



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO. 3B OF 2017**

LABAN JUMA TOTO.....1<sup>ST</sup> PETITIONER

DAVID AMUNGA .....2<sup>ND</sup> PETITIONER

VERSUS

THE KENYA COPYRIGHT BOARD.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY

MUSIC PUBLISHERS ASSOCIATION OF KENYA...2<sup>ND</sup> INTERESTED  
PARTY/APPLICANT

**R U L I N G   N U M B E R   2**

**The Application**

1. This ruling relates to the Notice of Motion dated 15.05.2017 filed by the firm of Asewe and Company Advocates on behalf of Music Publishers Association of Kenya who appear in these proceedings as the 2<sup>nd</sup> interested party. The applicant prays for the following orders.

(1) THAT pending the hearing and determination of this application, the Honourable Court be pleased to vacate the conservatory orders it issued on the 5<sup>th</sup> day of April, 2017 staying the decision of the 1<sup>st</sup> Respondent of 27<sup>th</sup> March, 2017 approving the License of the 2<sup>nd</sup> interested party and revoking the License of the 1<sup>st</sup> interested party pending the inter-parties hearing of the petition herein.

(2) THAT pending the hearing and determination of this application, the Honourable Court be pleased to vacate the conservatory orders it issued on the 5<sup>th</sup> day of April, 2017 staying the decision of the 1<sup>st</sup> Respondent of 27<sup>th</sup> March, 2017 approving the License of the 2<sup>nd</sup> interested party and revoking the License of the 1<sup>st</sup> interested party pending the inter-parties hearing of the petition herein.

(3) THAT Pending the hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order restraining the music copyright society of Kenya from

unlawfully and illegally collecting royalty tariffs from music users without a license.

(4) THAT pending the hearing and determination of petition herein, this Honourable Court be pleased to issue a Conservatory Order restraining the music copyright society of Kenya from unlawfully and illegally collecting royalty tariffs from music users without a license.

(5) THAT this Honourable court be pleased to Order that this petition be heard and determined as a test suit.

(6) The costs of this application be provided for.

2. The application is premised on the 13 grounds set out on the face of the application and is also supported by the affidavit sworn by Bernard Kioko in his capacity as a member of the 2<sup>nd</sup> Interested Party and its current chairman. The main point raised in the supporting affidavit can be found at paragraphs 5 and 6 of the deponent's affidavit to the effect:-

“5. THAT I swear this affidavit in support of the instant application to vacate the conservatory orders that this court issued on the 5<sup>th</sup> day of April 2017. That it is in the public interest that this court issue conservatory orders restricting the 1<sup>st</sup> Interested Party from collecting music tariffs from unsuspecting members of the public and or music users.

6. THAT it is also in the interest of justice and good governance of the music copyright Sector that the orders that this court issued on the 3<sup>rd</sup> April, 2017 be vacated since the orders have effectively brought to a standstill collective administration of music copyright in Kenya and it is our position that the petitioners herein deliberately withheld material information from the court thereby misleading it when they appeared before the court *ex parte*.”

3. The deponent goes on to say that the petitioners were under a duty to disclose to the court details regarding any court cases involving them and which are related to the matter in dispute in this case, namely:-

- *Nairobi HC Constitutional Petition No. 51 of 2017 – Dan Okoth – vs – Kenya Copyright Board and Music Copyright Society of Kenya in which the Petitioner therein obtained a temporary injunction against the 1<sup>st</sup> Respondent barring them from renewing the MCSK annual licence until the petition was determined.*
- *Judicial Review 75 of 2017;- the Music Copyright Society Of Kenya –Vs – Kenya Copyright Board and IPO Kenya. In this case, MSCSK was seeking Judicial review remedies namely an order of certiorari to quash KECOBO's decision made on 17<sup>th</sup> February, 2017 declining to issue them with an annual licence MCSK also sought an order of mandamus to compel KECOBO to issue them with an annual licence. In the case, MCSK failed to disclose that it was party to Constitutional Petition No. 51 of 2017 and further that it had only 3 days before successfully applied to be enjoined in Constitutional Petition No. 3 of 2017. The court declined to grant conservatory orders, noting that the effect of such stay would amount to MCSK operating without a licence in contravention of Section 46 of the copyright Act.*
- *Nairobi JR 144 of 2017 Music Copyright Society of Kenya – vs – Kenya Copyright Board and MPAKE.*
- *Nairobi HCC Constitutional Petition No.350 of 2015 – David Kisaka and 5 others – vs – Music copyright Society of Kenya and Safaricom and Nairobi HCC Constitutional Petition Number 317 of 2015 – Xpedia Management Limited – vs – the AG and 4 others. In these two cases, the court held that setting aside conservatory orders would not cause irreparable harm or prejudice to the interests of the petitioners since they had not demonstrated sufficient cause to warrant grant of the conservatory orders.*

## **Submissions**

4. When this matter came up on 11.10.2017 for the inter-parties hearing of the application filed by Albert Gacheru Kiarie, proposed 13<sup>th</sup> interested party, Mr. Kiarie's application could not proceed on grounds that he had just been served with replying papers for which he would need time to study before proceeding with his application.

5. In the meantime, Mr. Asewe asked the court to set aside the interim orders as prayed vide the application dated 15.05.2017. The reasons for making the application are the ones I have highlighted above from the various court cases cited, and in which cases the Music Copyright Society was a party.

6. Mr. Kaindo for the 1<sup>st</sup> respondent and holding brief for the 2<sup>nd</sup> Interested party supported Mr. Asewe's application. Mr. Otieno for the 12<sup>th</sup> Interested Party also supported Mr. Asewe.

### **Response to the application**

7. Despite the fact that the application was served on all the parties, no single response has been filed thereto. This therefore means that the application is unopposed.

### **Determination**

8. In view of the submissions made by counsel in this matter, and considering the detailed grounds and the averments in the affidavit in support of the application, and the fact that none of the parties filed any papers in opposition to the application, I have no doubt in my mind that the application is meritorious. The impugned order dated 05.04.2017 reads as follows:-

“That this honourable court hereby grant conservatory orders staying the decision of the 1<sup>st</sup> respondent of 27<sup>th</sup> March, 2017 approving the licence of the 2<sup>nd</sup> Interested Party and revoking the licence of the 1<sup>st</sup> Interested Party pending the inter-parties hearing of the petition herein.”

9. I do find and hold that allowing the above stated order to remain alive means that certain parties to this suit can neither move to the left nor to the right, and that even if they were to move forward, their movements would be seriously curtailed by the above order. From the submissions, the prejudice to be suffered by the 2<sup>nd</sup> Interested Party is far greater than the prejudice that would be suffered by the 1<sup>st</sup> interested party and the petitioners. Consequently, I allow the Notice of Motion dated 15.5.2017 in terms of prayers 4 thereof. Prayers 1, 2 and 3 are all subsumed in prayer 4. As for prayer 5, its fate will be determined later when it is established whether the hearing of this case proceeds before a bench of one judge or a bench of at least three judges. The costs of this application shall abide the outcome of the petition.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega today.....19<sup>th</sup> .....  
.....day of .....October.....2017

RUTH N. SITATI

JUDGE

In the presence of:-

.....Mr. Asewe.....2<sup>nd</sup> Interested Party/Applicant

.....M/S Khaminwa & CO. (absent).....For Petitioners

.....For Respondents

.....Mr. Asewe holding brief for Mr. Kiando..... For 1<sup>st</sup> Interested Party

.....Polycap.....Court Assistant