



**Multichoice Kenya Limited v Safaricom PLC & another; Kenya Copyright Board  
& another (Interested Party) (Miscellaneous Civil Application E567 of 2019)  
[2022] KEHC 3256 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3256 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E567 OF 2019**

**WA OKWANY, J  
JUNE 23, 2022**

**BETWEEN**

**MULTICHOICE KENYA LIMITED ..... APPLICANT**

**AND**

**SAFARICOM PLC ..... 1<sup>ST</sup> RESPONDENT**

**JAMII TELCOM LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA COPYRIGHT BOARD ..... INTERESTED PARTY**

**COMMUNICATIONS AUTHORITY OF KENYA ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the Amended Notice of Motion dated November 28, 2019 wherein the applicant seeks the following orders:-
  - 1) Spent.
  - 2) Spent.
  - 3) A permanent injunction as per Section 35D (2) of the *Copyright (amendment) Act 2019* do issue to the respondents to prevent or impede the use of its service to access a service, website place, domains or facilities (and as may be replaced, amended or moved from time) situate in or outside Kenya that is used to infringe the Applicant's copyright as contained in the takedown notice dated October 29, 2019 upon the hearing and determination of this application.



2. The application is supported by the affidavit of Mr. Fredrick Saramba and is based on the grounds that:-
  - 1) Despite being duly served with a takedown notice pursuant to Section 35B of the Copyright (Amendment) Act 2019 (hereinafter the Act) the respondents have disregarded the notice- have failed to acknowledge or act on it, neither have they given their reasons for failing to comply with it.
  - 2) The respondents continue to host or allow content to be hosted on their networks very well knowing that the same infringes on the rights of the applicants.
  - 3) By operation of Section 35D of the Act, the Applicant moves to this honourable court to seek grant of an interim injunctive relief as against the respondents.
  - 4) The respondents intend to move to the High court to challenge the constitutionality of Section 35B, 35C and 35D on account that their views were not taken into account, the Applicant is apprehensive that this will have the effect of defeating the very reason the Act was amended hence the applicant's rights will continue to be infringed leading to irreparable economic loss.
  - 5) It is clear that the respondents do not intend to comply with the take down notices nor the provisions of the Act. On that premise, it is only fair and just that this application be certified urgent, heard forthwith and orders sought therein granted.
3. The 2<sup>nd</sup> respondent opposed the application through the replying affidavit of its General Manager Mr. John Kamau who acknowledges that the applicant served the 2<sup>nd</sup> respondent with a notice to block the infringing sites. He states that the 2<sup>nd</sup> respondent was however not able to act on the takedown notice because the applicant did not substantially demonstrate that it owned the audio/visual broadcast and transmission rights of the English premier league, UEFA Champions League, UEFA Super Cup UEFA Europa League La Liga and Series A competitions (hereinafter "the Sports Channels").
4. The 2<sup>nd</sup> respondent's deponent further avers that the takedown notice was vague and incapable of being acted upon, as it did not specifically describe, in detail, the copyright work that was subject of the infringement. He confirms that the 2<sup>nd</sup> respondent was served with a further takedown notice dated October 29, 2019 which was expansive non-specific and therefore not compliant with the law.
5. The 2<sup>nd</sup> respondent's case was that they did not comply with the takedown notice because the owners of the rights in question, Multichoice Africa Holding B.V and Supersport International did not identify the exact location of the infringing content on the 141 sites thereby leaving the 2<sup>nd</sup> respondent with the investigative responsibilities and obligations under the law.
6. The 2<sup>nd</sup> respondent further states that Multichoice and Supersport International Limited was under a duty to provide the exact location and nature of the offending content on each website. The deponent avers that the 2<sup>nd</sup> respondent did not comply with the takedown notice because the websites in question hosted non-infringing content belonging to third parties and that it was therefore untenable to block the entire website. He further states that the takedown notice did not describe in specific detail the exact subject of the alleged infringement as required by the law.
7. The 2<sup>nd</sup> respondent contended that due to privacy laws, it could not tell the exact contents of what its subscribers accessed in the 141 websites and internet platforms identified by Multichoice Africa Holding B.V and Supersport International PYT. According to the 2<sup>nd</sup> respondent, internet service providers cannot be tasked with the responsibility of combing through numerous websites in order to locate content that appeared to have infringed the rights of Multichoice Africa Holding B.V and Supersport International PYT.



8. The 1<sup>st</sup> Interested Party responded to the application through the replying affidavit of its Assistant Executive Director Mr. George M. Nyakweba who states that Section 35B of the Copyright (Amendment) Act 2019 allows a person whose copyright has been infringed to request the Internet Service Provider to remove the infringing content or disable access to the infringing content. He acknowledges that the Interested Party received a takedown notice, from the applicant, requesting the respondents to block rights infringement by 142 sites. He further states that, except where there is a valid justification, the Internet Service Provider is liable for any loss or damages resulting from non-compliance with a takedown notice.
9. The 2<sup>nd</sup> Interested Party, Communications Authority of Kenya, responded to the application through the replying affidavit of its Acting Manager/Multimedia Licensing of the Authority Mr. Walter Kiptum Rono who states that the Copyright Act limits the 2<sup>nd</sup> interested Party's functions to licensing and regulation of its licensees through mechanisms such as regulatory enforcement. He further states that Section 35B (2) (h) of the Copyright Act 2001 provides that a takedown notice issued by a person whose rights are alleged to have been infringed be copied to the interested parties. He states that the said Act does not provide any remedies or action to be taken by the 2<sup>nd</sup> Interested Party after the issuance of such notice save for Section 83A which is purely administrative.
10. He acknowledges that the 2<sup>nd</sup> Interested Party received the takedown notices issued to respondents to remove content alleged to infringe on the applicants copyright. It is the 2<sup>nd</sup> interested party's case that a finding on infringement had to be made before it can consider exercising its powers pursuant to Section 83A of the Copyright Act.

### Hearing

11. The hearing commenced on July 6, 2021 when the Plaintiff presented the testimony of its certified practitioner and specialist in piracy, fraud and security investigation Mr. Barry Patrick Cole who adopted his witness statement dated March 11, 2020. Mr. Cole testified that sometime in October 2019, he discovered that there were 141 piracy domains whose accessibility he verified after which he developed a report titled access to piracy domains.
12. On cross-examination, he clarified that Multichoice Africa Limited and Multichoice Kenya Ltd were under the same entity. He further testified that the 141 piracy sites were accessible on and off at any given time depending on the number of people accessing the site. He further stated that some of the websites would change from time to time and that they had developed specialized techniques to track the pirates' address which could change from time to time as the pirates move from one source to the next.
13. Mr. Cole described a piracy domain as a website that makes content that it does not own. He further explained that the 141 domains in contention in this case were accessed through the 1<sup>st</sup> and 2<sup>nd</sup> respondents at a ratio of 89% and 66% respectively. He stated that he was not able to identify the owners of the domain pirate sites.
14. On re-examination, he clarified that one does not need special expertise to block a domain as what is necessary is only the name of the domain.

### Submissions

15. Parties canvassed the application by way of written submissions which their respective advocates highlighted at the hearing on September 28, 2021.



16. The applicant submitted that the takedown notices of 29<sup>th</sup> October 2019 were proper, lawful and valid. It was submitted that the 2<sup>nd</sup> respondent made no attempts to reach the pirate sites as required under Section 35B (4) of the [Copyright Act](#) but that the 1<sup>st</sup> respondent attempted to serve notices at the pirated sites. The applicant noted that the respondents' claims of the invalidity of the takedown notice was general and did not particularize any provision of the law that was not complied with.
17. It was submitted that the 1<sup>st</sup> respondent declined to block the pirate sites and did not respond to the formal demand and takedown notices. The applicants observed that while the 2<sup>nd</sup> Respondent made no attempts whatsoever to reach the pirate sites as obligated under Section 35B (4) of the Act, the 1<sup>st</sup> Respondent conceded that it served the notices on several pirate sites.
18. It was the applicant's case that the respondents did not comply with section 35 (C) (1) (b) of the [Copyright Act](#) (hereinafter "the Act") which obligates an Internet service provider to designate an agent or electronic or other address for receiving such notices under its terms and conditions of service. The applicant faulted the 1<sup>st</sup> respondent for not only declining to block the pirate sites but also for failing to respond to the formal demand and takedown notice issued to it.
19. Regarding the 1<sup>st</sup> respondent's assertions that considerations must be made to protect the rights of other users, the applicants submitted that pirate sites are faceless third parties not before this Court which the respondents cannot purport to speak for.
20. On the respondents' claim that they are likely to suffer lawsuits from their users if they blocked the infringing sites, the applicant noted that the respondents did not present any evidence of demands from the said persons and added that Section 35A (1)(b)(v) of the Act provides for indemnity in the event of such liability. It was further submitted that under Section 35B (8) of the Act the infringing sites had recourse against the applicant if it lodged fake or malicious take down notices.
21. The applicant gave a detailed comparative analysis of similar takedown provisions applicable in the United Kingdom and observed that the use of internet blocking by governments to prevent access to illegal content is a growing worldwide trend. It was submitted that there are many reasons why policy makers choose to block access to some content; for instance, access by children to obscene material, or access by anyone to child abuse material.
22. The 1<sup>st</sup> respondent submitted that the applicant lacks the locus standi to institute the application as it did not demonstrate that Supersport and Multichoice BV are the owners, assignees or exclusive licensees of the broadcast rights to the Sports Channels. It was further submitted that the evidence in the supporting affidavit was not sufficient, as it did not establish a link between the owners of the broadcast rights to the Sports Channels and the applicant.
23. It was submitted that the applicant did not establish that it is the owner, assignee or exclusive licensee of the broadcast rights to the European Competitions listed in the takedown notice. Counsel submitted that the takedown notice partly met the requirements of Section 35 (B) (2).
24. The 1<sup>st</sup> respondent urged the court to apply the practice adopted in the United States in dealing with the takedown notices as opposed to the procedure in the United Kingdom. Counsel observed that the model developed by the US courts provides that where a copyright owner fails to provide information that is reasonable and sufficient to inform the ISP of the copyright being infringed and where the infringing content is located, then such a notice would be considered as invalid.
25. It was submitted that the takedown notice of October 29, 2019 did not describe, in detail, the copyright work subject to the infringement and that as a result, the 1<sup>st</sup> respondent was unable to locate specifically which sites, within the domains, were the infringing sites. Counsel submitted that the applicant failed



to establish that it held perpetual rights to the six European competitions and was thus undeserving of the permanent injunction order.

26. The 2<sup>nd</sup> respondent submitted that the applicant did not demonstrate that it owned the audiovisual broadcast and transmission rights that they sought to protect. It was submitted that the right to enforce copyright belonged to the owner of the rights and that the applicant was not a holder of the rights it sought to enforce.
27. It was further submitted that the applicant is not entitled to the copyright in equity as the parent company had not assigned its rights to the applicant prior to the commencement of the suit. The 2<sup>nd</sup> respondent submitted that the takedown notice was not compliant with the law, as it was not specific on the nature of the copyright work and the location of the content.

### **Analysis and Determination**

28. I have carefully considered the application, the respondents' response and the parties' respective submissions. The main issues for determination are as follows: -

- a. Whether the applicant has the locus standi to institute these proceedings.
- b. Whether the take down notices issued on 29<sup>th</sup> October 2019 were valid and therefore actionable under Section 35B of the [Copyright Act](#).
- c. Whether the applicant has made out a case for the granting of orders sought.

#### **Locus Standi**

Whether the applicant is the holder of the rights it seeks to protect

29. The 1<sup>st</sup> respondent's case was that the applicant is not the holder of the rights that it seeks to protect through the take down notices. According to the 1<sup>st</sup> respondent, the applicant did not establish that Supersport and Multichoice BV are the first owners and exclusive licensees of the broadcast rights to the Sports Channels or that they have a license for the European football competitions. The 2<sup>nd</sup> respondent argued that the applicant did not have the requisite locus standi to institute this case.
30. According to the 2<sup>nd</sup> respondent the applicant did not tender proof of ownership of the transmission rights or that it authored the take down notices that it sought to enforce.
31. The applicant, on its part, submitted that it is a subsidiary of Multichoice Africa BV Holdings, which in turn is a subsidiary of Multichoice group. The applicant's deponent averred that the applicant is the appointed subscriber management service provider for Multichoice Africa B.V Holdings which holds various exclusive rights granted to it by, amongst others, Supersport International (Pty) Limited. He further averred that Supersport holds the exclusive broadcast and transmission rights in all sub Saharan Africa for the Sports Channels.
32. In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No 464 of 2000, the court defined Locus standi and held that: -

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.



33. In *Alfred Njau and others v City Council of Nairobi*[1982] KAR 229, the Court held that: -

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

34. I have perused the replying affidavit sworn by Walter Kiptum Rono on behalf of the 2<sup>nd</sup> Interested Party and I note that he confirmed that the applicant is the licensed Subscription Management Service Provider appointed by Multichoice Africa Limited. He also stated that applicant is the holder of Lading Rights as an agent locally providing subscription management services on behalf of Multichoice Africa Limited. The said averments were not challenged or controverted by the respondents.

35. The 2<sup>nd</sup> respondent submitted that it was not in contention that Multichoice Africa Limited had the audiovisual broadcast and transmission rights of the Sports Channels in Kenya.

36. It was not disputed that the applicant is a company that is registered in Kenya and licensed to offer subscriber management services. I find that the registration and license gives the applicant the requisite locus to institute the suit on behalf of Multichoice Africa Holdings B.V.

The validity of the take down notices issued on October 29, 2019.

37. It was not disputed that the applicant issued formal takedown notice to the 1<sup>st</sup> and 2<sup>nd</sup> respondent against 141 sites for allegedly infringing on its rights by re- broadcasting, or replicating its exclusive content without authorization.

38. The 1<sup>st</sup> respondent submitted that the said takedown notice of October 29, 2019 did not describe, in detail, the copyright work alleged to have been infringed and that, as a result, the 1<sup>st</sup> respondent was unable to locate the specific infringing sites within the domains. The 2<sup>nd</sup> respondent similarly submitted that the takedown notice was invalid as it was not specific on the nature of the copyright work and the location of the infringing content.

39. Further, on takedown notices, the 1<sup>st</sup> respondent’s submitted that there is no precedent on how the requirements of Section 35B should be interpreted. The 1<sup>st</sup> respondent urged the court to adopt the standard adopted by in the Courts in the United States of America where the notice is considered invalid if the copyright owner does not provide information on the copyright infringed and the location to the Internet Service Provider. For this argument, reference was made to the decision in *Viacom International Inc Et Al v Youtube Inc Et Al* No 1:2007 Cv02103 Document 364 (S.D.N.Y. 2010) which dealt with specificity of a takedown notice and held as follows:-

“.....Plaintiffs complain that YouTube removes only the specific clips identified in DMCA notices, and not other clips which infringe the same works. They point to the provision in § 512(c)(3)(A)(ii) that a notification must include “Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.” This “representative list” reference would eviscerate the required specificity of notice (see discussion in Parts 1 and 2 above) if it were construed to mean a merely generic description (“all works by Gershwin”) without also giving the works’ locations at the site, and would put the provider to the factual search forbidden by § 512(m). Although the statute states that the “works” may be described representatively, 512(c)(3)(A)(ii), the subsection which immediately follows requires that the identification of the infringing material that is to be



removed must be accompanied by “information reasonably sufficient to permit the service provider to locate the material.” 512(c) (3) (A) (iii). See House Report at 55; Senate Report at 46: “An example of such sufficient information would be a copy or description of the allegedly infringing material and the so-called “uniform resource locator” (URL) (i.e., web site address) which allegedly contains the infringing material.”

40. The 2nd respondent reiterated the 1<sup>st</sup> respondent’s submissions and maintained that the takedown notice issued by the applicant was not specific in nature. According to the 2<sup>nd</sup> respondent, it is not enough for the owner of the copyright to merely point out a website, as the law requires the owner to be specific on the location of the copyright work.
41. The respondents contended that the takedown notice was not valid as it did not identify the specific location of the infringing content. The 2<sup>nd</sup> respondents conceded that the applicant provided a schedule of 141 domain names but argued that the said domains host a wide array of content such that it was unable to locate the specific infringing sites within the domains. The 2<sup>nd</sup> respondent did not make any attempts to comply with the said notices.
42. The 1<sup>st</sup> respondent’s deponent, on the other hand, averred that it sent out the takedown notices to 84 of 141 pirate sites and confirmed that some of the notices were undelivered, some were delivered but ignored while some ended up with domain registrars who informed the 1<sup>st</sup> Respondent to reach out directly to the pirate sites. The 1<sup>st</sup> Respondent further stated that some of the pirate sites redirected users to other links which hosted the protected content. According to the 1<sup>st</sup> respondent, blocking such sites would have had no effect as the content would still be accessed either way.
43. I note that even though the 1<sup>st</sup> respondent did not furnish the court with the particulars of the 84 pirate sites to which it was able to send the notices, the fact that it was able to send out the said notices clearly confirms that the infringing sites were identifiable. I find that having sent out the notices, whether or not the notices were ignored by the recipients could not prevent the respondents from complying with Section 35B (5) of the Act which required them to disable access to the material within 48 business hours unless they received a counter notice fulfilling the requirements set for takedown notice and contesting the contents of the takedown notice.
44. In the instant case, the respondents did not state that they received any counter notices from the infringing sites contesting the contents of the takedown notices so as to justify their failure to disable access to the infringing sites.
45. The respondents argued that they did not act on the takedown notices because the applicant did not establish that it owned the audio-visual broadcast and transmission rights that they sought to protect. They submitted that the right to enforce copyright belonged to the owner of the rights and that the applicant was not a holder of the rights it sought to enforce. They maintained that the applicant is not entitled to the copyright in equity as the parent company had not assigned its rights to the applicant prior to the commencement of the suit.
46. With all due respect to the above position taken by respondents, I find that the duty of the respondents under the Act, upon service with a Takedown Notice was to comply with the provisions of Section 35 of the Act and not to deliberate upon whether or not the applicant owns the rights it seeks to enforce. My humble view is that the dispute before me is not about the ownership of the rights in question but rather, whether takedown notices were issued and complied with in accordance with the applicable law.
47. I find that nowhere in the Act is the respondent required to inquire into the ownership of the rights as a prerequisite to the action of disabling access to the infringing material and this, to my mind, explains



why Section 35A (1)(b)(v) provides protection/indemnity to an ISP from any liability arising from compliance with takedown notices. The said section stipulates that: -

“An Internet Service Provider shall not be liable or infringement for the automatic, intermediate and temporary storage of that content, where the purpose of storing such content is to make onward transmission of the data more efficient to other recipients of the service upon their request as long as the Internet Service Provider, removes or disables access once it receives a takedown notice as provided in section 35B(1) or where the original material has been deleted or access disabled on orders of a competent court or otherwise on obtaining knowledge of unlawful nature of the cached material.”

48. I further note that under Section 35B (8) the ISP and the infringing site have a recourse against the Applicant in the event the applicant lodges a false or malicious take down notice. The section provides that: -

“Any person who falsely or maliciously lodges a takedown notice or a counter notice under this section commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.”

49. I find that the safeguards provided for under the above sections sufficiently cushion both the ISP and the infringing sites from any blame or liability arising from a false or malicious takedown notices. This means that an ISP can simply act on the take down notice as required by the law without concerning itself with the issues such as ownership of the rights in question.

50. Section 35B (4) of the Act provides;

“An Internet Service Provider shall, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.”

51. A simple reading of the above section reveals all that was required of the respondents, upon service with the notices was to notify the alleged infringing sites by providing them with a copy of the notice and disable access to the infringing material within forty eight business hours unless they received a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

52. What emerges from the facts of this case is that while the 1<sup>st</sup> respondent made attempts to contact some 84 sites out of the alleged 141 infringing sites, the 2<sup>nd</sup> respondent did not make any such attempts. It is however clear, from the facts of this case, that the 1<sup>st</sup> Respondent did not at any point receive a counter takedown notice.

53. It is noteworthy that 1<sup>st</sup> respondent did not tender any proof that it issued notices to the infringing sites or that it disabled access to the infringing material as required by the Act. The logical conclusion that this court can arrive at is that the respondents were unwilling to comply with the clear provisions of the Act and are, in this case, merely giving excuses for their noncompliance as can be discerned from the 1<sup>st</sup> respondent’s argument that blocked users could still use entirely different domains.

54. The legal framework on takedown notices is provided for under Section 35B of the Copyright (Amendment) Act 2019 which stipulates as follows: -

35B.



- (1) A person whose rights have been infringed by content to which access is being offered by an Internet Service Provider may request, by way of a takedown notice, that Internet Service Provider removes the infringing content.
- (2) A takedown notice issued under subsection (1) shall—
  - (a) be in writing and addressed by complainant or his agent to the Internet Service Provider or their designated agent;
  - (b) contain the full names and telephone, physical and email address of the complainant;
  - (c) be signed by the complainant or his authorized agent;
  - (d) describe in specific detail the copyright work subject to the alleged infringement or sought to be removed;
  - (e) identify the rights being infringed;
  - (f) set out the content sought to be removed with details of where the content is contained;
  - (g) attach an affidavit or any other declaration attesting to claim of ownership, validity of the rights, good faith and setting out any efforts to have entities responsible for making the content available to remove the content;
  - (h) be copied to the Board, Communication Authority and the recognized umbrella association of service providers.
- (3) A takedown notice shall be deemed delivered on the next business day following physical delivery at its registered offices or two days following the day it is sent by registered post or immediately it is sent by electronic communication to a designated address of the Internet Service Provider or its designated agent.
- (4) An Internet Service Provider shall, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.
- (5) An Internet Service Provider shall disable access to the material within forty eight business hours unless it receives a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.
- (6) An Internet Service Provider which fails to take down or disable access when it receives a takedown notice shall be fully liable for any loss or damages resulting from non-compliance to a takedown notice without a valid justification.
- (7) An Internet Service Provider which contravenes the provisions of subsection (4) commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.



- (8) Any person who falsely or maliciously lodges a takedown notice or a counter notice under this section commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.
- (9) A person responsible for such misrepresentation under subsection (7) shall, in addition to the penalty provided under that subsection, be liable for any damages resulting from such false or malicious misrepresentation.
- (10) An Internet Service Provider shall not be liable for wrongful takedown in response to a valid takedown notice.

55. I have perused the takedown notice issued by the applicant and I note that it is in writing, it is signed and contains the applicant's full names, telephone number, physical and email address. The notice also describes the copyright work subject to the alleged infringement, the details of where the content is contained and is accompanied by the affidavit of one S. Saramba who attests to the claim of ownership, validity of the rights and good faith. The notice was also copied to the Board, Communication Authority.
56. I find that the takedown notice of the October 29, 2019 substantially and satisfactorily complied with the provisions of Section 35B (2) of the Act. I further find that the said notice was proper and hence, valid.
57. The issue which then arises is whether the respondents had any defence against the takedown notices.
58. I have examined the takedown notices dated October 29, 2019 sent to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, and I find that the applicant satisfactorily met the conditions outlined under Section 35B(2) of the Act.
59. On the respondent's allegation that the applicants did not disclose the specific location of the infringing content, I am of the view that the aforementioned section requires the applicant to provide details of the location of the content. I find that this disclosure was done as the applicant gave the details of the websites that infringed on their content. I find that the take down notices issued on October 29, 2019 were valid and were therefore capable of being acted upon as provided for under Section 35B of the Copyright Act.
60. I further find that the respondents obligation under Section 35B (4) and (5) of the Act, upon receipt of the valid takedown notice, was to notify the parties responsible for the infringement and disable access to the applicant's content within forty eight business hours unless a counter notice was made. In the instant case, I note that this provision was not adhered to as the respondents instead, ignored the takedown notices and challenged their validity. It is however worthy to note that the instant application does not seek to determine whether or not there was copyright infringement.
61. The import of Section 35B of the Act is to protect the Copyright owners against infringement. Section 35(B) (10) of the Act protects the respondents from any liability that may arise from honouring the takedown notices but failure to adhere to the above stated provisions exposes the respondents to potential second liability for assisting in the infringement.  
  
Whether the applicant has made out a case for the grant of a permanent injunction.
62. The applicant seeks an order of permanent injunction under Section 35(D) of the Copyright (Amendment) Act 2019 to prevent or impede the use of the respondents' platforms to access a service, website place domains or facilities situate in or outside Kenya used to infringe on the applicants copyright as contained in the takedown notice dated October 29, 2019.



63. Section 35(D) of the Act provides that:-

35D.

- (1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.
- (2) The High Court may, upon application under subsection (1), grant an order requiring—
  - (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;
  - (b) a person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or
  - (c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

64. Courts have taken the position that they will not readily grant mandatory injunctions, especially at an interlocutory stage, except in clear-cut cases. This was the reasoning, by the court, in *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR when it rendered itself thus:-

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”



65. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, it was held, inter alia, as follows:-

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

66. In the instant case, I have already found that the applicant established that it has the locus standi to institute this case. I also found that the takedown notice in question is valid. I also note that there was no objection to the said takedown notice. I find that the applicant has made out a clear-cut case for the granting of the injunctive orders sought.

67. In the upshot, I find that the application has merit and hereby allow it in the following terms: -

- a. An order of permanent injunction is hereby issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to impede the use of its service to access a service, website place, domains or facilities situate in or outside Kenya that is used to infringe the applicants copyright as contained in the takedown notice dated October 29, 2019.
- b. Costs of the application shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Omondi Eddy for Applicant.

Mr. Angwenyi B. for Imende for 1<sup>st</sup> Respondent.

Ms Nderu for 2<sup>nd</sup> Respondent.

Ms Mudibo for Mbogo for 2<sup>nd</sup> Interested Party.

Court Assistant – Sylvia

