



REPUBLIC OF KENYA



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**Asige v Sol Generation Records Limited & 5 others (Civil Case E322 of 2022)  
[2023] KEHC 24541 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24541 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E322 OF 2022  
MN MWANGI, J  
MAY 26, 2023**

**BETWEEN**

**CRYSTAL ASIGE ..... PLAINTIFF**

**AND**

**SOL GENERATION RECORDS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BIENAIME A BARAZA T/A SOL ENTERTAINMENT ..... 2<sup>ND</sup> DEFENDANT**

**POLYCARP O OTIENO T/A SOL ENTERTAINMENT ..... 3<sup>RD</sup> DEFENDANT**

**WILLIS A CHIMANO T/A SOL ENTERTAINMENT ..... 4<sup>TH</sup> DEFENDANT**

**DELVIN S MUDIGI T/A SOL ENTERTAINMENT ..... 5<sup>TH</sup> DEFENDANT**

**KONINKLIJKE LUCHTVAART MAATSCHAPPIJ NV ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 7<sup>th</sup> December, 2022 brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 11 Rule 3, Order 20 Rules 1, 3 & 4 and Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The plaintiff/applicant seeks the following orders-
  - i. That this Honourable Court be pleased to issue a temporary prohibitory injunction restraining the defendants from in any way infringing on the plaintiff/applicant's copyright in composition and sound recording which she has created and contributed to while working with the 1<sup>st</sup> defendant/respondent's label and in particular those that have been released to the public



specifically “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” pending the hearing and determination of the main suit;

- ii. That this Honourable Court be pleased to order the defendants/respondents to deliver up a full statement of royalties and revenues allocated and/or received by them/their representatives in respect of the compositions and sound recordings in respect of “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” from the year 2019 to date pending the hearing and determination of the main suit;
  - iii. That this Honourable Court be pleased to order 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents to deliver up all licensing, assignment and/or royalty information, including synchronization, in respect of “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” from the year 2019 to date;
  - iv. That this Honourable Court be pleased to make such further orders that may be appropriate in the interest of justice; and
  - v. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of it, and it is supported by an affidavit sworn on the same day by Crystal Asige, the plaintiff herein. In response thereto, the 1<sup>st</sup> to 5<sup>th</sup> defendants filed a replying affidavit sworn on 20<sup>th</sup> February, 2023 by Moriasi Omambia, the General Counsel and Head of Business Affairs of the 1<sup>st</sup> to 5<sup>th</sup> defendants, whereas the 6<sup>th</sup> defendant filed a replying affidavit sworn on 6<sup>th</sup> March, 2023 by Marius Van Der Ham, the 6<sup>th</sup> defendant’s General Manager Nigeria, Ghana, East and Southern Africa.
  3. The application was canvassed by way of written submissions which were highlighted on 28<sup>th</sup> March, 2023. The plaintiff’s submissions were filed on 15<sup>th</sup> March, 2023 by the law firm of Mwakireti & Asige Advocates, the 1<sup>st</sup> to 5<sup>th</sup> defendants’ submissions were filed by the law firm of Conrad Law Advocates LLP on 27<sup>th</sup> March, 2023, while the 6<sup>th</sup> defendant’s submissions were filed on 22<sup>nd</sup> March, 2023 by the law firm of Hamilton Harrison & Mathews Advocates.
  4. Mr. K. Asige, learned Counsel for the plaintiff relied on the case of *Giella v Cassman Brown* [1973] EA 358 where the Court laid down the factors to be considered when dealing with an application for an interlocutory injunction. He further relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, where the Court of Appeal defined what constitutes a prima facie case and submitted that this Court is faced with the question of whether the plaintiff has a right to the stated works and whether that right is being infringed by the acts of the defendants.
  5. Counsel for the plaintiff referred to the provisions of Sections 2 and 22(5) of the *Copyright Act* and stated that in as much as the defendants contend that she is not the author/co-author to the musical composition “intro”, she had produced text messages from February, 2019 where she shared with the 2<sup>nd</sup> defendant lyrics to the said composition, approximately twelve months before the 2<sup>nd</sup> to 5<sup>th</sup> defendants released their infringing work. Mr. K. Asige submitted that the 2<sup>nd</sup> to 5<sup>th</sup> defendants have licensed/assigned the said song/composition for distribution without reference to the plaintiff despite the fact that they continue to acknowledge her as a ‘co-writer’. He stated that it is not disputed that for the other works in question, the plaintiff is an author, co-author and performer in the stated works.
  6. Mr. K. Asige relied on the provisions of Sections 26(1), 35(1) & 35(2) of the *Copyright Act* in reference to what constitutes an infringement of a copyright, the rights of an author, and what constitutes



- infringement upon the rights of a performer. He also relied on the Court of Appeal finding in the case of *Royal Media Services Limited v John Katana Harrison* [2019] eKLR and contended that the 1<sup>st</sup> and 6<sup>th</sup> defendants have infringed on the plaintiff's rights for the musical works "Lenga" and "Ukiwa Mbali" by granting the 6<sup>th</sup> defendant exclusive rights and license to use and promote the musical works throughout the world. He further contended that the said rights and license were granted in perpetuity for the 6<sup>th</sup> defendant to use internally and for advertisement purposes even after the contractual term expires.
7. Mr. K. Asige referred to the provisions of Section 33(3) of the [Copyright Act](#) and stated that the 1<sup>st</sup> and 6<sup>th</sup> defendants failed to obtain the plaintiff's written consent for the above license, and instead, the 1<sup>st</sup> defendant passed itself off as the plaintiff's lawful agent despite the plaintiff not having any knowledge of the agreement, while the 6<sup>th</sup> defendant did not do any due diligence to ascertain existence of any such agency. To this end, Counsel relied on the Ugandan case of *Angela Katatumba v Anti-Corruption Coalition Uganda (ACCU)*. He contended that the plaintiff's claim applies to the 2<sup>nd</sup> to 5<sup>th</sup> defendants who did not seek permission or license from the plaintiff, for their use of her original composition now known as "Intro", which they now claim to have fully assigned, sold or licensed to a third party without any reference to the plaintiff.
  8. He submitted that the plaintiff was denied an opportunity to negotiate her terms in regard to the musical works "Ukiwa Mbali", "Favorite Song" and "Extravaganza" since the 1<sup>st</sup> to 5<sup>th</sup> defendants proceeded to use the impugned term sheets without further reference to her, and even went further to use her image and likeness in the music video for "Ukiwa Mbali" without her consent. He relied on the case of *John Boniface Maina v Safaricom Limited* [2013] eKLR and stated that as an author and co-author of the above-mentioned works, the plaintiff has a fair and bona fide question to raise against the defendants since any use of the plaintiff's works by the defendants has been based on a questionable contractual foundation, which unconscionably disadvantaged the plaintiff.
  9. On the issue of whether the plaintiff stands to suffer irreparable injury, Mr. K. Asige relied on the case of *Rebecca Wanjiku v Christ is the Answer Ministries (Citam) & another* [2021] eKLR and stated that the plaintiff has been and will continue to suffer actual, substantial and demonstrable injury without the Court's intervention since the defendants have been enjoying the outcomes of the plaintiff's copyright to her exclusion. He further stated that even though the 6<sup>th</sup> defendant alleges to have removed the infringing works from its Facebook page, in its agreement with the 1<sup>st</sup> defendant under paragraph E(d)(v), it was given perpetual rights to any filmed, recorded or photographed aspect of the plaintiff's works, performances, image and likeness termed as 'KLM Materials'. These materials are still within the possession and internal usage of the 6<sup>th</sup> defendant.
  10. Mr. K. Asige contended that the popularity of the works involved has resulted in a substantial 4 years' worth of royalties, fees, licenses and other undisclosed earnings which the plaintiff will continue to lose if an injunction is not granted. Further, that the 2<sup>nd</sup> to 5<sup>th</sup> defendants' dealings with the musical composition not only infringes upon the plaintiff's economic rights, but also tramples on her moral rights by claiming authorship and presenting it as their own creation both to the general public and to an unsuspecting 3<sup>rd</sup> party to whom they claim to have disposed the song to. He stated that in view of the fact that the 1<sup>st</sup> to 5<sup>th</sup> defendants in their replying affidavit deposed that they do not own any rights in the "Midnight Train" album in which the song "Intro" is featured, the 1<sup>st</sup> to 5<sup>th</sup> defendants have admitted to infringing upon the plaintiff's copyright by assigning and/or licensing and/or synchronizing the song "Intro" without the plaintiff's knowledge or authorization.
  11. Mr. K. Asige cited the decision in *Radio One Limited vs Phonographic Performance Ltd Appeal No. 122 of 2013*, where the Court at Bombay, India stated that where the plaintiff establishes a strong prima



facie case, the balance of convenience would weigh in favour of injunction against an infringement of its copyright. He submitted that, since the plaintiff's authorship grants her a strong prima facie case, the balance of convenience should tilt in her favour.

12. Mr. K. Asige submitted that delivery up of accounts is recognized as a relief against copyright infringement under Section 35(4) of the *Copyright Act*. He referred to the case of *Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others* [2018] eKLR and asserted that the plaintiff has reason to believe that the 1<sup>st</sup> to 5<sup>th</sup> defendants have been receiving royalties and revenues from the works, including her due share and without her consent, and knowledge. He stated that the split sheets produced by the 1<sup>st</sup> to 5<sup>th</sup> defendants are not prepared in accordance with Kenyan Copyright law nor duly executed calling into question their veracity. He contended that the said split sheets attempt to consume the plaintiff's copyright share by the inclusion of production rights, and performance rights in a move aimed at giving them a greater percentage of the copyright, to the detriment of the plaintiff.
13. He submitted that the plaintiff has never earned a single cent in royalty or other revenue from her works mentioned hereinabove, and when she disputed the said split sheets, the 2<sup>nd</sup> to 5<sup>th</sup> defendants distributed the musical works to numerous streaming platforms and media hence she has no way of ascertaining the revenue collected nor the portion of copyright she is entitled to. Further, that the 6<sup>th</sup> defendant paid out monies to the 1<sup>st</sup> defendant, of which the plaintiff was neither informed nor granted her rightful share. He stated that obtaining a statement of accounts shall assist in computing the plaintiff's rightful share of royalties and revenues.
14. Mr. K. Asige submitted that due to the defendant's refusal to recognize and uphold the rights of the plaintiff, and despite numerous attempts by the plaintiff to engage in dispute resolution, she has been unable to ascertain her rightful economic dues since 2019, whereas the defendants continue to contract in various financial engagements using her works which she is not aware of. He contended that it is in the public domain that the song "Extravaganza" has been synchronized to the Netflix series show known as "Country Queen", and that it is very likely that similar licenses and/or assignments in respect of the said works have been issued with no reference to the plaintiff. He asserted that for the plaintiff to ascertain the quantum of her share of royalties in respect of the said works, it is necessary for delivery of such information which is within the defendants' knowledge.
15. Mr. Maloba, learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> defendants stated that in the instant application, the plaintiff is seeking final orders. He relied on the case of *Giella v Cassman Brown & Co. Ltd* (supra). In submitting that in granting injunctions, Courts should take cognizance of the fact that such prayers should be issued with great caution and not in any case as alleged by the plaintiff, without considering that the facts of the case ought to be strong, and straight forward to present a incontrovertible case to warrant the said orders. He relied on the case of *Showind Industries v Guardian Bank Limited & Another* [2002] 1 EA 284.
16. He also relied on the Court of Appeal holding in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (supra) and submitted that the plaintiff has not established a prima facie case with a probability of success since she has only alleged but has not demonstrated that her copyright in composition, and sound recording has been infringed. He cited the case of *HGE v SM* [2021] eKLR and stated that the plaintiff has not placed any evidence before this Court that the 1<sup>st</sup> to 5<sup>th</sup> defendants have infringed on her copyright. Further, that the 1<sup>st</sup> defendant in his replying affidavit deposed that the applicant owns and enjoys the master rights with respect to the musical work "Lenga" and has full control over its distribution for commercial benefit, which assertion has not been disputed by the plaintiff by way of a further affidavit hence it remains an uncontroverted fact. He stated that the said



musical work appears on the plaintiff's Facebook page. And by so doing, the maxim "nemo dat quod non habet" (no one can give what he does not have) is applicable herein.

17. Mr. Maloba submitted that, the 2<sup>nd</sup> to 5<sup>th</sup> defendants as the executive producers by investing and funding the production of the musical work "Extravaganza", hold the and convey the master rights of the said musical works, while on the other hand, the plaintiff as a contributing Artist who was rightfully credited as such, is conveyed with a percentage of publishing and performer's rights under the copyright law thus she is entitled to royalties over those rights only. He contended that in respect to the musical work "Ukiwa Mbali", the 1<sup>st</sup> defendant has rightfully credited the plaintiff as a contributing Artist and has in no way infringed on her copyright.
18. Counsel for the 1<sup>st</sup> to 5<sup>th</sup> defendants submitted that in respect to the musical work "Intro", the plaintiff has been credited as a co-writer and the said defendants do not own any rights of the referenced sound recording, as it is wholly owned by Universal Music (Pty) Limited. He submitted that the 1<sup>st</sup> to 5<sup>th</sup> defendants are not obligated by law to deliver royalties to the plaintiff since they have not been licensed to collect or receive royalties on her behalf. He contended that it is incumbent upon her to contract her own independent publisher to collect royalties owed on her behalf.
19. Mr. Maloba cited the case of Riara Group of Schools Limited v Lucas Kimani [2015] eKLR and submitted that the plaintiff had also failed to demonstrate that she will suffer irreparable harm that cannot be compensated by way of damages. He stated that in any event, the loss of royalties can be quantified thus any loss to the plaintiff can be compensated by an award of damages. He submitted that the plaintiff had not demonstrated how the balance of convenience tilts in her favour. He relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR and expressed the view that plaintiff shall not be inconvenienced in any way should the instant application be disallowed.
20. He contended that the plaintiff has no reason to believe that the 1<sup>st</sup> to 5<sup>th</sup> defendants have been receiving royalties including her due share without her consent. He contended that she had not tendered any evidence in support of the said allegation. It was stated by Mr. Maloba that, in light of the fact that the musical works "Lenga" and "Intro" are not under the control of the 1<sup>st</sup> to 5<sup>th</sup> defendants, issuing an order for production of statement of royalties and revenues would be in vain since that information is not in their possession. He further stated that in respect to other musical works, the plaintiff had been credited as a contributing Artist, and her rightful share allocated as indicated in the split sheets.
21. On the prayer that the plaintiff is entitled to a licensing, assignment and/or royalty information, Mr. Maloba submitted that all ownership rights to the musical work "Lenga" have been conveyed to the plaintiff, and that the 1<sup>st</sup> to 5<sup>th</sup> defendants are not obligated to collect any royalties on behalf of the plaintiff in respect to the musical work "Extravaganza" and "Ukiwa Mbali". He contended that the plaintiff was not involved in the arrangement of the musical work "Favorite Song" but only performed background vocals hence she is only entitled to royalties over performer's rights. He stated that the 2<sup>nd</sup> to 5<sup>th</sup> defendants do not own any rights to the musical work "Intro", as it is wholly owned by Universal Music (Pty) Limited thus the information requested for by the plaintiff is not in their possession. He urged that prayer 2 of the instant application should not be granted.
22. Mr. Mwihuri, learned Counsel for the 6<sup>th</sup> defendant submitted that the 6<sup>th</sup> defendant has never used the songs "Extravaganza", "Favorite Song", and "Intro" and no evidence had been tendered to that effect. He further submitted that indeed the 6<sup>th</sup> defendant used the songs "Lenga" and "Ukiwa Mbali" on its Facebook page and as a result, more than Kshs. 4,000,000/= was paid to the 1<sup>st</sup> defendant by the 6<sup>th</sup> defendant but due to the current dispute the said songs have since been removed from its Facebook page. Counsel contended that no evidence has been tendered by the plaintiff to demonstrate that the 6<sup>th</sup> defendant is infringing on the plaintiff's copyright by using these songs.



23. The 6<sup>th</sup> defendant admitted that it removed the two songs from its Facebook page, and it was upon the plaintiff to demonstrate that there is ongoing infringement by the 6<sup>th</sup> defendant. He cited the Court of Appeal case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR and stated that despite having the right to file a further affidavit to produce such evidence, the plaintiff opted to file submissions on the issue. Mr. Mwihuri relied on the case of James Titus Kisia v Said Majid Said [2013] eKLR and indicated that in the absence of evidence of infringement by the 6<sup>th</sup> defendant, this Court should not grant the order of injunction sought as doing so would be in vain.
24. He submitted that even assuming that there was infringement, any harm that would arise can be quantified and adequately compensated by an award of damages and contended that the plaintiff had failed to prove irreparable harm, Counsel relied on the case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 25 others [2016] eKLR. He further referred to the Court of Appeal holding in the case of Chatur Radio Services v Pronogram Limited [1994] eKLR and submitted that since the plaintiff had failed to give an undertaking as to damages, she had failed to meet a primary criterion for the grant of an order of injunction.
25. On the prayer for the defendants to provide a statement of the royalties and revenues received by them on account of the alleged infringement, Mr. Mwihuri contended that the 6<sup>th</sup> defendant has never earned any revenue from usage of the songs “Lenga” and “Ukiwa Mbali” and it would be in vain for the 6<sup>th</sup> defendant to produce a statement of royalties and revenues allocated. He stated that no evidence to the contrary had been presented by the plaintiff and in the absence of such, an order to provide a statement cannot issue against the 6<sup>th</sup> defendant. In submitting that an order which cannot be enforced cannot be granted, Counsel referred to the case of James Titus Kisia v Said Majid Said (supra).
26. In a rejoinder, Mr. K. Asige submitted that the plaintiff’s music has been used on several platforms thus she was seeking an order stopping the use of her songs. He further submitted that in as much as the master rights were conveyed to the plaintiff, there is still infringement of her copyright in respect to the songs “Lenga” and “Ukiwa Mbali” which were only pulled down recently. It was stated by Counsel for the plaintiff that the temporary order being sought is on infringement of the plaintiff’s artistic works and that the defendants are the genesis of the said infringement by misuse of her works. He further stated that the orders being sought are not final orders.

### **Analysis And Determination.**

27. I have considered the application herein, the grounds on the face of it and the affidavit filed in support of the application. I have also considered the replying affidavits by the defendants and the written and oral submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether an order for temporary prohibitory injunction should issue;
  - ii. Whether the defendants should be ordered to deliver up a full statement of royalties and revenues allocated and/or received by them and/or their representatives; and
  - iii. Whether the defendants should be ordered to deliver up all licensing, assignment and/or royalty information.
28. In the affidavit in support of the application, the plaintiff deposed that sometime in February 2019, she was aboard a taxi in the company of Lloyd Metto together with the 2<sup>nd</sup> defendant when she performed an original song for the 2<sup>nd</sup> defendant to get his feedback and he stated that it was a great composition.



- She averred that she later forwarded to him the lyrics of the song for further feedback but none was forthcoming and he never spoke about it again.
29. It was stated by the plaintiff that she was surprised to hear her original composition which had been titled "Intro" with a credit to her as a co-author, performed and recorded by the 2<sup>nd</sup> to 5<sup>th</sup> defendants' studio album "Midnight Train" with a few additional lyrics without her knowledge and consent sometime in June 2021. She stated that she had not received a lawful split-sheet or copyright agreement setting out her copyright share in respect to the said composition/sound recording.
  30. The plaintiff deposed that she co-authored the song "Extravaganza" yet to date, she has not received a lawful split-sheet or copyright agreement setting out her copyright share in respect of the said composition/sound recording. She further deposed that the song "Extravaganza" was featured in episode 1 of the Netflix series entitled "Country Queen" without her consent and she has never received any income statement or remuneration for use of the same.
  31. The plaintiff's case is that in the year 2019, the 1<sup>st</sup> and the 6<sup>th</sup> defendants entered into a contract without her knowledge where the 1<sup>st</sup> defendant purported to act as her agent despite the fact that she did not have an agreement with it to that effect. That the said contract allowed the 6<sup>th</sup> defendant to use her musical compositions in "Lenga" and "Ukiwa Mbali" which she authored/co-authored, composed and/ or arranged, as well as her image to market their enterprise. She averred that she had not received a lawful split-sheet or copyright agreement setting out her copyright share in respect of the said composition/sound recording.
  32. She asserted that she also arranged and performed background vocals in the sound recording "Favorite Song" by artist Bensoul but she had also not received a lawful split-sheet or copyright agreement setting out her copyright share in respect of the said composition/ sound recording. The plaintiff averred that despite making several requests to the defendants she has never received any statement of income generated, remuneration, compensation or royalties.
  33. Further, without documentation between the parties herein acknowledging her lawful copyright share in the aforementioned musical works, she is unable to register her copyright with the Kenya Copyright Board hence she cannot receive any royalties earned. She claimed that the defendants are free to use, license, assign and/or otherwise deal with the said musical works for profit without any reference to her as a lawful copyright holder. The plaintiff stated that she has also made requests to have lawful copyright agreements, licensing, assignment and/ or royalty information in respect of "Lenga", "Extravaganza", "Ukiwa Mbali", "Favorite song " and "Intro" from the year 2019 in order to ascertain what was due to her but all her efforts have been in vain. She further stated that this Court needs to know what income has been generated from the said songs so as to ascertain her lawful share in the main suit.
  34. The 1<sup>st</sup> to 5<sup>th</sup> defendants in their replying affidavit deposed that they do not own any rights of the album "Midnight Train" which is wholly owned by Universal Music (Pty) Limited. They averred that in respect to the song "Extravaganza", the plaintiff was engaged by the 1<sup>st</sup> defendant and her contribution was as a featured Artist on agreed terms. They further averred that the plaintiff exclusively owns and enjoys the master rights with respect to the musical work "Lenga" and has full control over its distribution for commercial benefit.
  35. It was stated by the 1<sup>st</sup> to 5<sup>th</sup> defendants that the 1<sup>st</sup> defendant owns the master rights to the sound recording "Ukiwa Mbali" and that she failed to acknowledge the split sheet and unilaterally terminated her engagement with the 1<sup>st</sup> defendant. They further stated that the broadcast and distribution of the audio-visual of the stated works were with the full knowledge and consent of the plaintiff who



participated fully in the production of the works during the subsistence of her engagement with the 1<sup>st</sup> defendant.

36. It was the 1<sup>st</sup> to 5<sup>th</sup> defendants' averment that the plaintiff was not involved in the arrangement of Bensoul's song "Favorite Song" but she only performed background vocals. They further averred that split sheets have always been shared with the plaintiff and that she was informed on the formula used in preparation of the said split sheets for distribution of royalties to various contributors of musical work, within the provisions of copyright laws and accepted practice in the music industry. The said defendants deposed that the plaintiff declined to sign the split sheets demanding a variation of the formula, and an increase in her quota of the royalties which was unacceptable. They contended that split sheets are not registerable with the Kenya Copyright Board.
37. The 6<sup>th</sup> defendant in its replying affidavit deposed that it entered into an agreement dated 12<sup>th</sup> September, 2019 with the 1<sup>st</sup> defendant where the 1<sup>st</sup> defendant was identified as an agent of various Artists including the plaintiff. It averred that at paragraph 35 of the plaint, the plaintiff averred that together with the 2<sup>nd</sup> to 5<sup>th</sup> defendants they created songs that were to feature on the 6<sup>th</sup> defendant's album therefore the plaintiff cannot claim that the 6<sup>th</sup> defendant has infringed on her copyright in respect to the song "Lenga" when in October, 2019 she consented to the song being uploaded onto the 6<sup>th</sup> defendant's Facebook page. The 6<sup>th</sup> defendant indicated that it has since removed the said song from its Facebook page due to the current unfounded allegations.
38. The 6<sup>th</sup> defendant further indicated that in respect to the song "Ukiwa Mbali", it was evident from paragraph 36 of the plaint that the plaintiff knew that the said song would feature on the 6<sup>th</sup> defendant's album hence she cannot claim that the 6<sup>th</sup> defendant has infringed on her copyright. The 6<sup>th</sup> defendant reiterated that it has since removed the said song from its Facebook page due to the current unfounded allegations.
39. It was stated by the 6<sup>th</sup> defendant that it has never used the songs "Extravaganza", "Favorite Song", and "Intro". The 6<sup>th</sup> defendant asserted that it has neither infringed on the plaintiff's copyright in any way nor received any royalties or revenues from the songs referred to in the instant application. In addition, it averred that the plaintiff merely alleges infringement without specifying where and how her songs are allegedly being infringed.

#### **Whether an order for temporary prohibitory injunction should issue.**

40. The plaintiff's case is that the defendants have infringed on her artistic works and by extension her copyright in respect to the musical works "Lenga", "Extravaganza", "Ukiwa mbali", "Favorite Song" and "Intro". She stated that it is in the interest of justice for this Court to grant her an order of temporary prohibitory injunction restraining the defendants from any further infringement on her artistic works.
41. The threshold for grant of a temporary injunction was set out by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR as hereunder -

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and



- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

42. This Court first has to establish whether the plaintiff has established a prima facie case with probability of success. To this end I am guided by the Court of Appeal decision in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the Court defined what constitutes a prima facie case. It stated that -

“...a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

### **The musical work “Intro”**

43. In respect to the musical work “Intro” featured in the album titled “Midnight Train”, it is not disputed by the parties herein that the plaintiff authored and/or co-authored the said song. However, it was stated by the 1<sup>st</sup> to 5<sup>th</sup> defendants that in as much as that is the position, and that the plaintiff has been acknowledged as a co-writer in the said song, they do not own the rights to it as it is exclusively owned by Universal Music (Pty) Limited. I therefore agree with Counsel for the plaintiff that in view of the foregoing, the 1<sup>st</sup> to 5<sup>th</sup> defendants admitted to licensing and/or assigning the said song for distribution without the plaintiff’s consent and/or any reference to her whatsoever.

### **The musical works “Lenga” and “Ukiwa Mbali”**

44. In respect to the musical work “Lenga”, it is also not disputed that the plaintiff is the author and performer of the said song. The 1<sup>st</sup> to 5<sup>th</sup> defendants stated that they do not own the master rights to the said song, therefore the plaintiff has full control over its distribution for commercial benefit.

45. With regard to the musical work “Ukiwa Mbali”, the plaintiff’s case is that she is the author and/or co-author of the said song. The 1<sup>st</sup> defendant on the other hand contends that it owns the full master rights to the sound recording of the said song, as the plaintiff only participated as a contributing Artist and she has been rightfully credited as such.

46. The plaintiff averred that the defendants used her image/likeness in the broadcast of the audio-visual of the song “Ukiwa Mbali”, but the 1<sup>st</sup> defendant claimed that the broadcast, and distribution of the audio-visual of the said song was done with the full knowledge and consent of the plaintiff who even participated in the production of the works, thus it cannot be said that the defendants have infringed on her copyright in any way.

47. It is not disputed that the 1<sup>st</sup> and 6<sup>th</sup> defendants entered into a contract where the 6<sup>th</sup> defendant was granted exclusive rights and license to use and promote the musical works “Lenga” & “Ukiwa Mbali” throughout the world. The said license was granted in perpetuity for the 6<sup>th</sup> defendant to use internally and for advertisement purposes even after the contractual term lapses. The plaintiff contended that in order to get into the said agreement, the 1<sup>st</sup> defendant misrepresented itself as her agent without her knowledge of the existence of the agreement. She also stated that no written and/or express consent was sought from or issued by her for the use of the musical works “Lenga” & “Ukiwa Mbali” prior to the 1<sup>st</sup> and 6<sup>th</sup> defendants entering into the contract.

48. The 6<sup>th</sup> defendant averred that upon perusal of the plaint at paragraphs 35 and 36, it is evident that the plaintiff was aware that the songs “Lenga” & “Ukiwa Mbali” would be featured in its album hence she



cannot claim that the 6<sup>th</sup> defendant has infringed on her copyright. It further stated that it did not earn any revenue from the said songs which have since been pulled down from its Facebook page.

49. In light of the above averments, is this Court's finding that, it is not disputed that the plaintiff contributed in one way or another to the composition of the musical works "Lenga" & "Ukiwa Mbali". It is evident that the 1<sup>st</sup> defendant does not dispute entering into a contract with the 6<sup>th</sup> defendant over the said songs in its capacity as the plaintiff's agent, although the plaintiff's position is that she neither had no knowledge of the said agreement nor was her consent and/or approval sought before getting into the said contract.
50. A perusal of the contract between the 1<sup>st</sup> and the 6<sup>th</sup> defendants dated 12<sup>th</sup> September, 2019, under paragraph E(d)(v), it is clear that the 6<sup>th</sup> defendant was granted perpetual rights to any filmed, recorded or photographed aspect of the materials referred to in the contract which include musical works that the plaintiff has contributed to in one way or another.
51. Bearing the above in mind, it is this Court's finding that the plaintiff authored/co-authored and or contributed to the composition of the musical works "Lenga" & "Ukiwa Mbali". Since the said material is still in custody of the 6<sup>th</sup> defendant, which was granted perpetual rights pursuant to the contract dated 12<sup>th</sup> September, 2019 between itself and the 1<sup>st</sup> defendant, it is in the interest of justice for this Court to grant an order of injunction pending the hearing and determination of the main suit as against the 1<sup>st</sup> defendant. The 6<sup>th</sup> defendant stated that it had pulled down the said songs from its Face book page. The plaintiff did not rebut that averment and as such, there is currently no infringement of the plaintiff's rights by the said 6<sup>th</sup> defendant.
52. The 6<sup>th</sup> defendant contended that there is no evidence of any ongoing infringement. I find that at this juncture all this Court is required to determine is whether the plaintiff has a prima facie case without delving into the merits and demerits of the dispute between the parties herein. This was the Court's position in the case of Mbuthia v Jimba Credit Corporation Ltd 1988 KLR 1, where the Court held that -

"In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases."

### **The musical work "Extravaganza"**

53. The plaintiff averred that she was the co-author of the musical works "Extravaganza". The 1<sup>st</sup> to 5<sup>th</sup> defendants stated that she was only a contributing Artist thus entitled to a percentage of publishing and performer's rights. The plaintiff contended that the said song was synchronized to the Netflix series "Country Queen", thus if the application herein is disallowed, similar licenses will continue to issue without her knowledge.

### **The musical work "Favorite Song"**

54. It is not disputed that the plaintiff performed background vocals in respect to the musical works "Favorite Song". The defendants averred that the plaintiff was not involved in the arrangement of the said musical work as she alleged and as such, she is not entitled to royalties over performer's rights.
55. The plaintiff stated that in all the aforementioned musical works, she has been unable to register her copyright since the defendants have refused to acknowledge her lawful copyright hence she cannot receive royalties. She further stated that in respect to the songs "Ukiwa Mbali", "Favorite Song" & "Extravaganza", she has been unable to negotiate terms since the 1<sup>st</sup> to 5<sup>th</sup> defendants used the impugned



split sheets without further reference to her after she disputed them, thus denying her four years' worth of royalties, fees, licenses, and other undisclosed earnings.

56. The above contentions have not been disputed by the defendants who instead stated that the plaintiff failed to acknowledge split sheets and unilaterally terminated her agreement with the 1<sup>st</sup> defendant and that there is no evidence that they received royalties due to the plaintiff. They also averred that the plaintiff declined to sign split sheets demanding variation of the formula used in preparation of the split sheets for distribution of royalties and an increase in her quota of the royalties
57. From the foregoing, it is my finding that the plaintiff has adequately demonstrated that the defendants have infringed and/or threatened to infringe on her artistic works and/or copyright. As a result, the plaintiff has established a prima facie case with a probability of success.
58. On whether the plaintiff will suffer irreparable injury that would not be adequately compensated by an award in damages, the plaintiff submitted that she has been and will continue to suffer actual, substantial and demonstrable injury without the Court's intervention since the defendants have been enjoying the outcomes of her copyright to her exclusion. The defendants on the other hand submitted that that the plaintiff has failed to demonstrate that she will suffer irreparable harm that cannot be compensated by way of damages. Further, the loss of royalties can be quantified thus any loss to the plaintiff can be compensated by way of damages.
59. I am of the considered view that having demonstrated that the defendants have infringed on the plaintiff's artistic works and/or copyright, in the event the application herein is disallowed, the plaintiff shall suffer irreparable injury as the defendants shall continue to benefit from her work to her exclusion and detriment. To this end, I am guided by the Court's finding in the case of Nonny Gathoni Njenga & another v Catherine Masitsa & 2 others [2015] eKLR, where the Court in allowing a similar application held that -

“...Courts have held time and again that damages are not always an adequate remedy in determining whether or not to grant an injunction and especially where there has been a breach of the law. In the case of Waithaka –vs- Industrial and Commercial Development Corporation (2001) KLR 374 Ringera J (as he then was) in granting an injunction went ahead and delivered himself thus at page 381: -

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust.”

...

See also: Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207.”

60. It is this Court's finding that the balance of convenience tilts in favour of the plaintiff who has demonstrated that the defendants have infringed on her artistic works and/or copyright. In any event, the defendants have not demonstrated any prejudice that they stand to suffer in the event that the application herein is allowed.



**Whether the defendants should be ordered to deliver up a full statement of royalties and revenues allocated and/or received by them/their representatives.**

61. It is the plaintiff's case that the 1<sup>st</sup> to 5<sup>th</sup> defendants have been receiving royalties and revenues from the works, including her due share and without her consent, and knowledge. She further states that the split sheets produced by the 1<sup>st</sup> to 5<sup>th</sup> defendants have not been prepared in accordance with the Kenyan copyright law or duly executed, which calls into question their veracity. The plaintiff averred that the 6<sup>th</sup> defendant submitted that it paid out monies to the 1<sup>st</sup> defendant, of which the plaintiff was neither informed nor granted her rightful share. As such, the plaintiff is entitled to a statement of accounts which will assist her to compute her rightful share of royalties and revenues.
62. The 1<sup>st</sup> to 5<sup>th</sup> defendants on the other hand submitted that the musical works "Lenga" and "Intro" are not under the control of the 1<sup>st</sup> to 5<sup>th</sup> defendants hence it would be in vain to issue an order for production of statement of royalties and revenues since that information is not in their possession. The plaintiff on the other hand contended that she has never earned a single cent in royalty or other revenue from her works mentioned hereinabove, and when she disputed the split sheets, the 2<sup>nd</sup> to 5<sup>th</sup> defendants distributed the musical works to numerous streaming platforms and media, and she has no way of ascertaining the revenue collected nor the portion of copyright she is entitled to. These assertions were not disputed by the 1<sup>st</sup> to 5<sup>th</sup> defendants who stated that the plaintiff was duly credited as a contributing Artist, and her rightful share allocated as indicated in the split sheets. The 6<sup>th</sup> defendant on other hand submitted that it has never made and/or collected any revenue from the use of the musical works "Lenga" and "Ukiwa Mbali", thus the information required by the plaintiff is not in its possession.
63. The allegation that the 6<sup>th</sup> defendant has never made and/or collected any revenue from the use of the musical works "Lenga" and "Ukiwa Mbali" is subject to proof at the hearing of the main suit. The assertion that the 1<sup>st</sup> to 5<sup>th</sup> defendants are not in possession of statement of royalties and revenues in respect to the musical works "Lenga" and "Intro" is not believable since the rights to the song "Intro" contained in the album titled "Midnight Train" were sold to a third party by the 1<sup>st</sup> to 5<sup>th</sup> defendants, and as a result, the 1<sup>st</sup> to 5<sup>th</sup> defendants earned revenue from the said sale. Further, the 6<sup>th</sup> defendant submitted that it paid the 1<sup>st</sup> defendant Kshs. 4,000,000/= pursuant to the agreement dated 12<sup>th</sup> September, 2019 for the use of the song "Lenga", which constitutes proof that the 1<sup>st</sup> defendant earned revenue from the said song.
64. From the evidence on record, it is not disputed that the plaintiff authored, co-authored and/or contributed in the composition of the musical works in issue, in one way or another and for the said reason, she is entitled to royalties, and/or revenues generated from the use of the said musical works. It is also not disputed that the plaintiff did not agree with the split sheets availed by the 1<sup>st</sup> to 5<sup>th</sup> defendants hence the said split sheets were not executed by the plaintiff. From the foregoing, I am of the considered view that in order to ascertain how much the plaintiff is entitled to in terms of royalties, and/or revenue generated from the use of the musical works, this Court should make an order directing the defendants to deliver up a full statement of royalties and revenues allocated and/or received by them and/or their representatives.

**Whether the defendants should be ordered to deliver up all licensing, assignment and/or royalty information**

65. On the prayer that the plaintiff is entitled to a licensing, assignment and/or royalty information as prayed, Counsel for the 1<sup>st</sup> to 5<sup>th</sup> defendants submitted that all ownership rights to the musical work



“Lenga” have been conveyed to the plaintiff, and that the 1<sup>st</sup> to 5<sup>th</sup> defendants are not obligated to collect any royalties on behalf of the plaintiff with respect to the musical work “Extravaganza” and “Ukiwa Mbali”. Further, that the plaintiff was not involved in the arrangement of the musical work “Favorite Song” but only performed background vocals hence she is only entitled to royalties over performer’s rights and the 2<sup>nd</sup> to 5<sup>th</sup> defendants do not own any rights of the musical work “Intro”, as it is wholly owned by Universal Music (Pty) Limited, thus the information requested by the applicant is not in their possession.

66. This Court has already held that the plaintiff authored, co-authored, and/or contributed in composing the musical works in issue in one way or another and for this reason, she is entitled to royalties. In addition, having established that she has certain rights to the musical works herein, the 1<sup>st</sup> to 5<sup>th</sup> defendants ought to have informed her and/or sought her consent before licensing and/or assigning the said musical works for use by third parties. Notably, the rights of the musical work “Intro”, are wholly owned by Universal Music (Pty) Limited, further the song “Lenga” was licensed and/or assigned to the 6<sup>th</sup> defendant to use and promote the musical works throughout the world. Therefore, it is only proper for the 1<sup>st</sup> to 5<sup>th</sup> defendants to deliver up all licensing, assignment and/or royalty information with regards to the musical works in issue to the plaintiff. The above information will assist this Court in determining the dispute between the parties in the suit. For this reason, I find that this prayer is merited.
67. In the premise, it is this Court’s finding that the application dated 7<sup>th</sup> December, 2022 is merited. The said application is allowed in the following terms-
- i. That an order of temporary prohibitory injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants from in any way infringing on the plaintiff’s copyright in composition and sound recording which she has created and contributed to while working with the 1<sup>st</sup> defendant’s label and in particular those that have been released to the public specifically “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” is hereby issued pending the hearing and determination of the main suit;
  - ii. That an order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants to deliver up a full statement of royalties and revenues allocated and/or received by them/ their representatives in respect of the compositions and sound recordings in respect of “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” from the year 2019 to date is hereby issues, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to deliver up all licensing, assignment and/or royalty information, including synchronization, in respect of “Lenga”, “Extravaganza”, “Ukiwa mbali”, “Favorite Song” and “Intro” from the year 2019 to date is hereby issued;
  - iii. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants shall comply with the orders made in paragraphs (ii) and (iii) of this ruling within thirty (30) days from today; and
  - iv. Costs of this application shall abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



**JUDGE**

