



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Arika & 2 others v Tamasha Corporation Ltd & 8 others (Civil Case E545 of 2020)
[2021] KEHC 387 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E545 OF 2020
DAS MAJANJA, J
DECEMBER 22, 2021**

BETWEEN

**HELLEN WILFRIDA ARIKA 1ST PLAINTIFF
SYSERA MILANI IGNARCE AS ADMINISTRATOR OF JOSEPH
KIAMBUKUTA LONDA (DECEASED 2ND PLAINTIFF
ERIC SENTAMA MPOYI AS ADMINISTRATOR OF DJO MPOYI
KANYINDA 3RD PLAINTIFF**

AND

**TAMASHA CORPORATION LTD 1ST DEFENDANT
LIBERTY AFRIKA LIMITED 2ND DEFENDANT
XPEDIA LIMITED 3RD DEFENDANT
SAFARICOM LIMITED 4TH DEFENDANT
KENYA ASSOCIATION OF MUSIC PRODUCERS 5TH DEFENDANT
GOOGLE LLC T/A YOUTUBE 6TH DEFENDANT
MDUNDO KENYA 7TH DEFENDANT
BOOM PLAY 8TH DEFENDANT
APPLE T/A ITUNES 9TH DEFENDANT**



RULING

1. This ruling is in relation to three applications seeking to strike out the Plaintiff's claim under Order 2 rule 15 of the *Civil Procedure Rules* ("the Rules"). The applications are as follows; the 2nd and 3rd Defendants' Notice of Motion dated 9th February 2021, the 9th Defendant's Notice of Motion dated 19th February 2021 and the 4th Defendant's amended Notice of Motion dated 24th August 2021.
2. The 1st Plaintiff has opposed the all the applications through her replying affidavit sworn on 5th July 2021. The Parties have filed written submissions in support of their respective positions. The parties also cited various authorities which I shall refer to where necessary.
3. Since the Defendants seek to strike out the Plaintiff's case, it is important to appreciate the nature of the claim filed on behalf deceased Artists. The 1st Plaintiff states that she is the holder of Powers of Attorney donated to her by Kiambukuta Londa Joseph t/a Josky Kiambukuta and Eric Sentama Mpoyi son of and Administrator of the Late Djo Mpoyi Kanyinda with rights to sue and defend over their musical and artistic rights. The 2nd and 3rd Plaintiffs are the Administrators of the estates of the respective Artists who are now deceased.
4. The gravamen of the Plaintiff's claim is set out in para. 6 of the Plaint as follows:
 - (6) The Plaintiff avers that the Defendants have been tortuously infringing on her Artists intellectual property rights and her economic rights.
Particulars of Infringement of Copyrights
 - A. Selling musical creation of the Plaintiff's Artists without any colour of right.
 - B. Collecting royalties and monies from the artistic and musical intellectual properties of the Plaintiff's rights without any colour of right.
 - C. Representing to the general public that the Defendants' have rights to sell and receive royalties over the works of the Plaintiff's Artists.
 - D. Keeping and investing illegally acquired royalties and monies from unlawfully exploiting the works of the Plaintiff's Artists.
 - E. Failing to pay the Plaintiff's artists.
5. Due to the Defendants' unlawful acts, the Plaintiffs aver that they have suffered loss and damage and they pray for the following reliefs:
 - I. The Defendants to pay Damages calculated based on the reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned. For the purpose of determining the amount of damages or a reasonable royalty to be awarded, that the court issues directions that an enquiry be held and issues directions as to such procedures for conducting such enquiries as this court considers necessary.
 - II. Account by the Defendants to the Plaintiff in respect to monies and royalties the Defendants have been collecting, transferring, charging, assigning or in any way dealing with the intellectual properties of the Plaintiff's Artists from the date of incorporation of the Defendants.



- III. Injunction restraining the Respondents from collecting, transferring, charging, assigning or in any way dealing with royalties or monies collected in respect intellectual properties of the Plaintiff's Artists from the date of incorporation of the Defendants and that such royalties or monies be payable to the Plaintiff in account of her artists.
- IV. Exemplary Damages
- V. Costs
- VI. Delivery up to the plaintiff of any article in the possession of the Defendants which appears to the court to be an infringing copy, or any article used or intended to be used for making infringing copies.
- VII. Any other or further order the court deems necessary to grant in respect to the nature of this suit.

6. Turning to a brief history of the suit, the Plaintiff filed suit together with an application dated 17th December 2020 seeking, inter alia, breaking, entry and seizure orders into the 1st Defendant's premises; orders compelling the 1st Defendant to pay to the 1st Plaintiff any monies received from the sale or exploitation of the 1st Plaintiff's Artists and an order as to accounts. On 21st December 2020, the court issued interim orders. The 1st Defendant also filed an application seeking orders that all the computer and related equipment seized by the Plaintiffs be released to the 1st Defendant and that the 1st Defendant grant supervised access to Plaintiffs to enable them retrieve any information material to this suit. By the ruling dated 25th January 2021, the court allowed the application on the condition that the 1st Defendant undertook not to interfere with the computers and related information and to give to the 1st Plaintiff all the information requested by her.
7. By the ruling dated 21st May 2021, the court disposed of the Plaintiff's application dated 17th December 2020 by directing the 1st Defendant to produce the documents in its power and possession in respect of the royalties it has been collecting in the name of the Artists within 30 days from the court's ruling. In the same ruling, the court dismissed the 1st Plaintiff's application dated 27th January 2021 seeking, inter alia, an order permitting her to serve the court process upon the 4th Defendant by alternative means and an order directing Google Kenya to accept service on behalf of Google (the 6th Defendant) and orders that the 1st Defendant's directors, employees and servants be arrested, charged and prosecuted for the crimes of copyright infringement under the Copyright Act and that any evidence that was gathered by the Police subject to the orders of this court be seized according to the law and be preserved for the criminal prosecution and contempt of court proceedings of the Defendants including all evidence released to the Defendants herein.
8. With the above rendition, I now turn to determine the Defendants' applications.

The Applications

9. The 4th Defendant contends that the Powers of Attorney issued to the 1st Plaintiff are bad in law on the ground that once a donor of a Power of Attorney dies, the donee's powers stands extinguished. It also states that a legal representative lacks capacity to donate a Power of Attorney on behalf of the estate of a deceased person and that the grant of letters of administration provided by the 2nd and 3rd Plaintiffs, which are in the French language, are bad in law as neither are resealable in the Republic of Kenya, and even if they are, the same have not been resealed.



10. The 9th Defendant's case is that the Plaintiff as drawn does not disclose any reasonable cause of action against in regard to the alleged copyright infringement. That it has not provided any particulars to demonstrate details of the specific Plaintiffs' musical creations purportedly sold through the 9th Defendant's platform; specific links playing and allegedly infringing on the Plaintiffs' music, details and particulars of the Plaintiffs' musical creations against which the 9th Defendant has purportedly collected royalties or particulars of the royalties allegedly collected by the 9th Defendant and which the 9th Defendant has failed to remit to the Plaintiffs.
11. The 9th Defendant submits that the Plaintiffs have not demonstrated any causal link, express or implied, between the actions or inactions alleged against the Defendants generally and the 9th Defendant. It states that the only reference made in the Plaintiff to the 9th Defendant lies in the descriptive portion of the Plaintiff in which the 9th Defendant is erroneously described 'as an international company working for gain in Kenya amongst other countries'.
12. The 9th Defendant thus submits that it is evident that the Plaintiff as drawn does not disclose a cause of action whatsoever against it and no purpose will be served in having it dragged in these proceedings without a specific claim or complaint made out against it and which it is called upon to defend.
13. The 2nd and 3rd Defendants case is that the Plaintiff does not disclose any reasonable cause of action against them. That it does not disclose as to what and how the copyrights have been infringed and that there is no nexus between the evidence produced by the Plaintiffs and the 2nd and 3rd Defendants.

The Plaintiffs' Reply

14. The Plaintiffs states that the evidence it has produced and which the court has already ruled shows that all the Defendants have been illegally dealing with the musical works of the Artists. The Plaintiffs invite the court to examine the Plaintiff alongside the application for Anton Piller orders and find that each Defendants is named therein and that from the Defenses already filed in court, all the Defendants and other persons not before the court but named by some Defendants herein have been illegally earning money using the musical works of the Artists and that the Defendants continue to do so without any colour of right.
15. The Plaintiffs aver that section 32A of the [Copyright Act](#) that protects Internet Service Providers from liability is unconstitutional and invites the court to so hold as it infringes on the fundamental right to own property as guaranteed under the Constitution and the same should be declared unconstitutional.
16. The 1st Plaintiff states that she has and continues to be associated with the Artists' Relatives as their agents through powers of attorney donated to her. She states that she also continues to work in conjunction with the other Plaintiffs herein who are the administrators of the estates of the deceased Artists. The 1st Plaintiff submits that the other Plaintiffs are administrators of the estates of the respective deceased Artists have been joined to this suit by the court without objection by the Defendants.
17. The Plaintiffs contend that there is no basis for striking out the suit against any of the Defendants and that based on the evidence, there is no other implication that any reasonable, average man-on-the street can draw other than that the Defendants have been and continue to infringe on the Artists' property and musical rights. The 1st Plaintiff states that the Artists are legends of Congolese music and have died in abject poverty and in pain while the Defendants illegally and unconscionably profit from their works without paying a cent to the Artists or their widows/children.

Analysis and Determination



Reasonable Defence

18. I do not think it is in dispute that under Order 2 Rule 15 of the Rules, the court has power to strike out pleadings on several grounds which include striking out where the pleading in question does not disclose a reasonable cause of action. As the court held in [*Susan Rokih v Joyce Kandie & 6 others NRB HCCC No. 34 of 2017 \[2018\] eKLR*](#) amongst other decisions that an application seeking to strike out pleadings for not disclosing a reasonable cause of action or defence should not be supported by any evidence. All an applicant needs to do is to state concisely the grounds on which the application is premised. The court only looks at the pleadings, in this case the Plaintiff, and cannot go beyond them in order to establish whether the impugned pleading raises a reasonable cause of action or defence.
19. The principles upon which the court acts in considering applications to strike out pleadings under Order 2 rule 15 of the Rules have been settled in several cases. The court is guided by the general principle that striking out of a pleading is a draconian act and that it should be circumspect in doing so unless there are clear grounds. In *D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1* the Court of Appeal expressed the principle as follows:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

20. In the same case, the Court further defined “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaintiff only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer....” It went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. Madan JA expressed the view that:

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ...

21. Thus, the question of whether or not the suit discloses any reasonable causes of action against the said Defendants can be determined by a scrutiny of the Plaintiffs’ amended Plaintiff. In [*Kwame Kariuki and Another v Hassconsult Limited and 2 Others ML HCCC No. 134 of 2012 \[2014\] eKLR*](#), Havelock J., explained what amounts to a reasonable cause of action. He stated as follows;

(22) But what is a cause of action? According to the Black’s Law Dictionary, 9th Edition at pg. 251, cause of action is defined as:
“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”.

I would also refer to Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure*, 2nd Edition, where at pg. 170 the author writes:



“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunctions; or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”

A cause of action, therefore, in following the fore stated definitions, would be a set or group of facts that give rise to a claim or suit and that they clearly violate the rights of the Plaintiff, as per Edwin Bryant (sic). Order 2 Rule 15 (2) states that the application should be predicated upon facts, and that evidence may not be adduced in the first instance for its determination. In *Anderson v Bell Mobility Inc. (2008) NWTSC 85* it was held that;

“In an application to strike a statement of claim, the allegations of fact are accepted without evidence and the question is whether those allegations of fact disclose a cause of action... [T]hat a pleading will be struck only if it is “plain and obvious” that it discloses no reasonable claim.”

22. As stated in the introductory part, the Plaintiffs’ suit is premised upon the allegation that the Defendants have been tortuously infringing on the Artists’ intellectual property rights and economic rights. I have set out the specific allegations against the Defendants at para. 4 above. One thing is very clear from the Plaintiff is that the Plaintiffs have made general allegations of breach of infringement of intellectual property rights against all the Defendants.
23. Intellectual property rights are not general rights but specific rights conferred and protected by the law, either statutory or common law. It is therefore important to plead the nature of the intellectual property right, for example, whether it is copyright, trademark or patent infringement or any other right. This requirement is not idle as each of the rights have specific ingredients and which the defendant is entitled to know to enable it invoke specific defences available to it. In this respect, the Plaintiffs’ case suffers from a major deficiency in that it does not define the specific intellectual property rights infringed and how that right has been violated as against the Defendants.
24. However, it is clear from the pleading and submissions that the Plaintiffs’ claim is for copyright infringement but as the Defendants submit, the Plaintiffs have not alleged specific facts that show how each of the Defendants committed that acts complained of in relation to the Plaintiffs.

Locus Standi

25. The other ground for seeking to strike the suit is that the 1st Plaintiff lacks the standing to institute the suit and the letters of administration provided by the 2nd and 3rd Plaintiffs being bad in law.
26. It is not in dispute that the said Kiambukuta Londa Joseph t/a Josky Kiambukuta and Eric Sentama Mpoyi (“the 3rd Plaintiff”) who have since passed away donated powers of attorney to the 1st Plaintiff to pursue their musical and artistic rights. It is also common ground that both Kiambukuta Londa Joseph t/a Josky Kiambukuta and Djo Mpoyi Kanyinda have since died. I agree with the 4th Defendant that a power of attorney is extinguished upon the death of the donor. However, such death does not extinguish the cause of action as the personal representatives have the right to pursue the action on behalf of the deceased’s estate (see *Loice Wanjiru Meru & 3 others v John Migui Meru MRNGA ELC Appeal No. 3A of 2017 [2017] eKLR* and *Andrew Olea v Minneh Wanjiru NRB HCCC No. 544 of*



[2003 \[2020\] eKLR](#)). The inexorable conclusion is that the 1st Plaintiff no longer has any powers of attorney in respect of Kiambukuta Londa Joseph t/a Josky Kiambukuta and Djo Mpoyi Kayinda.

27. Further, under Kenyan law, the personal representative of the deceased cannot delegate their authority under the grant of representation. This statement of law was summarized by Musyoka J., *in Re: Estate of Haji Mohammed (Deceased) MSA HC Succession No. 380 of 2008 [2016] eKLR* who after considering the nature of a grant of representation stated that:

(18) It is clear from the above that the law does not allow personal representatives to delegate any discretion in matters relating to the administration of estates. The power of attorney donated by the Administrators herein to the Respondent has led to the delegation of decision making power. Indeed the Respondent has himself stated that as he served as executor of the estate herein, he is best placed to assist the executors in managing the properties. The power of attorney from the Administrators to the Respondent has no backing in law and is therefore of no effect.

28. In the circumstances, the 1st Plaintiff cannot maintain this suit on the basis of the Powers of Attorney granted to her by the personal representatives of the deceased Artists. The Personal Representatives of the respective deceased Artists have the right to pursue the causes of action on behalf of the estates of the respective deceased Artists by instructing advocates to act on their behalf.
29. The 2nd and 3rd Plaintiffs were joined to these proceedings by an order of the court but this did not validate their lack of capacity, if any. Capacity of a party to agitate a suit is fundamental and can be raised at any time hence the Defendants are entitled to raise it as it goes to the root of the matter. The objection is that the grants of representation furnished to this court are in a foreign language and have not been or are incapable of being resealed. The 4th Defendant's challenge is premised upon section 77(1) of the [Law of Succession Act](#) which provides as follows:

Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth Country or in any other foreign Country designated by the Minister by notice in the gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof, in respect of the estate of the deceased, person, such grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that Court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.

30. The wording of the aforesaid provision shows that for a grant of representation to be valid in Kenya, it must be from a Commonwealth Country and if not, the issuing country must be one designated by the Minister by notice in the gazette. It is only if the grant of representation is from the two categories of countries that it is duly recognized under the [Law of Succession Act](#), and it may be presented for resealing for it to have effect in Kenya.
31. In this case, the grants of representation issued to Sysera Milani Ignarce and Eric Djo Mpoyi are in a foreign language that has not been translated hence it is difficult to know whether they are, in fact, grants or representation. However, and more fundamentally, assuming they are grants of representation issued from the court in Democratic Republic of Congo (DRC), they are not issued by a Commonwealth Country and or a country duly notified in the Kenya Gazette under section 77(1) of the [Law of Succession Act](#). Further, mere resealing of the grant cannot surmount the hurdle of the origin of the grant of representation. I am therefore constrained to hold that the 2nd and 3rd Plaintiffs,



in so far as they purport to act as administrators for deceased persons, lack capacity to agitate this suit in the Republic of Kenya.

32. The right of representatives of the estate of a deceased person to sue on behalf of a deceased is a right granted by and founded on statute. In Kenya, a grant of representation issued under the [Law of Succession Act](#) is a fundamental and necessary requirement for the representative to sue on behalf of the estate of the deceased. Without a valid grant issued thereunder then the cause of action vesting in the deceased cannot be agitated by any person with the grant of representation (see [Trouistik Union International and Another v Jane Mbeyu and Another \[1993\] eKLR](#)).
33. Striking out of a suit is a drastic action hence I have also considered the possibility of staying the suit to enable the representatives of the deceased Artist's estate to apply for grant ad litem in Kenya in order to do justice to the Plaintiffs. This however, would not be of assistance because a such grant issued in Kenya would not retrospective in its application and would not validate the proceedings that have taken place. This is what Musyoka J., explained [in Re Estate of Barasa Kenenje Manya \(Deceased\) \[2020\] KEHC 1 \(KLR\)](#)(ruling 30th July 2020) as follows:

(4) The property of a dead person vested in his estate upon his death. In turn, when personal representatives were appointed to administer the estate, whether in testacy or intestacy, the property then vested in the personal representatives by dint of section 79 of the [Law of Succession Act](#), Cap 160, Laws of Kenya. Section 79 should be read together with section 80 of the [Law of Succession Act](#), which stated when grants of representation became effective. A grant of probate related back to the date of death, and, therefore, it applied retrospectively, to authenticate any acts of the executor done between the date of death and the date of the making of the grant. A grant of letters of administration was effective from the date of the making of the grant, and it did not relate back or apply retroactively. [Emphasis mine]

34. It is therefore clear that this suit must now be struck out as the Plaintiffs lack the capacity to agitate it as personal representatives under the [Law of Succession Act](#). This result is drastic but is ordained by the law and statute. I would urge the Office of the Attorney General, who is the Minister concerned, to look into the possibility of getting non-Commonwealth countries particularly those Kenya has close regional ties with, gazetted as provided for by section 77(1) of the [Law of Succession Act](#).

Conclusion and Disposition

35. For the reasons I have set out above, I now order as follows:
1. The 2nd and 3rd Defendants' Notice of Motion dated 9th February 2021, the 9th Defendant's Notice of Motion dated 19th February 2021 and the 4th Defendant's amended Notice of Motion dated 24th August 2021 are allowed on terms that the Plaintiffs' suit against the Defendants be and is hereby struck out.
 2. All interim orders in force are now discharged forthwith.
 3. The Plaintiffs shall pay the costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango

Mr Macharia instructed by Walioli Wabwoba and Company Advocates for the Plaintiff.

Ms Wataka instructed by Jared Kangwana and Company Advocates for the 1st Defendant

Mr Kiingati instructed by Kiingati Ndirangu and Company Advocates for the 2nd and 3rd Defendants.

Mr Kiamba instructed by Kiamba and Siboe Advocates for the 7th Defendant.

Mr James T. Makori Advocate instructed by the 8th Defendant.

Mr Karani instructed by Iseme Kamau and Maema Advocates for the 9th Defendant.

