



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 507 of 2009

**MUSIC COPYRIGHT SOCIETY OF KENYA LTD.
PLAINTIFF**

VERSUS

**SAFARICOM LIMITED
DEFENDANT**

**CELLULANT KENYA LIMITED **THIRD
PARTY****

RULING

1. The chamber summons dated 17th July 2009, filed by the plaintiff seeks for orders inter alia to restrain the defendant its agents or servants from publishing selling, distributing or offering to the public musical works by artists as set out in the application. Secondly, the applicant also sought for orders that a court bailiff be allowed to search the defendants' premises and their computer saver and remove there from musical works stored in digital or sound format in the defendant's business premises.
2. This application is premised on the grounds stated on the body thereto and the supporting affidavit sworn by **Maurice Okothi Mwande** on 15th July 2009 and a further affidavit sworn on 23rd October 2009. According to the applicant, it is contended that they are the assignees or owners of Musical works composed by eleven artists. The plaintiff is the owner of the copyrights as shown by the documents attached to the affidavit. It is not disputed the defendant offered the music to the public through their promotion dubbed "**skiza**". The music is offered to the defendants' customers as ring back tones down loadable to the subscribers who are over ten million. The plaintiff is concerned about the musical works over which they hold a copy right and is now being offered to the public for reward without their knowledge, authority or license.
3. The defendant admitted they offered these musical works for sale to their subscribers but they contended that they were given the rights by **Cellulant Kenya Limited** who they sought to join and were joined in these proceedings as third parties. Counsel for the plaintiff argued that the applicant as the copy right holder, of the Music by the Artists named in the application has been able to prove on a balance of probability that, unless the respondent is restrained by an order of injunction, they will continue to infringe on the plaintiff's rights to the musical works thereby causing irreparable damages.
4. Although the third party claims to have rights due to agreements that were signed with various artists, the third party has admitted having used the works by **Mwanaisha Mohamed** without authority. Mwanaisha swore an affidavit denying ever giving authority to the defendant and third party to use her works. The third party also claims to have obtained authority to use the works of **les Wanyika**. However, the person described as **Alfan Maraga Kandiro** who purportedly gave authority on behalf of the estate of Les Wanyika is a stranger because the works of Les Wanyika belongs to the late John Andrew Ngerenza who assigned it to the plaintiff.
5. Dennis Waweru Kagia (DNA) also denied having dealt with the third party with regard to his musical works. The agreement between **Njomaimo Enterprises Limited** and the third party does not

mention DNA or his works. The agreement attached to the application was also faulted for lack of execution. Moreover, it is vague because the songs and their titles are not identified. Counsel urged the court to find that there is a dispute over the works belonging to the plaintiff which has been illegally used by the defendant and the third party who infringes on the plaintiff's rights and thus grant an interim order of injunction to prevent further infringements and losses.

6. This application was opposed by counsel for the defendant. He relied on the replying affidavit sworn by Mr. **Nzioka Waita** sworn on 28th September 2009. It was argued that the plaintiff has failed to demonstrate a breach of contract or to show the injury they have suffered as a result of the matters complained about. There is no contractual relationship between the plaintiff and the defendant to warrant the granting of an injunction. The plaintiff is not an artist and has not produced any work at all. They only claim to be assignees thus they have not been able to prove that they are the owners of the copy right.

7. Further a deed of an assignment is not sufficient to entitle the plaintiff to copy rights. The artists have not even signed the deed of assignment. In this case the artists have constitutional rights to assign other entities their rights to the music. The artists are free to use their works as they please. Indeed going by the assignment the artists can contract another party to use their works in addition to the plaintiff. The defendant relied on the contents of music works obtained from the third party. The third party represented to the defendant that they had received licenses from various owners of certain musical works and the defendant denied that they have infringed on the plaintiffs' intellectual property.

8. The defendant has duly executed an agreement and was indemnified by the third party in the event that they were found to have used musical works which infringed on intellectual property of anybody. In this regard the third party furnished the defendant with various agreements it had entered into with various artists. And since the defendant was not aware of the assignment between the plaintiff and the artists, the defendant has not infringed on the rights of the plaintiff. As a sign of good faith when demand was made by the plaintiff, the defendant made full disclosure of the sources of the music and the third party was joined in these proceedings.

9. Moreover as soon as the defendant was served with an ex parte order of injunction they stopped using the disputed works. Thus there is no point of seeking for orders to delete the music works from their computers. In any event, the defendants' computers contain other works and other confidential information for their subscribers whose security is guaranteed by Kenya Communications Act. Finally the plaintiff will not suffer any irreparable loss, and if they suffered any loss of royalties it can be compensated for with money which is determinable from what the artists get from their works and the defendant is capable of paying damages. The balance of convenience favors the defendant continuing with the works because at the end of the day the artists will be paid for the works utilized by the third party.

10. The third party who was joined in these proceeding also opposed the application. It was argued that the music works rights vests in an individual musician and not the plaintiff. The third party entered into an agreement with the artists. It is the artists who are now putting the plaintiff and the third party at logger heads and this conflict can only be determined at a full hearing. The plaintiff and the third party are both claiming to have the authority to use the music works of the artists. In any event the third party and the plaintiff are involved in another suit **MILIMANI HCCC 154 OF 2009** where the third party has given security of Ksh.2 million pending the hearing of an appeal which is pending between the two parties. Counsel urged the court to dismiss the application as there is no infringement of the copy right.

11. The above is the summary of the salient issues raised in the rival submissions and the pleadings. The principle element for determination is whether the applicant has established a prima facie case with a probability of success to warrant the granting of an order of injunction. The court of appeal has explained what constitutes a prima facie case in the case **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held 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."

12. The principle complaint by the plaintiff is that the defendant infringed upon their rights through their caller ring back tone service commonly known as "**skiza**". According to the plaintiff, there is infringement of their works by eleven artists who assigned their rights to the plaintiff. The defendant deny that they have anything to do with the infringement because they entered

into a contract called Content Provision Agreement with the third party, by which the third party was supposed to obtain licenses including the rights to distribute the contents from the copy right owners. The third party informed the defendant that it had entered into mobile content distribution agreements with the various artists and the defendant was thus indemnified from any claims by the content owners. That is why they joined the third party in the proceedings.

13. On the part of the third party they claim to have entered into a distribution agreement directly with the artists. However the validity and authenticity of these agreements have been seriously challenged. At this interlocutory stage, I find that there are issues that require to be sorted out by way of oral evidence. This is so for example with regard to works by **Les Wanyika** which the third party claims to have rights pursuant to an agreement signed one **Alphan Kadiro** when indeed the plaintiff claims that the works of Les Wanyika belonged to the late one **Andrew Ngereza** who assigned his rights to the plaintiff in 1993. The third party does not deny having used the works of **Mwanaisha Mohammed** and she has sworn an affidavit denying having given authority to the third party to use her works.

14. Some of the letters attached to the affidavit by the third party especially the one purportedly written by Mohamed Mazingazinga on behalf of Simba Wa Nyika is not even dated and is not a legal contract and no one knows how Mohamed was signing on behalf of Simba Wa Nyika. In regards to the works of DNA there is a dispute over who he has signed for the third party. According to the provisions of section 33 (1) of the Copy Rights Act it is provided that:

“Subject to this section, copyright shall be transmissible by assignment, by license, testamentary disposition, or by operation of law as movable property.”

15. When this application came up for hearing, interim ex parte orders were issued in terms of prayer No.2. I agree with the defendant that the orders sought by plaintiff in terms of prayer No.7 and 8 are very drastic. I am of the view that the status quo in terms of the orders made exparte in terms of prayer No. 2 should remain in force until the hearing and determination of this suit. The plaintiff has established that they have an arguable case. As noted above the issues identified above and others can only be determined by evidence for the court to arrive at a final conclusion on who is the rightful assignee.

16. Accordingly an order in terms of prayer No.2 is hereby granted. Costs will be in the cause.
RULING READ AND SIGNED ON 19TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE