Wamae aka Eddi Benzi v Mwende (Civil Appeal E987 of 2022)
[2024] KEHC 7666 (KLR) (Civ) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E987 OF 2022

WM MUSYOKA, J

JUNE 24, 2024

BETWEEN

CHRISTOPHER WAMAE AKA EDDI BENZI ..... APPELLANT

AND

WANGECHI WAWERU MWENDE ..... RESPONDENT

(An appeal arising from the judgment of Hon. VM Mochache, Resident Magistrate/ Adjudicator, delivered on 25th November 2022, in Nairobi SCCC No. E5432 of 2022)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent, against the appellant, for compensation, arising from a contractual agreement between her and the appellant, for production of audio and video music recordings for the respondent. The case was that the appellant did record the music as agreed, but subsequently negligently destroyed the recordings, forcing the respondent to seek the services of another producer. Thereafter, there was a dispute on copyright, between the appellant and the respondent, after the music was released to the public for sale, upon which the appellant issued a take-down notice of the entire music, instead of the 4 songs that were under his copyright. The respondent claimed a total of Kshs. 731,496.00 as her loss.

2. The appellant filed a response, in which he admitted the transactions that he had with the respondent. He averred that he had recovered the lost instrumentals, but in breach of contract, the respondent engaged another producer, who went on to produce and release the album. The appellant averred that he gave the respondent notice to have remedial action taken, failing which he was to have the music taken down, and that action followed when the respondent defaulted. He asserted that the respondent was not entitled to revenue from the streaming of the 4 songs he had produced, without credits being

given to him as producer. He counter-claimed for breach of contract, and Kshs. 290,400.00, being the value of what he lost by way of exclusive rights licences.

3. The matter was disposed of through a formal hearing. Only the 2 parties testified.

4. On her part the respondent stated that the appellant had denied her the right to distribute the song, yet she incurred expenses on music that she could not sell. She explained that Kshs. 731,496.00 was what she incurred in re-producing the music, after it was destroyed by the appellant. She stated that the songs were not retrieved, for what the appellant was able to retrieve were the beats, and, for that reason, it was only her and the musician who were entitled to receive credit. She stated that she was not obligated to put up his credits, as his music was not played on the social media. She stated that the album had 10 songs, but only 4 had beats from the appellant, and when the appellant called for take-down, all 10 were taken down, instead of the 4 where he was involved. She stated that the appellant could have written, to ask that the 6 songs be reinstated, but he did not. He was the only one who could do so, but he did not, instead he began demanding money. She testified that when she noticed that he had not been allocated credits, she instructed the distributor to allocate him some, instead he instructed him to take down the songs, for the contract, according to him, was void.

5. The appellant followed. He testified that he was to produce 6 songs, he recovered beats for 4 songs, but he refused to send them to the respondent, before entering into a fresh contract with her, to ensure payment. When she contracted another producer for the songs, he sold the beats to someone else, as he had the exclusive rights to the beats. When he noticed that the credits were missing, he issued a take-down notice, because the respondent had failed to talk to him, and had failed to pay moneys for the breach. He stated that he took down the songs after he was not credited with the songs after the notice to the responded. He said that there was an indemnity clause. He stated that his claims was for Kshs. 194,000.00, because the beats ended up in the respondent's songs. He said that the beats had been playing in his platforms before he sold them to the respondent. He said that he granted exclusive rights to the respondent, and the beats ceased to be accessible to him after that. He said that the beats were not available to the public. He said that he was claiming Kshs. 96,000.00, because he did not get credits in 28 days.

6. After taking written submissions, the court delivered a judgment on 25th November 2022. The court found and held that it had been proved the appellant had lost the recorded works by the respondent. On the takedown notice, the trial court noted that after the respondent noted that the appellant was not being credited as a producer, the respondent moved to instruct the distributors to credit him, but that notwithstanding, the appellant issued the take-down notice, something which the respondent argued was done prematurely. It was concluded that the violation, with respect to not being credited, did not amount to an infringement of the contract, under section 35B of the *Copyright Act*, Cap 130, Laws of Kenya. It was further held that the appellant, having granted the respondent a licence for a consideration, it could not, subsequently, be held that the respondent had infringed the appellant's work, and there was no basis for the take-down notice, as the issuance of such a notice implied that a copyright had been infringed, which was not the case. The trial court concluded that the respondent had complied, with respect to crediting the appellant, once she was notified, and nothing more was expected of her. On the amounts claimed by the appellant, the court found that they were not provided for in the indemnity contract, and that the indemnity only applied where the appellant had suffered loss to third parties, which was not the case. The conclusion was that the take-down and termination of the agreement were done un-procedurally, and without following the terms of the contract. On the damages sought by the respondent, the court found that due to the unlawful conduct of the appellant, the respondent was exposed to damage, in the manner he lost the respondent's word, and in the manner he caused the respondent's work to be taken down. On the counter-claim, it was found that the same

was predicated on the credit issue, and that the respondent was on her way to compliance, when the take-down was undertaken, making the music unavailable for the credit. On the 2 instrumentals said to have been on revenue sharing, there court was unable to find evidence to support the claim.

7. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 2nd December 2022, revolve around the trial court award of Kshs. 731,495.00, when the same was not supported by evidence; relying on an itemised list prepared by the respondent, without documentary proof of receipt and acknowledgement of payment from any third party; shifting burden of proof to the appellant, when the onus was always on the respondent; making findings despite lack of documentary proof; and ignoring the submissions by the appellant.

8. Directions were given on 8th February 2024, for disposal of the appeal by way of written submissions. Both sides have filed written submissions.

9. The appellant has identified 2 issues for determination: breach of contract, and whether the evidence adduced by the respondent supported the claim for Kshs. 732,496.00. On breach of contract, it is submitted that page 1 of the agreement, dated 9th January 2022, carried an obligation for the respondent to give credit, which the respondent failed to, exposing the appellant to loss, as it was the credit which enabled the appellant to market himself. It is submitted that according to the terms of that agreement, the appellant was entitled to terminate the contract upon breach of its terms and failure to fulfil the obligations of the contract, with the exception that the respondent could remedy the situation within 5 days. It is submitted that in this case the breach subsisted for 28 days.

10. On the second item, evidence to support the claims for Kshs. 732,496.00, it is submitted that the same took the nature of special damages, which required to be specifically pleaded and specifically proved. *Hahn vs. Singh* [1985] KLR (Kneller, Nyarangi JJA, & Chesoni, Ag JA). It is submitted further that the courts have insisted that actual receipts ought to be produced as evidence, to substantiate loss or economic injury, and that invoices would not do as proof. *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevams Limited* [2015] eKLR (Warsame, M'Inoti & Murgor, JJA) and *Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku* [2006] eKLR (OK Mutungi, J) are cited. It is submitted that the respondent did not provide any documentary proof of actual payment, and of costs amounting to Kshs. 731,496.00. The material produced in court, it is submitted, were an itemised list of costs without supporting documents, uncertified MPesa and bank statements, and projected streaming revenue. *Douglas Kalafa Ombeva vs. David Ngama* [2013] eKLR (Mwera, Warsame & Gatembu, JJA), which reiterates that special damages needed to be specifically pleaded, and specifically proved.

11. The appellant has thrown in a third issue in his written submissions, on the amount claimed, which he founds on section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, on the basis that he who alleges must prove. He submits that the trial court placed that burden on the appellant, on where it squarely lay, with the respondent, on the moneys alleged to have been spent on third parties. He submits that the respondent did not provide any proof that he made any payments to anyone, and the MPesa statement produced was inadequate. It is further submitted that the MPesa statement was not certified, and that only 2 of the payments in it related to him. Articles 47(1)(3), 48 and 50 of *the Constitution* are mentioned.

12. On her part, the respondent identifies 5 issues for determination, which are actually regurgitations of the grounds of appeal: whether the award of Kshs. 731,496.00 was supported by documentary proof, whether the itemised list prepared by the respondent was supported by any documentary proof of receipt or acknowledgement of payment of funds from any third party, whether burden of proof was shifted from the respondent to the appellant, whether the court made findings despite lack of

evidence or documentary proof, and whether by ignoring the submissions of the appellant and the subsequent allowing of the respondent's claim. On whether the claim was supported by evidence, it is submitted that the list was supported by oral evidence and the MPesa statements. It is further submitted that the appellant had not objected to production of the documents. On burden of proof shifting, it is submitted that the same keeps shifting between the parties at various instances, and Mbuthia Macharia vs. Annah Mutua Ndwiga & another [2017] eKLR (Visram, Karanja & Koome, JJA) is cited in support. It is asserted that the appellant was under a duty to provide rebuttal evidence. On the documents filed by the appellant not being considered, it is submitted that the same were adopted and produced as evidence, and the trial court must have considered them. On the submissions by the appellant not being considered, it is submitted that the trial court must have considered them.

13. On the written submissions by the appellant, on breach of contract, it is submitted that the issue was considered by the trial court, and resolved in her favour. On special damages, it is conceded that the special damages were not pleaded, but they were proved. It is submitted that the special damages were proved by way of the costs breakdown and the MPesa statements.

14. I would agree with the framing of the issues for determination by the appellant. The 5 grounds of appeal really boil down to those 2 issues: whether there was breach of contract by the appellant in relation to the credits, and whether the monetary claim was proved.

15. On the breach of contract on the credits, the parts had an agreement between them. The clauses of the agreement are not serialised, but fall under various headings. The agreement granted or licensed the respondent to use certain beats or instrumentals. That entailed recording music containing part or whole of the beats, mixing mastering re-arranging or re-engineering the whole or part of the beats, publishing broadcasting distributing or performing the music containing the beats in any part of the world, and making money relating in whole or part of the music. One of the obligations, under the agreement, was that the respondent would credit the appellant in all situations where the music was credited distributed published broadcast or performed. Upon execution of the agreement the appellant was to retain full copyright of the beats, and the respondent was not to sell loan rent share upload or resell the beats, nor to transfer or lease any of the rights to other parties. There was also a term on how the royalties were to be shared between the parties. The consideration for the agreement was Kshs. 48,000.00, which the appellant acknowledged receiving.

16. There was an identity clause, in favour of the appellant, with respect to any loss or damage to third parties, flowing from any breach of the contract by the respondent. There was also a termination clause, kicking in where 3 conditions were not met, relating to payments not being made to the appellant in a timely manner, the obligations under the agreement not being fulfilled, and breaches of any terms and agreements under the agreement. The process of termination was by way of a written notice from the appellant to the respondent. Upon the notice being given, the respondent acknowledged and agreed to make good the loss, the respondent would have 5 days, from receipt of the notice to do so, in default of which the agreement would stand terminated, and the appellant entitled to recover whatever damages were due to him. The effect of the termination would be that upon such termination, the agreement would become void, and the respondent would be completely restricted from promoting, performing, recording, distributing and manufacturing music containing the contracted beats. There was also an arbitration clause, to effect that upon any dispute arising on the agreement, the parties would refer the same to a single arbitrator.

17. So, what happened here? The agreement, discussed above, related to licensing for use of certain beats. Apart from that, it would appear that there was a separate agreement on production of some music for the respondent, by the appellant, using the beats licensed, which went wrong, as the respondent argued the recordings were destroyed by the appellant, forcing her to have the same produced elsewhere. The

claim for Kshs. 731,496.00 hinged on that. The issue around termination of the licence or contract had nothing to do with the claim for Kshs. 731,496.00. Indeed, it would seem to be independent of that claim. It sprung directly from that agreement, dated 9th January 2022. It was about the respondent producing music, using the beats or instrumentals, and putting the said music into the market, without crediting the appellant, contrary to the agreement. The respondent did not contest that. She admitted that she noticed that that had happened, and began to take remedial action. However, the appellant gave her a short notice, after which he proceeded to treat the contract as terminated, whereupon he asked that the music be taken out of the market.

18. As the breach was conceded, the question would be whether the appellant was justified to terminate the contract. According to the contract, the termination would only have been effective after a 5-day notice had been given, which notice would have given the respondent 5 days to take remedial action, and that the termination would be considered effective upon expiration of the 5-days with no remedial action being taken. The question is whether that 5-day notice was given, and whether the respondent took any remedial action within the 5-days. The respondent attached emails from the appellant, dated 9th July 2022 and 10th July 2022, claiming that the respondent had breached 2 terms of the agreement, being failure to credit his work and not supplying him with a free copy of music made using the contracted instrumentals. The first email asked her to remedy the situation within 2 days, and the other gave her 5 days. The remedy was to take the form of the respondent paying a sum of Kshs. 48,000.00, according to the first email, and Kshs. 96,000.00, according to the second email, and crediting him on all the platforms produced or promoted. I would presume that the second email superseded the first email. The respondent also attached 2 emails, written by her to the appellant, in response. The first email informed the appellant that her music was no longer being played in the platforms. The second letter was from one of her distributors, indicating that they were discontinuing distributing her music, on account of her dispute with the appellant.

19. Then there was a letter from the Advocates for the respondent, dated 13th July 2022, on the issue of termination of the said contract, essentially stating that the respondent had taken remedial action, by instructing the distributors to credit the appellant, but complaining that the amounts demanded were unjustified. They also complained that the action by the appellant, of asking the distributors to take down the music, had the effect of stopping the playing of the music, making it difficult for the instructions on the remedial action to be carried through.

20. The appellant placed the same documents on record. The agreement dated 9th January 2022, and the termination email dated 9th July 2022. The email dated 10th July 2022 was not attached, but there was an email from the appellant to the respondent, dated 14th July 2022, where he acknowledged the notice to take down the music.

21. So, what do I make of all that? One, the appellant issued a notice or notices after the breach. The first notice was for 2 days. The second notice was for 5 days. According to the agreement, the notice required was for 5 days. The first notice did not comply with that. The second notice, however, did. Was remedial action taken? The respondent did not exhibit any emails or letters that he might have written to the appellant over the notices, and what was placed on record was the letter from her Advocates, dated 15th July 2022, which indicated that she had indeed taken action to remedy the situation, and the distributors had indicated that the remedial action would be effective within 7 days. The only email filed, from the respondent to the appellant, dated 13th July 2022, was not a response to the notices, and did not talk about what she had instructed the distributors, and it only said that she needed to get another distributor. The email from one of the distributors, DistroKid, did not talk of the alleged instructions, but only advised the respondent to get another distributor. The letter from the Advocates for the respondent was not backed by any material, demonstrating that the respondent had instructed

the distributors to remedy the situation. The information on the remedial action was not first hand, but second hand, and, therefore, within the realm of hearsay. In short, the trial court had no material, from the respondent, that demonstrated that the respondent had instructed distributors to remedy the omission to credit the appellant in the music.

22. Did the 2 notices effectively terminate the contract? The appellant issued 2 notices, purportedly to terminate the same agreement. That was a curious circumstance. I have indicated above that I presume that the first notice was superseded by the second one. The first gave a 2-day notice, which was contrary to the agreement, and the second gave a 5-day notice, which was in accord with the agreement. No doubt, the second notice issued to cure the first. So, the only notice in contention was the second one, that dated 10th July 2022. As it was in compliance with the terms of the agreement, it was effective. However, it was undermined by several factors. One was the email by the appellant of 14th July 2022, which appeared to give credence to the claim by the respondent, that she had instructed the distributors to credit the appellant. In that email, he appeared to be unhappy with what the distributors had proposed, the 7 days to begin to credit the music to him, prompting him to take down the music. That email plugged the gap in the case by the respondent, that she had given certain instructions to distributors to remedy the situation. What emerged was that those instructions were frustrated by the appellant. The respondent appeared to have had acted promptly, within the 5 days given, by giving the instructions to the distributors. The fact that the distributors could not act immediately, would appear to be something that was beyond her control. The appellant ought to have gone by the timelines given by the distributors, and any other issues thereafter could be ironed out, and compensated in monetary form, upon proper accounts being taken. The appellant acted rashly and in a rush, without allowing the instructions given by the respondent to take effect.

23. Secondly, and more importantly, the agreement was subject to an arbitration clause, which stated that any dispute between the parties, including on termination, was to be referred to arbitration. A contract is read as a whole. No clause is to be interpreted independently of the other. The meaning of the agreement is to be gathered from the whole document. Consequently, the termination clause must be read together with the arbitration clause. A proper reading of the arbitration clause would be that the appellant could not terminate the contract without first referring the dispute to an arbitrator. To the extent that he proceeded to terminate the contract, before referring it to arbitration, meant that he did not act faithfully to all the terms of the agreement dated 9th January 2022. He did not act in good faith, and his actions were contrary to the arbitration clause. Upon the respondent making a proposal that was unpalatable to him, he should have invoked the arbitration clause, on the matter of the termination of the agreement.

24. For avoidance of doubt, the arbitration clause stated as follows:

> "Any dispute in connection with or arising out of Contract. Including any question of its existence, validity or termination (a "Dispute"), shall to the extent possible be settled amicably by the Licensor and the Licensee ("Parties"). The Parties will negotiate in good faith to settle any Dispute. In the event the Parties are not able to resolve the dispute either party may give written notice of the Dispute to another party ("Dispute Notice"). Upon receipt of Dispute Notice, the Dispute shall be resolved by the appointment of a single arbitrator to be agreed between the parties, after each party has given to the other a written request to concur in the appointment of an arbitrator. The seat of the arbitrator shall be in Kenya and the arbitration shall be governed by both the *Arbitration Act* 1995 and rules as agreed between the parties."

25. An arbitration clause is not merely decorative of an agreement or contract. It is inserted into the contract to serve some purpose. It is a term of the contract, and it is part of what the parties sign up to, and it binds all the signatories, who should not thereafter act as if there was no arbitration clause. The parties hereto executed the contract with that arbitration clause in place, and when implementation of the agreement hit the headwinds, at the time it did, they ought to have invoked the terms of the arbitration clause, instead of taking steps, either way, as if there was no such a clause. Their separate acts were premature, in the circumstances. Indeed, upon the suit being filed, the appellant, upon being served, ought to have notified the trial court of the arbitration clause, and should have sought to have the matter referred to arbitration in terms of that clause.

26. In view of what I have discussed above, I find and hold that the appellant did not properly terminate the agreement dated 9th January 2022.

27. Let me now turn to the second issue, whether the trial court should have awarded the sum of Kshs. 731,496.00. That amount was what the respondent allegedly paid to the appellant for the rights over the beats or instrumentals, for production of the Chonjo album, and for a video production of one of the songs, and which amount of money was lost, or went to waste, after the songs were destroyed through the alleged negligence of the appellant, and the respondent was forced to have the same work done again by another producer. That alleged extra expense was the loss or special damage suffered by the respondent. The claim to recover that money, or to be reimbursed of the expense, would be in the nature of special damages. It is a cardinal rule of the law of damages, that special damages must not only be pleaded, they have to be specifically proved. See Hahn vs. Singh [1985] KLR (Kneller, Nyarangi JJA, & Chesoni, Ag JA).

28. So, the question would be whether there was compliance with that mantra. Was there a special pleading of that loss? The statement of claim did not use or employ the words "special damages," but there was a pleading for the sum of Kshs. 731,496.00, and a background on how that claim came about. The pleading gave the appellant clear notice of the claim for Kshs. 731,496.00, inclusive of an indication about how it came about. For all practical purposes, the said claim was adequate for a specific pleading for special damages. The only issue for consideration is whether the claim was specifically proved.

29. From the documents filed by the respondent, by way of list of documents, dated 11th October 2022, the first 3 were the material that was meant to prove special damage, that was the confirmation of payments made to the appellant, the breakdown of costs for production of the album, and the projected streaming of the revenue. On confirmation of payments to the appellant, there was an MPesa statement, which indicated 2 payments to the appellant, of Kshs. 6,000.00, made on 21st October 2021, and Kshs. 48,000.00, made on 4th January 2022. The same account reflected one payment to DistroKid, of Kshs. 3,816.00, made on 17th January 2022. On the breakdown of the cost of the production of the album, there was an account, blow by blow of the cost of each item in the production process. Finally, the projected streaming revenue was in a one-page document, showing 5 entries for the period between May 23 and May 30, being 9403, 6706 4115, 2996 and 8.

30. Did that material amount to specific proof of the special damage that the respondent suffered on account of the destruction of her music by the appellant, forcing her to involve another producer? Proof of special damage has to be proof of actual payment of the money being claimed. Did the trial court have such proof before it? The only material on payment of any moneys would be the MPesa statement. Unfortunately, that statement indicated that the appellant was paid a sum of Kshs. 54,000.00 only. Unfortunately, again, the said statement did not indicate what that payment was for, or was meant for. It would have been relevant for the respondent to establish that she actually paid the producers who subsequently re-did the music. Curiously, the said producers were never mentioned,

for the only mention there was, was of the distributors, Distrokid. The MPesa statement indicated that only a sum of Kshs. 3,816.00 was paid to that distributor. Based on that, there was no material, before the trial court, upon which it could find that the appellant had spent Kshs. 731,496.00 on the appellant, or even an equivalent amount on the other producers. The MPesa statement had not been authenticated by the issuer, Safaricom Limited, for it bore no signature, nor stamp, or any other form of certification, from that entity. There would have been no basis of treating it as authentic without such certification. That certification was crucial, given that the statement was not being produced by its maker. The other documents did not help either. The breakdown of costs was done by the respondent herself. It could not possibly be evidence of what she paid to the appellant or the other producer. The projected streaming revenue was not a reality, but a projection. It was not evidence of revenue. It was not evidence of moneys that the respondent incurred in the production by the appellant, or by the other producer. The amount of Kshs. 731,496.00 was not about loss of revenue, and, therefore, that evidence was of no relevance. It would appear that the trial court did not interrogate those documents, and merely presumed that they were authentic or proved what was meant to be established.

31. Was the oral evidence by the respondent enough? I doubt it. The fact of payment of moneys to anyone, in transactions of the nature of what was before the trial court, require documentary proof, that the money was paid by the payer, and was received by the recipient. There ought to be evidence that the money moved from the payer to the payee. That is how special damages are proved. It was argued that the documents were admitted in evidence as exhibits. That might have been so, but the mere admission, or even production, of documents, does not authenticate otherwise inauthentic documents. The mere production of a document does not amount to proof of what is sought to be proved. It does not bind the court to treat the document produced as authentic, or as proof of that which it purports to prove. It was argued that the appellant did not challenge production of the documents. Again, the mere fact that a party does not oppose or challenge production of documents in court does not of itself make the documents authentic, neither does it mean that they are proof of what the person relying on them seeks to prove, and the trial court is not bound to rely on them as proof of what is sought to be proved. See Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR (Visram, Mwilu & Otieno-Odek, JJA), South Nyanza Sugar Co. Ltd vs. Mary A. Mwita & another [2018] eKLR (Mrima, J), Billiah Matiangi vs. Kisii Bottlers Limited & another [2021] eKLR (Ndung'u, J), Sammy Wafula Meja vs. Republic [2021] eKLR, Jackson Ndwiga vs. Elizabeth Thara Ngahu [2021] eKLR (Njuguna, J), Sofie Feis Caroline Lwangu vs. Benson Wafula Ndote [2022] eKLR (Nyagaka, J) and Lwangu vs. Ndote [2021] KEELC 2 (KLR)(Nyagaka, J).

32. In the end, I find that the appeal herein is merited, and I hereby allow it. The consequence is that the order made on 25th November 2022, by the trial court, to allow the claim by the appellant, is hereby set aside, and it is substituted with an order dismissing the said claim in its entirety. The appellant shall have the costs of this appeal, and at the Small Claims Court. It is so ordered.

JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 24TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Macharia, instructed by Macharia Gikonyo & Company, Advocates for the appellant.

Ms. Gichuhi, instructed by Omuodo Ogutu, Advocate for the respondent.