



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 653 of 2009

AVENUE SERVICE STATION (1977) LTD.....1ST PLAINTIFF

CENTRAL RENT-A-CAR.....2ND PLAINTIFF

EXECUTIVE RENTAL LIMITED.....3RD PLAINTIFF

WIGA CAR HIRE & TOURS LIMITED.....4TH PLAINTIFF

PLATINUM CAR HIRE & TOURS LIMITED.....5TH PLAINTIFF

ALPHA WHISKY LIMITED (T/A CONCORDE CARE HIRE).....6TH PLAINTIFF

APOLLO TOURS & TRAVEL LIMITED.....7TH PLAINTIFF

MARKET SERVICES STATION.....8TH PLAINTIFF

CROWN TOURS & CAR HIRE LIMITED.....9TH PLAINTIFF

GLORY RENT A CAR HIRE LIMITED.....10TH PLAINTIFF

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA.....1ST DEFENDANT

KENYA COPYRIGHT BOARD.....2ND DEFENDANT

KENYA ASSOCIATION OF MUSIC PRODUCERS.....3RD DEFENDANT

RULING

The application is brought by a Chamber Summons dated 3rd September, 2009 and taken out under **Sections 63(e) and 3A of the Civil Procedure Act; and Order XXXIX Rule 2 of the Civil Procedure Rules**. The Applicants thereby seek two main orders-

1. That pending the final determination of the dispute between the parties hereto the Defendants employees, servants and/or agents be restrained from unlawfully demanding and/or collecting licence charges from the Plaintiffs or in any other manner from harassing, and/or interfering with the operations of Applicants Car Hire businesses.

2. That pending the final determination of the dispute between the parties hereto, the Defendants be restrained from unlawfully enforcing the notice dated 18th February, 2008 or any notice amending or replacing the same against the Plaintiffs in so far as the same applies to private car-hire motor vehicles.

The application is supported by the annexed affidavit of Hemant Kibalal Shah, and is based on the grounds that the Defendants have no authority to levy licence charges in respect of private car-hire motor vehicles; that the Plaintiffs are not under any obligation to take out the licence demanded by the Defendants; and that the Defendants are collecting agents who subsequently distribute the sums they collect to their members and might not be in a position to refund the amounts collected.

Opposing the application, the 1st Respondent filed a Notice of Preliminary Objection on the grounds, inter alia, that the Plaintiff's suit/cause of action is a matter for the Judicial Review Court and not the Civil or Commercial Court; and that the Plaintiff, the suit and application are incompetent for want of authority under **Order 1 Rule 12 of the Civil Procedure Rules**. These grounds were adopted by the 1st and 3rd Respondents in their written submissions.

After considering the application and the submissions of respective counsel, I note that the case for Applicants can be summarized by stating that their main complaint is that they let out motor vehicles for private hire. Once an individual hires any such a vehicle for private purposes, the nature or character of the audience in that motor vehicle is private and as such falls under the exceptions to **Section 26**. The Applicants therefore contend that the Respondents have no authority or colour of right to demand or require licences from the Applicants.

Secondly, the Applicants maintain that they do not perform any acts which can constitute any infringement under the Act as they do not provide any music to the hirer of the public even if that were the case, any infringement is actionable at the instance of the owner of the right.

On their part, the Respondents take the view that there is no distinction whether a vehicle is being used for private or public purpose. Either way, whoever is using the vehicle is bound to pay authorization fee, and the argument that the vehicles were for hire does not make a difference. In any event, damages would be an adequate remedy in this matter, as the same are quantifiable.

The grant of an order of injunction is predicated upon satisfaction of the conditions laid down in **GIELLA v CASSMAN BROWN & CO, LTD [1973] EA 358**. These conditions are that "**First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience**"

With regard to the first condition, it is noteworthy that in this matter, there is a contract between the Applicants and their clients which does not allow for the Applicants to commit an infringement. In the circumstances of this case, it is evident that the decision to play music or not, or which music should be played, does not rest with the Applicants but lies exclusively with their clients. The Applicants are therefore not in a position to commit an infringement of copyright and, on that basis, would seem to have made out a strong *prima facie* case with a probability of success.

However, the same Applicants have diluted an otherwise fairly strong case by praying for damages. In paragraph 17(f) of the Complaint, they expressly claim general damages. This is a clear manifestation that they can adequately be compensated by an award of damages and therefore they cannot suffer irreparable injury. The second condition for the grant of an interlocutory injunction has not been fulfilled. I have no doubt that for that reason, the balance of convenience tilts in favour of not granting the injunction. These observations are adequate for declining to grant the injunction sought.

The Respondent's, however, raised some two procedural points. The first was that this matter ought to have been filed in the Judicial Review Court rather than the Civil or Commercial Court. That may be so. However, my understanding of the Divisions of the High Court is that this is done for Administrative convenience rather than for jurisdiction, at least for now. Nothing much turns on that.

The second procedural point relates to **Order 1 Rule 13(1)** which ordains that ***“where there are more Plaintiffs than one, any one or more of them may be authorized by another of them to appear, plead or act for such other in any proceedings.”*** Such authority ***“shall be in writing signed by the party giving it and shall be filed in the case.”***

Although there is on record authority to act, it is attached to the Verifying Affidavit and had not been filed in the case as required by the rules. I accordingly make the following orders-

- 1. The application for injunction is hereby dismissed with costs.**
- 2. The 1st Plaintiff to file and serve a complaint Authority to act under Order 1 Rule 12(2) of the Civil Procedure Rules within 7 days of this order.**
- 3. Upon failure to do so within the prescribed period, the Complaint herein will stand struck out with costs to the Respondents.**

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 7th day of November, 2012.

ODUNGA
JUDGE