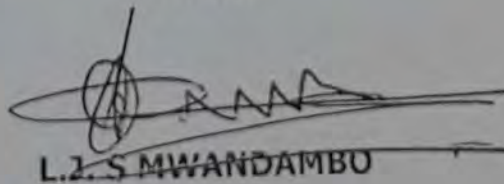
L.K. N KADURI

JUDGE



S.B. BONGOLE

JUDGE



L.J. S MWANDAMBO

JUDGE