REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 7 OF 2014

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 11, 12 AND 13 OF THE CONSITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006

AND

IN THE MATER OF CONTRAVENTION AND/OR ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, 27, 40, 43, 46 AND 47 OF THE CONSTITUTON

AND

IN THE MATTER OF THE COPYRIGHT ACT NO. 12 OF 2001 LAWS OF KENYA

BETWEEN

CASCADE COMPANY LIMITED ……..…….. PETITIONER

VERSUS

KENYA ASSOCIATION OF

MUSIC PRODUCTION (KAMP) ……..….. 1ST RESPONDENT

PERFORMANCE RIGHT SOCIETY

OF KENYA (PRISK) ……..…… 2ND RESPONDENT

THE OFFICER IN CHARGE

THIKA POLICE STATION ……...……...…. 3RD RESPONDENT

ATTORNEY GENERAL……...…...……4TH RESPONDENT

RULING

Background

By an undated petition filed in court on 13th June, 2014, the petitioner sought several declarations and damages against the respondents on the basis that its constitutional rights have been violated; alongside the petition, the applicant also filed a chamber summons dated 7th June 2014 under **rules 20** and **21** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** in which he sought for conservatory orders pending the hearing and determination of the main petition.

The particular prayers in the chamber summons for conservatory orders are framed in the following terms:-

> ***"2. THAT pending the hearing and the determination of this application, this Honourable Court be pleased to issue a Conservatory Order of Prohibition restraining the 1st, 2nd and 3rd Respondent from unlawfully(sic) seizure, entering, impounding harassing, intimidating, coercing, roughing-up, beating and arbitrarily arresting, distressing the Applicant (sic) employees, servants and or agents in the course of operating restaurant Business trading as Cascade Restaurant and Cascade Annex within Thika town.***
>
> ***3. THAT pending the hearing and the determination of the petition herein this Honourable Court be pleased to issue a Conservatory Order of Prohibition restraining the 1st, 2nd and 3rd Respondent from unlawfully(sic) seizure, entering, impounding harassing, intimidating, coercing, roughing-up, beating and arbitrarily arresting, distressing the Applicant (sic) employees, servants and or agents in the course of operating restaurant Business trading as Cascade Restaurant and Cascade Annex within Thika town.***
>
> ***4. THAT pending the hearing of this application this Honourable Court be pleased to exercise its supervisory jurisdiction and for that purpose call for the record of the proceedings in Thika Chief Magistrate No. 1601/14 Republic versus Martin Chege Githiri and Thika Chief Magistrate Criminal Case No. 667 of 2014 Republic versus Simon Wainaina Njuguna matters before the subordinate court at Thika and make any order or give any direction it considers appropriate to ensure the fair administration to (sic) justice and Stay the proceedings and or any anticipated proceedings and prosecution in all the criminal cases preferred against the Applicants (sic) employees and or the servant thereto between the period where the applicants is aggrieved under the Constitution(sic)."***

Applicant's case

The chamber summons for conservatory orders was supported by the affidavit of Sylvester Njuguna sworn on 26th May, 2014; in that affidavit Mr Njuguna described himself as the operations director of the applicant company which is incorporated mainly to undertake hotel business; to this end, the company has two food outlets located at Kibe Gatumbi Building, off Mama Ngina drive in Thika town.

The applicant has complained that its business has been interrupted on several occasions by the respondents' officers who are demanding what the applicant has described as non-existent licences. These employees, according to the applicant, do not carry any identification documents; they are alleged to demand bribes from the applicant's employees and whenever these demands are not met, they resort to confiscating the applicant's television sets and arresting its employees. It is the applicant's case that the respondents' conduct has led to the applicant's business losses.

The applicant contends that as part of the scheme to scuttle its operations, two of its employees have been charged with criminal offences in **Thika Chief Magistrate's Court Criminal Case No. 1601 of 2014 (Republic versus Martin Chege Githiri)** and **Thika Chief Magistrates Court Criminal Case No. 667 of 2014 (Republic versus Simon Wainaina Njuguna).** The applicant contends that the charges against its employees in these two cases are not only trumped up but also that the cash bail of Kshs. 30,000/=

which each of them was required to pay pending their trial is punitive and extortionist in nature.

The Respondent's case

The 1st and 2nd respondents filed replying affidavits in opposition to the applicant's summons; the 1st respondent's general manager, June Gachuhi, in her affidavit sworn on 30th June, 2014 deposed that the 1st respondent is mandated under **section 30A** of the **Copyright Act** to protect the rights of producers of sound-recordings through licensing. It is her position that the applicant has neglected and/or refused to comply with the licensing requirements and thereby infringed the rights of producers; it is the respondent's case that the applicant is in breach of **section 42** the **Copyright Act** and **Articles 11(c)** and **40 (5)** of the **Constitution of Kenya, 2010** which uphold and protect intellectual property rights.

In order to ensure compliance and enforcement of these provisions of the law, the 1st respondent made a formal complaint to the police who duly acted on the complaint and commenced criminal proceedings against the accused persons in **Thika Chief Magistrate's Court Criminal Case No. 1601 of 2014 (Republic versus Martin Chege Githiri) and Thika Chief Magistrates Court Criminal Case No. 667 of 2014 (Republic versus Simon Wainaina Njuguna).**

It is the 1st respondent's position that **articles 11(c)** and **40(5)** of the **Constitution** require the state to support, promote and protect intellectual property rights of the people of Kenya. The Copyright Act goes further to establish three categories of rights in relation to music; there are those rights of composers, authors and publishers of musical works; there is a category of rights of producers and sound recordings; and finally, there is that category of rights of performers who are singers, musicians, instrumentalists and actors.

The first respondent has explained that whereas the rights of composers, authors and publishers of musical works are protected and enforced by the Music Copyright Society of Kenya, the rights of producers and performers are protected and enforced by the 1st and 2nd respondents which have been commissioned for that purpose by the Kenya Copyright Board under **section 46** of the **Copyright Act, 2001**. It is in this context that the 1st respondent was incorporated to collect fees from those who broadcast or communicate audio-visual works to the public.

In execution of their respective mandates, so the 1st respondent's representative has sworn, the 1st and 2nd respondents visit premises of users of sound-recordings and/or audio visual works for purposes of informing them their mandates and roles; they also notify these users of the need to comply with the licensing requirements before they are given what has been described as the "Communication to the Public Licence".

The deponent has sworn further that sometimes in the months of August, 2013 and June, 2014, she was informed by one Paul Njemah Kariuki, a licensing agent that he visited the applicant company to notify and explain to them the 1st and 2nd respondents' mandates. In particular, having noted that the applicant's establishments were communicating to the public sound recordings and audio-visual works, which are copyrighted musical works, the licensing agent explained to the applicant or its agents the implications of their actions and more importantly the need to have an appropriate licence.

Subsequent to these visits, the 1st and 2nd respondent placed a notice in the "Daily Nation" newspaper on 6th February, 2014 reiterating the need for all users of sound recordings and audio-visual works to pay for the licences for the year 2014.

Despite the licensing agent's explanation to the applicant of the need to comply with the licensing requirements and despite the public notice placed in the newspaper reminding all and sundry, including the applicant herein, to comply with these requirements, the applicant ignored, neglected and/or refused to take out the requisite licence.

In the face of the applicant's ignorance, neglect and/or refusal to comply with the licensing requirements, the 1st and 2nd respondents complained to the police who acted and arrested and charged the applicant's agents with the offences of willful failure to pay for use of sound recordings and audio-visual works contrary to **section 30A (1)** and **(e)** as read with **section 38(2)** and **38(7)** of the **Copyright Act 2001**.

The 1st respondent's general manager has denied that any of their agents ever harassed the applicant's employees or disrupted its operations as alleged by the applicant; neither did they confiscate the applicant's television sets. She has dismissed the allegations that their agents demanded bribes from the applicant's agents as unfounded and scandalous because if such thing were to happen the aggrieved party is under obligation to inform the Kenya Copyright Board; there is no evidence that the applicant made any complaint in this respect to the Board.

The 1st respondent's general manager concluded her affidavit by contending that the application is fatally defective because it was brought under the revoked provisions of the Constitution of **Kenya High Court Practice and Procedure Rules, 2006** and also because it is in effect seeking judicial review orders against body corporates rather than administrative bodies.

The 2nd respondent's affidavit was sworn by its chief executive, Angela Ndambuki on 30th June, 2014; it is a replica of the affidavit sworn on behalf of the 1st respondent and thus it is apparent that the 1st and 2nd respondents have adopted a similar factual position.

3rd and 4th Respondent's case

Mr Adow Deiss Mohamed, the learned counsel for the state filed grounds of objection on behalf of the 3rd and 4th respondents. In those grounds, it has been urged that under **article 157(10)** of the **Constitution,** the Director of Public Prosecution does not act under the direction or the control of any person or authority in commencing any investigations or criminal proceedings against any person.

Similarly, following the provisions of **article 245(2)(b),(4)(a)(b)** of the Constitution, the Inspector General of the National Police Service does not act under the direction or control of any person or authority in investigating any offence or enforcing any law against any particular individual.

The learned counsel for the state has also argued that the petitioner has not disclosed how **articles 22, 27, 40, 43, 46** and **47** of the **Constitution** have been violated; without disclosing in any precise and specific manner how the constitution has been violated, counsel for the 3rd and 4th respondents argues that the petition is misconceived.

Parties' submissions

In their submissions, counsel reiterated their client's contentions as deposed in their respective affidavits; Mr Mungai, learned counsel for the applicant added that charges against the applicant's employees cannot be sustained because they do not exist and even if they do, it is the applicant company which ought to have been charged and not its employees. In his view, so he argued, the criminal proceedings in the magistrate's court have no legal basis.

On her part Ms. Ndirangu for the 1st and 2nd respondents argued that the respondent's respective mandates are founded in **sections 30A** and **46** of the **Copyright Act**. According to counsel, the applicant was informed of these mandates but chose to ignore the respondents' agent. In view of this deliberate infringement of the relevant provisions of the Copyright Act, the police had to be brought in to ensure enforcement.

Ms. Ndirangu argued further that prohibitory orders are only available against public bodies and not body corporates such as the 1st and 2nd respondents. As for the criminal charges against the applicant's employees, the learned counsel submitted that these employees were rightfully charged under **section 42**

of **the Copyright Act**. She asked the court to consider **articles 11(c)** and **40(5)** of the **Constitution** that recognise and protect the rights of intellectual property.

Mr Adow for the 3rd and 4th respondents reiterated that the accused persons were properly before a court of competent jurisdiction. Counsel argued that while the applicant was seeking to stop criminal proceedings, the presiding magistrate in the criminal cases against the applicant's employees had been omitted from the proceedings.

Mr Adow submitted that it is the duty of the police to enforce law and order. He argued that no particular provision has been shown to have been infringed and that much as the High Court has supervisory jurisdiction over the subordinate courts that in itself does not mean that the High Court should assume the jurisdiction of the magistrate's courts. In his view, the matters raised in the petition could properly be canvassed in the trial court.

Analysis and determination

This being an interlocutory application, all that the court is concerned with at this stage is whether the petitioner has made out a case for conservatory orders. In considering this question, I have noted that this Court has, in some of its previous decisions I have come across, held that that the conditions which an applicant for interlocutory injunction must satisfy in civil proceedings before such an injunction is issued are also necessary whenever one seeks a conservatory order pending the determination of a petition such as the one herein. Thus in **Nairobi High Court Petition No. 427 of 2014 Hon. Kanini Kega versus Okoa Kenya Movement & 6 Others (2014) eKLR** Odunga J held that all that the court is concerned with in an application for conservatory order is whether the applicant has established a *prima facie* case with a probability of success and in an earlier case of **Nairobi High Court Petition No. 16 of 2011, Centre For Rights Education and Awareness(CREAW) & 7 Others versus Attorney General, Musinga J** (as he then was) was of the view that a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

The Supreme Court of Kenya has taken a somewhat different view on this question; in a ruling on an application for conservatory orders in the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others Petition No. 2 of 2014** the Court drew a distinction between injunctions, orders of stay and conservatory orders. The Court said;

> ***"Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balance of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the court has given the green light.***
>
> ***"Conservatory orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory applications, linked to such private party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes".***

Without pretending to expound or reduce into a simpler language the ground or grounds upon which conservatory orders may granted as enunciated by the Supreme Court, I understand the Court to be saying that before a court grants a conservatory order, it has to consider not only *"the inherent merit of a case"* but has also consider whether the grant or rejection of that order is in the public interest; it is consistent with constitutional values; it is proportionate; and finally, whether it should be granted as a matter of priority, depending on the circumstances of each particular case.

The standard set by the Supreme Court suggests that while it is necessary and indeed obligatory on the part of the court to consider the merits of the petition, it must also take into account other specified factors or considerations.

The question that one may ask is whether in considering the *"inherent merit of a case"* the court will not be delving into the merits of that case at an interlocutory stage and thereby prejudging it before it is heard on merits. I was not able to find any court decision that could possibly have squarely addressed this question in the light of the Supreme Court decision; it is possible that this ruling is the first or amongst the first decisions post the **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others** (supra) ruling on what "the inherent merit of a case" is all about. In the absence of any decision that would have guided me on the interpretation of this phrase, I am of the humble view that a case that has inherent merit is a case which, on the face of it, is meritorious and therefore, likely to succeed. While this interpretation may be consistent with the concept of a case of with "high probability of success" which the Supreme Court is discouraging as the applicable test in granting or rejecting conservatory orders, I do not see any other meaning that may be ascribed to the phrase "the inherent merit of a case." The alternative interpretation would be, in my opinion, that "the inherent merit of a case" means that the case "*will* succeed" rather than "it is *likely* to succeed"; however, if we adopt this alternative interpretation, it would thereby imply that the case could as well be decided on an interlocutory application; I doubt this could have been what the Supreme Court had in mind.

I will proceed to determine the applicant's application based on what I think the Supreme Court must have meant.

Article 22 of the Constitution is one of the provisions of the law invoked by the petitioner in pursuit of the prayers in both the petition and the chamber summons with which it was filed. Amongst the orders this court may grant in any proceedings under **article 22**, regardless of whether they are proceedings of the main petition or are proceedings in an interlocutory application such as the application herein, is an order for judicial review. I suppose it is in this context that the petitioner has urged this court to grant an order of prohibition which, no doubt, is an order for judicial review, against the respondents.

The first limb of that prayer for prohibition which is the third prayer on the face of the summons was that the order of prohibition should be granted pending the hearing and determination of this application; that prayer was not granted prior to the hearing of the application and has, therefore, been overtaken by events and of no relevance in this ruling.

The second limb of that prayer, which is the fourth prayer in the summons, is more relevant in this determination; in the petitioner's words in this prayer, "*pending the hearing and determination of the petition herein this honourable court be pleased to issue a conservatory order of prohibition should issue "restraining the 1st, 2nd and 3rd respondents from seizing, entering, impounding, harassing, intimidating, coercing, roughing-up, beating and arbitrarily arresting, distressing the Applicant's employees, servants and or agents in the course of operating restaurant business trading as Cascade Restaurant and Cascade Annex within Thika Town."*

There is sufficient evidence on record and indeed it is admitted by the applicant that its employees or agents were arrested and charged in two separate cases now pending before the Chief Magistrates court in Thika. These cases are **Criminal Case No. 1601 of 2014** in which one **Martin Chege Githiri** is the accused **and Criminal Case No. 667 of 2014** where **Simon Wainaina Njuguna,** another of the applicant's employees, has been charged. Having been arrested and charged, it is difficult to see how an order of prohibition would issue to restrain the respondents from arresting and charging the applicant's employees. In a nutshell, the court is being asked to stop what has already been done.

The order for prohibition, in these circumstances, is not the appropriate prayer to seek for. If in the applicant's view, the arrest and the subsequent prosecution of the applicant's employees were unjustified in one way or the other, then the appropriate order for judicial review would have an order for certiorari to quash the charges and the proceedings against these employees.

In **Kenya National Examinations Council versus Republic ex parte Geoffrey Githinji Njoroge & Others Civil Appeal No. 266 of 1996 (1997) eKLR** the Court of Appeal made some useful pronouncements in respect of these orders of judicial review. As far as prohibition is concerned, the Court said;

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision… prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein against in excess of jurisdiction or in contravention of the laws of the land…It does not, however, lie to correct a course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…"***
>
> ***"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with of for such like reasons…"***

The other aspect of this order is whether, assuming that a case for an order for prohibition has properly been made out, can it issue against the first two respondents. The judicial review order of prohibition like other prerogative orders are available against public bodies and not private corporates. The question whether the first two respondents are public entities against which judicial review order could issue was considered in the case in **Nairobi Judicial Review Case No. 335 of 2013 Republic versus Kenya Association of Music Producers & 3 Others** who included the second respondent herein; in that case, the court cited the decision in **Nairobi High Court App. No. 158 of 2005 (2006) 1 KLR 443 Mureithi & 2 Others (for Mbari ya Murathimini Clan) versus Attorney General & 5 Others** and held that judicial review orders could not be issued against the first and second respondents. In the latter decision, Nyamu J (as he then was) stated;

> ***"The other reason why the claim must fail is that the 5th and the 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of mandamus, prohibition or certiorari are only available against public bodies."***

And even if the first two respondents were public bodies and therefore amenable to judicial review orders, it would be out of order for judicial review orders to issue against them in the context of an interlocutory application; in appropriate cases judicial review orders will only issue at the final determination of a case and they are not available in any other shape or description whether as interim or as conservatory orders. For these reasons, I opine that the third prayer in the summons must fail.

The final prayer for consideration is for stay of the proceedings in **Thika Chief Magistrate's Court Criminal Case No. 1601 of 2014 (Republic versus Martin Chege Githiri)** and **Thika Chief Magistrates Court Criminal Case No. 667 of 2014 (Republic versus Simon Wainaina Njuguna).**

The applicants employees were charged with the offence of willful failure to pay for the use of audio-visual works contrary to **section 30(A) (1) and (2)** as read with **section 38(2)** and **38(7)** of the **Copyright Act 2001**.

Section 30(A) (1) and (2) of that Act reads as follows:-

> ***"30A. Right to equitable remuneration for use of sound recordings and audio visual works***
>
> ***(1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly***

performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organisation, and the remuneration shall be shared equally between the producer of the sound recording and the performer.

(2) If fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organisation.

Section 38(2) and **(7)** thereof reads:-

38. Offence and penalties for infringement

(1) Any person who, at a time when copyright or the right of a performer subsists in a work-

(a) makes for sale or hire any infringing copy; or

(b) sells or lets for hire or by way of trade exposes or offers for sale any infringing copy; or

(c) distributes infringing copies; or

(d) possess otherwise than for his private and domestic use, any infringing copy; or

(e) imports into Kenya otherwise than for his private and domestic use any infringing copy; or

(f) makes or has in his possession any contrivance used or intended to be used for the purpose of making infringing copies

Shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that that copyright or the right of a performer would or might thereby be infringed, be guilty of an offence.

(3) any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed. (Underlining mine).

Looking at these provisions, it is apparent that the charges against the applicant's employees have a statutory backing; contrary to the applicant's argument, they are not non-existent charges or offences. The role of the 3rd and the 4th respondents is also expressly provided for; **section 42** of the **Act** has empowered the police to arrest without a warrant any person suspected of having committed an offence under the Act. On his part, the 3rd respondent has been authorised under **section 43(1)** of the **Act** to appoint public prosecutors for purposes of prosecuting cases covered under the Act; these will certainly include prosecution of offences for which the applicant's employees have been charged with. The role of prosecution having been given to Director of Public Prosecution under the Constitution of Kenya 2010, I suppose, he has now taken over this task.

The constitutionality of the **Copyright Act, 2001** or any provisions thereof including the provisions under which the applicant's employees have been charged have not been questioned in the petition. Any suggestion to question the Act would have been a long shot considering that the Constitution itself recognises the intellectual property rights whose details are encapsulated in Act; **article 11(2) (c)** thereof states:-

The state shall-

(a)…

(b)…

(c) promote the intellectual property rights of the people of Kenya.

And **article 40(5)** of the same **Constitution** states:-

"The state shall support, promote and protect the intellectual property rights of the people of Kenya."

It is apparent that while the Constitution broadly provides the framework for the intellectual property rights, legislation such as the Copyright Act, 2001 provides the details of these rights. This being the case, it is difficult to appreciate the applicant's argument which, in essence, implies that the respondents' action in enforcement of certain provisions of the **Copyright Act, 2001** is unconstitutional; in my humble view, as long as the enabling legislation is constitutional, the respondents' actions ensuing therefrom are lawful unless, of course, it can be demonstrated that the respondents have, in their actions, breached those very provisions or have acted *ultra vires* the Act. Simply put, the respondents should not be inhibited unnecessarily from exercising their constitutional and statutory mandates. For these reasons I would be reluctant to grant prayer (4) of the applicant's chamber summons.

The upshot of my determination is that the applicant's chamber summons is deficient of any inherent merit; the public interest will not be best served by halting the applicant's employees' trial; there is nothing to indicate that their arrest, prosecution and generally, the criminal process contravenes any of the constitutional values or is inversely proportional to their rights to a fair trial. The applicant does not deserve the conservatory orders sought; accordingly, the chamber summons dated 7th June, 2014 is dismissed. The costs of the application will abide the outcome of the petition.

Dated and signed in Nyeri this 17th day of November 2014

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE