Ivusa v Safaricom Limited (Civil Case E562 of 2021) [2021] KEHC 280 (KLR) (Commercial and Tax) (25 November 2021) (Ruling)

Neutral citation: [2021] KEHC 280 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E562 OF 2021

WA OKWANY, J

NOVEMBER 25, 2021

BETWEEN

DAVISON IVUSA ..... PLAINTIFF

AND

SAFARICOM LIMITED ..... DEFENDANT

RULING

1. Through the Plaint dated 20th April 2021 the Plaintiff herein, Davison Ivusa, sued the Defendant seeking the following orders: -

    a) An order restraining the Defendant by itself, it's servants, its agents, its workers, assigns and/or any persons claiming through it, from using, causing to be advertised in the print and electronic media or any other form of media the product titled or bearing the name 'SAFARICOM REVERSE CALL FEATURE'

    b) Damages for breach of trust and passing off the Plaintiff's mark.

    c) Damages for loss of business and income.

    d) Costs of the suit.

2. A summary of the Plaintiff's case is that on or about 10th May, 2010 he approached the Defendant with a proposal christened 'JICHOMOE' which detailed a concept aimed at ensuring that the defendant's customers' calling habits are not limited by their financial capabilities/circumstances. He states that the proposal explained, in detail, how the concept, if adopted, would ensure a caller in distress is still able to communicate by transferring the calling charges to the recipient.

3. The Plaintiff's case is that his proposal was not acted upon by the defendant and remained pending despite numerous promises, from the Defendant, that it would be considered after which the plaintiff would be notified of once a decision was made.

4. The Plaintiff claims that on 18th June, 2019, the Defendant illegally launched the idea contained in his jichomoe proposal by renaming and passing it off as 'SAFARICOM REVERSE CALL FEATURE' without his consent and contrary to the promises that the defendant had made through various correspondences. The launching of the defendant's reverse call feature precipitated the filing of this suit.

5. Contemporaneously with the plaint, the Plaintiff filed the application dated 21st April 2021 which is the subject of this ruling.

Application

6. Through the application dated 21st April 2021, the Plaintiff/Applicant seeks the following orders: -

   a. That a temporary injunction do issue restraining the Defendants whether by themselves, their servants and/or agents to forthwith cease trading, promoting, advertising, marketing, carrying on business and/or any other trade documents of any nature with the said product name inter alia SAFARICOM REVERSE CALL FEATURE or in any way dealing in any other way howsoever with the product SAFARICOM REVERSE CALL FEATURE pending the hearing and determination of this suit.

   b. That an order be issued directing the Defendant to avail full statements of account on the income generated from the Safaricom Reverse Call Feature from 18th June, 2019 to the date of filing of this case.

   c. Costs.

7. The application is supported by the applicant's affidavit and is based on the main grounds that: -

   i. The Applicant approached the Defendant with a proposal which detailed a concept aimed at ensuring its customers calling habits are not limited by their financial capabilities/ circumstances.

   ii. The Defendant took in under consideration the proposal which explained in detail how the concept if adopted would ensure a caller in distress is still able to communicate by transferring the calling charges to the recipient.

   iii. The said proposal remained pending at the Defendant's offices with numerous promises from the Defendant that the same was still under consideration and that the Plaintiff would be notified as soon as a decision, on whether the Defendant would be interested in the concept or not, is reached, a position that cultivated trust in the Plaintiff.

   iv. On the 18th June, 2019 in a widely broadcasted launch, the Defendant illegally launched the Plaintiff's idea without any prior consultation with the Plaintiff as promised in the various correspondences.

   v. Since the said launch the Defendant has failed and or refused to engage the Plaintiff with regards to his proposal vis a vis the launched product that had all the similarities to the Plaintiff's proposal.

vi. The Plaintiff is bound to suffer immense loss and damage if this matter is not heard and determined expeditiously.

vii. The Plaintiff now seeks this Honourable Court's intervention as his rights are being violated by the Defendants.

8. The Defendant/Respondent opposed the application through the Replying Affidavit of its Legal Counsel-Technology & Corporate Centres, Ms. Doreen A. Ochodo who states that as the leading provider of converged communications solutions in Kenya the Defendant invests heavily in creating solutions and improving voice usage by its customers. She states that the Defendant identified its business challenge whereby a majority of its customers were unable to complete their calls due to lack of airtime. She adds that the challenge led to the initiation of a proposal dated June, 2018 dubbed 'Reverse Call Service' to enable the Defendants subscribers reverse or collect a call and complete their calls when they had insufficient airtime by allowing the 'called party' to pay for the call instead of the initiator 'calling party'

9. Ms. Ochodo avers that the Defendant's commercial objective was to increase the proportion of completed calls through reverse calls which would allow the called party to pay for an initiated call in cases where the calling party had no funds hence growing outgoing voice outage and revenue. She confirms that the Defendant launched the Reverse Call Service on 26th April, 2019 but adds that the Reverse Call Service is neither unique to the Plaintiff nor is it his original concept or idea as the said service existed even before the advent of the mobile telecommunications service providers in Kenya. She further contends that with the advent of mobile telecommunications service providers in Kenya, sometime in 2012 Yu Mobile Kenya at the material time launched a reverse call charge service dubbed 'Pay4me-6565' which would enable its subscribers to make calls even with zero balances at the expense of the recipient.

10. The Defendant contends that it was aware of the existence of the reverse call service and that through email dated 19th August, 2010 the Plaintiff informed the Defendant that he wished to extend assistance regarding the new concept that had been introduced by Zain at the material time, now Airtel Kenya Ltd. Through the said email, the Plaintiff indicated that his proposal would take Zain's concept a notch higher and attached his proposal titled 'Jichomoe' which he perceived as an addition to Zain's concept and encouraged Safaricom to apply the same so as to have an advantage over its competitor, Zain at the material time.

11. The Defendant maintains that the Plaintiff has not adduced evidence to show that he expended sufficient and independent effort in developing Jichomoe concept so as to give it an original character that could entitle him to copyright protection. It maintains that its Reverse Call Service is fundamentally different from the Plaintiff's Jichomoe concept in many aspects and that arising from the said differences, the Defendant did not copy the Plaintiff's Jichomoe concept in developing its Reverse Call Service or at all.

12. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the application meets the threshold set for the granting of orders of injunction.

13. The principles governing the granting of orders of injunction were settled in the case of *Giella vs Cassman Brown (1973)*. Under the said conditions, applicants for injunctive orders is required to demonstrate that: -

a. They have a prima facie case with a probability of success;

b. That, if the orders sought are not granted he stand to suffer irreparable loss that cannot be compensated with damages; and

c. If the court is in doubt about these requirements, then it must decide on a balance of convenience.

(i) (i) Prima facie case with a probability of success.

14. What amounts to a prima facie case was discussed by the Court of Appeal in *Mrao vs First American Bank of Kenya and 2 others, (2003) KLR 125* which was cited with approval in *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR*, as follows: -

> " A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later..."

15. In Showind *Industries vs Guardian Bank Limited & Another (2002) 1 EA 284* it was held that: -

> " .....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

16. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012*, the Court stated as follows regarding the importance of satisfying all the three conditions for the granting of orders of injunction: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> a) establish his case only at a prima facie level.
>
> b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established 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. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86*. 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." (Emphasis added).

17. Applying the above principles to the present case, I note that the gist of the plaintiff's case is that the defendant the illegally launched his idea/proposal christened 'Jichomoe reverse call concept' without his consent and passed off the idea as their own thus grossly violating his rights.

18. The defendant, on the other hand, maintained that the reverse phone call concept is not a novel idea that was first invented by the plaintiff. The defendant argued that the reverse call application existed long before the advent of mobile telephone service and was in use by other mobile phone service providers before the plaintiff came up with the jichomoe concept.

19. The defendant submitted that Copyright law protects the author's actual expression and not the ideas of an author. They added that a party claiming breach of copyright is required to demonstrate that the material in an earlier copyright work is found in a later work and that the author of the later work had access to the earlier work wherein an inference of copying may be raised. According to the defendant, this means that if the copyright work in question is a literary work, the allegation will normally be that part of the text of the earlier work was copied, exactly or with some modification, in the creation of the later work.

20. The defendant contended that ideas expressed by a copyright work may not be protected if they are not original. Reference was made to the decision in *Baigent and Leigh vs. The Random House Group Ltd [2007] EWCA Civ. 247* where the Court of Appeal cited the case of Designers' *Guild Ltd vs. Russell Williams (Textiles) Ltd [2000] 1 W.L.R. 2416* and stated as follows: -

> If it is found that any of the material common to both works was copied from the earlier work, then the question arises whether what was copied was a substantial part of the earlier work.
>
> The point was mentioned by Lord Hoffmann in the House of Lords in D*esigners' Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416, at paragraph 24, which concerned artistic copyright:
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> "there are numerous authorities which show that the "part" which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to have been copied in this case. Or to take another example, the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work."
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> Lord Hoffmann addressed the point usefully in paragraphs 25 and 26 as well:
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> "25. ... The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work.
>
> ...
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> 26. Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented."
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> Lord Scott made a similar point at paragraph 64, quoting first a test proposed in Laddie, Prescott & Vitoria, The Modern Law of Copyright, to determine whether an altered copy constitutes an infringement:

"Has the infringer incorporated a substantial part of the independent skill, labour etc contributed by the original author in creating the copyright work?'

21. My finding is that having regard to the facts of this case, the copyright law and the decision in the above cited case regarding protection accorded to original copyright works, it is not possible for this court to determine, at this interlocutory stage, the claim that the defendant copied the plaintiff's works. I find that the decision on whether or not the defendant's reverse call telephone service is copied directly from the plaintiff's work can only be determined after the full hearing where the details of the works can be unpacked through expert evidence. This court is also alive to the fact that orders for injunction should be issued sparingly and only in exceptional circumstances in order to preserve the subject matter of the case such as where the applicant's case is very strong and straight forward.

22. I note that the plaintiff's case cannot be said to be straightforward in the face of the undisputed claim that the reverse call telephone service was in existence long before the plaintiff came up with his jichomoe concept. I am therefore not satisfied that a prima facie case has been established so as to warrant the granting of the injunctive orders sought.

23. Having found that a prima case has not been established, I find that it will be pointless to belabor the remaining three conditions for the granting of order of injunction considering that all the three conditions listed in the Giella case have to be met sequentially. I am however still minded to consider if the plaintiff will suffer irreparable loss unless an order of injunction is granted and if the balance of convenience tilts in his favour.

24. *Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352* discussed irreparable loss as follows that: -

> " It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"
>
> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance,"[Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

25. From the applicant's plaint it is clear that the orders sought are for injunction to stop the defendant from using the reverse call feature, damages for breach of trust and loss of income. In my considered view the prayers sought disclose that the harm, if any, suffered by the plaintiff is quantifiable and can be remedied by way of damages should his case be successful.

26. Regarding balance of convenience, I note that the plaintiff filed this suit in April 2021 while the defendant launched the contested reverse call service in June 2019. This means that the telephone service had been in use for over 2 years as at the time the suit was filed in which case, it goes without saying that many of the defendant's clients have adopted it as their preferred manner of making phone calls. Considering the period that the contested telephone service has been in use, I find that the balance of convenience does not tilt in favour of granting the orders of injunction as such an order will affect parties who are not participants in this case.

27. In sum, I am not persuaded that the application dated 21st April 2021 meets the threshold set for the granting of orders of injunction. The application is therefore dismissed with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 25th day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Adoli for the Plaintiff/Applicant.

Ms Leila for Kiche for Respondent

Court Assistant: Margaret