REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 138 OF 2018

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF SECTION 5, 21, 33, 35, 46 & 48 OF THE COPYRIGHT ACT, CAP 130 LAWS OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF RULE 15 & 16 OF THE COPYRIGHT REGULATIONS, 2004

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 11, 19, 20, 21, 22, 23, 27, 28, 29, 33, 36, 40(1), 47, 48, 258(1) & 259 (1) OF THE CONSTITUTION OF KENYA

BETWEEN

MUSIC COPYRIGHT SOCIETY OF KENYA.....PLAINTIFF/APPLICANT

-VERSUS-

MUSIC PUBLISHERS ASSOCIATION OF KENYA LIMITED.....1ST DEFENDANT/ RESPONDENT

KENYA COPYRIGHT BOARD.....2ND DEFENDANT/RESPONDENT

RULING

1. Music Copyright Society of Kenya (MCSK) has withdrawn this suit against Music Publishers Association of Kenya (the 1st defendant) and Kenya copyright board (the 2nd defendant). Upon withdrawn, only the 1st Defendant insisted on costs.

2. The parties have through written submissions given their view on how the Court should treat the issue of costs. This Court has considered those views.

3. It is trite that while costs is in the discretion of the Court, the general rule is that costs follow the event. The Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR authoritatively pronounced itself on the discretionary aspect of the rule in the following terms:-

> [14] So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to *penalize the losing party*; rather, it is for *compensating the successful party* for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [*Judicial Hints on Civil Procedure,* at p.94]:
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> > **"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."**
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> [15] It is clear that there is *no prescribed definition* of any set of "good reasons" that will justify a Court's departure, in awarding

costs, from the general rule, costs-follow-the-event. In the classic *common law style*, the Courts have proceeded on a *case-by-case basis*, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In ***Amoni Thomas Amfry and Another v. The Minister for Lands and Another***, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in ***Harun Mwau and Others v. Attorney-General and Others,*** Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

> **"In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant."**

[16] Another example is the landmark Presidential election petition Ruling in ***Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others***, Sup. Court Petition No. 5 of 2013, in which the parties were required to bear their own respective costs; the Court's reasoning being given as follows [paras. 309, 310]:

> "Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.
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> "Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. **Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel**" [emphasis supplied].

[17] Falling well within the cast of the foregoing reasoning, which this Court sustains, a kindred set of fact-manifestations has in another case, ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others***, Sup. Ct. Application No. 2 of 2011 [2012] eKLR, led to this Court ordering that each party bear their own costs. This particular case is notable for the fact that it arose from the fact that a provision of statute law stood in conflict with that of the Constitution – and *action to resolve the discord was not perceived by this Court as a proper occasion for awarding costs against the losing party.*

D. CONCLUSION

[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the *judiciously-exercised discretion of the Court*, accommodating the *special circumstances of the case*, while being guided by *ends of justice.* The *claims of the public interest* will be a relevant factor, in the exercise of such discretion, as will also be the *motivations and conduct of the parties*, prior-to, during, and subsequent-to the actual process of litigation.

4. This Court need not look beyond this decision for guidance.

5. This Court is urged by the Plaintiff not to award costs because it is a non-profit making entity and that it is against public interest to make an award of costs. In this latter argument the Plaintiff states that an order for costs would be treated as an administrative expenses on its operations and this would be passed to its members. This would be inimical to its objective in pursuing these proceeding in the interests of its members. This Court is also told that this is a public interest litigation necessitated by the need to settle the question of collection of royalties on behalf of its members.

6. The court is also asked to follow the decisions in Malindi Constitution Petition No. 5 of 2016, Kakamega Petition No. 3 'B' of 2017, Kisumu Petition NO. 11 of 2017 or Kisumu Petition No. 15 of 2017, and Xpedia Management Limited & 4 others v Attorney General & 5 others [2016] eKLR.

7. For the 1st Defendant it is argued that the Plaintiff has engaged in misconduct and abuse of Court process. Two instances are alleged. First, that this suit was unnecessary as the Plaintiff should have filed a licensing dispute with the competent authority as provided under the Copyright Act instead of mounting a commercial suit for damages and a mandatory injunction. Second, that the Plaintiff failed to disclose that it was privy and party to a Court of Appeal decision in Nairobi Civil Appeal No. 185 of 2017 and the three High Court orders in Kisumu and Kakamega that barred it from collecting and distributing any royalty. The 1st Defendant insists that this suit is *res judicata* Kakamega High Court consolidated Petition No. 3B of 2017 Laban Toto Juma & 4 others v Kenya Copyright Board & others[2108]eKLR.

8. There is growing judicial tradition in Kenya that a litigant pursuing a public interest litigation will ordinarily not be punished in costs. The rationale for this approach was explained in Harun Mwau & Others v Attorney General & Others Nairobi High Court Petition No. 65 of 2011 [2012] eKLR as follows:-

> "180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a

case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.

181. Our Constitution places a premium on the values of social justice and rule of law, patriotism and participation of the public. Without unhindered access by the public to the courts, these values would be undermined. An award of costs is also one of the remedies the court may consider in granting appropriate relief under **Article 23(3)** and **Article 258**.

182. Our approach to the issue of costs in cases concerning the enforcement of fundamental rights and freedoms and for the enforcement of the Constitution is that the court has discretion in awarding costs. Like all forms of discretion, it must be exercised judicially, in light of the particular facts of the case and giving due regard to the values set out in the preamble of the Constitution and **Article 10** in order to achieve the objects of **Article 259(1)"**.

9. On the other hand, the Court should not allow the platform of public-interest litigation to be abused by person who simply seek to pursue frivolous claims or those motivated by ulterior motive in the guise of pursuing public good. The need to be vigilant against such abuse was pointed out by Lenaola J (as he then was) in Okiya Omtatah Okoiti –vs- Communication Authority of Kenya & 14 others [2015] eKLR.

10. The issue arising therefore is whether this matter is a genuine public interest litigation.

11. Emerging from the pleadings is that a substantial issue that arose in these proceedings is whether or not the 2nd Defendant properly considered the application by the Plaintiff to carry on the business of a copyright Collective Management Organisation **(CMO**) for the year 2018 in respect to copyrighted musical owners. That these owners ,who include authors, composers, arrangers and publishers, are a large body of persons is not doubted. Issues of licensing of CMOs and the manner in which they are governed and managed are of interest to this vast number of authors, composers, arrangers and publishers. Indeed, matters of licensing and supervision of CMOs are under the general function of The Kenya Copyright Board which is a state corporation established under Section 3 of The Copyright Act. Invariably, litigation around those issues have a public interest element.

12. Save for stating that these proceedings are an abuse of Court process, I do not hear the 1st Defendant assert that the proceedings are not in the nature of a public interest litigation. In fact I observe that in its counterclaim dated 18th April 2018, the 1st Defendant seeks the following prayers:-

a. An injunction prohibiting the Music Copyright Society of Kenya from collecting and distributing royalty or in any way conducting and or carrying on the business of a copyright collecting society without a license.

b. Damages for illegal collections of royalty by the Music Copyright Society of Kenya.

c. An order for a statement of account of profits made by Music Copyright Society of Kenya from 1st January 2017 to date in respect of each royalty paid and collected through its Mpesa Paybill Number 247247, 303030 and other bank accounts.

d. Costs of the entire suit and counterclaim.

A testimony to the public interest element of this litigation.

13. But was the commencement of the matter an abuse of Court process as alleged by the 2nd Defendant? I am afraid this Court is unable to make that call in this decision because the instances of abuse which had been encapsulated in the statement of defence of the 1st Defendant were not fully canvassed before me. Had the 1st Defendant sought that this Court declares that the proceedings were an abuse of Court process then this Court would have been invited to make that specific finding through determination of the Defences raised in that regard. What I am saying is that I am unable to make a finding that these proceedings are *res judicata* or otherwise an abuse of court process when those issues are not squarely before me for determination.

14. I find nothing that disentitles this matter from benefiting from the general rule on costs on public interest litigation. There shall be no order on costs on the withdrawn proceedings.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of November 2019

F. TUIYOTT

JUDGE

PRESENT;

Asewe for 1st Defendant

No appearance for Plaintiff

Court Assistant: Nixon