

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION  
CONSTITUTIONAL PETITION NO. \_\_\_\_\_ OF 2019

IN THE MATTER OF: A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO  
ARTICLES 22, 23, 165 (3) (B) & 258 (1) OF THE CONSTITUTION OF THE REPUBLIC  
OF KENYA

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE SUPERMACY OF THE  
CONSTITUTION AS PER ARTICLE 2 (1 AND 4) OF THE CONSTITUTION

AND

IN THE MATTER OF: THE BREACH AND CONTINUED BREACH OF  
INTELLECTUAL PROPERTY RIGHTS ENSHRINED IN ARTICLE 40 (5) OF THE  
CONSTITUTION

AND

IN THE MATTER OF: THE COPYRIGHT ACT (CAP XX) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE BREACH OF THE FUNDAMENTAL RIGHT AND  
FREEDOMS UNDER ARTICLE 53 (1) (F) (ii) OF THE CONSTITUTION REGARDING  
THE RIGHT OF A MINOR NOT TO BE DETAINED IN THE SAME CELL WITH  
ADULTS

AND

IN THE MATTER OF: DUTIES AND OBLIGATIONS OF STATE AND PUBLIC  
OFFICERS

BETWEEN

ERIC OBIERO NYADIDA.....PETITIONER

AND

EQUITY BANK (KENYA) LIMITED.....1<sup>ST</sup> RESPONDENT

EQUITY GROUP FOUNDATION.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

**AFFIDAVIT IN VERIFICATION OF THE PETITION**

I, **ERIC OBIERO NYADIDA** an adult of sound mind and a resident of the Komarock area within the county of Nairobi and of Postal Address 30313-00100, Nairobi within the Republic of Kenya do hereby make oath and state as follows:-

1. **THAT** I am the herein Petitioner in the matter and conversant with the fact and hence competent to swear this Affidavit.
2. **THAT** in the year 2013 I was only 16 years of age and residing with my parents in the City of Nairobi (*I hereby attach and mark "EON – 1" a copy of my birth certificate*).
3. **THAT** I at that time I was a student and a budding musician with a manager called John Kennedy who was able to get me an opportunity to create a original piece of music that could be used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the 2<sup>nd</sup> Respondent's project called Wings to Fly.
4. **THAT** armed with the offer I proceeded to the music studios of Homeboyz Records proceeded to compose and record a record which I titled "Wings to Fly".
5. **THAT** being a member of the Music Copyright Society of Kenya with the membership number 8015 I did cause to have the said song registered with the

Society on the 14<sup>th</sup> May 2013 (*I hereby attach and mark "ENO – 2" a copy of a confirmation letter from the Society*).

6. **THAT** thereafter my manger and myself proceeded to the offices of the 1<sup>st</sup> Respondent located at Equity Center in the City of Nairobi where we met a Mr. Edward Muchai who introduced himself to me as the 1<sup>st</sup> Respondent's Communications Manager.
7. **THAT** I gave Mr. Muchai a Compact Disk of my song and after listening to it on his computer he told me that I would have to write a proposal that would be presented to the 1<sup>st</sup> Respondent's Chief Executive Officer for consideration.
8. **THAT** later that week I did prepare a proposal and did with my manager return to the offices of the 1<sup>st</sup> Respondent where Mr. Muchai after reading my proposal sent me to the offices of the Chief Executive whom we met and after reading the proposal the Chief Executive a Dr. John Mwangi professed to me that he liked it and wanted to implement the same and he directed me to go see a Mr. Kibiru an officer of the 2<sup>nd</sup> Respondent (*I hereby attach and mark "EON – 3" a copy of my proposal*).
9. **THAT** I recall that Dr. Mwangi's secretary told me that due to renovations the offices of the 2<sup>nd</sup> Respondent were on the same floor as that of the Dr. Mwangi's.
10. **THAT** on meeting Mr. Kibiru he did read my proposal and asked me where my song was and I told him that I had left the song with Mr. Muchai.
11. **THAT** Mr. Kibiru told me to return to the offices of Mr. Muchai to collect it and when I went to the office of Mr. Muchai he presented me with a document titled "BUYING OF COPYRIGHTS" which document stated that they were buying the rights of my song for the sum of Kshs. 10,000,000/=.
12. **THAT** Mr. Edward Muchai explained the contents of the document to me and asked me to sign it which I duly did.

13. **THAT** Mr. Muchai did not sign the document but he kept it and did not give me a copy.
14. **THAT** Mr. Muchai sent me back to the offices of Mr. Kibiru who took my parents telephone numbers asked me if I would be interested in performing at their Wings to Fly Seminar.
15. **THAT** later that day Mr. Kibiru called my mother and asked her if I would be interested in being awarded a scholarship but my mother politely declined the same.
16. **THAT** it was not until towards the end of the year that I was informed by my manager that he had been told by the 1<sup>st</sup> Respondent that my song was still modified and that the payment of Kshs. 10,000,000/= would be made to me at the end of the financial year so I should expect the payment around the month of June of July 2014.
17. **THAT** as by August 2014 I still had not been paid I decided to go to the 1<sup>st</sup> Respondent's offices and was taken to a boardroom meeting where Mr. Kibiru, Mr. Muchai, and a Ms. Gichoki were present and they claimed that since my image was not that of a musician and my fan base and work unknown the amount to be paid to me was to be reduced to Kshs. 2,500,000/=.
18. **THAT** I did not in any way give an acceptance to their revised offer.
19. **THAT** they then told me to return the next day with one of my parents so that they could countersign the contract because I was a minor.
20. **THAT** in the evening of the same day I received a call from a Ms. Mary Njoki from the 1<sup>st</sup> Respondent's Finance Department who asked me to check my email for a document that she had sent and I was asked not to come for the meeting as agreed for the Contract would be sent to me in 2 weeks.

21. **THAT** later on Mr. Kibiru called my mother and asked her to send him the details of the Bank Account where the money was to be paid, he later sent his email address via text for my mum to send the details (*I hereby attach and mark "EON – 4" a copy of the text messages*).
22. **THAT** after the 2 week period I still had not been paid by the 1<sup>st</sup> Respondent my elder brother took it upon himself to attempt to seek a resolution to the impasse and was invited to a meeting by the 1<sup>st</sup> Respondent on the 30<sup>th</sup> September 2014 at which meeting the 1<sup>st</sup> Respondent's managers admitted to knowing me but denied any knowledge of any contract between the 1<sup>st</sup> Respondent and myself.
23. **THAT** in view of the denials from the 1<sup>st</sup> Respondent's managers my brother wrote a letter to the 1<sup>st</sup> Respondent's Chief Executive Officer Dr. James Mwangi in which letter my brother again stated that I had not been paid for the musical piece which piece was now being used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's in their advertising campaign without any legal right from myself or any consideration paid to me.
24. **THAT** in response to my brother's letter the 1<sup>st</sup> Respondent did reply stating that the issues raised in my brother letter would be addressed with the necessary action needed to be taken (*I hereby attach and mark "EON – 5" a copy of the 1<sup>st</sup> Respondent's letter dated 30<sup>th</sup> March 2015*).
25. **THAT** I verily believe that the 1<sup>st</sup> Respondent's letter in response to my brother's letter can be termed as an admission for the 1<sup>st</sup> Respondent clearly states that the positive necessary action will be taken to resolve the complaints raised in my brother's letter.
26. **THAT** much to my surprise the 1<sup>st</sup> Respondent proceeded to write another letter this time to my mother in which letter the 1<sup>st</sup> Respondent alleges that no contract existed between the 1<sup>st</sup> Respondent and myself and further that the documents that we were alleging were forgeries created by myself with the aim of

defrauding the 1<sup>st</sup> Respondent (*I hereby attach and mark "EON – 6" a copy of the 1<sup>st</sup> Respondent's letter also dated 30<sup>th</sup> March 2015*).

27. **THAT** we noted that the said letter made reference to the fact that the 1<sup>st</sup> Respondent alleged that we had committed a criminal offence and requested that we reported to their office to record a statement with their Security Officers.
28. **THAT** alarmed by the turn of events and the stance taken by the 1<sup>st</sup> Respondent my brother and I did the next day proceed to the offices of the 1<sup>st</sup> Respondent where upon our arrival the 1<sup>st</sup> Respondent's Security Officer refused to take any statement from us but instead proceeded to call officers from the 4<sup>th</sup> Respondent's Banking Fraud Investigative Unit who came and had us arrested and we spent the night at the 4<sup>th</sup> Respondent's Kileleshwa Police Station.
29. **THAT** at this time I was a minor and had not reached the age of majority.
30. **THAT** at the said Police Station I was kept overnight in a Police Cell with adults.
31. **THAT** I am informed by my Advocates on record whose advice I verily believe to be true that as a minor I had the constitutional right not to be kept in a Cell with adults.
32. **THAT** I was not afforded the right to contact my parents.
33. **THAT** I was not afforded the right to have access to a legal representative.
34. **THAT** I am informed by my Advocates on record whose advice I verily believe to be true that denying me access to my parents and a legal representative is a breach to my Constitutional Rights.
35. **THAT** the next day were taken to Milimani Law Courts and charged Criminal Case No. 691 of 2015 Republic –v- Geoffrey Nyadida Odongo and Eric Obiero Nyadida with the offence of Forgery contrary to Section 345 of the Penal Code as read with Section 349.

36. **THAT** the criminal proceedings commenced on the 17<sup>th</sup> April 2015 and culminated on the 3<sup>rd</sup> October 2017 with the delivery of the Judgment (*I hereby attach and mark "EON – 7" a copy of the proceedings of the trial*).
37. **THAT** in the Judgment delivered on the 3<sup>rd</sup> October 2017 the Learned Magistrate found that the prosecution had not proved a case beyond reasonable doubt against us and we were thus acquitted of the charges preferred against us (*I hereby attach and mark "EON – 8" a copy of the Judgment*).
38. **THAT** as can be seen in the proceedings and the Judgment the 1<sup>st</sup> Respondent's officers admit being in contact with me but they refuse to produce the emails which was in their interest if they were serious about prosecuting their case against my brother and I.
39. **THAT** in view of our acquittal we did again commence our attempts at getting my consideration from the 1<sup>st</sup> Respondent (*I hereby attach and mark "EON – 9" a copy of my Advocates letter dated 4<sup>th</sup> April 2018*).
40. **THAT** my Advocates wrote another letter on the 2<sup>nd</sup> May 2018 (*I hereby attach and mark "EON – 10" a copy of the said letter*).
41. **THAT** I response to my letter of 2<sup>nd</sup> May 2018 the 1<sup>st</sup> Respondent did reply stating they addressed the contents of my letter in their letter of 18<sup>th</sup> April 2018 addressed to my then Advocate Naomi Muliro & Co Advocates (*I hereby attach and mark "EON – 11" a copy of the 1<sup>st</sup> Respondent's letter dated 14<sup>th</sup> May 2018*).
42. **THAT** not being aware of the contents of the 1<sup>st</sup> Respondent's letter dated 18<sup>th</sup> April to Naomi Muliro & Co Advocates my Advocates sought a copy of the same vide their letters of 31<sup>st</sup> May, 2<sup>nd</sup> July and 9<sup>th</sup> August 2018 (*I hereby attach and mark "EON – 12 A, B & C" copies of the said letters*).

43. **THAT** it was only on the 20<sup>th</sup> August 2018 that the 1<sup>st</sup> Respondent saw it fit to avail to us a copy of their letter of 18<sup>th</sup> April 2018 (*I hereby attach and mark "EON – 13 A & B" copies of the said letters*).
44. **THAT** as can be seen in the 1<sup>st</sup> Respondent's letter of 18<sup>th</sup> April 2018 the 1<sup>st</sup> Respondent denies any knowledge of any agreement between itself and myself and thus denies any indebtedness to me.
45. **THAT** being totally dissatisfied by the stance taken by the 1<sup>st</sup> Respondent my Advocates did chose to pen a Cease and Desist Notice to the leading media houses in Kenya giving them due notice that the music to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's advert for the Wings to fly belonged to our me (*I hereby attach and mark "EON – 14 a copy of their letter dated 27<sup>th</sup> December 2018*).
46. **THAT** upon receipt of our letter the said media houses stopped airing or broadcasting the offending advert.
47. **THAT** my Advocates on record did proceed to issue the same Cease and Desist Notice to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents however I am aware that despite my Advocates demand they continue to use the advert on their Facebook social media platform (*I hereby attach and mark "EON – 15" a copy of my Advocates letter*).
48. **THAT** I verily believe that I was arrested by the 1<sup>st</sup> Respondent to intimidate me from pursuing my claim.
49. **THAT** I am the creator of the musical piece "Wings to Fly" and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continue to commercially benefit from my work having paid me no consideration for use of the same.
50. **THAT** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have never explained to me how they came to obtain the said musical piece or who was the creator of the same if it was not me.

51. **THAT** I verily believe that the 4<sup>th</sup> Respondent acted under the direction of the 1<sup>st</sup> Respondent to ensure that I was arrested and charged with little or no evidence at all and thus the prosecution against myself and my brother was malicious in nature designed on personal grounds to benefit the 1<sup>st</sup> Respondent.

52. **THAT** I verily believe that the act by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to use my musical work with compensating me is a breach of my Fundamental Rights and Freedoms.

53. **THAT** I believe this matter is urgent and pray the court do issue an order as prayed because unless the Conservatory Orders are issued my rights to property as defined by the Constitution will continue to be breached and I will therefore stand to suffer a great damage and loss.

54. **THAT** I both my song and the musical piece used on the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's advert are the same piece of music (*I hereby attach and mark "EON – 16 A & B Compact Disc of both my original piece and the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's advert*).

55. **THAT** I swear this Affidavit in verification of the averments made in my Petition.

56. **THAT** what is deponed herein is true to the best of my knowledge, belief and information.

**SWORN** by the said **ERIC OBIERO NYADIDA**

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**DEPONENT**

At Nairobi on this      day of              2019

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**BEFORE ME**

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**COMMISSIONER OF OATHS**

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**DRAWN & FILED BY:-**

KHAMINWA & KHAMINWA

ADVOCATES

GEORGE PADMORE ROAD,

OFF MARCUS GARVEY ROAD,

P.O. BOX 43758 – 00100,

**NAIROBI**