



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CONSTITUTIONAL AND JUDICIAL REVIEW**  
**PETITION NUMBER 11 OF 2017**

**KISUMU BAR OWNERS ASSOCIATION.....1st PETITIONER**

**KISUMU GREEN GARDEN RESTAURANT.....2nd PETITIONER**

**VERSUS**

**MUSIC COPYRIGHT SOCIETY OF KENYA.....RESPONDENT**

**AND**

**THE KENYA COPYRIGHT BOARD.....1ST INTERESTED PARTY**

**MUSIC PUBLISHERS ASSOCIATION OF KENYA.....2ND INTERESTED PARTY**

**RULING**

By a notice of motion dated 13th July 2017; the applicants claim against defendants/respondents is for orders among others:-

**THAT pending the hearing and determination of this application, the respondent whether by itself, its agents or servants or otherwise be restrained from demanding and collecting royalties for exploitation of Performing and Reproduction rights of Authors(songwriters), Composers, Publishers and Arrangers of copyrighted musical works from users**

The application is based on the grounds among others:-

- i. That the respondent's licence expired on 31st December 2016 and is barred by law from operating as a collective management organization under Section 46(1) of the Copyright Act Cap 130 Laws of Kenya
- ii. The respondent is collecting royalties from users illegally

The application is also supported by an affidavit sworn by the 1st petitioner's proprietor, Solomon Martins Omutsani on 13.7.17 in which he reiterates the grounds on the face of the application.

When this matter came up for direction on 26th July 2017, Mr. Bagada for the applicant urged the court to grant a temporarily restraining order against the respondent on the ground that the respondent's licence to

operate as a Collective Management Organization expired on 31.12.16 and that an application to renew the same was declined and communicated vide 1st interested party's letter dated 17.2.17 which also directed the respondent to immediately cease all royalty collecting operations.

The application was opposed by Mr. K'Ouko for the respondent who submitted that there is confusion as to who between the respondent and the 2nd interested party should collect royalties and that the interim order would stop the respondent from collecting royalties.

Mr. Kaindo, advocate for the 1st interested party supported the application for an interim injunction on the ground similar to the one argued by the applicant that the respondent's licence to operate as a Collective Management Organization expired on 31.12.16 and that the 1st interested party had by its letter dated 17.2.17 declined to renew the licence for non-compliance. It was also his submission that 1st interested party had directed the respondent to immediately cease all royalty collecting operations and that the respondent was acting illegally. It was further submitted that a license had been granted to the 2nd interested party and that the respondent had on that basis filed Petition No. 3 in Kakamega High Court which was still pending.

Mr. Asewe, advocate for the 2nd interested party also supported the application for an interim injunction on the same grounds advanced by the applicant and the 1st interested party.

### **Issue for determination**

Whether a temporary injunction should issue restraining the respondent whether by itself, its agents or servants or otherwise be restrained from demanding and collecting royalties for exploitation of Performing and Reproduction rights of Authors(songwriters), Composers, Publishers and Arrangers of copyrighted musical works from users

The conditions for the grant of an interlocutory injunction were settled in the case of **Giella v Cassman Brown [1973] EA 358**. The applicant must

- i. Show a prima facie case with a probability of success
- ii. That if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages
- iii. If in doubt the court shall decide the application on the balance of convenience.

Section 46 (1) of the Copyright Act provides:-

***No person or association of persons shall commence or carry on the business of a copyright collecting society except under or in accordance with a certificate of registration granted under this section.***

There is no denying that the respondent's licence to operate as a Collective Management Organization expired on 31.12.16. The respondent's application to renew the licence was declined and communicated vide 1st interested party's letter dated 17.2.17 which also directed the respondent to immediately cease all royalty collecting operations.

Notwithstanding that the respondent has no licence to operate as a Collective Management Organization, and the 1st interested party's directive to the respondent to cease all royalty collecting operations, the respondent has defied the law and the directive and continued to collect royalties from the applicants and others.

From the above exposition, I find that the applicants have established a *prima facie* case with probability of success as against the respondent. I will not consider whether or not the respondent is in a position to pay damages to the applicants because the respondent is in breach of clear provisions of the law. Public

interest tilts in favour of safeguarding the applicants and the public at large from illegal collections by the respondent.

In conclusion, the notice of motion dated 13th July 2017 is allowed in the following terms:-

***i. THAT pending the hearing and determination of this application, the respondent whether by itself, its agents or servants or otherwise be and is hereby restrained from demanding and collecting royalties for exploitation of Performing and Reproduction rights of Authors(songwriters), Composers, Publishers and Arrangers of copyrighted musical works from users***

***ii. Costs shall be in the cause***

**DATED AND DELIVERED ON THIS 27<sup>th</sup> DAY OF July 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Applicants/Petitioners - Mr. Anyul h/b for Mr. Maua

Respondent - Ms. Nabifo h/b for Mr. K'Ouko

1st interested party - Mr. Kaindo

2nd Interested party - N/A