



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1676 OF 2009

IN THE MATTER OF THE ESTATE OF OMAR SHABAN SALIM (DECEASED)

SIJALI SALUM ZUWA.....1ST APPLICANT

RASHID JUMA.....2ND APPLICANT

TOMMY MALANGA.....3RD APPLICANT

JOSEPH JUSTI SHAYO.....4TH APPLICANT

HASSAN MOHAMED NGAO.....5TH APPLICANT

VERSUS

PAMELA AKINYI ATIENO.....RESPONDENT

RULING

1. On 26th May 2014 directions were taken that this matter be disposed of by way of written submissions based on the affidavits that had been filed. It is on that basis that on 2nd December 2015 the Court indicated that judgment be delivered on 20th January 2016.
2. However, on perusing the affidavits I found that they contained insufficient evidence to enable a just and fair decision on this crucial matter. Basically, the respondent obtained a grant, which was confirmed, on the basis that she was the widow of the deceased whose only asset were forty eight (48) songs in respect of which he had exclusive copyright. By the grant, therefore, the copyright was transferred to her to be able to receive royalties over the songs.
3. The applicants came to court to seek the revocation of the grant. Their case was that they, along with the deceased and others, were members of a band called *Les Wanyika* and that, together, they were the authors, composers, and performers of the music. Therefore, they said, they were jointly entitled to the copyright in the music. The respondent, on the other hand, was saying that the band was exclusively formed by the deceased who employed the applicants as sessional musicians to help perform and/or produce the songs; that the applicants were paid for their work and had no claim to the music; and that it was the deceased who composed all the songs, and therefore was

the copyright owner.

4. The question that the parties want resolved is whether the deceased was the exclusive composer and owner of the music works, or whether the music works was the joint effort of the *Les Wanyika* band whose members included the applicants. It is when this question is answered that a determination can be made whether or not the applicants are joint copyright owners of the works. The court would have to consider the agreement or arrangement under which the band was formed, whether the applicants were employees or joint members, or whether the deceased was the absolute owner. The court would have to determine when the applicants and the deceased, or any of them, joined and/or left the band, if at all. This is because the applicants stated that they remained in the band from 1978 to 1998, and the deceased joined in 1978 and left in 1983. Against that evidence, the respondent stated that the deceased was in the band throughout and that it was the applicants who were in the band for only a few years after its inception and left altogether. There must be third parties who would testify to what happened to the band regarding its composition from its inception up to 1998. The producers of the music, for instance, would know one or two things about the band and the composers of the respective music. All this evidence would be tested against the **Copyright Act**, all other relevant laws and decided cases.
5. With respect to the parties and their counsel, I do not think that there is sufficient evidence and material on record to help substantially decide the case one way or the other.
6. It is for these reasons that, in the wider interests of justice, I review the order that was made on 26th May 2014 and in its place make order that this matter be determined by way of oral hearing (“*viva voce*”) where the parties and their witnesses can testify and be cross-examined, and all relevant documentary evidence received and scrutinized. I ask that this matter be mentioned on 22nd February 2016 by which time parties will have filed and exchanged witness statements and/or documents to enable the taking of a hearing date.
7. In the meantime, and in the wider interest of justice, I direct that the implementation of the confirmed grant be stayed and any royalties that are due be deposited into Court from now till the matter is determined.

DATED and DELIVERED at NAIROBI this 20TH JANUARY 2016

A.O. MUCHELULE

JUDGE