



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, KIAGE & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 221 OF 2018

BETWEEN

MUSIC PUBLISHERS ASSOCIATION OF KENYA.....APPLICANT

AND

LABAN JUMA TOTO.....1ST RESPONDENT

DAVID AMUNGA.....2ND RESPONDENT

KISUMU BAR OWNERS ASSOCIATION.....3RD RESPONDENT

KISUMU GREEN GARDEN RESTAURANT.....4TH RESPONDENT

KENNEDY MOSES AMAKOYE.....5TH RESPONDENT

THE KENYA COPYRIGHT BOARD.....6TH RESPONDENT

THE ATTORNEY GENERAL.....7TH RESPONDENT

MUSIC COPYRIGHT SOCIETY OF KENYA.....8TH RESPONDENT

ALBERT GACHERU.....9TH RESPONDENT

(An application for stay of execution of the Judgment of the High Court of Kenya at Kakamega (Sitati, Majanja & Cherere, JJ.) dated 13th July 2018 in Kakamega Petition No. 3B of 2017 consolidated with Kisumu Petition No. 11 of 2017 and Kisumu Petition No. 15 of 2017)

RULING OF THE COURT

1. In its application dated 26th July 2018 and made under Rule 5(2)(b) of the Court of Appeal Rules, Music Publishers Association of Kenya, the applicant, seeks an order that pending the hearing and determination of its appeal, there be a stay of part of the judgment of the High Court at Kisumu (*Sitati, Majanja & Cherere, JJ.*) delivered on 13th July 2018 in which the court declared as null and void, a licence that had been issued to it by Kenya Copyright Board, the 6th respondent on 27th March 2017.

2. In the same application, the applicant is also seeking a conservatory order to guarantee continued operation of the system of collection of

music royalty as jointly administered by it, the Kenya Association of Music Producers and Performance Rights Society of Kenya and regulated by Kenya Copyright Board; and an injunction barring Music Copyright Society of Kenya, the 8th respondent, from placing public notices in print or digital format purporting to be a collecting society for authors, publishers and composers of music copyright or in any way conducting the business of copyright collecting society without a certificate of registration from Kenya Copyright Board, the 6th respondent. Also sought is an order that service need not be effected on any person who did not participate in the proceedings in the lower court.

3. The background in brief is that in petitions before the lower court the 1st and 2nd respondents challenged the decision of the Kenya Copyright Board (the 6th respondent) that had issued licences to the applicant and to Music Copyright Society of Kenya, the 8th respondent to collect and distribute royalties. It was averred that the said licences interfered with the 1st and 2nd respondents' rights to freedom of association, right to property and fair administrative actions because if forced them to be members of the applicant so as to collect royalties. The 1st and 2nd respondents also challenged the action of the 8th respondent collecting royalties yet the license issued to it by the 6th respondent had expired.

4. In its judgment, the court found that the 1st and 2nd respondents did not demonstrate a violation of their rights under Article 40 of the Constitution, having assigned their intellectual property rights to Music and Copyright Society of Kenya (the 8th respondent) for management and collection of royalties. However, the court found that in violation of Article 47(1) of the Constitution and Section 5 the Fair Administrative Act there was no public participation prior to issuance of a licence to the applicant on 27th March 2017 and therefore that licence was null and void.

5. Aggrieved, the applicant lodged a notice of appeal on which the present application is hinged. The grounds in support of the application are elaborately set out on the face of the application and supported by an equally lengthy supporting affidavit sworn by Bernard Kioko, a director of the applicant.

6. It is the applicant's case that the intended appeal is arguable; that the orders issued by the lower court are not "*fair and just*" as required by the Fair Administrative Action Act; that the court failed to take into account the socio-economic role played by the applicant in collective management of copyright in the music industry in Kenya; that the court failed to give appropriate reliefs and instead gave reliefs that occasion loss and injury to Kenyan authors, composers and publishers of musical works; that the judgment took away the rights of Kenyan music authors, composers and publishers to earn royalties from the income of their music through collective administration of their music copyright and that it is in the public interest that the orders sought be granted.

7. It was contended that the intended appeal will be rendered nugatory if the orders sought are not granted because the applicant will not be able to collect royalty from users of music who used the impugned judgement to avoid paying royalty or to acquire licenses from the applicant.

8. Despite service of notice on the parties given by the Deputy Registrar of the Court communicating that the application would be considered on basis of written submissions without appearance of counsel, no submissions were filed by the parties and neither did the respondents file any replying affidavits. We have nonetheless considered the application based on the detailed grounds and affidavit in support against the applicable legal principles stated, for example, in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012 (2013) eKLR.**

9. As regards arguability, there is for instance the contention that the High Court failed to give appropriate orders and that the effect of the orders given is to occasion loss of income by way of royalties to Kenyan authors, composers and publishers of musical works. We think the appeal is arguable.

10. On the nugatory aspect, the case of **Shah Munge & Partners Ltd vs. National Social Security Fund Board of Trustees & 3 others [2018] eKLR** supports the proposition that an appeal would be rendered nugatory if refusal to grant an order of stay to the applicant would cause such hardship as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined. Bearing that in mind, we think that in the event the appeal eventually succeeds, the licence that was nullified by the court below will be reinstated and the applicant's authority to collect license fees and royalties restored. The applicant has not, in our view, demonstrated that the appeal will be rendered nugatory.

11. Consequently, the application fails and is hereby dismissed. As the respondents did not participate in the application, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR