



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURTS
CIVIL CASE NO 066 OF 2020

REBECCAWANJIKU.....PLAINTIFF/APPLICANT

VERSUS

CHRIST IS THE ANSWER MINISTRIES (CITAM).....1ST DEFENDANT/RESPONDENT

ISAAC PETER KALUA.....2ND DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 28th October, 2020 brought under **Section 1, 1A, 3A and 63 (e)** of the **Civil Procedure Act (CAP 21)** Laws of Kenya and **Order 40 Rules (1), (2) and (4)** of the **Civil Procedure Rules, 2010, Sections 31 (1), 35(4), 35D and 37** of the **Copyright Act** and **Article 40 (5)** of the **Constitution of Kenya 2010** and all other enabling provisions of Law. The prayers sought are the following:

a) THAT a prohibitory injunction do issue restraining the Respondents or any person acting in league with the Respondents from making any sales, hire, distribution, performance, reproduction and or other act that amounts to infringement of copyrights held by the Plaintiff in the song titled "Rungu Rwa Ihiga" but produced, distributed and or performed by the Respondents under the title "Athuri Mwihihe" pending the hearing and determination of this suit.

b) THAT the Honourable court do issue an order directing the Respondents to deliver to the court any copies, records and or performances of the song titled "Rungu Rwa Ihiga" but produced, distributed and or performed by the Respondents under the title "Athuri Mwihihe" pending the hearing and determination of this suit.

c) THAT costs of this application be provided for.

2. The application is based on the grounds on the face of it and supported by an Affidavit sworn by the Plaintiff herein on even date deposing that she is the author and owner of copyrights in the song titled "**Rungu Rwa higa**" under copyright certificate number CR.000475 dated 26th January, 2011. That the Defendants and/or persons acting in league with the Defendants have without her consent produced, distributed and performed the song titled "**Rungu Rwa higa**" under the title "**Athuri Mwihihe**". That on 27th May, 2015, the Defendants and/or persons acting in league with them even posted performances of her aforesaid song on a YouTube Channel named Mens Chorale with approximately 2,900 subscribers.

3. It was contended that the Defendants have distributed the infringing work titled "**Athuri Mwihihe**" as though it is their original composition. She argued that the said song as produced, distributed and performed by the Defendants is similar to her original work in all aspects including words, melody and rhythm. She stated that since the same was done without her consent, it amounts to copyright infringement which has caused her losses.

4. She averred that she has a *prima facie* case with a high probability of success and will suffer irreparable injury which cannot be adequately compensated by an award of damages if the orders sought are not granted. She also noted that the balance of convenience tilts in favour of granting the orders sought. Further, she averred that the Defendants shall not suffer any prejudice if the application herein is allowed for reason that the infringed works belong to her. Finally, she deposed that it is in the interests of justice that the application be allowed.

5. In response, the Defendants filed a joint Replying Affidavit sworn on 8th April, 2021 by **ANDREW MUSYOKA**, a legal officer of the 1st Defendant. He averred that the injunctive orders sought ought not to be granted since the Plaintiff has not proved ownership over the song titled '**Rungu Rwa Ihiga**'. He stated that the song that the Plaintiff alludes to have infringed on her copyright is titled "**Athuri Mwiithie**" which is distinctively different in sound and form from "**Rungu Rwa Ihiga**".

6. He averred that there exists no copyright in favour of the Plaintiff in the song titled "**Athuri Mwiithie**" and hence her consent over the same was not required. He argued that the Plaintiff's claim as presented both in the present application and the instant suit does not disclose a *prima facie* case with a high probability of success. That the claim is vague, wide reaching and with zero chances of success. Further, he noted that the Plaintiff has not demonstrated what loss she has suffered and in any case, loss suffered from intellectual property can and has always been compensated by damages thus the Plaintiff's assertion that she will suffer irreparable damages is baseless, unsupported and unfounded both in fact and law.

7. In addition, he averred that the song by the Defendants titled **Athuri Mwiithie** was released on the You Tube Platform on or around the year 2015 but the song by the Plaintiff titled **Rungu Rwa Ihiga** was only uploaded in November 2020 at the time when the current suit was filed. In the Defendants' view, that alone is enough to demonstrate that the Plaintiff has not suffered any loss as alleged. Further, it was argued that owing to the plaintiff's lack of specificity in the averments in her Plaint and the application herein, the balance of convenience does not tilt in her favour as the onus is on her to prove that she has suffered loss and damages.

8. Additionally, it was contended that in the event of a dispute, every party ought to be granted an opportunity to be heard and their rights determined by a court of competent jurisdiction. Therefore, granting the orders sought will result to the Defendants being condemned unheard and goes against the laws of justice and the principles of natural justice. That in view of the foregoing, the Plaintiff has not met the threshold for grant of injunctive orders hence they pray that the application be dismissed with costs to the Defendants.

9. In response, the Plaintiff filed a Supplementary Affidavit sworn on 19th April, 2021 annexing a translated transcript of the audio of the song titled "**Rungu Rwa Ihiga**" as performed by her, a translated transcript of the video of the song titled "**Athuri Mwiithie**" as performed by the Defendants as well as a copy of a certificate of translation. She reiterated that the Defendants were aware or ought to have been aware that producing, distributing and performing her song titled "**Rungu Rwa Ihiga**" under the title "**Athuri Mwiithie**" without her consent amounted to copyright infringement since the said song is well known.

10. The application was canvassed by way of written submissions. The Plaintiff's written submissions are dated 19th April, 2021 whilst the Defendants' are dated 26th April 2021.

11. The Plaintiff was emphatic that she has a *prima facie* case for copyright infringement with a high probability of success as she has duly demonstrated that the infringing work is similar to her original work, a fact which the Defendants knew or ought to have known since her song is well known. She submitted that **Section 37** of the **Copyright Act** vests this honourable court with authority to issue the orders sought.

12. The Defendants on their part maintained that the Plaintiff does not have the copy right to the song, "**Athuri Mwiithie**" which is performed by the 1st Defendant's Men's Chorale. They submitted that prior to 11th November, 2020, there was no digital footprint of the Plaintiff's song "**Rungu Rwa Ihiga**" on You Tube or at all. In their view, the Plaintiff decided to upload the song just before filing the current suit so as to hoodwink the court that she has suffered damages from copyright infringement. They argued that the Plaintiff has failed to produce to the court the alleged sales, hire, distribution, performance, reproduction by the Defendants of her song to warrant the issuance of the orders sought.

13. They also submitted that the Plaintiff has failed to demonstrate to this court how the Defendants have benefited from the song Athuri Mwiithie. They argued that in any event, the Plaintiff acquiesced to any alleged infringement as there are many other productions and performances of the song by different entities on You Tube some of which preceded the Plaintiff's work.

14. Further, it was the Defendants' submission that the Plaintiff has failed to demonstrate that she has satisfied the conditions necessary for the grant of an injunction as set out in **Giella vs Cassman Brown & Company Limited (1973) EA 358**. They submitted that the Plaintiff has not established a *prima facie* case with a probability of success as no evidence of infringement by the Defendants or at all has been placed before the court. They stated that a scrutiny of both songs reveals a common phrase in Christianity where Christians desire to be hidden under the rock which is a depiction of Christ the Savior. They contended that there are at least seventeen verses in the Bible that mention Christ the Rock which the two songs have interchangeably used.

15. They relied on the case of **Dedan Maina Warui & Another v Safaricom Limited [2014] eKLR** for the position that, in the absence of oral evidence which can be tested by way of cross examination, it would be difficult to ascertain whether the Defendants have infringed on any intellectual property rights of the Plaintiff.

16. On whether the Plaintiff stands to suffer loss that cannot adequately be compensated in damages, they submitted that no evidence has been tabled before this Court to demonstrate that the Defendants have been selling or distributing the Plaintiff's work as alleged. They were emphatic that in any event, the law on intellectual property is that any loss suffered can and has always been compensated by damages. It was also their view that the balance of convenience tilts in their favour as there is no evidence by the Plaintiff to demonstrate the alleged infringement. In totality, they urged that the application be dismissed with costs.

Analysis and Determination

17. I have carefully considered the application, the Supporting Affidavit, the Replying Affidavit as well as the rival submissions by the parties. I find that there is only one issue for determination namely, whether the Plaintiff has established a case for the grant of the prohibitory and mandatory interlocutory injunctions sought.

Whether the Plaintiff has established a case for the grant of the prohibitory injunction sought

18. The Plaintiff maintains that the Defendants have infringed on her literary copyrighted work, a song titled "**Rungu Rwa Ihiga**" under the title "**Athuri Mwiithie**" by producing, distributing and performing the same without her consent. She has produced a translated transcript of the audio of her song titled "**Rungu Rwa Ihiga**" and a translated transcript of the video of the song titled "**Athuri Mwiithie**" as performed by the Defendants. A comparison between the translated transcripts of the two songs, which were accompanied by a Certificate of Translation, reveals an apparent similarity in the wording used in the two songs. The Defendants' song appears to be a case of copying and reproduction of the Plaintiff's work.

19. Further, the Defendants have not disputed the Plaintiff's contention that she secured a copyright registration of her song titled "**Rungu Rwa Ihiga**" and was issued with a copyright certificate number CR.000475 dated 26th January, 2011 in that respect. They have also not mentioned whether they have also secured any copyright registration in respect of their song titled "**Athuri Mwiithie**". What they are saying is that the Plaintiff has no copyright in their said song that would have warranted the seeking of her consent over the same. They claim that both songs have interchangeably used a common phrase in Christianity to the effect that Christians desire to be hidden under the rock which is a depiction of Christ the Savior.

20. The threshold for a temporary injunction is as set out in the case of **Giella v Cassman Brown & Co. Ltd [supra]** in which Spry, V.P (as he was then) that:

"The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."

21. In my considered view, the Plaintiff's certificate of copyright registration coupled with the fact that the Plaintiff has adequately demonstrated that the Defendants adapted her literary work leave no doubt in my mind that the Plaintiff has established a *prima facie* case. What constitutes a *prima facie* case was defined by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

"a prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

22. In this regard, I am persuaded by the case of **Nonny Gathoni Njenga & another v Catherine Masitsa & 2 others [2015] eKLR** where Ogola, J pronounced himself as follows:

"The Plaintiffs having secured copyright registration over the literary work and having shown that the Defendants adapted the said literary works in their Samantha bridal show, have established a prima facie case. The law under Section 22 and 23 of the Copyright Act expressly precludes everyone including the Defendants herein from in any way adapting the literary work of the Plaintiffs, into any subsequent work and deriving commercial gain therefrom without their consent."

23. As to whether the Plaintiff will suffer irreparable harm that would not be adequately compensated for in damages, I disagree with the Defendants submissions that any loss arising from infringement of intellectual property rights can and has always been compensated by damages. Under Section 35 of the Copyright Act, 2001, any person who copies or otherwise reproduces the work of another in which copyright subsists is guilty of infringement of that other person's copyright. Courts have been emphatic that damages cannot be regarded as an adequate remedy in instances where there has been a clear breach of the law. (See **Nonny Gathoni Njenga & another v Catherine Masitsa & 2 others [supra]**).

24. The instant case is a testament that the Respondents blatantly violated the law for their own benefits. It is not therefore a case in which it can be said that damages can adequately compensate the Applicant for infringement of the copyright.

25. In so holding, I further find solace in the case of **Waithaka v Industrial and Commercial Development Corporation [2001] eKLR** Ringera J (as he then was) pronounced himself thus:

"As regards damages, I must say that in my understanding of the law, it is not an insonorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust."

26. On the third limb, I find that the balance of convenience tilts in favour of the Plaintiff being that she is the registered owner of the copyrighted song titled "**Rungu Rwa Ihiga**" which the Defendants have now dubbed "**Athuri Mwiithie**". Further and in any event, the Defendants have not demonstrated any prejudice that they stand to suffer if the Plaintiff is granted the injunctive reliefs herein.

Whether the Plaintiff has established a case for the grant of an interlocutory mandatory injunction

27. The next issue is whether the Plaintiff has established a case for grant of mandatory injunction directing the Defendants to deliver to the court any copies, records and or performances of the song titled "**Rungu Rwa Ihiga**" but produced, distributed and or performed by the Respondents under the title "**Athuri Mwiithie**".

28. It is trite law that temporary mandatory injunction can only be granted in the clearest of cases and the likelihood of success of the case at hand must be higher than that which is required for a prohibitory injunction. This is because an interlocutory mandatory injunction may effectively determine a case without the benefit of a trial. For this reason, courts have been reluctant to grant mandatory injunctions at an interlocutory stage.

29. In the case of *Locabail International Finance Ltd v Agro-Export & Another (1986) ALL ER 901* the court set out the principles for the grant of mandatory injunctions as follows;

‘A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction’

30. In *Shepherd Homes Ltd v Sandahm (1971) 1 Ch 34*, Meggery, J. stated as follows on interlocutory mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the end of the action, the court will of course grant such injunction as the justice of the case requires, but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought to enforce a contractual obligation”.

31. I am inclined to apply the threshold set by the above cited cases. This is because, the court falls under the risk of determining the suit altogether at an interlocutory stage without the evidence of analyzing the evidence each party wishes to rely on. Furthermore, at the trial preparation stage, the parties will be at liberty to request from each the production of any documents they may need in support of their respective cases. This prayer therefore fails.

32. In the circumstances, the Plaintiffs’ Notice of Motion dated 28th October, 2020 is hereby allowed in terms of prayer 5 thereof with costs to the Applicant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST MAY, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Joseph Mwangi for the Plaintiff/Applicant.
2. Miss Mwangi for the for the Defendant/Respondents.