REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 512 OF 2016

J. W. SEAGON & CO. INSURANCE BROKERS

(KENYA) LTD. ....…...PLAINTIFF

-VERSUS-

LIAISON GROUP (I.B) LIMITED…....................................1st DEFENDANT

JUBILEE INSURANCE COMPANY LIMITED................. 2ND DEFENDANT

SATIB INSURANCE BROKERS (PTY) LIMITED............3RD DEFENDANT

JUDGMENT

1. The *sine qua non* of Copyright is originality. A controversy arising in this dispute is what constitutes originality in Kenya copyright law.

2. J. W. Seagon is an insurance broker offering, negotiating and selling insurance policies and products in Kenya and the East African region. Taking a view that policies in Kenya, and perhaps the region, were wanting in certain aspects, J. W. Seagon employed Mr. Jeremy Clayton whose mandate included developing insurance products targeted at the hospitality industry and focused in tourism and the safari sector. The gap in the market, it was contended, was lack a product that specifically dealt with the comprehensive needs of the clientele in this segment. Clientele which is said to be discerning and sophisticated.

3. The evidence of Clayton was that in the course of 2014, J. W. Seagon commissioned him to employ labour and skill in selecting and arranging the subject matter for, and assemble, author, develop and create an insurance policy and product unique to that industry. He takes pride that the outcome of his labour is the Safari Plan Policy.

4. Clayton traces the history of the policy prior to 2014 when J. W. Seagon is said to have developed a proposal for the sector targeted at securing an underwriter to a new proposed scheme covering risks involved in the Tourism and Hospitality trades (P. Exhibit Page 6). The idea transformed into a brochure which covered the need for a policy in the relevant sector, the types of businesses that would be covered under the new proposed scheme of insurance and policy highlights.

5. Mr. Clayton sought to interest underwriters in the proposed scheme. First, ICEA Lion (P. Exhibit Page 12) and later, GA Insurance. The latter came on board and agreed to make valuable comments/proposals in the drafting process which began in late 2014.

6. Clayton claims credit for writing the policy and contends that his 30 years' experience in the industry in the United Kingdom where he authored insurance policies and other technical insurance documents stood him in good stead.

7. The creation of the policy involved several stages. The zero draft was shared with members of J. W. Seagon and GA, both of whom gave feedback. Several versions followed, culminating with the fourth version which was the final version (See P. Exhibit Page 56.)

8. At the hearing, Clayton gave testimony of collaboration in the journey to the final policy. At a cost of £ 400, Unigraph Design, a marketing agency based in the United Kingdom formatted and aligned the policy according to his recommendation and J. W. Seagon's house style and design. THB Group, a London headquartered organization said to specialize in international reinsurance broking and risk management reviewed the policy and proposed additional clauses and paragraphs which were taken into account by Clayton (P. Exhibit Page 278).

9. The draft Safari Plan Policy, improved by the input of Unigraph design and THB review was subjected to further internal review by J. W Seagon. Eventually, in February 2015, Unigraph Design drafted the policy schedule to the Safari Plan Policy. The schedule is described by Clayton to be an outline of the cover provided under the Policy which shows details of the policyholder, what the policyholder does, the cover given and the relevant limits, sums insured and excess.

10. The final version of the Safari Plan Policy was drafted and J. W Seagon entered into a service level agreement with ICEA Lion on 26 th April 2016 (P. Exhibit Page 403). The earlier arrangement with GA Insurance having ended.

11. J. W Seagon boasts that the Safari Plan Policy is the backbone of a unique insurance product with the following features:-

a) It is a packaged policy so that there is no need for multiple policies.

b) It has worldwide jurisdiction, the widest overall cover on the market.

c) It is a full all risk cover – in situ, in storage or in transit around East Africa.

d) It has the option to use the client's current broker, subject to approval.

e) It has wide range of areas in Africa created for.

f) The policy is written in Kenyan shillings but has the option of claims payments currency.

g) It has a Standard Public Liability limit of USD 10 Million.

h) It has extensive WIBA cover levels.

12. J. W Seagon's grievance is that "Safari Shield" an insurance product launched by the Defendants is grounded on a policy document which is identical with the policy document authored by it. That the Defendant policy has stark and glaring similarities in wording, form, general structure and provision. Simply, that Safari Shield is a copy of Safari Plan Policy and infringement is alleged.

13. In a plaint dated 16th December 2016 and filed on the same day J. W Seagon seeks the intervention of this Court and the following prayers:-

a) A permanent injunction restraining the Defendants by themselves, or through their agents, officers, servants, employees, and or assigns, from dealing with, using, copying, selling, offering for sale, distributing, or making available to the public the insurance policy known as Safari Shield Insurance Policy in its current form and/or in any form or manner that amounts to an infringement of the Plaintiff's copyright.

b) A permanent injunction restraining the Defendants whether by themselves, or through their agents, officers, servants, employees, and or assigns, from infringing the Plaintiff's copyright in the Safari Plan Insurance Policy.

c) An order for delivery up and forfeiture to the Plaintiff or the Court for destruction, all copies of the Safari Shield Insurance Policy Infringing Policy that infringe the Plaintiff's Safari Plan Policy and of any articles specifically designed or adapted for making such copies, or in the alternative, destruction upon oath of all such copies of the infringing policy.

d) General damages for copyright infringement.

e) Interest on prayer (d) above at court rates.

f) Costs of this suit.

14. Brian K. Rop (Rop) is a Group Business Manager of Liaison Group (I.B) Limited (Liaison or the 1st Defendant). Just like J. W Seagon, Liaison is an insurance broking company with operations both in Kenya and the East Africa region. Satib Insurance Brokers PTY Limited (Satib or the 3rd Defendant) is an insurance broker based in South Africa and specializing in the tourism, hospitality and wildlife industry.

15. The evidence of Rop was that, on 31st March 2015, Liaison and Satib formalized a long standing association by entering into a three year joint venture to grow short term insurance business in the tourism industry in Eastern Africa. This association led to the development of a single policy known as Satib Safari Shield Policy which bundles all the basic products of a tourism policy. It is the case of the two brokers that they then engaged Jubilee Insurance Company Limited (Jubilee or the 2nd Defendant) to underwrite the policy.

16. Liaison and Satib assert that, on 11th March 2010, Lion of Kenya Insurance Company introduced a specialized tourism and hospitality policy in Kenya and in the East Africa region dubbed "Simba Safari Cover" and challenges claims of originality by J. W Seagon.

17. Further, that just like most commercial works, an insurance policy is not copyrightable.

18. The two Defendants deny unlawfully copying or substantially copying any part of J. W Seagon policy, and that at any rate the

expressions employed in the insurance industry are stock, standard and commonplace.

19. Identifying with certain aspects of the Defence by Liaison and Satib, Jubilee contends that it has its own “Tour Operators Liability Policy” to cater for risks in the tourism and travel sector and similar policies exist in Kenya and worldwide. Jubilee, dismissively, contends that it has nothing to gain from copying the Plaintiff’s mundane and unoriginal policy.

20. Jubilee further states that “Safari Shield Policy” which is the subject of J. W Seagon’s attack is not Jubilee’s document.

21. An important defence pleaded by Jubilee is the doctrine of merger in copyright law. Under this doctrine where an idea and the expression of an idea are so tied together that there is only one conceivable way or a limited number of ways of expressing the idea in a work, then the expression of the idea is not copyrightable. Jubilee argues that the doctrine applies to insurance policies.

22. Taking prominence in the proceedings is the question whether insurance policies are eligible for copyright protection at all, the case by J. W Seagon being that the subject of infringement is Safari Plan Insurance Policy, a tourism and travel insurance policy.

23. Jubilee argues that an insurance policy is a contract which, inter alia sets out the rights, duties and obligations as between an insurer and an insured. Cited in support this uncontroversial proposition is the decision of **Cannon Assurance (K) Limited v Mohansons Food Distributors Limited.** Jubilee asserts that while the list of literary works under section 2 of the Copyright Act does not expressly include or exclude an insurance policy as a literary work, the provision expressly excludes written law and judicial decisions. Building on the argument, Jubilee contends that under the *ejusdem generis rule* of statutory construction, contracts are more aligned to written laws or judicial decisions which are excluded than they would be to plays, novels, letters, lecture notes, maps, charts which are included. The common denominator between contracts and written laws and judicial decisions, it is suggested, is that they are documents of a legal nature.

24. Jubilee relies on a passage in **Continental Casualty Company. v. Beardsley, 151 F. Supp. 28 (S.D.N.Y.1957)** on the copyrightability of legal documents.

25. Liaison and Satib identifies with Jubilee’s position.

26. J. W Seagon is confident that an insurance policy is a literary work that is copyrightable and asks this Court to find support in the American decision of **American Family Life Assurance Company of Columbus v. Assurant, Inc., 1:05-cv-01462-BB1** and the Kenyan decision of **Sapra Studio v Tip- Top Clothing Co. Ltd (1971) EA 489.**

27. Section 22 of the Copyright work provides the list of works that are eligible for copyright;

> **“Works eligible for copyright;**
>
> **(1) Subject to this section, the following works shall be eligible for copyright—**
>
> > **(a) literary works;**
> >
> > **(b) musical works;**
> >
> > **(c) artistic works;**
> >
> > **(d) audio-visual works;**
> >
> > **(e) sound recordings; and**
> >
> > **(f) broadcasts.**
>
> **(2) A broadcast shall not be eligible for copyright until it has been broadcast.**
>
> **(3) A literary, musical or artistic work shall not be eligible for copyright unless—**
>
> > **(a) sufficient effort has been expended on making the work to give it an original character; and**
> >
> > **(b) the work has been written down, recorded or otherwise reduced to material form.**
>
> **(4) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.**
>
> **(5) Rights protected by copyright shall accrue to the author automatically on affixation of a work subject to copyright in a material form, and non-registration of any copyright work or absence of either formalities shall not bar any claim from the author.”**

28. There is consensus between the parties, and the Court is in agreement, that if an insurance policy were to be eligible for copyright then it

would have to fall in the category of a literary work. It would not be a musical, artistic or audio-visual work. Neither would it be a sound recording nor a broadcast.

29. A literary work is defined as follows in Section 2:-

> **"Literary work" means, irrespective of literary quality, any of the following, or works similar thereto—**
>
> **(a) novels, stories and poetic works;**
>
> **(b) plays, stage directions, film sceneries and broadcasting scripts;**
>
> **(c) textbooks, treatises, histories, biographies, essays and articles;**
>
> **(d) encyclopaedias and dictionaries;**
>
> **(e) letters, reports and memoranda;**
>
> **(f) lectures, addresses and sermons;**
>
> **(g) charts and tables;**
>
> **(h) computer programs; and**
>
> **(i) tables and compilations of data including tables and compilations of data stored and embodied in a computer or a medium used in conjunction with a computer, but does not include a written law or a judicial decision."**

30. Not cited by either side are the provisions of the Berne Convention for the Protection of Literary and Artistic Works. This convention has been ratified by Kenya and is, by dint, of Article 2(6) of the Constitution part of our laws. Article 2 (1) of the convention gives a wider meaning to literary and artistic works:-

> **"(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."**

31. Just like section 2 of the Act, the list in article 2(6) of the convention is not closed or exhaustive. In the statute, literary works are expressed to be any of those listed "or works similar", while in the convention, literary and artistic works are said to include those enumerated there. And it has to be accepted, I think, that in reflecting on whether an insurance policy is a work similar to those listed, the canon of interpretation to be used is the *ejusdem generis* rule. In **Spentech Engineering Limited v Methode Limited & 2 others [2017] eKLR** Onguto J says the rule:-

> **"44. The *ejusdem generis rule* of statutory construction is basically to the effect that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same character. Of the word "other", Strouds Judicial Dictionary 3rd Ed says the following in relation to the *ejusdem generis rule*:**
>
> ***"Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated."***

32. For a start, Jubilee's argument that the *ejusdem generis* rule should be used to align an insurance policy to a written law or a judicial decision is flawed. From a plain reading of the definition section, these two are expressly excluded from the meaning of literary works. The provision does not extend that exclusion to works that are similar to a written law or a judicial decision. While the *ejusdem generis* rule is the tool to use in examining whether an insurance policy is kindred to the other literary works that are listed, the rule cannot be used in regard to the closed list of what is expressly excluded. So in respect to the exclusion, all that the Court is required to do is to determine whether an insurance policy is a written law or judicial decision. This, surely, must be an easy task.

33. Neither the word "written law" nor "judicial decision" is defined in the Copyright Act.

34. A Judicial decision is:-

> **"...judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment**

pronounced by a court when considering or disposing of a case"

(Tenth Edition, Black's Law Dictionary)

35. In section 3 of the Interpretation and General Provisions Act, written law means:-

"(a) an Act of Parliament for the time being in force;

(b) an applied law;

(c) any subsidiary legislation for the time being in force; or

(d) any county legislation as defined in Article 260 of the Constitution."

36. From these definitions an insurance policy is neither a written law nor a judicial decision and is therefore not expressly disqualified from being a literary work.

37. By its very nature, an insurance policy is a contract between the insurer and insured yet it may involve a compilation and arrangement of information that may put it in kinship with other works falling within the meaning of literary works either in the Copyright Act or the Berne Convention. Instances are reports and compilations of data. Thankfully, the task of this Court deciding whether an insurance policy or at least portions of it is a production in the literary domain is made easier by looking at other jurisdictions. As shall be apparent in the discussion of case law later in this decision, jurisdictions like the United States of America grant copyright protection to insurance policies or elements of it.

38. The next challenge to the Safari Plan Policy is that it is caught up in the doctrine of merger. In Black's Law Dictionary (10th Edition) the merger doctrine in the context of insurance law is defined thus:-

"**The principle that since an idea cannot be copyrighted, neither can an expression that must inevitably be used in order to express the idea. When the idea and expression are very difficult to separate, they are said to merger**."

39. In **Morrissey v. Procter & Gamble Co. - 379 F.2d 675**, the United States Court of Appeals, First circuit, says as follows of the doctrine:-

"when the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires"…if not one form of expression, at best only a limited number ,to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms ,could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated."

40. And as correctly pointed out by counsel for Jubilee even in **American Family Life Assurance Company of Columbus** *(supra)* relied on by J.W. Seagon, the Court found that certain parts of the insurance policies in the matter could not be copyrighted because of the doctrine of merger. These included definitions, limitations and exclusions.

41. It is also true, as observed by counsel for Jubilee, that J. W Seagon seeks or claims protection, not to portions of the policy, but of the entire document. Jubilee argues that protection of even basic terms and definitions contained in the policy is not tenable because to do so would deny others use of such expressions, absent the permission of the Plaintiff. In effect to checkmate the public from use of expressions which are commonplace in the insurance industry.

42. The argument made by the Defendants that the Plaintiff's policy should be scrutinized in the context of the doctrine of merger is not without merit. That said, the onus is on the party invoking the doctrine to demonstrate that the policy or parts of it are in not copyrightable on account of the doctrine. It is not sufficient to rely on past decisions that have found certain definitions, limitations and exclusions ineligible to argue that even those in the Safari Policy need to suffer the same fate. Jubilee shoulders the task of demonstrating that part or parts of the policy are ineligible on the facts and circumstances of this case.

43. With those two preliminary matters discussed, the Court identifies (and draws these from the proposals of the parties) the following to be the issues for determination:-

i. Does a copyright subsist in the Plaintiff's Safari Plan Insurance Policy?

ii. If so, has either one or all the Defendants infringed on that copyright?

iii. Is the Plaintiff entitled to the prayers sought in the Plaint?

44. The journey to answering the first issue begins by understanding when a literary work can be eligible for copyright. On this Section 22 (3) of the Act provides:-

"(3) A literary, musical or artistic work shall not be eligible for copyright unless—

(a) sufficient effort has been expended on making the work to give it an original character; and

(b) the work has been written down, recorded or otherwise reduced to material form."

45. This provision and indeed the entire statute does not define or unpack the catch phrase "original character." In addition, the type or form of effort is not elaborated. These, and in particular what constitutes originality, have attracted much debate over time.

46. Counsel for the Plaintiff submits that case law suggests that the skill, energy, effort, time and expense put into a work is sufficient to deem in it an original character and relies on the decision in **Jiwani v Going Out Magazine & Another**. In that matter a holding of the Court was that **"the plaintiff had proved that he had done sufficient work by way of photography, development, design artwork colour separation, and the publication of the said photographs to confer on them an original character."**

47. That decision followed the English decision of University of London **Press Limited Vs University Tutoral Press [1916] 2 Ch 601** which famously held that:-

> **"Assuming that they are "literary work", the question then is whether they are original. The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work", with the expression of thought in print or writing. The originality which is required relates to the expression of thought. But the Act does not require that the expression must be an original or novel form, but that the work must not be copied from another work-that it should originate from the author."**

48. The gist of the decision is that an author gains a copyright through diligence, labour and skill. Creativity in a work is not relevant. The decision is the flag bearer of the "sweat of the brow" doctrine which has come under severe pressure from alternative views.

49. Discounting that the sweat of the brow is sufficient ,the Supreme in **Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)** held:-

> **"To qualify for copyright protection, a work must be original to the author….Original as the term is used in copyright, means only that the work was independently created by the author(as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low, even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious "it might be. Originality does not signify novelty, a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."**

50. Although of common law tradition, the Supreme Court of India, in Eastern Book Company & Ors Vs D. B. Modak & Anor, departed from the sweat of the brow doctrine and embraced the modicum of creativity approach in which it explained itself as follows:-

> **"Novelty or invention or innovate idea is not the requirement for protection of copyright but it does require minimal degree of creativity."**

51. Clearly then the two competing views of what originality entails has an implication on the burden to be borne by a party invoking a copyright. The threshold to be reached in the sweat of the brow doctrine being the lighter.

52. There is then the Canadian decision of CCH Canadian Vs Law Society of Upper Canada: 2004 SCC 13. Declaring itself to be coming between the two extremes, the Court suggested the following to be the correct approach:-

> **"For a work to be "original" within the meaning of the "Copyright Act", it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one's capacity for the discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. The exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work"**

53. In mulling over which test to apply to this matter, the Court also gives regard to the decision of the Court of Justice of the European Union (CJEU) in **Infopaq International A/s v Danske Dagblades Forening** Case C-5/08. In answering a question whether the concept of reproduction within the meaning of Directive 2001/29 of the European Parliament and the Council is to be interpreted as meaning that it encompasses the storing and subsequent printing out on paper of a text, the Court held:-

> **"33. Article 2(a) of the directive 2001/29 provides that the authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit**

reproduction is intended to cover 'work'.

34. It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations"

54. Article 2 (5) of the Berne Convention, from which the Court partly drew inspiration, provides:-

"**Collections of literary works such as encyclopedias and anthologies which, by reason of the selection and the arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."**

55. In a later case of **Football Association Premier League Ltd V QC leisure** and **Karen Murphy V Media Protection Services Ltd(c-403/08** and **c-429/08 [2011]E.C.R 1-9083;[2012] 1 C.M.L.R 29**, involving works within a broadcast of an event, CJEU reaffirmed the test as follows:-

"**96. To be so classified, the subject-matter concerned would have to be original in the sense that it is its authors own intellectual creation (see to this effect infopaq…)"**

The Court seemed to confirm that test was not just in respect to literary works (not only to databases) but to also work as well.

56. There is good reason for the Court to align itself to that position and to hold that in determining whether a literary work has an original character in terms of section 22(3) of the Copyright Act, the work must be its author's intellectual creation. This is because the test is tandem with the general scheme of the Berne Convention which is part of our law.

57. As to what the test entails, the Court in Infopaq stated:-

"**Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."**

58. It seems that intellectual creation cannot be achieved without some element, albeit small, of creativity. In addition, the work must reveal a personal touch of the author. On that aspect the test of intellectual creation is closer to the modicum of creativity doctrine than to the sweat of brow principle. Indeed, even the creativity doctrine does not insist on a high threshold of creativity. As observed in American Family Life Assurance Company of Columbus (*supra*):-

"Notably, the threshold for protection is not high. Indeed, all that must be shown in the work possess some minimal degree of creativity ...... even a slight amount will suffice.

Feist. 499 U.S. 345

With this in mind, I turn to the facts of this case.

59. The journey leading to the birth of the Safari Plan Policy can be divided into two parts, prior and after the drafting process. Mr. Clayton's evidence was that in the course of 2014, J.W. Seagon commissioned him to create an insurance policy and product that was unique to the tourism industry. It would seem that even before then Mr.Clayton had developed a scheme proposal for tourism and hospitality risks. Subsequently a brochure stemming from the scheme proposal was developed. On 24th September 2014, he invited ICEA to participate as an underwriter in the scheme. ICEA was unresponsive and he turned to GA Insurance who agreed to do so once the policy was developed. Thereafter, which Mr. Clayton puts as late 2014, the drafting process of the policy began.

60. Mr. Clayton had a 30 year experience in the insurance industry in the United Kingdom and had authored insurance policies and other technical insurance documents. In packaging together the Safari Plan Policy from other multiple policies, he engaged underwriters such as GA Insurance who gave valuable comments and proposals at the drafting stage. He says that he wrote the policy from scratch.

61. On developing the first version, he circulated it for internal comments of the Plaintiff's staff. The comments enriched subsequent versions.

62. The policy document needed to be typed and designed. The Plaintiff enrolled the help of Unigraph Design, a marketing agency based in United Kingdom, at a fee of £ 400. They cleaned up the document and a new designed draft of Safari Plan Policy was shared with GA Insurance on 21st January 2015.

63. That was not all. On or about February 2015, the Plaintiff sought a review of the fairer copy with THB Group, a specialist international reinsurance broking and risk management group headquartered in London. Feedback from the specialist were taken into account in a further version. The revised draft with more internal reviews was presented to Unigraph Design for further amendments.

64. The Plaintiff further commissioned Unigraph Design in February 2015 to draft the policy schedule to the policy. The policy schedule is

said to be an outcome of the cover provided under the policy. Eventually, having included all proposed changes and amendments, Unigraph Design shared the final draft version of the policy with J. W Seagon on or about March 2015.

65. The drafting process, on the evidence of Mr. Clayton, incepted in late 2014 and the final version was ready on or about March 2015. The work of drafting and completing the policy took about four or so months. There was no evidence to guide the Court in determining whether four months, for this type of task, is out of the normal. More clear, nevertheless, is that some (if not considerable) skill, time, reviews and consultation was expended in developing the policy. Not to be discounted is that conceptualization of the policy had started before late 2014 and the period from conceptualization to finalization of the policy may have taken 15 months as pleaded by J.W. Seagon. All this considered together is indicative of the time, skill, labour and effort put into the development of the policy and helps J. W Seagon in making the argument that sufficient effort had been expended on the work(in the language of section 22(3) of the Act).

66. But as observed earlier, that may not be all to the matter. The Plaintiff needed to prove that the work was its own intellectual creation. Inevitably, J.W. Seagon was called upon to demonstrate that the policy expressed an element, even very slight, of creativity and that the work had a stamp of its personal touch as the author. Borrowing from the Supreme Court of India in **Eastern Book Company** (*supra*), the policy had to have a flavor of minimum requirement of creativity.

67. The scrutiny as to originality must be undertaken within the context of J. W Seagon's case that the copyright in the policy lies in the totality of the work and not certain aspects. In underscoring this argument, J. W Seagon submits that it is not claiming copyright over words, terms and language from existing policies. The Plaintiff relied on **Halsbury's Laws of England 4th Edition, Volume 9** paragraph 836 in which the esteemed authors state:-

> **"The skill and labour necessary in order to fulfil the test of originality may consist in the compilation of dictionaries, directories, maps or road books or in the mere preparation of lists, though there will be no copyright if the list conveys no useful information whatever… The work must be regarded as a whole; it is not the correct approach to dissect the work into fragments and, if these are not entitled to copyright, to deduce that the whole would not be so entitled."**

68. It is also argued that another aspect of originality of the Safari Plan Policy lies in the fact that it was the first all-inclusive policy for the Hospitality and Tourism sector in Kenya. It was asserted that never before had there been a single insurance policy that combined cover for material damages, business interruption, workman compensation (WIBA), employer's liability, general public liability, product liability, professional operations liability and incidental medical malpractice.

69. I should begin with this latter proposition. It has to be remembered that at very core of copyright is that it does not protect an idea but an expression of the idea. The evidence on record is that, while it was not uncommon for insurance companies to bundle together more than one policy or cover into a policy, J. W Seagon's acclaim of originality is that it had never been done so comprehensively, at least for the hospitality and tourism industry, that there would be an all-inclusive policy covering every conceivable risk associated with that industry. In this regard Mr. Clayton testified:-

> **"The first policies I looked at or found in the Kenyan market was that there wasn't such a policy as a combined policy."**

70. Emerging from the evidence is that as a concept, combining policies or covers is not uncommon. As an illustration, the Lion Kenya Simba Safari policy **(D. Exhibit 2 Page 817)** covered public liability, pollution liability, product liability and passenger liability. And this Court is not too sure that combining say 10 policies is more creative than combining 4 or that combining policies that cover all possible risks associated with an industry is then more the creative. While developing a comprehensive policy may require great effort, time, resources and perhaps skill, the concept or call it the idea is the same. It involves collapsing risks or policies into one policy so that need for taking out a multiplicity of policies is avoided.

71. But what is more crucial, for purpose of copyright law, is that the packaging (Mr. Clayton's word) or putting together of several covers or policies into one policy may be an idea but not an expression of an idea. And the idea is not copyrightable. So too are the advantages in the policy to the customer such as that the policy enjoys worldwide jurisdiction; is written in Kenya Shillings with the option of claims in payment currency; has a standard public liability limit of USD 10 Million; or has extensive WIBA cover. These are not protectable by copyright which is concerned with an expression of the idea.

72. That said the manner in which the packaging is achieved or done can amount to an expression of an idea. So that the packaging, call it compilation, is itself an original work attributable to the person who put the package together. In **American Family Life Assurance Company of Columbus** (*supra*) it was held:-

> **"Such editorial revisions, annotations, elaborations, or other modifications to a pre-existing work plainly creates a copyrightable interest."**

73. In addition, creativity can be demonstrated in the packaged or compiled works where the style of narration, language employed and arrangement is not present in the previous policies.

74. The need for J. W Seagon to prove some creative element in the end product become greater still because it emerged from the evidence that the policy wording may have benefitted from a lot of copying and pasting of other policies. In an email of 17th January 2015 **(P. Exhibit 275)** Mr. Clayton writes to Neeruj of Unigraph as follows:-

> **"Apologies for the delay, but I am delighted to advise that that the new scheme has now been signed off by the insurers and, subject to local regulatory sign off, we are ready to launch.**

The first port of call, and apologies if I got the terminology wrong, is to "type-set" the policy wording, and it's pretty urgent. Attached you will find the final policy wording (ignore highlighting forgot to remove), but you will see it has different colours, fonts, paragraphing, spacing, page breaks, indexing, page numbering, etc are all out and generally no consistency. That's what we need you to do...assuming that is something you can do? There's been a lot of copying and pasting done and lots of backwards and forwards. Further, we based the font cover on what you have designed, but didn't have the pictures, so just stuck something on there we found.

After this, we have our AIG Household "Sleep Easy" policy that I will send you once I have had that signed off, and then we really need to work on the Safari Plan brochure. The product will be known as "Safari Plan" unless you think otherwise, and is for the Tourism Industry, but also the Wildlife and Conservancy side of things....so that will need to be included in the details.

So, before you start, perhaps you can give David and I some feedback on costing, then we can give the go ahead."

75. This Court sees an attempt by Mr. Clayton in paragraph 27 of his written testimony to identify elements of creativity in J. W Seagon's work. He asserts that the arrangement of different insurance related provisions is in a unique and original manner. The trouble is that there was no attempt by Mr. Clayton to specify and prove the alleged uniqueness in the Safari Plan Policy that made it stand out, or be somehow different, from past or present policies.

76. The policy is praised for including several discretionary choices in selecting and drafting the different clauses, provisions, sections and schedules. Again, there is no evidence of those choices.

77. The dearth of the evidence persists in the assertion that the policy employs use of refined and distinctive narrative language to express the unique terms of the policy in a customer friendly and easy to understand manner and to derive a competitive advantage. The narrative language is not pointed out to Court nor is there an attempt to distinguish the language from language in past or present policies.

78. It could never have been the task of the Court to dig up evidence of creativity in the work of J. W Seagon or to discover where J.W. Seagon's personal touch lay in the policy. The onus was on the party seeking to benefit from copyright to get past the relativity low threshold. And I cannot help but notice the very elaborate and detailed evidence that J. W Seagon marshalled to prove the similarities between Safari Plan Policy and the policy assailed for infringing. I must wonder why like effort was not put by the same Plaintiff to elaborate on the asserted creativity of its works. And in holding that the Plaintiff has not done enough, it may be useful to read the entire decision in American Family Life (*supra*) to appreciate the type of evidence put forward by the Plaintiff there that persuaded the Court to hold that its policies revealed a measure of creativity.

79. So to the first issue, I find and hold that a copyright does not subsist in the Plaintiff's Safari Plan Insurance Policy. And that should have been the end of the matter but I am duty bound to say a little more.

80. Had this Court found that such a copyright subsisted then I would have held that it did not suffer a setback under the doctrine of merger as the Defendants failed to lead evidence as to why either the entire policy or any part of it is not eligible for copyright on account of the doctrine.

81. As to whether the 1st and 2nd Defendants were guilty of appropriating portions of Safari Plan Policy into their Safari Shield Policy, so audacious was the copying that typographical errors in the Safari Plan Policy found their way into the Safari Shield Policy. Just by way of illustration, Mr. Clayton's evidence is that:-

"I was surprised to see my typographical error copied in the infringing policy at Page 13 where "Extension 17 Theft of Building Fabric" ought to be cited as "Extension 11 Theft of Building Fabric appearing at Page 21 of the infringing policy."

Even the remark by Mr. Rop, a witness of the two defendants, that "great minds think alike" cannot possibly explain the striking similarities in the two policies. Unless of course, it is the case that when great minds make typographic errors, they are an exact mirror!

82. So liability would have attach on Liaison and Satib. What about Jubilee? Jubilee disassociates itself with the Safari Shield Policy. And as to why its logo is endorsed on the impugned policy and it is described as an underwriter, its witness Jaideep Goel explained that the impugned policy appears to be a draft and that Jubilee has no knowledge as to how its logo came to be endorsed on the said draft. Further, it does not understand how it could be described as an underwriter when it had no knowledge of the policy.

83. Stated in its defence, and reiterated by their witness Mr. Rop, Liaison and Satib contend that they engaged Jubilee to underwrite Safari Shield Policy.

84. I must say that I found the attempt by Jubilee's witness Mr. Goel to disassociate with the impugned policy rather evasive. Goel's testimony is that Jubilee first came to know of the policy after this suit was instituted. That would have to be after 16th December 2016. Yet, that may not be true because there is a demand letter of 8th November 2016 made to the three Defendants who include Jubilee and which shows that it was received by its C.E.O's office on 14th November 2016 (See receipt stamp).

85. Equally curious was his explanation as to why Jubilee, if innocent, took no steps to stop the 1st and 3rd Defendants from associating it with the impugned policy. He explained that having checked its record and confirming that it was not the underwriter, Jubilee saw no reason to move forward. Jubilee boasts as a leader in the insurance industry in Kenya and in the Insurance Awards of 2010 won no less than seven awards which included "marketing initiative of the year". It seems unlikely that a company of such repute would be unconcerned about allegations (even if false) that an infringing policy was associated with it. On a balance of probabilities, I believe the evidence of the other

two Defendants that they had engaged Jubilee as an underwriter in respect to the Safari Shield Policy.

86. What remedies would this Court have granted had it found the Defendants liable? As against all Defendants, I would grant the orders of permanent injunction sought. As against all Defendants, I would have granted orders for delivery up and forfeiture. As there is no evidence that Jubilee participated in copying the policy, I would not order any damages against it. Against the other two Defendants, I would award general damages of Kshs.3,000,000/= in favour of the Plaintiff. In doing so the Court would keep in mind that such damages are at large and need not be proved. Further, while the Defendants never benefitted from the copying as they were injuncted by a court order, the copying was so extensive and unbashed.

87. But as the Plaintiff failed to make out its case as required by law, the suit is dismissed with Costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 29th Day of January 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Baiya Ndungu for Plaintiff

Kivindyo for 1st and 3rd Defendant

Mbaluto & Okutta for 2nd Defendant