

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

Civil Case 154 of 2009

CELLULANT KENYA LTD.....PLAINTIFF

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA LTD.....DEFENDANT

RULING

On 8th July 2009, this court dismissed the plaintiff's application which sought to restrain, by means of an interlocutory injunction, the defendant by itself or its agents from trespassing into the plaintiff's premises and interfering with the plaintiff's business or from demanding royalties from the plaintiff in respect of alleged public performance rights and or communication to the public of the sound recordings it had contracted with the artists or demand payment for royalties that was allegedly disputed. The plaintiff was aggrieved by the decision of the court and duly filed its notice of intention to appeal against the said decision to the Court of Appeal.

On 15th July 2009, the plaintiff invoked the inherent jurisdiction of this court by notice of motion seeking orders of the court to restrain by means of an injunction the defendant, by itself or its servants or agents, pending hearing of the intended appeal, from demanding from the plaintiff payment of any royalties, using the police to coerce the plaintiff to make payment for claims which were disputed, from trespassing into the plaintiff's property and interfering with any of the plaintiff's property, from seizing or causing to be seized, without any lawful order, any of the plaintiff's property or interfering with the operations of the plaintiff's business, from harassing, intimidating, threatening or interfering with the plaintiff's employees or its clients in regard to its business relating to the digital downloading of ringtones and content provision for the said downloads. The grounds in support of the application are on face of the application. The application is supported by the annexed affidavit of Kennedy Njoroge, a director and the chief executive officer of the plaintiff.

The application is opposed. The defendant filed grounds in opposition to the application. The defendant stated that the orders being sought by the plaintiff were substantially the same orders which were sought by the plaintiff and were disallowed by the court. The defendant was of the view that the issues being raised in the application were therefore *res judicata*. It was the defendant's contention that the application was misconceived, mischievous, made in bad faith, frivolous and an abuse of the court process.

At the hearing of the application, I heard rival arguments made by Miss Kirimi for the plaintiff and by Mr. Rombo for the defendant. I have carefully read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the oral arguments made in court together with the cited authorities. The plaintiff is essentially seeking to stay the orders of this court pending the hearing and determination of the intended appeal to the Court of Appeal. Under **Order XLI Rule 4(2)** of the **Civil Procedure Rules**, this court has discretion to either grant or refuse stay of its orders pending the hearing and determination of the intended appeal. If the court is inclined to grant stay, it would do so upon the applicant giving security for the due performance of the order or decree. I concur with the holding in **Butt vs Rent Restriction Tribunal [1982] KLR 417** where it was held that the general principle in granting or refusing stay should be that where there is no overwhelming hindrance, a stay must be granted so as not to render nugatory the intended appeal.

As stated earlier in this ruling, this court dismissed the plaintiff's application which sought to restrain the defendant from demanding royalties from the plaintiff on behalf of its members. This court reached a finding that the plaintiff had not established a prima facie case to entitle the court grant the sought interlocutory injunction. The present application in a sense requires this court to reconsider the same grounds it took into account when it disallowed the application for injunction. The plaintiff cited the now notorious decision of **Erinford Properties Ltd vs Cheshire County Council [1974] 2 All ER 448** where it was held that it would not be incompatible for a court which had dismissed an application for injunction to grant the unsuccessful applicant injunction pending the hearing of an appeal against the dismissal. This case was cited with approval by the Court of Appeal in **Madhupaper International Ltd vs Kerr [1985] KLR 840** where it was held that a judge who dismisses an application for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending the hearing of the intended appeal so as not to render the decision of the appellate court, should the appeal be successful, nugatory.

I, for one, do not subscribe to the principle that an unsuccessful applicant in an application for interlocutory injunction has an automatic right to invoke this court's discretion to be granted injunction pending the hearing of an appeal. I think there are plethora of decisions by the High Court which disapprove of the practice where unsuccessful parties crave exercise of discretion from the same court under the same applicable principles for grant of injunction, this time, on the grounds that such an applicant's intended appeal would be rendered nugatory if the injunction is not granted. I stand to be corrected, but I think the exercise of this court's discretion in granting injunction pending the hearing of an intended appeal should be invoked under exceptional circumstances where the facts of the case are such that it would be appropriate for the development of the law for the highest court in the land to render its opinion on the subject matter of the suit.

In the present application, I hold that the facts of this case disclose exceptional circumstances under which this court will be inclined to exercise its discretion to grant injunction pending the hearing of the intended appeal. I am not convinced that the plaintiff has established a prima facie case to entitle this court grant the injunction pending the hearing of the intended appeal. I was however convinced that the plaintiff would suffer irreparable loss to its business that will unlikely be compensated by an award of damages should the intended appeal be successful. This court has exercise its exceptional jurisdiction after it was persuaded that the grounds of appeal which the plaintiff seeks to canvass before the Court of Appeal raise novel points of law which the Court of Appeal is invited to render its decision. I am further of the view that the Court of Appeal should be given an opportunity to give its interpretation of contentious sections of the **Copyright Act 2001**, so as to safeguard the intellectual property of music artists and other persons who rely on their creativity to earn a living. It is for this reason, and this reason alone, that this court will exercise its discretion and grant the orders of injunction pending the hearing of the intended appeal as sought by the plaintiff in terms of prayer 3 of the application.

The injunction is however granted in one condition: the plaintiff shall deposit in a fixed interest earning account in the names of the respective counsel for the plaintiff and for the defendant the sum of Kshs.2,000,000/= within thirty (30) days of today's date. In default of such deposit, the injunction pending hearing of the intended appeal granted herein shall stand automatically vacated. The costs of the application shall be in the cause.

DATED AT NAIROBI THIS 23RD DAY OF OCTOBER 2009

L. KIMARU

JUDGE