



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW APPLICATION NO. 251 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA COPYRIGHT BOARD.....1<sup>ST</sup> RESPONDENT**

**KENYA ASSOCIATION OF MUSIC PRODUCERS.....2<sup>ND</sup> RESPONDENT**

**MUSIC COPYRIGHT SOCIETY OF KENYA.....3<sup>RD</sup> RESPONDENT**

**PERFORMERS RIGHTS SOCIETY OF KENYA.....4<sup>TH</sup> RESPONDENT**

**EX PARTE:DIANA INTERNATIONAL LTD T/A ANDREW APARTMENTS**

**RULING NO 2**

**The Application**

1. Judgment was delivered herein by Hon. Mativo J. on 11<sup>th</sup> March 2020. Diana International Ltd T/A Andrew Apartments (hereinafter “the Applicant”) thereafter filed the Amended Notice of Motion dated 17<sup>th</sup> April 2020, that is the subject of this ruling, after being granted leave to amend its initial Notice of Motion dated 8<sup>th</sup> April 2020. This Court directed the parties to argue the application by way of pleadings filed electronically, due to the scaling down of Court operations as result of the COVID -19 pandemic.

2. The Applicant is seeking the following outstanding orders in its Amended Notice of Motion:

- a) **The Applicant be granted leave to change its advocates from the law firm of Ataka, Kimori & Okoth Advocates to AKO Advocates LLP.**
- b) **The Court be pleased to extend the time for filing of the Notice of Appeal against the Judgment dated 11<sup>th</sup> March, 2020, of the High Court (Mativo, J) in Nairobi Judicial Review App. No. 251 of 2019.**
- c) **The Notice of Appeal filed herewith be deemed to have been duly filed upon leave being granted.**
- d) **This Court be pleased to stay the enforcement of the decision contained in the invoice dated 23<sup>rd</sup> July, 2019 and demand notice dated 19<sup>th</sup> August, 2019, being the decisions challenged in the Judicial Review Proceedings, pending the hearing and determination of the intended Appeal.**
- e) **The costs of this Application be in the cause.**

3. The said application is supported by an affidavit sworn on 17<sup>th</sup> April 2020 by David Gichuki, who is employed as an accountant by the Applicant. The Applicant avers that the 14- day period prescribed by statute for filing the Notice of Appeal lapsed on 25<sup>th</sup> March 2020, and it was unable to file the said Notice of Appeal during the said period due to the substantial scaling down of operations in courts all over the country, aimed at preventing the spread of COVID-19. Furthermore, that it had acted without undue delay. Additionally, that its appeal is

arguable with a good chance of success, as demonstrated in the grounds contained in its draft Memorandum of Appeal, a copy of which was attached.

4. The Applicant also filed a Notice of Change of Advocate dated 8<sup>th</sup> April 2020, informing that it had appointed the firm of AKO Advocates LLP to conduct this matter on its behalf in place of Ataka, Kimori & Okoth Advocates, and a signed consent to this effect between the two firms of advocates, also dated 8<sup>th</sup> April 2020.

5. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents were not opposed to the prayer for the Applicant to change its advocate, but opposed the remaining prayers through a replying affidavit sworn on 30<sup>th</sup> April 2020 by Jane Achieng Wandiga, the in charge of accounts at the 2<sup>nd</sup> Respondent. According to the said Respondents, the Applicant had adequate time between the delivery of the judgment herein on 11<sup>th</sup> March 2020 and the scaling down of Court operations on 21<sup>st</sup> March 2020 to file its Notice of Appeal. Furthermore, that their draft grounds of appeal do not demonstrate an arguable appeal to warrant stay of execution.

6. On the stay of enforcement of its decisions, the Respondents averred that the royalties payable by the Applicant are of a modest amount that can be refunded to it in the event that it succeeds in its appeal, and that given the time it will take to hear the appeal, the artists to whom the disputed royalties are payable will have been denied their dues if the intended appeal fails. That in the event the Court orders stay of execution, the assessed royalties for 2018 and 2019, as well as assessed royalties for future years should be deposited in court.

### **The Determination**

7. The Applicant filed skeletal and further submissions on the application on 24<sup>th</sup> April 2020 and 5<sup>th</sup> May 2020 respectively. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents also filed submissions on the application dated 30<sup>th</sup> April 2020. The 1<sup>st</sup> Respondent did not file any response to the application. I have read and considered the Applicant's and 2<sup>nd</sup> to 4<sup>th</sup> Respondents' pleadings and submissions, and find that there are three issues before this Court for determination.

8. The first issue is whether leave should be granted to the Applicant to change its advocates on record. This prayer was not opposed and the issue therefore is essentially one of confirming whether the Applicant has met the requirements of the applicable law. Order 9 rule 9 of the Civil Procedure Rules provide as follows in this regard:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

9. I agree with the position stated by Mabeja J. in the case of **Ritesh Nandlal Pamnani & Another vs Dhanwanti Hitendra Hirani & 2 Others (2012) E KLR**, that it is a party's fundamental and constitutional right to have an advocate of his choice, and that for a Court to deprive a litigant his right to representation of his choice there must be a clear and valid reason for so doing. It is notable in this respect that the main reason why leave of the court is required for a change of advocate after judgment, is for the court to confirm that the respective rights and duties between the advocate on record and the client have been settled.

10. In the present case, the two firms of advocates involved, namely the advocates currently on record, and the advocates seeking to come on record, have filed a consent in court dated 8<sup>th</sup> April 2020 as regards the change of advocates. There is therefore no good reason to decline the leave sought.

11. The second issue before the Court is whether the time for filing the Notice of Appeal by the Applicant should be extended, and if so whether consequent orders should be granted. The Applicant in this respect submitted that this Court is empowered by section 7 of the Appellate Jurisdiction Act to extend the time for filing the Notice of Appeal and reliance was placed on the decisions to this effect in **Loise Chemutai Ngurule & Another vs Wilfred Leshwari Kimung'en & 2 Others (2015) e KLR**, and the decision of the Court of Appeal in **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Limited (2015) eKLR** on in the principles to be considered in an application to extend the time for filing a Notice of Appeal.

12. The Applicant reiterated that it was unable to file the Notice of Appeal in time due to the sudden and substantial scaling down of operations in courts all over the country aimed at preventing the spread of COVID-19 announced on 15<sup>th</sup> March, 2020 by the Chief Justice, and urged this court to take judicial notice of the prevailing circumstances pursuant to section 60 of the Evidence Act, which provides that matters that this Court shall take Judicial Notice of include all matters of general or local notoriety.

13. The 2<sup>nd</sup> and 4<sup>th</sup> Respondent reiterated their argument that the Applicant had ample time to file the Notice of Appeal as scaling down of Court operations took effect on 21<sup>st</sup> March 2020, and the Applicant therefore had eight (8) working days to file the notice.

14. It is not disputed that this Court has the power under the provisions of section 7 of the Appellate Jurisdiction Act to extend the time for the filing of a Notice of Appeal, which provisions state as follows:

**“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for**

giving such notice or making such appeal may have already expired.”

15. The Court of Appeal has confirmed the competence and the jurisdiction given to the High Court by the said section in Kenya Airport Authority & Another Vs Timothy Nduvi Mutungi, (2014) e KLR . In addition, the grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the cases of Stanley Kahoro Mwangi & 2 others vs Kanyamwi Trading Company Limited (supra), Machira & Company Advocates vs Mwangi & Another ,(2002) e KLR and in Kenya Shell Ltd Vs Kobil Petroleum Ltd, (2006) 2 EA 132.

16. The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others, (2014) eKLR laid down the applicable principles for extension of time for filing an appeal as follows:

- 1) **Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2) **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3) **Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;**
- 4) **Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5) **Whether there will be any prejudice suffered by the respondent if the extension is granted**
- 6) **Whether the application has been brought without undue delay; and**
- 7) **Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

17. The dispute in the present case revolves around the question of whether the delay by the Applicant to file the Notice of Appeal is inexcusable. In this respect, the Applicant has pleaded the events that followed the occurrence of the COVID-19 pandemic in Kenya as the main reason for the delay. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents insist that the Applicant had ample time to file the Notice of Appeal before the occurrence of the COVID-19 pandemic in Kenya.

18. This Court takes judicial notice of the fact of the existence of the COVID-19 pandemic in Kenya, and the resultant scaling down of court operations, which is a matter of public notoriety. In particular, it is a fact that Courts and registries have not been open to the public since 16<sup>th</sup> March 2020 as a result, and most court processes are now conducted electronically. In addition, the judgment sought to be appealed from was delivered on 11<sup>th</sup> March, 2020, and a substantial part of the 14-day period for filing the Notice of Appeal fell during the time Courts were not operating normally. Lastly, the Applicant filed his first application for extension of time on 8<sup>th</sup> April 2020, a period of approximately two weeks after the lapse of the 14-day period on 25<sup>th</sup> March 2020.

19. *It is the finding of this Court on the instant issue that taking into account the above stated factors, that the delay by the Applicant in filing the Notice of Appeal is not relatively inordinate. This is especially so considering the nature of circumstances that the Applicant has explained it was operating under, and whose cause was largely systemic and beyond its control. The Applicant has thus provided a reasonable and sufficient excuse, and reason for the exercise of the Court’s discretion in its favor. I also note in this respect that the Applicant had already filed and paid for its Notice of Appeal, and it can thus be admitted to the record.*

20. The last issue before the Court is whether there should be a stay of enforcement of the Respondents’ decision contained in the invoice dated 23<sup>rd</sup> July, 2019 and demand notice dated 19<sup>th</sup> August, 2019. It is notable in this regard that the judgment delivered herein on 11<sup>th</sup> March 2020 *inter alia* declined to issue an order of certiorari to quash the said decision and demand notice issued by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents, and which were levying Kshs 192,616.50 as monies payable by the Applicant as royalties.

21. In this respect, the Applicant invoked the Court’s inherent powers to further the ends of justice, and urged the Court to issue a conservatory order of stay to restrain the Respondents from enforcing the said decisions and demand notice, and likened the powers of this Court in this regard to the exercise of the powers by the Court of Appeal under Rules 5(2)(b) to preserve the subject matter of the appeal as held in the case of Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR.

22. The Applicant further submitted that its appeal will be rendered nugatory if the orders are not granted, and that the appeal is arguable with a good chance of success. Lastly, the Applicant in its further submissions submitted that in the interest of time and justice, it is prepared to have one half of the demanded royalties placed in an interest earning account.

23. The 2<sup>nd</sup> and 4<sup>th</sup> Respondent on their part reiterated the averments made in their replying affidavit on this issue.

24. This Court’s powers, and the procedure to applied in an application for stay of execution following delivery of a judgment and pending an appeal, are expressly regulated by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provide as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such**

application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

25. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

26. As regards the first condition, this Court has already found that the application by the Applicant was filed without unreasonable delay. On the second condition of proof of substantial loss, the Applicant has pleaded and urged that its appeal will be rendered nugatory if the enforcement of the Respondents’ decision and demand is not stayed. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents on the other hand urge that they will be able to reimburse the sums levied as royalties in the event the Applicant’s appeal succeeds.

27. In this regard, I am in agreement with the holdings in Antoine Ndiaye vs. African Virtual University [2015] eKLR and John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR that mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay of execution. An applicant must therefore establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.

28. In the present application it is indeed the case that the issue of the said payment of the royalties is the core of the Applicant’s appeal, which will thus be rendered nugatory if the stay orders are not granted. In addition, I note that the 2<sup>nd</sup> to 4<sup>th</sup> Respondents also argue that the artists are being prejudiced and need to be paid the royalties due to them, and it is therefore not evident how the said royalties will be refunded by the Respondents once they are paid to third parties who are not parties to this suit.

29. I am in this regard guided by the position as stated by the Court of Appeal in National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, NRB CA Civil Application No 238 of 2005 where it was held as follows:

*“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”*

30. Lastly, on the requirement of security, the Applicant initially did not give any undertaking as to security, but later one offered in its submissions to place half of the demanded royalties in an interest earning account. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents on the other hand are amenable to stay of execution, provides the Applicant provides a deposit of the demanded and future royalties. The only observation I would like to make on the 2<sup>nd</sup> to 4<sup>th</sup> Respondents concession is that the security in Order 42 Rule 6 is provided in relation to the specific decree that is sought to be executed, and which is thus binding on an applicant.

31. In the present case, the decision and demand notice that the subject the present judicial review proceedings and whose enforcement the Applicant seeks to stay is for a levy of royalties of Kshs 192,616.50. A deposit for any other or future royalties will have to be the subject of separate proceedings by the Respondents.

32. Accordingly, and arising from the findings herein, I find that the Applicant’s Amended Notice of Motion dated 17<sup>th</sup> April 2020 is largely merited to the extent of the following orders:

**I. The Applicant be and is granted leave to change its advocates from the law firm of Ataka, Kimori & Okoth Advocates to AKO Advocates LLP.**

**II. The time for filing of the Notice of Appeal against the Judgment dated 11<sup>th</sup> March, 2020, of the High Court (Mativo, J) in Nairobi Judicial Review App. No. 251 of 2019 be and is hereby extended for a period of fourteen days from the date of this ruling .**

**III. The Notice of Appeal dated 30<sup>th</sup> April filed herein by the Applicant is deemed to have been duly filed upon leave being granted, and is hereby admitted to the record..**

IV. The enforcement of the decision contained in the 2<sup>nd</sup> to 4<sup>th</sup> Respondents' invoice dated 23<sup>rd</sup> July, 2019 and demand notice dated 19<sup>th</sup> August, 2019, being the decisions challenged in the judicial review proceedings herein, is hereby stayed for a period of twelve months pending the hearing and determination of the Applicant's appeal, and only on condition that the Applicant deposits as security, the sum of Kenya Shillings One Hundred and Ninety Two Thousand, Six Hundred and Sixteen and Fifty Cents (Kshs 192,616.50) in an interest earning account opened in the joint names of the Applicant's and 2<sup>nd</sup> to 4<sup>th</sup> Respondents' Advocates on record within sixty (60) days of the date of this ruling.

V. Upon default of compliance by the Applicant with the orders herein regarding the deposit of security, the stay orders herein shall stand vacated and the Respondents shall be at liberty to execute.

VI. The Deputy Registrar of this Court shall send a copy of this ruling and the extracted orders to the Applicant by electronic mail by close of business on 22<sup>nd</sup> May 2020.

VII. The Applicant shall meet the costs of the Notice of Motion dated 17<sup>th</sup> April 2020.

33. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17<sup>th</sup> March 2020 and published in the Kenya Gazette on 17<sup>th</sup> April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the Applicant's and 2<sup>nd</sup> and 4<sup>th</sup> Respondents counsels email addresses, by close of business on 22<sup>nd</sup> May 2020.

P. NYAMWEYA

JUDGE