



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 552 OF 2009

CHRISTOPHER N. OMARE AND MICHAEL OTACHI

T/A OMARE AND PARTNERS..... PLAINTIFF

- VERSUS -

SAFARICOM LIMITED.....DEFENDANT

JUDGMENT

1. The evidence before me in this case calls upon me to determine the issue whether the defendant, Safaricom Limited, infringed the copyright of Christopher Omare and Michael Otachi t/a Omare & partners, the plaintiffs.

2. It is the plaintiff's case that they had title to ownership of a mobile telephone programme which would enable a subscriber to the mobile network to obtain emergency air time credit in Kenya Shillings. They called this Emergency Credit Service (ECS). The purpose of ECS was to provide emergency credit air time to subscribers who might have been :

- Travelling and run out of air time;
- Be in an area where airtime cannot be obtained;
- Require to make an emergency call at night; and
- Those who might not wish to buy in available outlets credit for as little as Ksh 50/- of Ksh 100/=

3. It is not denied by the defendant that the plaintiffs on or about 23rd November 2006 forwarded their written proposal of the ECS. The defendants forwarded to the plaintiffs an indemnity form, for their signature, relating to that written proposal.

4. It is the plaintiff's case that the defendant failed to respond to that proposal and in March 2009 the defendant launched into the market a product called "*Okoa Jahazi*" which allowed its subscriber to access emergency airtime. The plaintiffs pleaded, in their plaint, that that product of the defendant was based on the ideas of the plaintiff contained in the plaintiff's proposal. The plaintiff has claimed that it suffered damage as a consequence of the defendant's infringement of their copyright. They therefore seek judgment for unspecified amount.

5. The plaintiff's case is denied by the defendant who stated, through the evidence of Daniel Ndaba a Principal In House Counsel of the defendant, that the defendant, prior to receiving the plaintiff's proposal, had in its possession and knowledge the concept by virtue of learning about it from Vodafone operators, such as Vodafone Spain. He further stated that the concept was in use in India, Egypt and Spain by the time the plaintiffs presented their proposal. The defendant presented documents such as emails to prove their dealing with the concept before they obtained the plaintiff's proposal. It is important to note that the plaintiff's learned counsel did not cross examine the defence witness on this evidence and the court will therefore take that evidence as not contested by the plaintiff. It will be considered as admitted by the plaintiff.

6. Although copyright law is intended to protect the rights of the author which in turn encourages creativity it is important to note that if the plaintiff's work is "sufficiently general the mere taking of that idea will not infringe" see the book Copinger and Skone James on Copyright.

7. The plaintiff's proposal is so general that even if the defendant took that general idea they cannot be said to have infringed. The plaintiff's proposal simply states that mobile subscribers can be given emergency airtime, by the mobile services provider which would then give the mobile provider a return. Apart from these general statements the proposals bears no other details of how that concept could be worked out.

8. Further it ought to be noted that the plaintiffs proposal was not original and this is confirmed by the plaintiffs themselves in their proposal, where they stated:

“We are informed that Lesotho is one countries that has succeeded in a similar venture.”

9. The plaintiff’s claim is therefore to be rejected for lack of originality in that the plaintiff knew of the concept being used in Lesotho. The question that the plaintiff did not address is how much of Lesotho’s concept the plaintiff copied in the proposal.

10. The plaintiff’s claim would also fail because the plaintiffs failed to plead the infringement they alleged against the defendants. Other than pleading that the defendant’s concept is based on their idea the plaintiff did not specify what the infringement was. As I have found, the plaintiff’s proposal was very general. A case in point, is a Canadian case, namely **Close Up International Ltd. v. 1444943 Ontario Ltd., 2006 CanLII 32925 (ON SC)**.

“On the other hand, the defendants also argue that the pleadings lack sufficient particulars to which they are entitled especially in a copyright action. In particular the proposed pleading does not state which films were allegedly reproduced and sold for profit. This is the real problem with paragraph 37 as well as paragraphs 38 and 40 which allege sale of the films in improper packaging. Although in paragraph 37 the plaintiff adds that “the extent of the Defendants’ infringing activities is known to the Defendants and not the Plaintiffs” the plaintiff must still provide sufficient particulars that are within its knowledge as to the films unlawfully sold and the specific trademark infringed so as to sufficiently define the issues and so as to allow the defendants to marshal their defences.” (Emphasis mine)

11. The defendants have provided a chart featuring their concept and the plaintiff’s concept showing the differences in the two. I will reproduce that chart, as set out, because it finds favour with me, that is it shows the differences in the two concepts as follows:

Feature	Okoa Jahazi	Plaintiffs’ Emergency Credit Service
Eligibility	Service available only to prepaid subscribers	Service available to all subscribers
Mode of Top up	All top up methods were valid, including M-Pesa, Sambaza, 3 rd Party top up and direct subscriber top up	Limited to subscriber top up only
Accessibility	Service to be accessed via unstructured Supplementary Service Data (USSD)	Not defined
Scope of the service	Credit advance plus free minutes	Credit advance only

12. On the whole I find that the plaintiffs failed to produce cogent evidence to support the claim. The case therefore does fail with costs.

CONCLUSION

13. The plaintiff’s case is dismissed for reason set out above with costs to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March 2020.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant