



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E545 OF 2020**

**BETWEEN**

**HELLEN WINFRIDA ARIKA.....PLAINTIFF**

**AND**

**TAMASHA CORPORATION LTD.....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**

**GOOGLE LLC T/A YOUTUBE.....6<sup>TH</sup> DEFENDANT**

**MDUNDO KENYA.....7<sup>TH</sup> DEFENDANT**

**BOOM PLAY..... 8<sup>TH</sup> DEFENDANT**

**APPLE T/A ITUNES.....9<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. There are three applications for the court's determination. The Plaintiff's Notice of Motions dated 17<sup>th</sup> December 2020 and 27<sup>th</sup> January 2021 and the 1<sup>st</sup> Defendant's Notice of Motion dated 19<sup>th</sup> January 2021. Before I deal with the applications, let me set out the background of the matter which, for purposes of this ruling, is mainly between the Plaintiff and 1<sup>st</sup> Defendant.

2. The Plaintiff claims that she is the holder of Powers of Attorney donated to her by Kiambukuta Londa Joseph t/a Josky Kiambukuta and Eric Sentama Mpoyi son of and Administrator of the Late Djo Mpoyi Kanyinda (hereinafter her 'Artists') with rights to sue and defend over their musical and artistic rights. Her case against the Defendants is for damages and consequential relief for copyright infringement.

3. The 1<sup>st</sup> Defendant states that it has never held and/or distributed any musical works by Djo Mpoyi Kanyinda. It states that it acquired the copyright to some of the musical works by Josky Kiambukuta from *Polygram Records (K) Limited* ("Polygram") through a sale agreement dated 14<sup>th</sup> August 1992 ("the Agreement") by which it acquired the right to distribute the musical works in the said recording. The 1<sup>st</sup> Defendant states that due to the age of the musical works it did not have all the current contacts of various artistes particularly those from the Democratic Republic of Congo such as Josky Kiambukuta represented by the Plaintiff as such it was unable to contact some of these artistes

in respect of payment of royalties. Nevertheless, it kept records of revenue from these works should a valid claim be made and that this position was communicated to the Kenya Copyright Board.

### **The First and Second Applications**

4. The first application is the Plaintiff's Notice of Motion dated 17<sup>th</sup> December 2020 ("the First Application") in which the Plaintiff seeking an order of access, break-into/out of/enter the Defendants' premises and take any infringing copies of musical works in respect to Kiambukta Londa Joseph t/a Josky Kiambukuta and Eric Sentama Mpoi son of and Administrator of the late Djo Mpoi Kanyinda, contained in any documents, CDs, Severs, Computers, Laptops, vinyl records, mobile phones, radio cassettes, video tapes, CPUs, and preserve them for the remainder of the suit at Nairobi Central Police Station. The Plaintiff further seeks an order directing the Defendants to produce bank account records in respect to monies and royalties they have been collecting, transferring, charging, assigning or in any way dealing with in the name of the Plaintiff's artists and musical creators. The application is supported by the grounds on its face and the Plaintiff's supporting affidavit sworn on 17<sup>th</sup> December 2020. It is opposed by the replying affidavit of Drusila Kwamboka, the 1<sup>st</sup> Defendant's Officer Manager, sworn on 11<sup>th</sup> February 2021.

5. The second application by the 1<sup>st</sup> Defendant is the Notice of Motion dated 19<sup>th</sup> January 2021 ("the Second Application") seeking to set aside the ex parte orders issued by this court on 21<sup>st</sup> December 2020 and 15<sup>th</sup> January 2021 and an order directing the Plaintiff and/or the Officer Commanding Parklands Police Station to release its office equipment set out in the inventory annexed to the application. It also prays that on a date fixed by the Court, the 1<sup>st</sup> Defendant grant supervised access to the Plaintiff to enable the Plaintiff to retrieve any information that is material to this suit. The application is supported by the grounds on its face and the affidavit of Drusila Kwamboka sworn on 20<sup>th</sup> January 2021. It is opposed by the Plaintiff through her affidavit sworn on 25<sup>th</sup> January 2021.

6. Since I have dealt with the First and Second Applications, I do not intend to spend time on them as I consider that they are largely resolved. When the Plaintiff filed suit, it filed the First Application under certificate of urgency. The matter was place before me and I issued interim orders on 21<sup>st</sup> December 2020 where the court ordered the Plaintiff, in the company of police officers, to access the 1<sup>st</sup> Defendant's premises and take any infringing copies of musical works belonging to Joseph Londa Kiambukuta and Djo Mpoi Kanyinda, contained in any documents, CDs, Severs, Computers, Laptops, vinyl records, mobile phones, radio cassettes, video tapes CPUs, and preserve them pending the hearing and determination of the suit.

7. Upon filing of the Second Application, I issued the following order on 25<sup>th</sup> January 2021 stated as follows:

[1] THAT all the computer and related equipment set out in the inventory dated 19<sup>th</sup> January 2021 in the custody of the Commanding Officer(OCS), Parklands Police Station shall be released to the 1<sup>st</sup> Defendant by the close of business today, 25<sup>th</sup> January 2021 on the condition that the 1<sup>st</sup> Defendant does undertake not to interfere with the computers and related information and to give to the Plaintiff all the information requested by the Plaintiff ..

8. Looking at the order dated 21<sup>st</sup> December 2020, which was an *Anton Piller* order, and the subsequent order of 25<sup>th</sup> January 2021, the First Application was largely spent as the Plaintiff accessed the 1<sup>st</sup> Defendant's premises took away the material, equipment and/or evidence she considered relevant to the suit. The Second Application was also spent when I granted the order of 25<sup>th</sup> January 2021. I do not see any reason why the court should order another break-in when the orders issued have served their intended purpose. Therefore, the only issue pending determination in First Application is whether the court should order and direct the Respondent's Directors to produce bank account records in respect to monies and royalties the Defendants have been collecting, transferring, charging, assigning or in any way dealing with in the name of the Plaintiff's artists and musical creators from the date of incorporation of the Respondent.

9. The 1<sup>st</sup> Defendant admits that it has the revenue records in respect of the royalties to the Plaintiff's artists and it does not oppose producing any such information. I therefore direct the 1<sup>st</sup> Defendant to produce the records in its possession in respect royalties and any other money it has been collecting, transferring, charging, assigning or in any way dealing with in the name of the Plaintiff's artists and musical creators from the date of incorporation of the 1<sup>st</sup> Defendant.

### **The Third Application**

10. The Notice of Motion dated 27<sup>th</sup> January 2021 ("the Third Application") is filed by the Plaintiff. She seeks an order permitting her to serve the court process by alternative means through an advertisement in Nation Newspapers in the Republic of Kenya and an order directing *Google Kenya* accept service on behalf of *Google*. The Plaintiff also seeks orders that 1<sup>st</sup> Defendant's directors, employees and servants be arrested, charged and prosecuted for the crimes of copyright infringement under the **Copyright Act** and that any evidence that was gathered by the Police subject to the orders of this court be seized according to law and be preserved for the criminal prosecution and contempt of court proceedings of the Defendants including all evidence released to the Defendants herein. The Plaintiff further seeks an order that the evidence gathered by her be admitted for trial herein. The application is supported by the grounds in its face together with the affidavits of Charles Wabwoba Walioli, the Plaintiff's advocate, sworn on 27<sup>th</sup> January 2021 and Radson Chimwani, a clerk in the firm of *Walioli Wabwoba and Company Advocates* sworn on 13<sup>th</sup> February 2021.

11. The thrust of the Third Application is that the Plaintiff has faced challenges in serving court process on the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. It contends that the 4<sup>th</sup> Defendant has refused service of physical documents due to *COVID-19* and documents sent to their email address *info@safricom.com* result in their domain sending a delay notice; the 7<sup>th</sup> Defendant have closed their physical offices and that *Google Kenya* have refused service on behalf of the 6<sup>th</sup> Defendant, *Google*, and it does not have a known email.

12. The Plaintiff further contends that the 1<sup>st</sup> Defendant has purported to issue a 7-day notice to the Plaintiff to download the ordered information but the said link is false, illegal, outside this Court's orders and inaccessible. It accuses the 1<sup>st</sup> Defendant of intending to obfuscate and escape this court's orders and also escape their civil, criminal and contempt of court liability within the Republic of Kenya and that the evidence gathered against the Defendants now before court shows clearly that the Plaintiff will suffer prejudice if the orders sought are not granted. It submits that the laws of Kenya prescribe that the 1<sup>st</sup> Defendant be charged and prosecuted for the crimes of copyright infringement under the **Copyright Act** and the **Criminal Procedure Code** also permits concurrent/singlehanded civil and criminal prosecution for acts that fall under both civil and criminal liability. She urges the court to issue orders that secure the preservation of the evidence herein for future prosecution.

13. The 1<sup>st</sup> Defendant opposes the application on the ground that this suit is of a commercial nature and this Court does not have jurisdiction to order the arrest, charging and prosecution of offences. It states that whether or not to charge the 1<sup>st</sup> Defendant, its directors or agents is a matter within the discretion of the Director of Public Prosecution (DPP) as set out in **Article 157(6)** of the Constitution and that this court does not have jurisdiction to direct the DPP on carrying out of the functions of the DPP's office as set out in **Article 157(10)** of the Constitution. The 1<sup>st</sup> Defendant adds that there is no evidence before the Court of any complaint made to the police and that the same has been forwarded to the DPP for further action.

14. The 1<sup>st</sup> Defendant submits that the Second Application was partly and conditionally allowed and the equipment was released by the police to the 1<sup>st</sup> Defendant on 26<sup>th</sup> January 2021. The condition of the court was that the 1<sup>st</sup> Defendant provides the information required by the Plaintiff which as per the Plaintiff's deposition in response to the 1<sup>st</sup> Defendant's application, the Plaintiff annexed a list of 19 tracks which form part of the Plaintiff's allegations of infringement against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant states that by the email dated 26<sup>th</sup> January 2021 it forwarded a download link with the 19 tracks to the Plaintiff's advocates in compliance with the terms of the Release Order and that the email expressly indicated that the link was only valid for 7 days as dictated by the host of the download service and not the 1<sup>st</sup> Defendant. Nevertheless, the 1<sup>st</sup> Defendant states that it is willing to provide the 19 tracks in a flash drive

15. The 1<sup>st</sup> Defendant states that save for the said 19 tracks, the Plaintiff has not made any other request to the 1<sup>st</sup> Defendant for release of any form of information and that the Plaintiff's allegation that it *intends to obfuscate and escape this court's orders and also escape their civil, criminal and contempt of court liability in the Republic of Kenya* is untrue, baseless, unsubstantiated, and made in bad faith and that there is nothing in the Plaintiff's application that supports this very serious false allegation. Further, there is nothing in the Plaintiff's application that supports the baseless allegation that the 1<sup>st</sup> Defendant will destroy any documentation or information as the 1<sup>st</sup> Defendant has all along and continues to maintain that it is willing to provide any information that is required for purposes of this suit but that no request for information has been received by the 1<sup>st</sup> Defendant from the Plaintiff.

16. The 1<sup>st</sup> Defendant maintains that the Plaintiff makes vague and unspecified allegations against it without clearly stating which musical works are in issue hence the 1<sup>st</sup> Defendant is unable to respond to those allegations. The 1<sup>st</sup> Defendant contends that the Plaintiff's prayer for costs against the 1<sup>st</sup> Defendant including costs of expert costs for work done in respect of extraction of information from the 1<sup>st</sup> Defendant's computers has no basis. It states that at time the Release Order was made on 25<sup>th</sup> January 2021, the equipment had already been at the Plaintiff's disposal for 5 days. It further avers that the annexures produced in the Plaintiff's application are the 1<sup>st</sup> Defendant's internal records and are not in any way evidence of any wrong-doing. It urges the court to dismiss the application with costs.

17. The Third Application seeks preservation of the evidence seized and thereafter released to the 1<sup>st</sup> Defendant. The order issued on 25<sup>th</sup> January 2021 directed the 1<sup>st</sup> Defendant not to interfere with the computers and related information. I do not see any evidence that the 1<sup>st</sup> Defendant is interfering with the computers and related information hence no purpose will be served by making further orders in the matter.

18. Turning to the orders seeking an order directing that the 1<sup>st</sup> Defendant's directors, employees and servants be arrested, charged and prosecuted for the crimes of copyright infringement under the **Copyright Act**. It is true that the **Copyright Act** provides for prosecutable offences but there is nothing therein that gives the court powers to order for the arrest and prosecution of suspected offenders. I am in agreement with counsel for the 1<sup>st</sup> Defendant that that the discretion to charge a person with an offence and institute criminal proceedings lies with the Director of Public Prosecution under **Article 157(6)** of the Constitution. Further, the court does not have the jurisdiction or power to direct the DPP on carrying out of the functions of the DPP's office as set out in **Article 157 (10)** of the Constitution. This prayer by the Plaintiff must therefore fail.

19. The final prayer for consideration is the Third Application for an order for service of court process by substituted service on the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. The 7<sup>th</sup> Defendant has already entered appearance and filed defence hence the application is only in relation to the 4<sup>th</sup> and 6<sup>th</sup> Defendants.

20. The 4<sup>th</sup> Defendant is company incorporated and carrying on business in Kenya. The Process Server, Kivisu Amos Mutambu, in the Affidavit of Service sworn on 27<sup>th</sup> January 2021 states that he effected service on the 4<sup>th</sup> Defendant through its last known email address after it declined physical service due to the Covid-19 pandemic. When the documents were forwarded via email, the 4<sup>th</sup> Defendant issued a delay notice meaning that service has not been effected. I have not seen the evidence that service through email has failed hence I find and hold that the Plaintiff has not made out a case for substituted service. The Plaintiff still has the options to effect personal service including service by email under **Order 22B** of the **Civil Procedure Rules**. The order for substituted service upon the 4<sup>th</sup> Defendant is declined.

21. The Plaintiff acknowledges that the 6<sup>th</sup> Defendant is a foreign entity with its offices located in the United States of America. The Plaintiff's deponent stated that the 6<sup>th</sup> Defendant's "representative office" in Kenya known as 'Google Kenya' declined service. It now seeks an order directing 'Google Kenya' to accept service on behalf of the 6<sup>th</sup> Defendant. However, there is no evidence that 'Google Kenya' is a subsidiary or agent of the 6<sup>th</sup> Defendant here in Kenya authorised to receive service on its behalf hence the court cannot compel 'Google

Kenya' to accept service on behalf of the 6<sup>th</sup> Defendant.

22. If the Plaintiff feels that the 6<sup>th</sup> Defendant is indeed a necessary and proper party in this suit, she needs to notify it of the same by effecting service of a notice of summons but first, she ought to seek leave of the court under **Order 5 of Rules**. The purpose of seeking leave is to enable the court to weigh the reasons adduced by the Plaintiff and determine whether a proper case has been made out for service of summons outside its jurisdiction and the principles which govern the court in determining whether or not to grant leave are set out in **Order 5 Rule 25**. Upon such leave being granted, the summons has to be served upon such a defendant and it is only upon such service of the summons that a court assumes jurisdiction over a foreign defendant and not a moment sooner (see *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others* MSA CA Civil Appeal No. 118 of 2018 [2019] eKLR and *Raytheon Aircraft Credit Corporation & Another vs Air Al- Faraj Limited* [2005] 2 KLR 47).

### **Conclusion and Disposition**

23. For the reason I have set out, I now make the following orders:

- 1. The Plaintiff's application dated 17<sup>th</sup> December 2020 is allowed to the extent that the 1<sup>st</sup> Defendant is directed to produce the documents in its power and possession in respect of the royalties it has been collecting in the name of the Plaintiff's artists within 30 days from the date hereof.**
- 2. The Plaintiff's application dated 27<sup>th</sup> January 2021 is dismissed with costs to the 1<sup>st</sup> Defendant.**

### **Further Directions**

24. I note that there are two applications pending hearing and determination to strike out suit; The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Notice of Motion dated 9<sup>th</sup> February 2021 and the 9<sup>th</sup> Defendant's Notice of Motion dated 19<sup>th</sup> February 2021. I now issue directions as follows:

- 1. Both applications are consolidated and shall be heard together.**
- 2. The Plaintiff is directed to file and serve its Replying Affidavit within 7 days from the date hereof.**
- 3. The Defendants shall each file and serve written submissions limited to 3 pages within 7 days from the date of service.**
- 4. The Plaintiff shall file and serve its written submissions limited to 3 pages within 7 days of service of the Defendants' written submissions.**
- 5. The matter shall be mentioned on a date fixed for directions and further orders.**

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY 2021**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Macharia instructed by Walioli Wabwoba and Company Advocates for the Plaintiff.

Ms Wataka instructed by Jared Kangwana and Company Advocates for the 1<sup>st</sup> Defendant

Mr Kiingati instructed by Kiingati Ndirangu and Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Mr Kiamba instructed by Kiamba and Siboe Advocates for the 7<sup>th</sup> Defendant.

Mr James T. Makori Advocate instructed by the 8<sup>th</sup> Defendant.

Mr Karani instructed by Iseme Kamau and Maema Advocates for the 9<sup>th</sup> Defendant.