



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 629 OF 2003**

GABRIEL K. TOROME

T/A TOROME PRODUCTIONS..... PLAINTIFF

VERSUS

SIMON MUIRURI KIREHU

T/A ONE STOP NDUTI MUSIC STORE..... DEFENDANT

RULING

This Ruling is confined to the application dated 11.6.04, after which parties will proceed with the application dated 17.6.04. The application dated 11.6.04 sought directions on the 3rd Party, while that dated 17.6.04 essentially seeks orders that the 3rd Party if he is to be party in this suit should deposit security for continued appearance and security in the event that the Plaintiff's case succeeds and the issue of execution arises.

During the hearing of these proceedings on 2.7.04, it appeared as if hearing the application dated 11.6.04 would be distinct from the issues raised in the application dated 17.6.04. My reading of the entire pleadings in the court file from filing of the Plaintiff, on 3.10.03, has revealed that the issues are so intertwined that directions on the 3rd Party cannot be made without touching on the very issues raised in the application dated 17.6.04.

Yet the two applications are quite distinct.

To appreciate the role and place of the 3rd Party in the dispute between the Plaintiff and the defendant, it is imperative to peruse the plaintiff and the defence in the main suit, but without getting into the merits.

In the plaintiff dated 3.10.2003, the Plaintiff, in Paragraph 15, claims, that the defendant started infringing on the copyright granted to the Plaintiff by the 3rd Party through an agreement between the Plaintiff and Reverend Emmanuel John Mwasota, an artist from Tanzania, the 3rd Party.

In his defence, dated 10.12.03, the defendant, at Paragraph 6 of his defence, avers that he derives the right to market and distribute the musical works complained of from the composer of the said musical works by virtue of an Agreement between the composer and him – the defendant – in which the composer gave the defendant such rights. Its crucial to appreciate that the composer is the 3rd Party herein.

In his 3rd Party Statement of defence, Rev. Emmanuel John Mwasota, dated 8.6.04, states that he is the composer of the musical works at issue between the defendant and the Plaintiff; and that he entered into an interim copyright agreement with the Plaintiff pending the drawing of a formal agreement between the

parties but that no formal agreement to date had been entered into between the 3rd Party and the Plaintiff herein despite the 3rd Party's insistence on the same.

The Defendants sought and obtained leave to join the 3rd Party who subsequently entered defence, and disputes any agreement between the 3rd Party and the Plaintiff.

In the Plaintiff/Applicants application, dated 17.6.04, the prayer sought is that the 3rd Party should deposit a security in the sum of Kshs.5million simply because he is a Tanzanian, but operates here in Kenya, who has no known property or assets in this country.

After careful consideration of the pleadings and submissions by counsel for all the parties – Mr. Nyandieka for the Plaintiff/Applicant; Ms Nganga for the defendant, and Ms. Mungai for the 3rd Party, this court rules as under:-

1. Dismisses the application for deposit of security (for appearance) by the 3rd Party as this has no legal basis. Over 70% of the businesses in Kenya are owned and/or control by non-Kenyans, and to make any dispute between such parties subject to security by the non-Kenyans would clearly ground this country's economy. But of great significance is the fact that there is sufficient legal framework for the enforcement of Judgments as may result from disputes like this.

2. The dispute between the Plaintiff and the defendant should be heard together with the 3rd Party's claim that no copyright agreement was ever formally entered between the 3rd Party and the Plaintiff. Indeed, since the gist of the claim in the suit herein is the infringement of a copyright granted by the 3rd Party to the Plaintiff; a determination of who, between the Plaintiff and the defendant was actually granted the copyright by the 3rd Party is SINOQUONON. The claim by the defendant his claim is derived from the 3rd Party makes that 3rd Party indispensable in the suit.

3. In the end, I rule that both the applications of 11.6.04 and that of 17.6.04 are fully disposed of by ruling No. 2 above, and the parties should proceed to the substantive hearing of the suit herein together with the 3rd Party issue. Only that way can justice be done. Any other approach of hearing the applications separately is no more than litigation by instalments which simply delays the final determination of the key issues, and for no good reason.

DATED and delivered in Nairobi this 22nd Day of April, 2005.

O.K. MUTUNGI

JUDGE