



REPUBLIC OF KENYA



**Lutumba v Tamasha Corporation Limited & 7 others (Civil Case E116 of 2022)  
[2024] KEHC 10278 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E116 OF 2022  
PM MULWA, J  
AUGUST 15, 2024**

**BETWEEN**

**MUZINGA LAURE LUTUMBA ..... PLAINTIFF**

**AND**

**TAMASHA CORPORATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LIBERTY AFRIKA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**XPEDIA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**SAFARICOM LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**KENYA ASSOCIATION OF MUSIC PRODUCERS ..... 5<sup>TH</sup> DEFENDANT**

**MDUNDO KENYA ..... 6<sup>TH</sup> DEFENDANT**

**BOOM PLAY ..... 7<sup>TH</sup> DEFENDANT**

**APPLE T/A ITUNES ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The following applications by way of Notices of Motion are before the court for determination:
  - i. 1st defendant's application dated 6<sup>th</sup> June 2022
  - ii. 2nd and 3rd defendants' application dated 25<sup>th</sup> May 2022
  - iii. 6th defendant's application dated 11<sup>th</sup> March 2024
  - iv. 7th defendant's application dated 9<sup>th</sup> June 2022



- v. 8th defendant's application dated 3<sup>rd</sup> June 2022.
2. In the applications, the defendants respectively prayed for an order to strike out the instant suit on the grounds that the plaintiff lacks the capacity to institute the suit and further that the plaint does not disclose a reasonable cause of action against the defendants.
  3. The plaintiff filed replying affidavits sworn by herself in opposition to the aforementioned applications.
  4. She contended that she filed the instant suit as the administrator of her late father's estate and with full mandate to pursue the royalties of her father's music from all over the world; that the defendants are actively engaged in selling and distributing her late father's musical works without authority and that the plaint discloses reasonable causes of action against the defendants with regard to the alleged infringement of her late father's intellectual property rights.
  5. In response to the applications, the plaintiff asserted that the defendants were hiding behind procedural technicalities to avert substantive justice as stipulated under article 159(2) (d) of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act.

### **Analysis and determination**

6. The court has considered the pleadings and written submissions filed in this matter.
7. I will start by determining the issue of whether the plaintiff has the locus standi to file the suit herein.
8. The plaintiff instituted this suit vide a plaint dated 4<sup>th</sup> April 2022, as administrator of the estate of the late Simon Lutumba Ndomanueno seeking to protect her deceased father's musical works from infringement by the defendants.
9. She claimed that the defendants had been selling the musical creations of the deceased without any right to do so. The plaintiff prayed inter alia for \$ 10,000,000 as damages.
10. To prove that she is the administrator of her late father's estate, the plaintiff relied on a grant of representation issued in the Democratic Republic of Congo (DRC). It is produced as exhibit 'LLN-1' in the supporting affidavit sworn on 4<sup>th</sup> April 2022.
11. Section 77(1) of the Law of Succession Act states:

“Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth country or in any other foreign country designated by the Attorney-General by notice in the Gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof in respect of the estate of a deceased person, such grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.”
12. In this case, the DRC, where the grant was allegedly issued, is not a member of the Commonwealth, there is also no evidence that it was designated by the Attorney General by notice in the Gazette in order for the grant to be sealed and have the force and effect as if granted by this court.



13. Even if the conditions mentioned above were met, the plaintiff has not demonstrated, or otherwise adduced any evidence to prove that the said grant of representation had been resealed in Kenya in accordance with section 77(1) of the Law of Succession Act.

14. In the case of Kipngetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021]e KLR it was held:

“The issue of locus standi being a point of law which goes to the root of any suit, its absence therefore renders a suit fatally defective. The issue of the lack of locus standi cannot therefore be termed as a mere technicality as the Plaintiff/Respondent herein would want us to believe and therefore the provisions of Article 159 (2) (d) of the Constitution cannot in the present circumstance salvage this suit. For this reason, I strike out the suit.”

15. In the absence of a valid resealed foreign grant of representation, the plaintiff lacks locus to file this suit on behalf of her late father. This means that the suit is fatally defective and on this ground alone this suit is struck out with costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2024.**

**P. MULWA**

**JUDGE**

**In the presence of:**

Mr. Osendi for Plaintiff

Mr. Odiero for 1<sup>st</sup> Defendant

Mr. Imbuga for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

Mr. Opole for 4<sup>th</sup> Defendant

Mr. Bowry for 6<sup>th</sup> Defendant

Mr. Lwande for 7<sup>th</sup> Defendant

Mr. Odhiambo h/b for Mr. Karuti for 8<sup>th</sup> Defendant

Court Assistant: Lilian

