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Unauthorized Ringtone Downloads And The Prosecution Of Network Service Providers For Copyright Infringement: The Effect Of The Withdrawal Of A Petition With The NCC On A Criminal Charge

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Introduction

Under Nigeria's Copyright Act, copyright infringement can be resolved through a civil and/or criminal action. While the civil lawsuit is maintainable by the rightsholder, the Nigerian Copyright Commission ("NCC") is empowered to prosecute infringers in the form of a criminal action. By virtue of the provisions of section 20 3 of the Copyright Act, [2] it is a criminal offence for anyone to distribute a copyrighted work in public for commercial purposes without the consent of the owner.

In a recent case involving the Nigerian Copyright Commission vs. MTN, [3] the Federal High Court sitting in Abuja (the FCT was called to rule on whether the withdrawal of a complaint of alleged infringement by an aggrieved copyright owner suffices for the NCC to discontinue a criminal case against the infringer, a network service provider. The case is presided over by Dr. Nnamdi Dimgba, J.

Background Facts

One Mr. Omenuowma Okson Dovie (aka "Baba 2010") had on 6th August 2015 through his Solicitor, petitioned the NCC that telecomunications giants, Mobile Telecommunications Network ("MTN") had infringed on the copyright in his musical works. Acting on the strength of the complaint, NCC wrote to MTN and having found merit in the complaint, the NCC on 8th December 2015 instituted a criminal action against MTN and its CEO pursuant to its powers under section 20 of the Copyright Act. [4] "Baba 2010" also instituted a civil action against MTN at the Federal High Court, Abuja [5] for copyright infringement of his musical compositions by appropriating and selling three of his songs as caller tunes on its network without his permission. The parties however reached an out-of-court settlement shortly after the action was filed, which was adopted as a consent judgement on 19th January 2016. However, during the pendency of both cases, "Baba 2010" had written, through his solicitors, to NCC on 18th December 2015 requesting for a withdrawal of the criminal charges brought against MTN. The letter to NCC was based on the settlement of the civil suit he had filed

against MTN. NCC declined the request for a withdrawal and proceeded with the criminal case at the Federal High Court. Following NCC's refusal to withdraw the criminal case, "Baba 2010" filed an application as Complainant/Intervener/Applicant seeking an order of the Court to withdraw his complaint against the Accused persons. It would appear that as part of the Consent Judgment/out-of-court-settlement, "Baba 2010" had also agreed, as an expression of good faith, to withdraw the criminal complaint against MTN.

Arguments before the Criminal Court

The Complainant/Intervener/Applicant's arguments

Baba 2010's application was based on the provisions of section 17 of the Federal High Court Act, [6] and sections 355 and 492 3 of the Administration of Criminal Justice Act ("ACJA"), [7] respectively, which are reproduced below.

Section 17 of the Federal High Court Act states that:

> ... in any proceedings in the court, the court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

Section 355 of the ACJA 2015 stipulates as follows:

> where a complainant at any time before a final order is made in any case, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw the complaint and shall thereupon acquit the Defendant.

Furthermore, Section 492 3 of the ACJA provides:

> where there is no express provisions in this Act, the Court may apply any procedure that will meet the justice of the case.

According to the Applicant these sections empower the court to take into consideration, any reconciliation between parties in a matter, and the withdrawal of a complaint by a complainant in aquiting a defendant. Counsel for the Applicant also relied on the case of Adejumo vs. State, [8] where the Court held that the High Court may in criminal cases, facilitate and encourage settlement in an amicable way on payment of compensation or on other terms approved by the Court. Since the offences for which the accused persons were charged were simple offences in the nature of misdemeanors, there was no need for a formal withdrawal by the Attorney General in accordance with section 211 of the Constitution. [9]

The NCC/Respondent's argument

On his part, the Prosecuting Counsel argued that the provisions of section 355 of the ACJA do not empower the Applicant to apply for the withdrawal of criminal charges, as he is neither the Complainant nor a party to the criminal case, as he is merely a prosecution witness. The only person with the power to withdraw or discontinue a matter is the Complainant, in this case the NCC, or the Attorney General in exercise of the powers conferred on him by the Constitution. [10] The prosecuting counsel further argued that the survival of the criminal action was not dependent on the amicable resolution of the civil

lawsuit, since the alleged criminal offence was committed against the state rather an individual. Counsel also challenged the standing of the Applicant to seek a discontinuance without the permission of the court, not being a party to the criminal action.

The Ruling of the Court

After carefully considering the facts and submissions by the parties, Dimgba, J. dismissed in its entirety the Applicant's submissions and upheld the prosecution's submissions. The Judge held that the Applicant's petition/complaint to NCC was voluntary and not a judicially mandated act that can be withdrawn and that the Applicant does not need any leave of Court to withdraw the petition in such a scenario.

The Court pointed out that the real issue was not whether the Applicant could withdraw its complaint (something the Applicant had already accomplished through the letter to the NCC of 06/08/15, and subsequently verified by the Consent Judgment of 19/01/16 , the actual point of contention was the effect on the criminal action of such a withdrawal.

On this issue, the judge held that the withdrawal of a petition by the Applicant cannot per force terminate a criminal charge. The judge proceeded to explain that the withdrawal of the charge and the consent judgement regulated only the parties' obligations in relation to matters strictly within their control, i.e. the bilateral civil proceedings that had been instituted by the Applicant. In other words, that the charge before the court relates to criminal proceedings which are not affected by the civil arrangements reached between the Applicant and MTN. [11] Moreover, the judge held that nothing in the provisions of the entire 53 sections of the Copyright Act makes the criminal jurisdiction of the NCC subject to the existence or otherwise of any civil proceedings or to the consent of the alleged copyright owner.

The Court also commented on who is a complainant under the law and held that Section 494 of the ACJA admits of both an 'informant' and 'prosecutor'. In the present case, "Baba 2010" qualifies as the 'informant' (or nominal complainant) while the NCC is the prosecutor i.e the official complainant in the criminal case. [12] While it may be expedient or desirable for the prosecutor to discontinue the action upon a withdrawal of the complaint, other reasons like policy considerations, may dictate otherwise.

Comments

While we agree with the ruling of the court that the discretion to prosecute or not is that of the NCC, [13] there seems to be the issue of how practical/feasible it will be for the NCC to logically conclude the prosecution of the case. The implication of the Applicant withdrawing his initial complaint against MTN and subsequently agreeing settlement terms with the alleged infringer, may make it difficult for NCC to establish its case against MTN. This is because the prosecutor's main witness who can give evidence in support of NCC's case has withdrawn his complaint - an indication that he is no longer interested in assisting NCC in prosecuting the action against MTN.

With the NCCs insistence to pursue the case to a logical conclusion, the Commission may be forced to seek the help of the Court to compel the Applicant to give evidence on its behalf

by way of a subpoena. [14] A failure to comply with an order of court compelling a witness to attend to give evidence or to produce relevant document(s) is contempt. Further, where NCC is able to secure the attendance of a reluctant witness to give evidence on its behalf, this may result in the Applicant being labelled a hostile witness where, for obvious reasons, he refuses to give incriminating evidence against MTN.

Another issue that bears highlighting is that NCCs standing to proceed with the case notwithstanding the withdrawal of the Complaint is based on the explicit provisions of the Act and not on the initiating complaint. The expectation of the legislature is for the NCC to conduct independent investigations upon receipt of a complaint. Consequently, the decision on whether or not a criminal action is warranted lies exclusively with that agency.

This important decision of the court clearly upholds the autonomy and exclusive powers of the NCC to institute criminal actions against copyright infringers and vindicates the legislative policy behind the relevant provisions of the Copyright Act which criminalizes infringing activities in the copyright arena. If copyrightholders are allowed to truncate such criminal actions instituted by the NCC on the basis of an amicable settlement of a parallel civil action, this would significantly limit the ability of the NCC to enforce the provisions criminalizing infringing activity. This policy rationale is borne out rather forcefully in the provisions of section 24 of the Act which stipulates that:

> "Notwithstanding the provisions of any law to the contrary, it shall be permissible for both criminal and civil actions to be taken simultaneously in respect of the same infringement under this Act."

In conclusion, it is our opinion that the ruling of Dr. Dimgba J. is a welcome development for the advancement of copyright protection in a country where copyright infringement is endemic. This decision will encourage the NCC to perform its statutory functions without hindrance from third parties.

Footnotes

1 Yetunde Okojie, Lekan Ikuomola and Chiamaka Anyanwu work with the Lagos office of the law firm of S. P. A. Ajibade & Co. Legal Practitioners, Arbitrators and Notaries Public].

2 Cap. C28 Laws of the Federation of Nigeria, 2004.

3 Suit No. FHC/ABJ/CR/379/15.

4 The section imposes criminal liability for infringement of a copyrighted work. Section 34 of the Act also vests the NCC with responsibility for the administration of all matters affecting copyright in Nigeria.

5 Suit No. FHC/ABJ/CS/895/2015 filed on 4th November 2015.

6 Cap. F12 Laws of the Federation of Nigeria, 2004

7 Administration of Criminal Justice Act 2015

8 2006 9 NWLR Pt. 986 627 at pp. 646 647.

9 Constitution of the Federal Republic of Nigeria 1999 (as amended).

10 Ibid

11 The Judge relied on the case of Cadbury Nig. Plc. vs. FRN 2005 5 NWLR Pt. 918 322 at 399.

12 In Nwosu vs. State 2004 15 NWLR Pt. 897 467, the Court defined a 'Complainant' to include 'an informant in any case relating to a summary conviction offence.'

13 This is primarily based on the consideration of public policy with a view to sending a clear message that the NCC is not a toothless bulldog, especially in a society where copyright works are mostly taken for granted and infringements are rife.

14 This may happen if the prosecution cannot establish the charge by other means of evidence. If the complainant can establish his case without the evidence of 'Baba 10', an application to the court to issue a subpoena may not be necessary.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.