



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX**

**CIVIL SUIT NO. E170 OF 2020**

**BAUDRY EVRARD MALELA.....PLAINTIFF/APPLICANT**

**VERSUS**

**WHITESPACE TECHNOLOGIES LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for consideration is the Plaintiff's Notice of Motion dated 27<sup>th</sup> May 2020 brought under **Article 40 (5) of the Constitution of Kenya, Sections 1, 1A, 3, 3A & 63 (e) of the Civil Procedure Act Cap 21, Order 40 (1) (2) & (3) of the Civil Procedure Rules, Sections 3 (1) (2) (a) (i) (ii) & (b) (4) (5) of the Laws of Contract Cap 23, Sections 22, 26, 26A, 26B, 35, 35D (1), & (2)(a), (b) & (c) of the Copyright Act No. 12 of 2001 (Revised 2019), the Intellectual Properties Act** and any other enabling Laws. It seeks the following Orders:-

***i. THAT a Mandatory injunction is granted in favour of the Plaintiff/Applicant and against the Defendant/ Respondent its agent, assigns, servants and personal representatives restraining them from further utilizing, accessing, operating, the Information Technology Systems developed, controlled and/or maintained by the Plaintiff/ Applicant by disabling it until the main suit is heard and determined.***

***ii. THAT costs of this Application to be in the cause.***

2. The application is predicated on the grounds on the face of it and supported by an Affidavit sworn on even date by the Plaintiff herein. He deposed that in the year 2008, he came to Kenya on secondment by a company known as Metal & Market Limited in Turkey whereupon he undertook a diploma course in Business Administration from the Institute of Advanced Technology (IAT) Nairobi. Sometime in the year 2011 while working for the Turkey Company here in Kenya, he met with one of the Directors and Shareholders of the Defendant, one Mr. Ben Babu, who introduced him and engaged him as a Marketing/Sales officer to Regional Bargains Ltd, an affiliate of the Defendant dealing with marketing and ferrying timber products, on contractual basis.

3. On 15<sup>th</sup> November 2014, his employment with the Defendant was formalized as a Material and Logistics Officer after he had worked for the Defendant on voluntarily basis for more than 12 months without a salary to help lay the groundwork for the Defendant. His employment with the Defendant was on permanent and pensionable basis, subject to the renewal of the work permit by the Ministry of Immigration and as required by the Kenya Citizenship and Immigrant Act No. 12 of 2011 of the Laws of Kenya. He was tasked with handling all logistics issues, Heavy Machinery allocations, all telecommunications apparatus and their components of cable systems such as aerial, buried and underground cables of several projects like, the National Optic Fibre Backbone Infrastructure (NOFBI) passing through 58 towns in 35 counties across Kenya, Fibre to the home (FTTH) and Africa's first modern Safe city Systems installation and maintenance of 1800 HD cameras and 200 HD traffic surveillance systems.

4. On 16<sup>th</sup> November, 2014 while still on the above employment, the Defendant approached him on a totally different contractual and consultancy arrangement altogether. They indicated to him that they had applied for several tenders from different corporate entities but were using their personal accounts such as Yahoo and Gmail as their addresses and hence they stood no chance of being pre-qualified as suppliers on this basis. That although they had engaged their own information technology experts, they specifically wanted him to develop for them intensive, efficient and effective Information technology system acceptable at the International Standards, urgently.

5. Since they were people he knew very well and had worked with for such a long while, he agreed to assist them but on certain mutually agreed terms and conditions. From that time, he embarked on developing a very elaborate Information System for the Defendant which included: development of the website for the Company; development of the Logo for the Company; and creation of a Platform for the corporate email systems, username and password for the Company and all its 128 employees. The said Information Technology System was tested and it started working successfully from the year 2014. The Defendant has continued to use it and has obtained a lot of benefit from it however, the Plaintiff has been in control and ownership of the IT Systems and still continues to manage, coordinate and service it

accordingly.

6. He averred that for all these works, the Defendant was supposed to have paid him a sum of Kenya Shillings Two Million (Kshs. 2,000,000.00) but despite all efforts made, the Defendant had refused, neglected and failed to settle this outstanding sum. Instead, the Defendant has willfully decided to engage him on several side shows all intended to intimidate, threaten and molest him to give up from making the demand for this payment and also to abandon his quest for the ITS package. As such, if the orders sought herein are not granted, the Plaintiff's rights will continue to be infringed leading to financial loss hence it is to the interest of justice, fairness and equity that the same be granted.

7. In response, the Defendant filed a Replying Affidavit sworn on 26<sup>th</sup> June 2020 by **ROSE MWERU**, the Defendant's Head of Finance and Administration. She deposed that vide a letter of appointment dated 1<sup>st</sup> November 2014, the Plaintiff was employed by the Defendant as a Material and Logistics Office. The Plaintiff's duties as the Defendant's employee entailed handling of all Logistics issues, heavy machinery, telecommunication machinery and their component parts for the NOFBI (National Optic Fibre Backbone Infrastructure) Project, workshop management and assisting in handling additional projects on a limited basis such as Fibre to the home (FTTH).

8. She deposed that by the end of 2018, the NOFBI project started slowing down so much that by January 2019, there was very little work in the project where the Plaintiff was in charge of materials management. Further, that the contract for CCTV site relocations expired on 14<sup>th</sup> March, 2020. In view of the aforesaid, it was not viable to sustain the Plaintiff's position and thus the Defendant's management resolved to declare the same redundant following a meeting held on 4<sup>th</sup> March, 2020 in which the situation was explained to the Plaintiff.

9. This was followed by an internal memo dated 5<sup>th</sup> March, 2020 through which he was notified of the intended redundancy. Subsequently, vide a letter dated 3<sup>rd</sup> April, 2020, the Defendant terminated the Plaintiff's employment and informed him that all his terminal dues would be paid once he hands over his responsibilities and the Defendant's property. The Plaintiff was also asked to prepare a comprehensive hand over report and hand over materials and logistics, workshop management and Information Technology to other employees.

10. Further, she denied that the Plaintiff developed and owns the Defendant's IT System. She stated that he domain name is leased from Swiftweb Technologies Limited for Kshs. 930 which is paid by the Defendant. The website is also hosted by the same company who levy charges of Kshs. 5,700/=. In total therefore, the Defendant pays Kenya Shillings Six Thousand Six Hundred and Thirty (Kshs. 6,630.00) for the domain name and website hosting. That the Plaintiff is the contact person with Swiftweb in charge of receiving the invoices and forwarding them to finance for payment. The website is up and running and has not been disconnected for any unpaid invoices.

11. Further, she averred that the information contained in the website, the interface, the photographs are all copyright of the Defendant. That the Plaintiff was an employee of the Defendant and as such, any work he may have done on the website, if at all, was done in his capacity as an employee using the Defendant resources and not as alleged. She stated that the Plaintiff was never engaged by the Defendant as a consultant and to date, the Defendant has not received any invoice or fee note from the Plaintiff claiming fees for the IT services as alleged.

12. In addition, she noted that Clause 3(d) and (e) of the Plaintiff's letter of appointment are categorical that the Plaintiff was not entitled to receive any extra remuneration for work performed outside his normal duties unless otherwise agreed. That there was no such agreement to pay the Plaintiff Kenya Shillings Two Million (Kshs. 2,000,000.00) for any additional services.

13. On the issue of the Logo, she averred that the Plaintiff developed his own email signature being a three dimensional cube with photographs on the sides which is used by the Plaintiff alone. No member of staff uses the said email signature or logo. She stated that the Defendant's letterhead actually has a different logo consisting of a single dimension photograph.

14. On the basis of the foregoing, she argued that the Plaintiff has not established a prima facie case and hence should not be granted the interim orders as prayed. Further, that the balance of convenience tilts in favour of the Defendant in the given circumstances. She therefore urged that the application be dismissed with costs to the Defendant.

15. In rejoinder, the Plaintiff filed a Supplementary Affidavit sworn on 16<sup>th</sup> July 2020 stating that the Defendant's Replying Affidavit is too general, wild, extremely peripheral and bears unnecessary unsubstantiated statements which have no meaningful bearing to the issues at hand and/or subject matter but instead aimed at attacking his personal character, competence and performances while at the employment of the Defendant. He argued that the Defendant has over concentrated on the employer - employee contractual relationship and the issue of redundancy which is irrelevant, immaterial and baseless to the subject matter herein and thus should be disregarded by this Court.

16. He averred that the Defendant is not being truthful as it only seems to be selectively referring to only one of the numerous project activities he handled while on employment being the National Optic Fibre Backbone Infrastructure (NOFBI) project so as to justify a case of redundancy. He noted that the Defendant has carefully avoided mentioning that he was also handling and managing Material and Logistics for all Huawei related logistics projects. In his view, the Defendant is making a desperate attempt to dent his integrity and deny his huge contribution towards its growth and good reputation with its main client, Huawei.

17. He reiterated that he was the one who conceptualized, designed and developed the website and internet package and material being utilized by the Defendant. Further, that he is actually the Information Technology Consultant who is still controlling and maintaining the stated website, and he can disable it at will but has not done so for the sake of maintaining a good relationship and business reputation. According to him, the issue of whether the website has been scaled down or not is a side show, baseless, unfounded and misguided.

18. Further, he averred that the process of developing the website sequentially entailed the following: coding; knowledge on how to maintain and service it; graphic designs; uploading of data; and allowing users to access and view the data inherent on both website and email which he performed and has been maintaining and controlling it as captured in the Minutes of the meeting of 29<sup>th</sup> May 2018. That vide an email dated 30<sup>th</sup> May 2018 addressed to Mr. George, the Plaintiff raised a complaint that they had avoided to mention that he had developed the

website while recording the Minutes and this anomaly was later corrected contrary to the exclusive minutes which the Defendant is now relying on.

19. He noted that upon the development of the website which is already in use, there is a webhosting service provider to be identified whose role is hosting of the already developed website. He was categorical that at no single time has he ever claimed to have been the host of the website and the domain name as the same was done by an Independent webhosting Service Provider, Swiftweb Technologies Ltd. He argued that Defendant acknowledges that the website has added more credibility and value to its business capacity but paradoxically, is not saying who developed it. He reiterated that he is the only one with the Administrative Rights being the exclusive right to create, delete and modify items and settings on the website Corporate Email system of the Defendant. He is however aggrieved that the Defendant has been enjoying this right for over six (6) years without making any payments.

20. In his view therefore, he has been able to establish "*a prima facie*" case having been the one who conceptualized, developed and maintains the Information Technology system being used by the Defendant and hence has a claim on its copyright and payment. He also noted that he has suffered irreparable damage in terms of payment of dues and the balance of convenience tilts in his favour.

### **Submissions**

21. The application was canvassed by way of written submissions. The Plaintiff filed written submissions dated 16<sup>th</sup> July, 2020 whilst the Defendant's written submissions are dated 28<sup>th</sup> July, 2020.

### **Plaintiff' submissions**

22. The Plaintiff formulated five issues for determination which he submitted on as follows:

### **Whether Plaintiff conceptualized, designed and/or developed the website? If yes, whether he is the one managing and in control of it and hence entitled to the copyrights**

23. On this, the Plaintiff submitted that he is entitled to the copyright in the website since he is the one who conceptualized, designed and/or developed the same. The Plaintiff set out various definitions of Copyright and highlighted the statutory provisions on which his application is based. In particular, he cited Sections 26 of the Copyright Act for the position that copyright shall be infringed by a person who without the license of the owner of the copyright does or cause to be done and act the doing of which is controlled by the Copyright. He also relied on the Indian case of **S.K. Dult v Law Book Co & other AIR 1954 ALL 570** where the court stated that to sustain a claim for infringement of copyright, there must be a substantial infringement of the work and a mere fair dealing with any work falls, outside the mischief of the Copyright Act.

24. The Plaintiff also relied on the case of **Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 Others [2019] eKLR** where the Court of Appeal stated that copyright seeks to protect the expression and recorded content of someone's intellectual labours. It refers to the dealing with copyrighted material in a manner inconsistent with the copyright owner's interest.

### **Whether the Defendant engaged the Plaintiff to conceptualize, develop and design the website as part of his employment terms? If yes what were the terms**

25. On this, the Plaintiff reiterated that he was engaged as a Material and Logistics Officer and his job description is very clear on that aspect. He submitted that there is nowhere in his letter of employment where his responsibilities are noted to include Information Technology works. He was however emphatic that the Defendant requested him to develop and design the Information Technology systems for them on consultancy basis and he proceeded to do so as a copyright.

### **What was the consideration entitled to Plaintiff for the works that he undertook for the Defendant?**

26. On this, the Plaintiff submitted that he entered into an oral agreement with the Defendant to develop the IT systems and he was to be given an initial sum of Kshs. 2,000,000/= as evidenced by the correspondence and promise made in the minutes of 29<sup>th</sup> May 2018. Relying on the Principle of restitution, he argued that the Defendant has unjustly couched themselves from the Information Technology System developed by him at his own expenses hence his claim for equitable remedy. He asserted that it was at the point of demanding for his payment that the issues of declaring his employment role as redundant came up followed by termination of service. He stated that the Defendant declined to apply for his work permit technically exposing him to threats of deportation to his country.

27. Further, the Plaintiff submitted that though the Defendant made a promise and have enjoyed its legal aspects, they are now reverting which made him seek redress from this Court. He relied on the case of **Benjamin Airo Shiraku v Fauzia Mohammed HCC 272 of 2011** where the Court held that:-

***“Where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his work and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him but he must accept the legal relations subject to the qualification which himself has so introduced even though it is not supported in point of law by consideration by only by his word”.***

### **Whether Plaintiff is entitled to the injunctive orders sought**

28. On this, the Plaintiff submitted that he has met the conditions for the grant of temporary injunctions as set out in the case of **Giella v Cassman Brown (1973) EA 368**.

29. On whether he has established a prima facie case with a probability of success, he reiterated that he has adequately demonstrated that he conceptualized, developed and scaled up the whole Information Technology systems being utilized by the Defendant at its request and still controls and maintains the same to date. On whether damages may be an adequate remedy, he submitted that although he was engaged on implied contract terms, the same should not be confused as being part of his actual employment terms since he is entitled to a sum of Kshs. 2,000,000.00 that was agreed on with the Defendant. As regards the balance of convenience, he submitted that instead of the Defendant compensating him for the good work; it opted to inconvenience him further by issuing with a letter of termination of service dated 5<sup>th</sup> March, 2020 thus the balance of convenience lies in granting the orders as prayed.

**Who will bear the cost of this Application and suit?**

30. On this, the Plaintiff submitted that costs follow the events and that from the inferences in this matter; it is the Defendant who should bear the costs of the instant application.

**Defendant's submissions**

31. On the Defendant's part, it was submitted that that the plaintiff has not established a case that warrants an injunction to restrain the Defendant from utilizing the website for the following reasons:

**i. The Plaintiff has not established a prima facie case with a probability of success**

32. The Defendant submitted that the Plaintiff has not met the threshold for a prima facie case as was discussed in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**.

33. First, it was argued that the Plaintiff was an employee of the Defendant and Clause 3 of the plaintiff's contract of service provides inter alia that he was to undertake such duties as the company would from time to time assign to or vest in him and perform such services for subsidiary and associated companies of the Company without further remuneration unless otherwise agreed. This means that aside from the plaintiff's normal duties as a Material and Logistics Officer, the Defendant would assign the plaintiff other additional duties and those additional duties would not attract any additional remuneration unless there was a prior agreement on the above. It was submitted that this is an express contractual term to which no oral evidence can be adduced to vary/amend/modify the contract of service.

34. It was also submitted that the alleged oral contract between the Plaintiff and the Defendant is an attempt to introduce extrinsic evidence to vary the terms of a written contract contrary to Section 97 of the Evidence Act (Chapter 80 Laws of Kenya). The Defendant relied on the case of **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR** where the court held that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms.

35. It also relied on **Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005** where the Court citing a passage in Odgers Construction of Deeds and Statutes (5<sup>th</sup> edn.) at p.106 emphasized that in construing the terms of a written contract; "It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument.

36. The Defendant argued that besides, it is trite law that parties cannot imply terms into a contract where there are express terms on the same; more so when the implied terms contradict the express written term. In support of this, it relied on the case of **Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security Services & another (2013) eKLR**. In its view, the Plaintiff is asking this Court to imply additional terms into the contract whereas it is trite law that a court of law cannot rewrite a contract between parties unless coercion, fraud or undue influence are pleaded and proved as was settled by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR**.

37. Secondly, the Defendant submitted that the copyright in the website and emails vests in it since the Plaintiff was its employee who from time to time, was additional duties to create email addresses and manage the Defendant's website <http://www.whitespacelte.com/>. It was asserted that save for the creation of email addresses, there is no evidence where the Defendant asked the Plaintiff to develop the website or the logo and that the only evidence adduced by the Plaintiff seems to point to management of the website rather than website development which cannot vest copyright in the website and the email addresses on the Plaintiff.

38. The Defendant further argued that nonetheless, if it is true that the Plaintiff did indeed develop the website (*which fact has not been proved*), it is trite that where the works under copyright are developed by an employee, the copyright will vest in the employer who is the Defendant. The rationale for this is that such works are developed using the Defendant's resources which includes but is not limited to official working hours spent in designing the website, Defendant's equipment such as computer hardware, internet and electricity. In addition, such works would be undertaken under the direction and supervision of the Defendant being the marketing tools for the Defendant. It is therefore impossible for the works to be the original work of the plaintiff. Equally, the utility of the website and the emails are tested using the Defendant's other employees.

39. The Defendant submitted that the above position is captured under Section 31 of the Copyright Act (Act No. 12 of 2001) which is clear that where the author or creator of works is an employee and the works under the copyright regime are developed in the course of the employment, the copyright for such works will vest in the employer unless there is an agreement between the employer and employee limiting the transfer of copyright. In its view, the Plaintiff has not demonstrated that there was an agreement stipulating that the copyright in

the website, emails and logo will vest in him; or that the website, emails and logo were not developed in the course of employment.

40. Thirdly, it was the Defendant's submission that promissory estoppel which the Plaintiff sought to rely on is not applicable in the present case. It submitted that the principle of promissory estoppel does not create new causes of action when none existed before; it is a shield and not a sword. It argued that the principle of promissory estoppel is to be employed to obviate the necessity for consideration in cases where parties are already bound contractually and one party promises to modify, waive or suspend its strict legal right. In support of this, it relied on the English case of **Combe v Combe (1951) 2 KB 215** and Paragraphs 1084 and 1085 of **Halsbury's Laws of England on Estoppel (VOLUME 16(2) (REISSUE))**.

41. It contended that the Plaintiff has not led any evidence to show that the Defendant made a promise to pay him the sum of Kshs. 2,000,000/= claimed or any other amount. That prior to the demand letter dated 17 March 2020 in which the Plaintiff demands for Kshs. 8,000,000/=, the Plaintiff had never sent the Defendant an invoice for developing the website, email addresses or logo. According to the Defendant, he only began to demand for astronomical amounts only after the Defendant notified him of the impending redundancy through their letter of 5 March 2020. It stated that the minutes for the redundancy meeting held on 4 March 2020 do not show any promise to pay the Plaintiff Kshs. 2,000,000/= and the Plaintiff has not even annexed the updated minutes showing that he is owed any monies by the Defendant.

***i. Damages are an adequate remedy***

42. On this, it was submitted that even if the Plaintiff demonstrates that he has a prima facie case, he must climb over the next hurdle being that he shall suffer irreparable harm and that damages are not an adequate remedy before the court can consider granting an injunction in his favour as stated by the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR**. The Defendant submitted that the Plaintiff has also failed to satisfy this second major criterion for obtaining an injunction. It stated that there is no irreparable loss in this case because the Plaintiff has readily quantified his claim at Kshs. 2,000,000/= and that in any case, the Defendant is a reputable company capable of meeting awards of damages.

43. It was contended that on the other hand, the Defendant will suffer irreparable loss if the injunction orders are granted since an injunction will effectively deny the Defendant the much needed online presence which helps the Defendant interact with and offer services to clients especially during this Covid-19 pandemic which has limited human contact. Additionally, that the website builds the Defendant's credibility even more because the Defendant is a technology company and loss of exposure and credibility cannot be compensated in terms of damages

***i. The balance of convenience tilts in the Defendant's favour***

44. The Defendant submitted that the balance of convenience tilts in its favour since by virtue of Section 31 of the Copyright Act, the copyright in the website, the emails and the logo vests in it. The Defendant, being a technology company relies on the website to establish an online presence for clients. The email addresses maintained by the Defendant enable the Defendant to interact with clients. This goes to show that the Defendant will be unduly prejudiced if an injunction is issued restraining the use of the website and the email addresses. The prejudice to be suffered by the Defendant if the injunction is granted will be greater than the prejudice to be suffered by the Plaintiff if the injunction is denied.

45. In view of the foregoing, the Defendant urged that the Plaintiff's Application dated 27<sup>th</sup> May 2020 lacks merit and should be dismissed with costs.

**Analysis and Determination**

46. I have carefully considered the Plaintiff's application, the Replying Affidavit filed by the Defendant as well as the submissions filed by both parties. The main issue for determination is whether the Plaintiff is entitled to the injunctive orders sought.

47. The granting of an interlocutory injunction is an exercise of judicial discretion which discretion has to be exercised judicially. The principles for the grant of interlocutory injunctions were set down in the case of **Giella v Cassman Brown Limited (supra)** as follows:

***“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.”***

48. In **Nguruman Limited v Jan Bone Nielsen and 2 Others [2014] eKLR**, the Court of Appeal added that:

***“...all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially....If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.***

49. Has the Plaintiff established that he has a prima facie case against the Defendant with probability of success? 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.”***

50. In the instant case, the Plaintiff claims that sometime in 2014, the Defendant requested him to develop and design an Information Technology system and/or website for it on consultancy basis. Accordingly, he conceptualized, designed and developed a very elaborate IT System and/or website for the company which the Defendant at an agreed sum of Kshs. 2,000,000/= but has never paid him the agreed consideration. He claims that the Defendant has been using the website since 2014 and has obtained a lot of benefit from it but it is him who has been in control and ownership of the IT System and still continues to manage, coordinate and service it accordingly.

51. In my considered view, the issues raised by the Plaintiff regarding the existence of an oral contract and alleged infringement of his copyright in the website in question go to the root of the matter and will require evidence to be adduced in support thereof. Indeed, it suffices to note that no evidence has been tendered to show, on prima facie basis, that the website was conceptualized, designed and developed by the Plaintiff herein. Be that as it may, I will not interrogate the issues raised by the parties at this point to avoid embarrassing the determination that may be made upon hearing the merits of the case. I therefore find that the Plaintiff has not established a *prima facie* case with probability of success hence it is not necessary to consider the other limbs of irreparable injury and balance of convenience.

52. The upshot is that I decline to grant the injunctive orders sought and hereby dismiss the Plaintiff’s Notice of Motion dated 27<sup>th</sup> May, 2020. The costs shall abide the outcome of the main suit. I order that parties proceed to prepare this matter for hearing of the main suit. It is so ordered.

**DATED AND DELIVERED IN OPEN COURT THIS 22<sup>ND</sup> JULY, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Macharia h/b for Rono for the Plaintiff/Applicant.*

2. *Kuloba h/b for Rimoi for the Defendant/Respondent*