



**Music Copyright Society of Kenya v Performers Rights Society of Kenya & 2 others;  
NCBA Bank Kenya Ltd & 3 others (Interested Parties) (Civil Suit E035 of 2023)  
[2023] KEHC 2283 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E035 OF 2023  
A MABEYA, J  
MARCH 22, 2023**

**BETWEEN**

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

**AND**

**PERFORMERS RIGHTS SOCIETY OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**KENYA ASSOCIATIONS OF MUSIC PRODUCERS ..... 2<sup>ND</sup> DEFENDANT**

**PETER KIASA ENYENZE ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**NCBA BANK KENYA LTD ..... INTERESTED PARTY**

**DAVID MABONGA BARASA ..... INTERESTED PARTY**

**WILBERT WANYAMA ..... INTERESTED PARTY**

**KENYA COPYRIGHT BOARD ..... INTERESTED PARTY**

**RULING**

1. Before Court are two applications by the plaintiff for determination. The first application is dated 1/2/2023 and the second 9/2/2023. The Court directed on 24/2/2023 that both be heard together.

**Application dated 1/2/2023**

2. The applicant was brought under Order 5 rule 22(b), Order 13 rule 2, Order 39 rule 1, Rule 5,6&8 Order 40 Rule 1 &2 Order 46 rule 20 of the *Civil Procedure Rules* 2020 and Sections 1A, 1B,3& 3A of the *Civil Procedure Act*, Section 7, Section 12(9)(a) and Article 159(2)(c).



3. It sought injunctive orders freezing the bank accounts NCBA Bank KAMP PRISK account no 678xxxx018 held in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant as well as the amount of Kshs. 34,000,000/ that was allegedly fraudulently transferred. The application further sought to have the court order the payment of 54% of the said sum of Kshs 34,000,000/=.
4. The application was premised on the grounds set out on the face of it and supported by the affidavit sworn on 1/2/2022 Dr. Ezekiel Mutua. He swore that the plaintiff and the 1<sup>st</sup> defendant had entered into an MOU dated 1/1/2019 by which the parties agreed to launch and activate licensing operations on certain terms.
5. That the terms included that; the amounts collected by the parties be shared between them on percentages, the Kenya Association of Music Producers at 21.12%, Performers Rights Society of Kenya at 24% and the Music Copyright Society of Kenya at 54%. That based on the MOU, the parties opened a bank account in the 1<sup>st</sup> Interested party where the revenue would and have since been collected, to wit, NCBA Bank KAMP PRISK MCSK account no 770xxxx014 (“the collection account”).
6. It was the plaintiff’s case that sometimes in January, 2023, the defendants, with the connivance of the 3<sup>rd</sup> defendant who was an employee of the plaintiff, fraudulently transferred Kshs. 34,000,000/- from the collection account to an account known as NCBA Bank KAMP PRISK within the same bank. That the transfer was illegal and had occasioned the applicant great inconvenience as it had been unable to meet its costs.

#### **Application dated 9/2/2023**

7. The application dated 9/2/2020 was brought under Order 5 rule 22(b), Order 13 Rule 2, Order 39 Rule 1, Rules 5, 6&8, Order 40 Rules 1 &2, Order 46 Rule 20 of the *Civil Procedure Rules* and Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Section 7, Section 12(9)(a) of the *Arbitration Act* 1995, Rule 3(1) of the *Arbitration Rules* 1997 and Article 159(2)(c).
8. The application sought orders to compel the 1<sup>st</sup> interested party to release the sum of Kshs. 34,000,000/- held in NCBA Bank KAMP PRISK account number 678xxxx01 as follows: -
  - a. Kshs. 7,180,800/- being 21% of Kshs 34,000,000/- to Kenya Association of Music Producers;
  - b. Kshs. 8,330,000/- being 24.5% of Kshs. 34,000,000/- to Performers Rights Society of Kenya; and
  - c. Kshs. 18,489,200/- being 54.38% of Kshs 34,000,000/- to Music Copyright Society of Kenya.
9. The plaintiff also sought orders that it be allowed to have access to 54.38% of all the money in the NCBA Bank KAMP PRISK MCSK account no 770xxxx014.
10. In support of the application, the applicant filed a supporting affidavit sworn by Dr. Ezekiel Mutua. He deponed that the illegal transfer of Kshs 34,000,000/- from the collection account had occasioned the plaintiff great harm as it had been unable to pay its bills. He further deposed that the payment for PAYE for the month of January 2023 had not been submitted and as a result there was risk of getting penalties from the Kenya Revenue Authority. That the plaintiff was under threat of auction on some liabilities it was unable to meet.
11. The applications were opposed by the defendants and interested parties. The 1<sup>st</sup> defendant opposed the same vide a replying affidavit sworn on 22/2/2023 by Joseph Njagih, its Chief Executive Officer. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had been licensed by the 4<sup>th</sup> Interested Party but the plaintiff had failed to satisfy the licensing conditions as set out by the 4<sup>th</sup> interested Party.



12. That it had been denied a License for failing to pay the requisite fee for 2021 and 2023 and to provide documents required by the board. He contended that the 4<sup>th</sup> interested party directed that the funds held in the joint MOU account be transferred to the account held by the licensed Collective Management Organizations, being the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
13. The 3<sup>rd</sup> defendant opposed the application vide his replying affidavit sworn on 23/2/2023. He stated that he was the immediate former operations manager of the plaintiff. That the plaintiff and his co-defendants entered into an, MOU whose aim was to undertake the joint copyright licensing operations and the same was subject to issuance of license under the Copyright Act. That he received a letter dated 26/1/2023 from the 4<sup>th</sup> interested party requiring the signatories of the collection account KAMP/PRISK/MCSK no. 770xxxx014 to transfer the funds therein to account number 678xxxx018 in the name KAMP/PRISK.
14. That he received an email from the 1<sup>st</sup> defendant's Chief Executive Officer instructing him to authorize the transfer of Kshs 34,000,000/-, being the collections for the year commencing January 2023 which he complied with. That upon the said transfer, he tendered his resignation on 31/1/2023 from the plaintiff. It was his averment that the orders sought could not be determined at an interlocutory stage.
15. The 2<sup>nd</sup> defendant opposed the applications vide a replying affidavit dated 22/2/2023 sworn by Maurice Okoth, its Chief Executive Officer. He averred that the plaintiff had obtained court orders barring the 1<sup>st</sup> and 2<sup>nd</sup> defendant from operating the account no NCBA Bank KAMP-PRISK Account no 678xxxx018. That the plaintiff had not disclosed to Court that it was not licensed by the Kenya Copyright Board to collect, hold, spend or distribute revenue on behalf of its members. That the MOU has ceased being operational as at 12/01/2023 after the publication by Kenya Copyright Board dated 27/01/2023.
16. It was averred that the transfer of funds to the new account was done lawfully under the directions of the Kenya Copyright Board and the account number 770xxxx014 in the name KAMP/PRISK/MCSK had since ceased to exist. He averred that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the only institutions licensed by the board to collect, hold, manage and distribute royalties.
17. The 4<sup>th</sup> Interested Party filed a replying affidavit dated 22/2/2023 sworn by George Nyakweba, its Deputy Executive Director. He averred that under section 46 of the Copyright Act 2001, the 4<sup>th</sup> interested party was tasked with the mandate to license and supervise activities of collective Management Organizations. That the 1<sup>st</sup> and 2<sup>nd</sup> defendant had been licensed by the 4<sup>th</sup> interested party to operate as Collective Management Organizations for the year 2023 but the plaintiff had been denied such licence.
18. He stated it was an offence for the plaintiff to attempt to collect licensing fees despite having no license and the application was meant to further an illegality.
19. The application was canvassed by written submissions which I have considered.
20. I have considered the two applications, the responses as well as the written submissions. In my view taking account of the pleadings, the main contention between the parties is whether the plaintiff is entitled to the 54.38% of Kshs 34,000,000/- as set out in the tripartite MOU dated 1/1/2019.
21. This is an injunction application. The principles applicable are well know as enunciated in the case of *Giella v Cassman Brown*. These are that; an applicant must establish a prima facie case with a probability of success, that the applicant will suffer loss that cannot be compensated by an award of damages if the injunction sought is not granted, and that if in doubt, the court will determine the matter on a balance of convenience.



22. The plaintiff's case is that on 1/1/2019, it entered into a tripartite MOU with the 1<sup>st</sup> and 2<sup>nd</sup> defendant in respect of operating a joint copyright licensing operation. The three were the only recognized Collective Management Organizations in the country.
23. That in order to cater for the running costs, they agree on a formula of sharing the proceeds obtained from the said operation whereby, the plaintiff would get 54.38%, the 1<sup>st</sup> defendant 21% and the 2<sup>nd</sup> respondent 24.5%. The collection account was opened and was operated by the three. Early in the year 2023, the 1<sup>st</sup> and 2<sup>nd</sup> defendant collaborated with the 3<sup>rd</sup> defendant, opened a new account and transferred a sum of Kshs 34,000,000/- to that account. That account was known as NCBA Bank KAMP PRISK account number 678xxxx018. The plaintiff contended that the said transfer was illegal and greatly inconvenienced the plaintiff in the running of its business.
24. The defendants admitted that there was an MOU which however had expired. They did not deny that despite the MOU expiring, they had continued to operate as if it was still in force. The defendants case was that the plaintiff had not been licensed by the 4<sup>th</sup> interested party and therefore could not be part of revenue collection. It was contended that the 4<sup>th</sup> Interested party (KECOBO) had instructed the defendants to set up another bank account to collect the revenue. The 3<sup>rd</sup> defendant further admitted that he participated in the transfer of the funds after getting instructions from the 4<sup>th</sup> interested party.
25. From the foregoing it is not disputed that the parties had operated jointly with respect to collecting revenue for the period of the MOU since 1/1/2019. It expired on 31/12/2021. They continued to operate under the terms of that MOU until January 2023.
26. The defendants admit that the transfer of the money from the collection account was as a result of the directive given by the 4<sup>th</sup> interested party. Section 5 of the Kenya Copyright Act sets out the mandate of the Kenya Copyright Board and it includes but not limited to licensing and supervising the activities of the Collective Management Organizations under the Act.
27. While I appreciate that the 4<sup>th</sup> Interested party role in granting the license to the three parties, I note that there exists a dispute between the plaintiff and the 4<sup>th</sup> Interested party in the Court of appeal with respect to whether the plaintiff was a Collective Management Organization and therefore subject to the control and supervision of the 4<sup>th</sup> Interested Party.
28. Further I have examined the evidence of the plaintiff in the further affidavit where the court granted conservatory orders with the issue of issuance of license. It cannot then be said that the plaintiff's receiving revenue would be an illegality since the same is subject to determination by the Court of Appeal.
29. I further note that in the month of January, 2023 the revenue collected was with respect to the three bodies. The funds transferred from the collection account was the one which had been collected before the licences for 2023 were granted by the 4<sup>th</sup> Interested party. The money constituted funds for all the three bodies, the plaintiff included.
30. The fact that the MOU expired in 2021 does not change the situation. The parties continued to act as if it was in force. They operated the whole of 2022 under its terms and conditions. They collected and shared the revenue under the formulae agreed in the MOU. Accordingly, I find that by their conduct, the parties were bound by the said terms. It was their custom and conduct to which they were bound.
31. In this regard, I am satisfied that the plaintiff has established a prima facie case with a probability of success.



32. On the 2<sup>nd</sup> limb in *Giella v Cassman Brown* Principle, the plaintiff indicated that it uses its share of the revenue for office operations it had not met its monthly bills by the time it came to court. That obligations such as taxes were still outstanding.
33. I am satisfied that if the plaintiff waits until the suit is determined and is unable to undertake its operations, it will suffer extreme damage including being evicted from its premises or wound up. That cannot be compensated by any award of damages.
34. On the third limb, I find that the balance of convenience tilts in favour of granting the orders sought and safeguarding the plaintiffs' existence.
35. There was an objection to the order for mandatory injunction. That it will have the effect of determining the matter at an interlocutory stage.
36. I am aware that the matter is subject to be heard where witnesses will have to tender evidence and be cross examined. However, the action of the defendants of transferring the funds from the collection Account without notice to the plaintiff was illegal. It was summary in nature. They should have started banking new revenue in the new account without transferring or touching the money that had been legally banked and/or collected in the collection account under the terms of their previous dealings.
37. The defendants summary action of transferring the funds without notice was meant to and actually stole a march against the plaintiff. It cannot be allowed to stand. It is capable of being summarily undone without causing any prejudice to the defendants or any of the Interested Parties.
38. In *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
39. In *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the Court of Appeal held: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”
40. In the present case, I have found that the defendants sought to steal a march against the plaintiff. There exist special circumstances in that, the monies sought by the plaintiff is its share for the period before 28/1/2023. It is a share due to it and keeping the same away from it would cause irreparable damage to the plaintiff.



41. Accordingly, I find that the two applications are meritorious. I allow them as follows: -

- a) The 1<sup>st</sup> Interested Party is hereby directed to forthwith release the sum of Kshs. 34,000,000 from NCBA Bank KAMP PRISK account No. 678xxxx018 as follows:-
  - i. Kshs. 7,180,800/= being 21.12% thereof to the Kenya Association of Music Producers.
  - ii. Kshs. 8,330,000/= being 24.5% thereof to the Performers Rights Society of Kenya.
  - iii. Kshs. 18,489,200/= being 54.38% thereof to the Music Copyright Society of Kenya.
- b) Pending the hearing of the suit, Music Copy Right Society of Kenya is hereby allowed to access 54.38% of all funds deposited in Account NCBA Bank KAMP PRISK MCSK Acc No. 770xxxx014.
- c) The plaintiff shall have the costs of the application.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

