



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E253 OF 2019

RADIO AFRICA LIMITED.....PLAINTIFF

VERSUS

THE STANDARD GROUP PLC.....1ST DEFENDANT

KENYA BROADCASTING CORPORATION.....2ND DEFENDANT

RULING

1. **Radio Africa Limited**, the plaintiff has brought this action against **The Standard Group PLC**, 1st defendant, and **Kenya Broadcasting Corporation**, the 2nd defendant.

2. The plaintiff's case is that it has been the exclusive license of the right to use, communicate to the public, broadcast and transmit live audio programmes with commentary of the 2019/2020 English Premier League Season, within Kenya. That right is by virtue of a licence in writing dated 17th May 2019 granted to the plaintiff by the Wireless Group Media (GB) Limited. That the only other entities with similar right within Kenya are Talksport, the BBC and the member clubs of Premier League. The plaintiff pleaded by its plaint that it paid a considerable price for that right to provide live radio coverage of the 2019/2020 English Premier League. By that licence the plaintiff is entitled to exclusive broadcasting and transmission and *inter alia* the following:

a. Live Audio Programmes in the English language, including Live Commentary, together with pre-match, half-time and post-match shoulder programming of an average of 5 Premier League matches in each week in which such matches are scheduled to take place during the term;

b. Live Audio Programmes in the Swahili language including Live Commentary of up to 5 premier League matches per week.

3. By Notice of Motion application dated 16th August 2019 the plaintiff seeks, pending hearing and determination of this case, injunction to restrain both the defendant from making live audio transmission with commentary on the 2019/2026 English Premier League.

4. The plaintiff has alleged that the defendants have infringed on its copyright by broadcasting with commentary two English Premier League matches being 'Arsenal vs New Castle United and 'Manchester United vs Chelsea by communicating them to the public by way of electronic transmission. The plaintiff is apprehensive the defendants will continue infringing on its rights for matches to be played in August 2019 (now past) and subsequent matches. That the defendant are infringing on the plaintiff's right and targeting the same radio audience, without paying a licence fee, to the plaintiff's detriment.

5. The 1st defendant's stand on the application is that the plaintiff does not have exclusive rights to broadcast and transmit live audio programmes in the English and Swahili live commentary. That there is no copyright protection in live audio transmission with commentary in Kenya. That the 1st defendant will suffer more than the plaintiff if the orders of injunction are issued.

6. The 2nd defendant, through the affidavit of its managing director, **Naim Bilal** stated that on receiving the notice of infringement from the plaintiff it stopped airing any further commentary on the English Premier League, and did so since 13th August 2019. That it is a state corporation which values and upholds the rule of law and it shall continue to withhold broadcasting as notified by the plaintiff.

ANALYSIS

7. I will begin my analysis by considering the correct approach in consideration of interlocutory injunction as stated in the case **Mbuthia v Jimba Credit Finance Corporation & another (1988) eKLR** thus:

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

8. I am satisfied that the plaintiff has met the three principles of granting an injunction set out in the case **Giella v Cassman Brown & Company Limited [1973] EA**, that is prima facie case with probability must be shown, the applicant must show that it will suffer irreparable damage unless an injunction is granted and if the court is in doubt the application should be decided on balance of convenience.

9. without wishing to breach the rule set in the case of **Mbuthia v Jimba Credit (supra)** I will say that the plaintiff has shown a prima facie case with probability of success. It has produced the syndicate agreement between itself and wireless Group Media (GB) Limited which satisfactorily reveals the right it seeks to protect.

10. The plaintiff alluded to having paid a substantial amount of money for the right to provide live radio coverage of 2019/2020 English League. I am also not doubting that such live coverage is a revenue stream which considerably benefits the plaintiff in more ways than one. This is so because the English Premier League does command a huge interest amongst the Kenyan public and does attract wide spread media attention. It is also pertinent to note that most Kenyan do not have the opportunity to travel where the matches take place, hence the large interest. It would be almost impossible to quantify the loss the plaintiff will suffer unless restraining orders are granted. The plaintiff is likely to suffer irreparable loss unless an injunction is granted.

11. The plaintiff having satisfied the first two principles of granting an injunction and because I am not in any doubt I do find the plaintiff is entitled to orders as sought with costs of the application.

CONCLUSION

12. The order of the court is as follows:

a. That pending the hearing and determination of this suit a temporary order of injunction is hereby issued restraining the Defendants, whether acting by their servants or agents or any of them or otherwise howsoever, from making live audio transmission with commentary on 2019/2020 English Premier League within Kenya.

b. The plaintiff is granted costs of notice of motion dated 16th August 2019, to be paid by the 1st defendant.

c. This case will be mentioned on 29th July, 2020 for further orders.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th day of April, 2020.**

MARY KASANGO

JUDGE