



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 115 OF 2018

ANTHONY KIBE KIBATHI PLAINTIFF

-VERSUS-

OXYGEN LOTTO LIMITED.....1ST DEFENDANT

COPYRIGHT BOARD OF KENYA (KECOBO).....2ND DEFENDANT

BETTING AND LICENSING BOARD.....3RD DEFENDANT

RULING

1. Through the plaint filed on 21st March 2018 the plaintiff sued the defendants herein seeking the following orders: -

- a. A permanent injunction restraining the 1st defendant from conducting any lottery and /or gaming business, based on a selection of 3 numbers, from 0-9 or using the name TATUA 3 or TATUA 3 KENYA or any other acronym or names similar to the plaintiff's registered copyright.
- b. Payment of general damages, and aggravated damages.
- c. Payment of the special damages.
- d. Cost of this suit and any just relief in the circumstances.

2. Concurrently with the plaint, the plaintiff also filed an application dated 12th March 2018 wherein he seeks the following orders: -

a. Spent

b. That this honourable court do issue an injunctive order restraining the 1st defendant from using and/or infringing on the plaintiff's copyright known or referred to as INTERACTIVE M. GAMING PUBLICATIONS (DAILY TATU) a concept based on selection of 3 numbers, from 0-9, pending the hearing and determination of this suit.

c. An order that the 1st defendant be restrained from advertising in the newspaper, television and/or social media using the plaintiff's copyright known or referred to as INTERACTIVE M. GAMING PUBLICATIONS (DAILY TATU) a concept based on selection of 3 numbers, from 0-9 and or any similar acronyms, pending the hearing and determination of this application.

d. That this honorable court do issue Anton pillar orders against the 1st defendant directing that court bailiffs or an auctioneer do search the 1st defendants' said gambling and betting premises and seize all the machines computers, dice, or any gambling item, in use for infringement of the plaintiff's copyright, pending the hearing and determination of this suit.

e. That cost of this application, be provided for.

3. The application is supported by the plaintiff's affidavit sworn on 12th March 2018 and is premised on the grounds that: -

a. That the plaintiff/applicant is the registered owner of the copyright known as INTERACTIVE M. GAMING PUBLICATIONS and which model is also known as DAILY TATU, LOTTERY.

b. That the 1st defendant/respondent has infringed the plaintiff's said copyright known as, DAILY TATU, LOTTERY by using an acronym similar to the plaintiff's model, which is based on a selection of 3 numbers, 0-9, to wit, TATUA or TATUA 3 KENYA.

c. That the plaintiff/applicant shall suffer great financial and sentimental loss, should the 1st defendant continue infringing on his copyright.

d. That no action short of this honorable courts injunction shall protect the plaintiff/applicant from the capricious infringement of this copy right, aforestated, as the 1st defendant has been adamant and/or negligent, in the same.

e. That it is only fair and just that the instant application, be allowed, in the interest of justice and protection of the fundamental rights of the owner of the copyright.

4. Through the written submissions dated d 1st February 2019, the applicant's advocates, M/S Mugo Moses & Company, submit that the 1st defendant colluded with one **Mugwe Manga** to make the lottery TATUA 3 or TATUA 3 KENYA appear free from infringement in total disregard to the plaintiff's rights to his copyright. It was submitted that the similarity in the names and concept cannot be a mere coincidence and that the 1st defendant took advantage of the plaintiff's business model and/or copyright.

5. It was submitted that the continued use of the names TATUA 3 or TATUA 3 KENYA will cause the plaintiff financial loss of opportunities due to the use of the concept and or words similar to DAILY TATU LOTTERY. It was submitted that the 1st defendant's copyright was registered in the year 2017 as opposed to the plaintiff's copyright that was registered in 2011 and that copyright protection is automatic and available from the creation and reduction of the work into material form as it is first made in Kenya. For this argument, counsel cited the case of *J. W. Seagon & Company Insurance Brokers Kenya Ltd Vs Liason Group (I.B) Limited & 2 Others* [2017] eKLR wherein interim orders of injunction were granted following copyright infringement.

The 1st respondent's response

6. The 1st respondent opposed the application through the replying affidavit of its Chief Executive Officer **Mr. John Gachihi** who avers that it is the beneficial owner/user of the trademark known as TATUA 3 registered to White Rhino Ventures Limited under Trade Mark No. 96962 class 28 and 42. He states that the alleged infringement is false as the 1st defendant has its own registered trademark that is totally different and distinct from the applicant's alleged copyright Daily Tatu.

7. He contends that the 1st defendant is entitled to use its registered trademark to conduct lotteries and competitions and that the plaintiff cannot purport to own copyright over a word or a concept.

8. In the written submissions filed by its advocates **M/S Kiamba & Siboe Advocates**, it was submitted that the applicant cannot claim copyright over a business model and that copyright only protects the expression of ideas and not ideas themselves. For this argument counsel cited Article 9 (2) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which Kenya has ratified. The Article stipulates that:

“Copy right shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”.

9. It was further submitted that the application does not meet the conditions for an act to be termed as an infringement of copyright or for the granting of orders of injunction as were set out in *Giella v Cassman Brown* [1973] EA 358. It was further submitted that the plaintiff has not adduced any evidence to show that the 1st defendant has infringed their copy right or that it has suffered any loss. It was argued that the 1st defendant has a valid and registered trademark that is protected under the law and that allows it to conduct lotteries under the said trademark.

2nd defendant's response

10. The 2nd defendant/respondent opposed the application through the Grounds of Opposition dated 8th February 2019. The 2nd defendant's counsel **Ms. Faith Amatika** submitted that since the grant of *Anton Piller* orders amounts to deprivation of property before judgment, such an order should only be granted in the clearest of circumstances and that such an order cannot be granted merely because the plaintiff suspects that there has been an infringement. For this argument, reference was made to the decision in *Style Industries Ltd v Sana Industries Company Ltd* [2018] eKLR where reliance was placed on *Anton Piller Kg v Manufacturing Processes Ltd & Others* [1976] A LLER where it was held:

“There are three essential pre-conditions for the making of such order in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, mental or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is real possibility that they may destroy such material before any application inter parties can be made.”

11. Counsel submitted that the plaintiff's claim that the 1st defendant colluded with one **Mugwe Manga** to use the copyright name and model is not pleaded in the plaint contrary to the settled law that parties are bound by their pleadings. It was submitted that the plaintiff has no case against the 2nd defendant as it has not been established that one of the functions of the 2nd defendant is to allow or disallow the use of one's copyright by another.

12. It was further submitted that as opposed to Trademarks which protects names, copyright protects how an idea is expressed in a fixed form but that it does not amount to an infringement if a party reads a concept and comes up with a betting/lottery plan and proceeds to implement it.

Analysis and determination.

13. I have carefully considered the application dated 12th March 2018, the defendants' response and the submissions made by the parties together with the authorities that they cited. The main issue for determination is whether the plaintiff has made out a case for the granting of the injunctive and *Anton Piller* Orders for the alleged infringement of its copyright referred to as Interactive M. Gaming Publications (Daily Tatu), a concept based on selection of 3 numbers from 0-9, pending the hearing and determination of the suit.

14. Section 2 of the Copyright Act defines "artistic Work: to mean:

"copy" means a reproduction of a work in any material form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means;

"Copyright" means copyright under this Act;

15. Literally work on the other hand means: -

"Literally work" means, irrespective of literary quality, any of the following, or works similar thereto-

- a. novels, stories and poetical works;**
- b. plays, stage directions, film sceneries and broadcasting scripts;**
- c. textbooks, treatises, histories, biographies, essays and articles;**
- d. encyclopedias and dictionaries;**
- e. letters, reports and memoranda;**
- f. lectures, addresses and sermons, but does not include a written law or judicial decision;**

16. Section 5 (1) of the Act stipulates as follows:

5. (1) subject to this Section, the following works shall be eligible for copyright-

- a. literacy works;**
- b. musical works;**
- c. artistic works;**
- d. audio-visual works;**
- e. sound recordings;**
- f. broadcasts; and**
- g. programme – carrying signals.**

17. In the instant case, the plaintiff states that the 1st defendant has infringed on its copyright known as Interactive M. Gaming Publications whose model is known as Daily Tatu Lottery by using an acronym similar to its model, which is based on a selection of 3 members between 0-9 to wit, Tatua 3 or Tatua 2 Kenya.

18. I have perused the certificate of Registration of a Copyright Work No. CR. 000504 that was attached to the plaintiff's supporting affidavit as annexure "**AK2**" and I note that a copyright work in the literary category entitled M. Gaming Publications and numbered KCB 0504 was registered in the name of one **Mugwe Manga**.

19. A letter dated 18th January 2018 from the 2nd defendant to the plaintiff's advocates indicates that **"Interactive M. Gaming Publications"** and **"Interactive M. Classified Publications"** are registered in the joint names of **Mugwe Manga** and the plaintiff herein.

20. On its part, the 1st defendant contends that it is the registered owner of trademark known as **Tatua 3** which is totally different from the plaintiff's alleged copyright known as **Interactive M. Gaming Publications – Daily Tatu**.

21. The principles governing the granting of orders of injunction are well settled. The said principles were set out in the case of **Giella v Cassman Brown & Company Ltd** [1973] EA 353 and restated, together with their mode of application in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, CA No. 77 of 2012, as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

1. establish his case only at a prima facie level,

2. demonstrate irreparable injury if a temporary injunction is not granted, and

3. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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).

22. I will now turn to consider if the instant application meets the threshold set for the granting of temporary orders of injunction.

Prima facie case

23. The Court of Appeal pronounced itself on what constitutes to a prima facie case in **Mrao Ltd v First American Bank of Kenya and 2 others** [2003] KLR 125 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".

2. I am alive to the fact that at this stage, I am not determining the main suit and my role is to determine whether the applicant has established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the law, the pleadings filed herein and the arguments advanced by both parties.

24. I note that the plaintiffs claim is that the 1st defendant is using an acronym **Tatua 3** or **Tatua 3 Kenya** which is similar to its copyright known as **Daily Tatu**. Even though the 1st defendant does not deny owning a Trademark under the name **Tatua** or **Tatua 3 Kenya**, I note that the plaintiff has not demonstrated how the registration of the Trademark **Tatua 3** or **Tatua 3 Kenya** amounts to an infringement of his copyright. I find that no material has been placed before this court to show that the 1st defendant has been engaged in any lottery and/or gaming business using the plaintiffs model/concept so as to warrant the granting of the injunctive orders sought.

25. Furthermore, I note the plaintiff states, in his supporting affidavit, that the 1st defendant has been using his business model without seeking licence and/or assignment from him and his co-owner of the copyright. In the submissions, however, the plaintiff changed tact and stated that his copyright co-owner one **Manga Mugwe** colluded with the 1st defendant to use his said copyright. It is to be noted that it is not in dispute that the plaintiff co-owns the copyright with the said **Manga Mugwe** who quite interestingly has not been made a party to this case. The plaintiff therefore appears to concede that his partner/co-owner of the copyright has allowed its use by the 1st defendant.

26. No evidence was tendered to show that the model expressed under the Copyright **Interactive M. Gaming Publications** is the same model/concept being used by the 1st defendant.

27. My finding is that at this interlocutory stage of the case it will be premature to make a finding on the issue of alleged infringement of copyright without hearing the merits of the case. Considering that the 1st defendant is duly registered as the owner of Trademark **Tatua 3** or **Tatua 3 Kenya** I am not satisfied that the plaintiff application meets any of the condition set for the granting of orders of injunction and Anton Piller orders.

28. I therefore decline to grant the injunctive orders sought and dismiss the application dated 18th March 2018 with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 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:

No appearance for the parties

Court Assistant: Sylvia