



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

CIVIL SUIT NO. 1458 OF 2000

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

VERSUS

PARKLANDS SHADE HOTEL LTD T/A KLUB HOUSE.....DEFENDANT

R U L I N G

The Music Copyright Society of Kenya Ltd (hereinafter called the Society), filed its suit against Parklands Shade Hotel Ltd t/a Klub House (hereinafter called Klub House). It prayed for *inter alia*, an injunction to restrain Klub House by itself, its servants and/or agents from playing music at its two premises in Nairobi without a license from it.

It also prayed for damages for infringement of copyright and conversion together with costs and interest thereon.

It simultaneously filed, an application under order XXXIX rule 2 and 3 of the Civil Procedure Rules, and sought orders to restrain Klub House, from playing or broadcasting any music either recorded or by a live band which is the subject of the copyright agreement between it and its members. The application is based on the grounds that Klub House has continually and unlawfully played through live band and recorded music the musical works of the plaintiff's members, which music is the subject of copyright, in flagrant disregard of the plaintiff's members' copyrights in the said music. Further, that the plaintiff's members' continue to suffer loss of royalties through the said breach of the copyright in the said musical works. The application is supported by the affidavit of Jennifer Shamalla, the plaintiff's General Manager who depones that the Society is the sole licensing body, which enforces the copyright of all musical works in Kenya and also enforces the copyright of the musical works registered with the Performing Rights Society Ltd.

She also depones that the Society requires all establishments which broadcast or play its members' musical works to take out an annual license. She also depones that Klub House was licensed by her Society prior to 1997. Further, that it paid the royalties that were assessed for it in 1997, 1998 and 1999, but that in 2000, although it paid the royalty fee which is equivalent to what it had paid for the three previous years, it however refused to take out a license and continues to play the music of the members of the Society.

The application is opposed.

A director of Klub House has sworn the replying affidavit. It is his contention that the Society is not the sole licensing body of copyrights of all musical works in Kenya. He goes further to add that even if it was, it would only enforce the copyright of musicians and artists who have in writing specifically assigned them the rights to that copyright, and this would thus not apply to all musicians generally. He depones that his company had paid the license fees over the specified period, only due to the harassment, intimidation and coercion of the Society, which has never, despite demand supplied Klub House with a schedule of a list of its members whose music it is alleged has been infringed. He however maintains that his company can freely negotiate and enter into contracts with live band performing musicians whose services it has paid for directly to them. This fact has been confirmed by John Desmond Katana Harrison, one of the performers who has sworn an affidavit and deponed that he has been performing for Klub House at a negotiated fee.

He also depones that Klub House has continually paid Multichoice Africa Ltd the requisite copyright fees that cover the "Pub and Clubs subscriptions", and to Kenya Broadcasting Corporation for the various television sets that it shows, which licenses authorises it to show and play all the music relayed by the said stations. It is his contention that to allow the plaintiff to collect royalties would amount to double taxation. It is therefore his contention that in any event, damages would be an adequate remedy as these would be equivalent to the fees that have been assessed prior hereto. All in all, Klub House maintains that it stands to suffer irreparably if the Court were to grant the orders being sought, which it contends are oppressive.

Several issues arise from this application, namely:

- who is the owner of the copyright in the music that the Society claims is being infringed, has Klub House infringed the copyrights,
- what are rights of the Society, and - is the Society entitled to the prayers that it now seeks.

Normally the author of the music, that is the one who actually writes, compiles, or composes it, is the first owner of the copyright. But it is well established that a copyright can be transferred by assignment in writing signed by the owner of the right or by his duly authorised agent. On broadcasts I have had to refer to sections 8 and 16 of the Copyrights Act cap 130 which stipulate that:

"8. (1) Where the owner of the copyright in any literary, musical or artistic work authorizes a person to incorporate the work in audio-visual works and a broadcasting authority broadcasts the film, it shall, in the absence of any express agreement to the contrary, be deemed that the owner of the copyright authorized the broadcast.

(2) Notwithstanding subsection (1), where a broadcasting authority broadcasts audio-visual works in which a musical work is incorporated, the owner of the right to broadcast the musical work shall, subject to the provisions of this Act, be entitled to receive fair compensation from the broadcasting authority, and in the absence of an agreement the amount of compensation shall be determined by the competent authority appointed under section 17."

"16.(1) Any person who, at a time when copyright or the rights of a performer subsists in a work-

- (a) makes for sale or hire any infringing copy;
- (b) sells or lets for hire or by way of trade exposes or offers for sale or hire any infringing copy;
- (c) distributes infringing copies;
- (d) possesses otherwise than for his private and domestic use, any infringing copy;
- (e) imports into Kenya otherwise than for his private and domestic use any infringing copy; or

(f) makes or has in his possession any contrivance used or intended to be used for the purpose of making infringing copies, shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright or the rights of a performer would or might thereby be infringed, be guilty of an offence.

(2) Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at time when copyright subsisted in such work or sound recording and where such performance was an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.

(3) For the purposes of paragraphs (a) to (f) of subsection (1), any person who has in his possession, custody or control three or more infringing copies of a work in the same form, shall, unless the contrary is proved, be presumed to be in possession of or to have imported such copies otherwise than for private and domestic use.”

Klub House has intimated that it has paid all dues to both Kenya Broadcasting Services and Multichoice Africa Ltd. I have no reason to doubt that they have.

In view of the above, is the Society entitled to claim to be the sole licensed authority which enforces copyrights of all musical works? In my humble opinion, it cannot. Only the owner of the copyrights would have a right to enforce compliance. Although to its further affidavit it exhibited a list of its members no executed assignments were provided as would be necessary to support its contention on the basis of which it has brought this suit.

Further the agreement between the plaintiff and the performing Right Society Ltd, which was also, attached as an exhibit to the further affidavit clearly stipulate that:

“By this contract the PRS confers on MCSK the exclusive right to authorise within Kenya all public performancesof the musical works, with or without lyrics, as the members of PRS and of the members of the scheduled society which are protected by and under the copyright law of Kenya.”

It is worthy to note that the applicant is not quite clear of the orders that it seeks in this application, for although the deponent of the supporting affidavit states that she depones in support of an application for a mandatory injunction, she however depones in paragraph 9 thereof:

“That I swear this affidavit in support of my application for an injunction restraining the defendant from playing any music of our members until the final determination of the suit.”

Both counsels did not refer to any cases in support of their submissions. I have however had to refer to 8 *Halsburys* pp 444-5 at par 808 which reads:

“The general principles upon which injunctions are granted for the protection of copyright do not differ from those upon which they are granted for the protection of other property. The nature of copyright property, however, makes an injunction a peculiarly suitable, and indeed the normal remedy.”

It however goes on in the next paragraphs to say that:

“If the granting of an injunction will not seriously interfere with the defendant, it may be granted although the plaintiff does not fully prove his title to the right alleged to be infringed or has only an equitable title, or although the quantity of the defendant’s work which constitute an infringement has not been ascertained. An interlocutory injunction will not however, be granted where the plaintiff can properly be protected by the defendant being ordered to keep an account of the defendant might suffer irreparable injury from an injunction restraining him from publishing

pending that; nor will an interlocutory injunction be granted if the plaintiff has been guilty of undue delay in coming to Court or if his conduct has amounted to acquiescence in the infringement, or there is any substantial doubt at the plaintiff's right to succeed."

Having heard the advocates from both parties, and taken the above into consideration, in my humble opinion the plaintiff has not established that it has a *prima facie* case with a probability of success. Any damage that it is likely to suffer would be easily assessed as I have found prior hereto. I however find that the business Klub House will be greatly interfered with and that it stands to suffer irreparably if the orders being sought were granted and by being stopped from playing the music at both its premises, which performances are the basis of its success in the business. In the circumstances, I do dismiss the application with costs.

Dated and delivered this 23rd day of November 2000.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. Imbenzi for the defendant

No appearance for the applicants.