



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 15 of 2013**

**ALPHONSIUS NYASETIA T/A STUDIO KENYA ..... PLAINTIFF**

**VERSUS**

**DR. IDA ODINGA, MGH**

**MASHA WA MAITHA T/A SIBANDUKI LOBBY GROUP ..... 1<sup>ST</sup> DEFENDANT**

**ORANGE DEMOCRATIC MOVEMENT (ODM) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application for the consideration of this Court is the Plaintiff's Notice of Motion dated 21 January 2013 brought under Certificate of Urgency. It is brought under the provisions of **Order 40 rules 1 – 4** of the *Civil Procedure Rules* as well as under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application in prayer b) seeks an Order that pending the inter-partes hearing and determination of the same, the Defendants, their employees, servants or agents be restrained by injunction from playing or broadcasting through a live band and/or recorded music, performing, producing or using the Plaintiff's music/songs namely "Awambo" and "Sibanduki", at any public rally, campaign, advertisement, fundraiser or any other forum without the Plaintiff's consent or authority. Interestingly, at prayer e) of the Application the Plaintiff also sought an award in damages as against the Defendants for illegally using the Plaintiff's said songs and infringing his copyright works and at prayer f) the Plaintiff asked for an Order compelling the Defendants to pay to him the sum of Shs. 6 million "for the copyright works, production and sales of the songs as agreed".

2. The Application is supported by the Affidavit of the Plaintiff sworn on 21 January 2013. The said Affidavit and the Grounds upon which the Application is based, are very similar in content. Such Grounds are set out as follows:

**“(a) At all material times, there existed a contract for service between the Plaintiff and the 1<sup>st</sup> Defendant.**

**(b) On or about March 2012, the 1<sup>st</sup> Defendant through its representatives approached the Plaintiff, Studio Kenya to produce a song to be used by the 2<sup>nd</sup> Defendant as a campaign tool and/or brand for its presidential candidate's bid.**

**(c) The salient terms of offer as per the agreement were as follows:**

- **Composing and production – Kshs.5,000,000/=**
- **Performance by Studio Kenya Artists: Kshs.200,000/= per performance.**
- **Payment for 400 CDs produced @1,000 Kshs. Per CD Kshs.400,000/=.**

**(d) The agreement was that upon composition and production of the songs, the 2<sup>nd</sup> Defendant would pay the Plaintiff for the services rendered on behalf of the 2<sup>nd</sup> Defendant and the defendants would thereafter be allowed to play the songs.**

**(e) The Plaintiff composed and produced the songs titled “Awambo and Sibanduki” as per the agreement and on or about 20<sup>th</sup> July 2012, the songs were produced.**

**(f) That the two songs namely Awambo and Sibanduki are the copyright works and property of the Applicant and the same are registered with the Copyright Board of Kenya.**

**(h) That on various occasions, the 2<sup>nd</sup> Defendant approached the Plaintiff’s artists to perform the songs in different venues namely Bomas of Kenya, Afraha Stadium, Malindi, Crown Plaza and Serena Hotel; which they accepted and performed.**

**(i) The Plaintiff supplied the 1<sup>st</sup> Defendant with 400 CDs which they sold on various occasions as had been agreed to remit the proceeds to the Plaintiff which they failed.**

**(j) It is the Plaintiff’s contention that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to pay the monies owed to them as per the agreed terms and that the Defendants are in breach of contract.**

**(k) The Plaintiff avers that the Defendants have continuously used his songs which his property illegally, playing them in rallies and public campaigns, which is contrary to laws of copyright works.**

**(l) The Plaintiff avers that he has demanded severally through issuance of demand letters for the defendants to cease and desist from illegally using their songs in vain.**

**(m) The Plaintiff now seeks this honourable court to issue an order of injunction restraining and prohibiting the defendants and their agents from illegally using their songs as well as compensation.**

**(n) This prayer is premised on the protection of property rights as enshrined in the Constitution.**

**(o) Should the Court allow the Defendant to continue with the breach of contract and continued use of the Plaintiff’s songs, the Plaintiff stands to suffer gross loss and damages. The Plaintiff avers that he has invested heavily and put a lot of time and effort in rendering the work and now stands to suffer irreparable loss and damage as the Defendants unjustly benefit from his works.**

**(p) That it is in the interest of justice that the orders sought in this application be granted”.**

3. The Application is strenuously opposed by both Dr/Mrs Ida Odinga and Mr. Masha Wa Maitha sued as the officials of the first Defendant lobby group. So far as the second Defendant is concerned it does appear from the Affidavits of Service of a process server one Daniel Gatutha King’ara sworn on 30 January 2013 and 8 February 2013 that the said process server attempted to effect service upon the second Defendant on two occasions. It appears that the service of process herein upon the second Defendant was made by leaving copies of the court documents at the registered office of the political party, the Orange Democratic Movement (ODM). The said Orange Democratic Movement has not entered appearance in this suit nor has it filed a response to the Application herein.

4. In a Replying Affidavit sworn on 8 February 2013 of the said Masha Daniel Maitha traced the history

of the relationship as between the Plaintiff and himself detailing that he had been approached by two gentlemen being Messrs. Phillip Abuor and Peter Oluoch. These two gentlemen had informed him that they intended to form a voluntary and independent initiative to champion the election of the Right Honourable Prime Minister, Dr. Raila Odinga as President of Kenya at the elections in 2013. They had asked the deponent to join them and he was proposed as the interim Chairman of the lobby group to be known as Sibanduki Lobby Group (hereinafter “the Lobby Group”), to which he had agreed. In March 2012, Messrs. Abuor and Oluoch introduced him to the Plaintiff as an upcoming musician who had composed a song known as “Awambo”. The Plaintiff had shown interest in joining the Lobby Group. The deponent stressed that it had been made very clear in the various meetings held by the persons interested in the Lobby Group that such was neither an organ of the second Defendant nor even registered. Mr. Maitha stated that the Plaintiff was “nominated” the “Director of entertainment” for the Lobby Group. In June 2012, the Lobby Group had approached Dr/Mrs. Ida Odinga to support the initiative, which she agreed to do. However the deponent made it quite clear that no financial support was canvassed from Dr/Mrs. Odinga but she contributed to discussions and strategies to raise funds for the Lobby Group’s activities. It was during such discussions that the Plaintiff floated the idea of producing music recorded onto CDs which could then be sold to generate funds for the Lobby Group. One of the ideas was to use the song “Awambo” as a campaign song for the second Defendant but the latter did not participate in any deliberations in that regard. Following upon this, the Plaintiff undertook to produce the Lobby Group’s signature tune named “Sibanduki”. The deponent stated that it was clearly understood that the Plaintiff would have an opportunity to negotiate directly with the second Defendant should the latter be interested in using the Plaintiff’s music or engaging artists to perform such music during its political campaign. Mr. Maitha was quite clear that there was no contract between the Plaintiff and the Lobby Group, Dr/Mrs. Odinga or himself either for the payment of the claimed sum of Shs. 6 million or for any amount whatsoever.

5. Continuing with his said Affidavit, Mr. Maitha detailed that it had been agreed to launch the Lobby Group at a function at the Nairobi Serena Hotel on 6 July 2012. The Plaintiff had floated the idea that during the function he could produce some CDs which would be autographed by Dr/Mrs. Odinga and handed out to persons attending the function, who would be asked to make donations to the Lobby Group to help further its objectives. He noted that the Lobby Group, through its Treasurer, gave to the Plaintiff a contribution of Shs. 10,000/- towards the cost of production of the CDs. The deponent emphasised that there was no agreement, written or otherwise, nor were there any representations or warranties as between the Plaintiff and the Lobby Group for the production of the said 400 CDs for sale, either in Kenya or elsewhere, at a price of Shs. 1000/-or any other price. At the said function, the Plaintiff and his group of musicians performed for the first time. Thereafter, in August 2012, the Plaintiff decided not to actively participate in the affairs of the Lobby Group and assigned another person, Mr. Mike Nyasetia, to take over his role as the “director of Entertainment”.

6. Mr. Maitha and then noted that that the next function organised by the Lobby Group took place on the 8 November 2012 being a fund raising dinner held at Crowne Plaza, Upper Hill, Nairobi. The deponent did not say whether the Plaintiff and his musicians attended that function but at paragraph 33 of his Replying Affidavit he stated:

**“THAT we have never had any time used, played or performed the Plaintiff’s songs as alleged in paragraph 11 of the Plaintiff’s Supporting Affidavit sworn on 21st January, 2013. We have never held any rallies or campaign functions other than the launch of the group and the fundraiser where the Plaintiff, as the Director of entertainment, conceived, planned and actualised the use of the group’s signature song, ‘Sibanduki’.”**

In concluding his said affidavit, Mr. Maitha noted that he did not know of Studio Kenya and he reiterated that the Lobby Group had not entered into any contract, agreement or representations with either the Plaintiff or the said Studio Kenya. In any event, at the time when the Plaintiff, in his Supporting Affidavit to the Application, alleged that the contract had been entered into the said Studio Kenya had not existed as it was only registered on 25 April 2012. He maintained that the Plaintiff’s claim was based on a non-existent agreement and that the reliefs sought in the Application were untenable.

7. On 30 January 2013, the advocates for the 1st co-defendant, Dr/Mrs. Odinga filed Grounds of Opposition to the Plaintiff's said Application dated 21 January 2013. The same were detailed as follows:

**“a) THAT the application is bad in law, misconceived, incompetent, and should be dismissed in limine shall raise the following objections as Preliminary Objections as to Jurisdiction as hereunder detailed to be determined prior to the hearing of the said application or any hearing of this matter:**

**(i) THAT this Honourable Court lacks jurisdiction to entertain, determine the suit and the application as drawn and filed.**

**(ii) THAT the Hon. Dr. Mrs. Ida Odinga is improperly erroneously and mischievously joined in this suit.**

**(iii) THAT the Hon. Dr. Mrs. Ida Odinga is not partner and does not trade as Sibanduki Lobby Group.**

**(iv) THAT Hon. Dr. Mrs. Ida Odinga is not an official of Sibanduki Lobby Group.**

**(v) THAT there is no institution, organisation and or body known in law by the name Sibanduki Lobby Group and as such it has no capacity to sue and/or to be sued.**

**(vi) THAT the Plaintiff's claim is based on an undisclosed agreement between unknown parties and no cause of action has been disclosed by the Plaintiff.**

**b) THAT the Hon. Dr. Mrs. Ida Odinga shall on the basis of the foregoing and at the earliest opportunity prior to the hearing of the current application apply for her name to be struck off as a Defendant/Respondent.**

**c) THAT Studio Kenya is purported to have been registered on 25<sup>th</sup> April 2012 and thus it had no capacity to enter into any agreement and/or contract as alleged or at all.**

**d) THAT the reliefs sought in the current Application are untenable, abuse of the Court process and an attempt to use the Honourable Court as a conduit for purposes of extortion.**

**e) THAT the reliefs sought in the Application seek to restrain unspecified third parties from doing certain activities without affording them an opportunity to be heard contrary to law.**

**f) THAT the Plaintiff states and alleges accrued rights and interest from March, 2012 yet the registration certificate annexed shows that the song entitled Sibanduki was registered on 13<sup>th</sup> November 2012 and hence the Plaintiff has no basis of making any claim since its rights, if any, accrued from 13<sup>th</sup> November 2012.**

**g) THAT the Application as drawn and filed is founded and seeks to enforce illegal and criminal acts which fly in the face of the principle of *ex dolo malo non oritur action*.**

**h) THAT the Plaintiff has alleged specific damages and thus the purported damage or loss, if any, can be quantified and compensated in damages and thus the prayer for injunction is untenable and unfounded”.**

8. Dr/Mrs Ida Odinga also swore a Replying Affidavit on 31 January 2013. At the outset thereof, she noted that she had been improperly, erroneously and mischievously joined in this suit, as she was not a partner nor did she trade as the Lobby Group as alleged by the Plaintiff. She noted that sometime in June 2011 (I believe a typographical error for June 2012) she had been approached by the Plaintiff and Mr. Maitha seeking the support for the Lobby Group including the promotion of songs which the Plaintiff had composed in support of and/or for the use of the second Defendant herein. She was not requested to offer any financial support to the Lobby Group and her role was limited to giving moral support, gracing their

functions and featuring in the songs which had been composed. To this end, she had attended the official launch of the Lobby Group at the Nairobi Serena Hotel on 6 July 2012. Similarly, she had attended the fund raising dinner held at the Crowne Plaza Hotel on 8 November 2012. She annexed a copy of the program in relation to that function to her said Affidavit. The deponent emphasised that her interactions with the Lobby Group were not formal and that she did not enter into any contract or agreement with the Plaintiff or make any representations to him or her co-1st Defendant or the Lobby Group. Finally, Dr/Mrs Odinga detail that she had been advised by her advocates on record that the Lobby Group was a stranger to law and not a juridical person thus being incapable of contracting with anybody and that the Plaintiff's claim was based on a non-existent agreement to which she was a total stranger. She had also been advised that the Plaintiff had alleged specific damages as against the Defendants and thus any purported damage or loss was not irreparable as the same could be compensated for in damages.

9. Counsel for the Plaintiff, as well as for the first co-defendant and the second co-defendant in person, appeared before court on 11 February 2013 for submissions as regards the Plaintiff's said Application. Miss Mithamo for the Plaintiff detailed that what the Plaintiff was seeking before Court was that the Defendants be restrained from the illegal use of 2 songs named "Awambo" and "Sibanduki". She pointed to a Certificate of Registration of a Copyright Work dated 13 November 2012 exhibited as "AN 2" to the Affidavit in support of the Application. Such, counsel stated, was in respect of an album of 5 songs named "Sibanduki". She maintained that the Lobby Group chaired by Mr. Maitha had approached her client for the use of the 2 songs for the second Defendant's campaign purposes. She went on to say that there was no formal contract for the use of the two songs. However, Dr/Mrs Odinga had featured in the two songs as recorded, which were launched and played at the said function on 20 July 2012. There had been no denial of this by either deponent to the Replying Affidavits filed herein.

10. Counsel then maintained that the two songs had been played at other venues including at Nakuru, Malindi and the Serena Hotel. Again, there had been no denial by the two deponents of the Replying Affidavits that the songs were played and that they were to be used as a campaign tool. There was no denial as to the composing (by the Plaintiff) of the two songs. The fact that the Lobby Group had contributed the Shs. 10,000/-towards the costs of the CDs was a clear indication of a contract being in place. It made no sense for her client to have produced the songs and to be paid therefore, later. Counsel noted that the Plaintiff was to be paid Shs. 5,000,000/- for the production of the songs and Shs. 200,000/- every time they were performed. The Defendants had also agreed to pay Shs. 400,000/- for the CDs. Counsel emphasised that the songs were the property of the Plaintiff and that there was no denial that they had been broadcast. The songs were tailor-made for the second Defendant and could not be used by any other political party. The Plaintiff was seeking an injunction against the Defendants so that the songs were not used for campaign purposes. If the Defendants were to continue to use the songs, the Plaintiff would be deprived of the fruits of his labour. Counsel noted that her client had invested heavily in the production of the CDs and if the injunction was not granted he would suffer irreparable damage

11. Mr. Abidah responded to the Plaintiff's submissions on behalf of his client Dr/Mrs Odinga. He started his submissions in relation to the question of jurisdiction of this court. He maintained that the Lobby Group was not a legal entity, it was neither a company nor a business nor a society. His client had never been an official of the Lobby Group. He maintained that there was no suit brought against Dr/Mrs. Odinga. He noted that the Plaintiff, as a trading entity, had been registered under the provisions of the Registration of the Business Names Act on 5 April 2012. That was when the businesses acquired the capacity to contract. The alleged contract as between the parties had supposedly been entered into in March 2012 but the Plaintiff, as a legal entity, was not in existence at that time. Counsel noted that only one of the songs ("Sibanduki"), had been copyrighted and such copyright could only be claimed from when the song was registered which was on 13 November 2012. No claim could be made for the use of the song prior to that time.

12. As regards the alleged contract made in March 2012, counsel maintained that it could only have been the Plaintiff and Mr. Maitha who could be parties to the same but the whole matter was questionable. For example, what were the terms of payment? When, where and how was the contract made? Counsel referred the court to section 3 of the Law of Contract Act which requires that any contract for the value of over Shs. 200/- had to be in writing. He noted that the Plaintiff was claiming substantial

terms of an oral contract in which the evidence thereof was questionable. He noted that the prayers of the Application were for injunctive relief as well as for damages. Such went against the principles as regards the granting of injunctions enunciated in ***Giella versus Cassman Brown***. As there was, in this case, a specific claim for damages, injunctive relief should not be granted.

13. Further as regards prayers c) and d) of the Application the same could not be granted as the Plaintiff was seeking to injunct parties who were not before the court. Mr. Abidah further commented that there was no evidence that there were any CDs supplied to his client as no receipts as to payment or deliver notes had been produced. As regards the invoice annexed to the Affidavit in support of the Application, this had been raised and the demand for payment made on the same day, several months after the supposed contract was alleged to have come into existence. In his opinion, the Plaintiff's claim was based on malice, illegality and mistaken identity and could not be granted. He applied for Dr/Mrs. Odinga's name to be struck out of the suit as she was in no way involved in this apparent scheme to deprive her of monies. Finally he asked that this court should direct that the costs of the Application be borne by Mr. Nyasetia personally.

14. Mr. Maitha, appearing in person, referred to his Replying Affidavit dated 8 February 2013. He noted that he had never been an officer of the second Defendant and had only come to hear of this suit through the Internet. He submitted that the Plaintiff was part and parcel of the Lobby Group which was launched on 6 July 2012 at the Serena Hotel, Nairobi. He stated that this was a lobby group made up of individuals to contribute their time to support the Presidential candidate, Dr. Raila Odinga. He noted that it was the agreed responsibility of the Plaintiff to make sure that the Lobby Group was provided with music, if such was wanted. He noted that when the CDs were produced, they had five songs recorded thereon. The one song that the Lobby Group was interested in was "Sibanduki". The Plaintiff had included four other songs as he wanted exposure as a musician. Finally, Mr. Maitha noted that this matter had caused him considerable embarrassment personally and he detailed that the Lobby Group was a loose association of individuals.

15. In a brief response, Miss Mithamo for the Plaintiff noted that Sibanduki had been informed as a lobby group to further the interests of the second Defendant. She maintained that the Plaintiff had a live contract with the second Defendant which had been served. She noted that the Plaintiff also sought relief against the second Defendant registered as a political party under the Political Parties Act. The songs were composed and made on behalf of the second Defendant to further its bid for the Presidency. Counsel admitted that "Sibanduki" was a whole album with 5 songs on it but the main ones were "Awambo" and "Sibanduki". Such was still the property of the artist, being the Plaintiff. The main aim was for the Plaintiff to make money out of the sale of the songs. He was not a member of the Lobby Group. He never approached Dr/Mrs Odinga although she did feature in the songs. Counsel referred the court to **Order 40 rule 2** of the *Civil Procedure Rules* and detailed that the Plaintiff was looking for a temporary injunction to issue until the hearing and determination of this suit or the 4 March 2013. The Plaintiff did not wish his work to be used for promotion of the campaign and he was entitled to the Copyright. It was the Plaintiff who had been approached by the Lobby Group and not the other way round. Finally, counsel noted that the second Defendant had been served four times.

16. **Order 40 rule 2 (1) and (2)** of the *Civil Procedure Rules* reads as follows:

**"40. 2. (1) In any suit for restraining the**

**defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**

**(2) The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".**

Counsel for the Plaintiff in her submissions pointed to the words:

**“whether compensation is claimed in the suit will not,”**

as justification for the Plaintiff seeking an injunction as well as (or as opposed to) damages. She maintained that this was a case where the Plaintiff, as well as being entitled to damages for breach of copyright, would also be entitled to an injunction so as to ensure that his copyright was breached no further by the Defendants

17. Be that as it may, the Plaintiff still has the task of showing to this court that he is entitled to the grant of an injunction as against the Defendants. To this end, he must satisfy this court in relation to the principles of granting interlocutory injunctions as per the celebrated case of **Giella v Cassman Brown (1973)** as exemplified in **Mrao Ltd. versus First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125**. That case detailed the principles of granting an interlocutory injunction as follows:

**"a) The applicant must show a *prima facie* case with a probability of success;**

**b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;**

**c) If the court is in doubt, it will decide an application on the balance of convenience."**

**Mrao** also established that:

**"A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

18. I have considered the submissions of learned counsel for Dr/Mrs Ida Odinga. I am in complete agreement that the Lobby Group is not a legal entity capable of suing or being sued. It is merely what Mr. Maitha detailed to the court in his submissions viz:

**“a loose association of individuals”.**

It is not registered under any of the statutes applicable in Kenya in relation to a non-individual legal entity. To this extent it is a “legal nothing”. As it is incapable of being sued nor are its so-called officials. Dr/Mrs. Ida Odinga has been described as the Lobby Group’s patron. In law, she is nothing of the sort. Mr. Maitha has been described as the Lobby Group’s chairman. Again, in law, he is nothing of the sort. The Complaint in paragraph 2 details that the Lobby Group is being sued through its officials. It has no officials. Accordingly, so far as the First Defendant is concerned, I strike out this suit as against it and similarly as against Dr/Mrs Ida Odinga and Mr. Masha wa Maitha with costs.

19. Turning to the Second Defendant, it has been brought to the attention of this Court by counsel for the Plaintiff that the Second Defendant has been served with court process in relation to this suit and to the Application “4 times now”. I have perused the Affidavits of Service sworn by the said **Daniel Gatutha King’ara**. There are only two (not four) of them sworn on 30<sup>th</sup> January 2013 and 8<sup>th</sup> February 2013. As regards service upon the Second Defendant, they both say the same thing to the effect that the deponent went to the offices of the Second Defendant at Orange House, Menelik Road, Nairobi where he met with **“a receptionist”** who refused to accept service of process so the deponent **“left the copies of the documents with her”**. Time and again this court has indicated that, so far as the service of court process is concerned, the process server, when serving such on a representative of a registered legal entity (such as the Second Defendant, a registered political party under the Political Parties Act), must as far as possible, name the individual upon whom service is effected. The mere description of **“a receptionist”** is not enough and to this end, I find that proper service of court process has not been made upon the Second Defendant herein.

20. Even if proper service had been effected upon the Second Defendant, would the Plaintiff have been entitled the interlocutory injunction sought? With respect, I don't think so. What is being sought before court, is an injunction to prevent the Defendants from performing, using etc. the Plaintiff's two songs for which he claims copyright being "Awambo" and "Sibanduki". But does the Plaintiff own the copyright thereto? In supposed proof that he has, the Plaintiff has attached to his said Affidavit in support of the Application as "AN 2", a copy of a Certificate of Registration of a Copyright Work purportedly issued by the Executive Director of the Kenya Copyright Board dated 13 November 2012. That Certificate reads:

**"that a Copyright Work in the MUSICAL category entitled SIBANDUKI and numbered KCB 0793 has been registered in the name of STUDIO KENYA of Nairobi".**

The question here is just who is the Plaintiff? In the Plaint dated 21 January 2013 and filed herein on 22 January 2013, the Plaintiff is described as:

**"a male adult person of sound mind trading as Studio Kenya, a business duly registered under the provisions of CAP 418 Laws of Kenya...."**

However, in the Affidavit in support of the Application, the deponent, **Alphonsius Nyasetia** details in paragraph 1 that he is a businessman and one of the business partners carrying on business in the name and style of Studio Kenya. Indeed in the Grounds in support of the Application paragraph (e) it details that:

**"The Plaintiff composed and produced the songs titled 'Awambo and Sibanduki'".**

What is not explained is how a business can compose the two songs. Has the individual, the said **Alphonsius Nyasetia** sold the Copyright in the two songs to the business? The position becomes even more confusing with the submissions of counsel for the Applicant in which she detailed that the Copyright Registration Certificate as above referred to an album entitled "Sibanduki" comprising five songs not a single song "Sibanduki" or two songs "Awambo" and "Sibanduki". Further, there was no evidence put before court in the Affidavit in support of the Application that either the one song, the two songs or even the five songs had been performed or presented by the Defendants after the date upon which the copyright was registered being (according to the Copyright Certificate) 13 November 2012. There was only reference to the musical work being performed as per paragraph 11 of the said Affidavit at Afraha Stadium, Nakuru on 7 July 2012, in London, United Kingdom on 12 August 2012, at Malindi on 30 September 2012 and at Bomas on 14 October 2012 all of which dates were before the 13 November 2012.

21. Before I leave this Ruling, I feel that I should comment on the alleged contract which the Plaintiff says that it has as Grounds (b) (c) and (d) of the Application. The provisions of Section 3 of the Law of Contract Act would negate reliance by the Plaintiff on an oral contract. Further, if the Plaintiff was the business, Studio Kenya, as opposed to the individual, Alphonsius Nyasetia, it had not been registered in March 2012 when the alleged contract was supposedly entered into and would not have had the capacity to contract. It would thus be unable to sue on the same, always presuming a contract existed at all.

22. I have set out the above in detail so as to demonstrate that in my opinion, the Plaintiff/Applicant herein has come nowhere near establishing the first requirement of the granting of an interlocutory injunction being a *prima facie* case with a probability of success. Further, quite apart from the Plaintiff/Applicant's pleading in relation to damages for breach of copyright, I am of the firm opinion that whoever the Plaintiff may be in this suit, he/it could be compensated for any loss by an award of damages. The conclusion therefore is that the Plaintiff/Applicant has not satisfied the established parameters for the granting of an interim injunction as against the first Defendant, who is non-suited anyway, as well as the second Defendant. Accordingly, I dismiss the Plaintiff/ Applicant's Notice of

Motion dated 21 January 2013 with costs to the Defendants.

**DATED and delivered at Nairobi this 15<sup>th</sup> day of February 2013.**

**J. B.HAVELOCK  
JUDGE**