



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 231 OF 2011**

**JACK J KHANJIRA**

**JOASH N MORURI.....PLAINTIFFS**

**VERSUS**

**SAFARICOM PLC.....DEFENDANT**

**RULING**

1. This ruling is in respect of the defendant's notice of preliminary objection dated 27.11.2019 in which the defendant/applicant challenges the jurisdiction of this Honourable court to hear and determine the matters forming the cause of action set out in the further amended plaint dated 3<sup>rd</sup> October, 2019.

2. The preliminary objection is premised on the ground that the proper forum for determination of the issues arising therefrom is the Industrial Property Tribunal established under Section 113 of the Industrial Property Act No. 3 of 2001 and the jurisdiction of the high court is appellate in accordance with section 115 of the said Act.

3. In the further Amended plaint dated 3<sup>rd</sup> October, 2019, the plaintiffs, who are joint authors of a project entitled "**Chemichemi na Safaricom**" have sued the defendant, a limited liability company operating a mobile money transfer business among others, claiming that they forwarded to the defendant a proposal titled "chemichemi na Safaricom," and the same was "hijacked" by the defendant through its product named "**M-Kesho**" hence allegedly breached their intellectual rights.

4. On 2<sup>nd</sup> December, 2019 the parties agreed to dispose of the applicant/defendants' notice of preliminary objection via written submissions and the court issued directions in that regard. The defendant/ Applicant filed their submissions on 5<sup>th</sup> December, 2019 while the respondents filed theirs on 10<sup>th</sup> December, 2019.

**SUBMISSIONS BY THE DEFENDANT APPLICANT**

5. Mr Ohaga, learned counsel for the defendant submitted that the plaintiffs' suit is for an alleged infringement of intellectual property invented by the plaintiff's and presented to the defendant, who allegedly, fraudulently utilized the same in breach of the plaintiffs' right of ownership. Therefore, the proper forum for adjudication of the present dispute is the Tribunal established under the Industrial Property Act No.3 of 2001. Counsel further submitted that a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied, and the court cannot confer itself jurisdiction.

6. Counsel also submitted that the plaintiffs' suit was bad in law for violating the doctrine of exhaustion of available remedies, as section 113 of the Industrial Property Act has established a tribunal, which is empowered to deal with disputes relating to innovations, inventions and infringements similar to what the plaintiffs are claiming against the defendant. Further, Section 115 of the Act gives the High court appellate jurisdiction to determine matters where parties are aggrieved by the decision of the tribunal.

**SUBMISSIONS BY RESPONDENTS/PLAINTIFFS**

7. Learned counsel for the plaintiffs on their part submitted that this court's jurisdiction is unfettered in both civil and criminal matters and therefore it should not down its tools as the plaintiffs' suit is rightly before it. Further, counsel submitted under section 32 (3) of the Copyright Act, 2014, the author has the right to seek relief in connection with any distortion, mutilation or other modifications of and any other derogatory action in relation to his work, where such work would be or is prejudicial to his honour or reputation.

8. Counsel further submitted that the plaintiffs' suit has nothing to do with patents or utility model or an industrial design and therefore it has no business being referred to the Industrial Property Tribunal since the copyright Act governs the plaintiff's claim. For authority, the plaintiff relied on the case of **Faulu Kenya Deposit taking Microfinance Limited V Safaricom Limited ( 2012) e KLR** where it was held as follows:

**“I do not consider that the Industrial Property Tribunal is the correct forum for the adjudication of this dispute. This court has unlimited jurisdiction and, to my mind, it is the proper place for the plaintiff to air its grievances.”**

9. Counsel also submitted that the court of Appeal acknowledged the jurisdiction of this court to determine the matter hence the application facing it is baseless as the doctrine of exhaustion is inapplicable to the respondent/Plaintiff.

10. I have considered the preliminary objection, the written submission by both parties, statute and cited laws. In this matter the issue for determination is whether the grounds of the preliminary objection are merited.

#### **ANALYSIS AND DETERMINATION**

11. It is trite law that jurisdiction is everything. Without it the court has no power to make one more step, as held in the case of **Owners of Motor vehicle Lillian ( “S”) Vs Caltex Oli (K) Limited ( 1989) 1 LKR**. Indeed where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, the court must determine the issue of jurisdiction at the outset.

12. For a Preliminary Objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The salient features of a valid preliminary objection were reiterated in the case of **Oraro v Mbaja ( 2005) e KLR**, where Ojwang J ( as he then was ) stated:

**“ I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as , and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. any assertion which claims to be a preliminary objection and yet bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr Ouguo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point”.**

13. I have gone through the plaintiffs' further Amended plaint on the 3.10.2019. At paragraph 7 of the said further amended plaint, it has been stated as follows:

**“Without the plaintiffs consent, the defendna infringed the plaintiff's' moral right not to be identified as the author of the said literarily works by commercially publishing the works after such assertion of right without identifying the plaintiffs as the author of the project”.**

It is clear from this pleading that the plaintiffs' claim is that the defendant has infringed on their literary works by commercially publishing the work without identifying them as the authors.

14. The Preambles of **The Copyright Act and The Industrial Property Act** pave clearly summed up the area subject to each. The preamble to The copyright Act, 2014 provides that;

**“ An act of Parliament to make provisions for copyright in literary, musical and artistic works, audio visual works, sound recordings, broadcast and for connected purposes”**

The Industrial Property Act, No 3 of 2001 preamble provides that:

**“ An act of Parliament to provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs to provide for the establishment, powers and functions of the Kenya Industrial Property Institute and for purposes incidental thereto and connected therewith”.**

15. Clearly, there is a distinction as to what the two statutes intend to serve. The interpretation of “literary work “ is provided for under section 2 (1) of the Copyright Act as follows:

“Means irrespective of literary quality any of the following or work similar thereto;-

(a) novels , stories and poetic;

(b) plays, stage directions, film sceneries, and the broadcasting scripts;

(c) textbooks, treaties , histories biographies, essays and articles;

(d) encyclopedias and dictionaries ;

(e) letters , reports and memorandum;

(f) lectures, addresses and sermons;

(g) charts and tables ;

(h) computer programs and

(i) tables and compilations of data including tables and compilation of data stored and embodied in a computer or a media used in conjunction with a computer but does not include a written law or a judicial decision”

16. I have also perused the plaintiffs’ proposed project, which was surrendered to the defendant and which is contained in the supporting exhibits. It is my view that the plaintiffs’ proposed project is not registered either as a patent, a utility model, a technovation or and industrial design. From the accompanying documents, it is quite clear that the plaintiffs have not made any application to be registered as patent owners under section 34 of the Industrial Property Act. Therefore, it is only where a party is so registered that the provisions of Section 106 Industrial Property Act come into play ( **See Faulu Kenya Deposit Taking Microfinance Limited V Safaricom Limited ( Supra)**).

17. I agree with the defendant’s counsel’s submissions that specialized tribunals have the technical expertise, resources and capacity to handle disputes presented before them and this makes the process expeditious and affordable. Unfortunately, under the Copyright Act, no specialized tribunal has been created to deal with copyright disputes plaintiff’s claim falls under the definition of literary works as provided for under Section 2 of the Copyright Act. And for this reason, I do not consider that the Industrial Property Tribunal is the correct forum for the adjudication of this dispute as Section 32 (3) and 35(4) (a) of the Copy right Act provides as follows:

**“ 32 (3) the author has the right to seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work where such work would be or is prejudicial to his honour or reputation.**

**35 (4) Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for infringement the following reliefs shall be available to the plaintiff**

**(a) the relief by way of damages , injunction, accounts of otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights;**

**(b)damages or**

**(c) any other remedy provided for in law.**

18. In the upshot, I find and hold that this court has unlimited jurisdiction and in my view, is the proper place for the plaintiff to air its grievances. Consequently, I dismiss the defendant’s preliminary objection dated 27.11.2019 with costs to the plaintiff.

**Dated, delivered and signed at Mombasa this 27<sup>th</sup> February, 2020**

**D. O. CHEPKWONY**

**JUDGE**