



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. 164 OF 2018

RADIO AFRICA LIMITED.....1ST PLAINTIFF

PATRICK QUARCOO.....2ND PLAINTIFF

-VERSUS-

EVANS GIKUNDA.....DEFENDANT

RULING

BACKGROUND OF THE APPLICATIONS

By an Application dated 27th April 2018 and filed on 30th April 2018, the Plaintiffs sought orders that pending hearing and determination of the application; the Defendant be restrained from breaching the terms of his Employment Contract dated 31st September 2013 by asserting ownership of the 1st Plaintiff's copyright. The defendant be restrained from interfering with the 1st Plaintiff's use and enjoyment of its registered trademark 'Songa' & 'Naked Groove' as depicted in Trademark Nos 94347 & 92093 respectively and from making defamatory or any remarks against the 2nd Plaintiff to third parties. The Application was/is supported by the Affidavit of Patrick Quarcoo.

The Defendant opposed the Plaintiff's Notice of Motion by filing Grounds of Opposition dated and filed on 9th May 2018. He opposed the Application on the grounds that the application was bad in law, misconceived, incompetent and frivolous. The prayers sought in the application as framed are vague and are against the Constitution.

The Defendant further filed a **Notice of Motion dated and filed on 9th May 2018** for orders that the suit/Plaint be struck out with costs on the grounds that the Plaintiff does not disclose any reasonable cause of action against the Defendant.

The grounds are that the prayers sought in the Plaintiff filed on 27th April 2018 are seeking to stop the Defendant from exercising his rights under the Constitution in pursuing remedies for infringement of copy right.

The orders sought amount to gagging the defendant from expressing himself as enshrined in **Article 33 of COK2010** and to pursue his rights under **Article 22 COK2010** and is hinged on preventing a suit being filed against them by the Defendant claiming ownership of the copyright or trademark.

In response to the Defendant's Application, the Plaintiffs filed a Replying Affidavit sworn by Patrick Quarcoo and dated 16th May 2018. In the Replying Affidavit, the 2nd Plaintiff averred that the Plaintiff discloses triable issues of copyright ownership and violation of the express terms of the Contract. The defendant is not denied the opportunity to file suit and/or bring Counterclaim. The suit is brought to protect the Plaintiffs contractual rights and/or wither its reputation and business relationships and hence the Defendant's claims that there was no reasonable cause of action, fails.

PLAINTIFF'S SUBMISSIONS

The Plaintiffs filed their submissions on 30th July 2018. They submitted that the Plaintiff discloses three causes of action namely: breach of contract, copyright infringement and trade mark infringement.

They relied on the case of *Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 Others Civil Case No. 37 of 2013 [2014] eKLR* where the court held that:

“A cause of action is a factual situation; the existence of which entitles one person to obtain a remedy against person: Letang vs Cooper [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial.”

In Tom Odhiambo Achillah t/a Achilla T.O. Advocates vs Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 Others [2015] eKLR adopted the pronouncements in the case of Drummond Jackson vs British Medical Association (1970) WLR 688 as follows;

‘A cause of action is an act on the part of the defendant which gives the Plaintiff his cause of Complaint’.....

The Plaintiffs submitted that in the Plaint dated 17th April 2018, The Plaintiffs herein sought orders seeking a permanent injunction restraining the Defendant from *inter alia*; breaching terms of contract dated 31st September 2013 and in fringing or threatening to infringe on the 1st plaintiff’s registered trademarks Nos 94347 & 92093 in respect of the “Songa” and “Naked Grove” Apps respectively.

The plaintiff submitted that the orders sought were on the basis of the Defendant’s action of writing to several parties claiming ownership of the 1st Plaintiff’s copyright in the “Songa by Safaricom” App. The Plaintiffs submitted that they hence established triable causes of action with some chances of success in respect of the infringement of the Plaintiff’s copyright, trademark and defamation.

The Plaintiffs further submitted that this court has jurisdiction to determine the issues before it as the cause of action arises from the **Copyright Act 2001 and Trade Mark’s Act Cap 506** which fall outside the purview of the Employment & Labour Relations Court.

The Plaintiffs submitted that they were entitled to the prayers sought in their Plaint as powers to strike out pleadings should only be exercised after the court has considered all facts and not the merit of the case.

The Plaintiff relied on the case of D.T.Dobie Co Kenya Limited vs Muchina [1982]eKLR which held;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by an amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.”

DEFENDANT’S SUBMISSIONS

The Defendant filed his Skeleton Submissions dated 12th June 2018 on 13th June 2018. He also filed Further Skeleton Submissions dated 12th September 2018 and filed on 13th September 2018.

He submitted that the suit is defective for failing to disclose a cause of action that can be addressed by the court and for being filed in the wrong forum.

The Defendant submitted that the Plaintiffs claim is of breach of an Employment Contract and seek to enforce a term of the said Employment Contract. They therefore claimed that the High Court was the wrong forum and the suit ought to be dismissed for lack of jurisdiction. **They reiterated Article 165 (5) (b) of the Constitution** which provides that:

“The High Court shall not have jurisdiction in respect of matters:

a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. Falling within the jurisdiction of the courts contemplated in Article 162 (2)”

The Defendant submitted that any issue concerning enforcement of an Employment Contract falls within the jurisdiction of the Employment and Labour Relations Court as set out in **Section 12 of the Employment and Labour Relations Act**.

In the Defendant’s Further Skeleton Submissions of 13th September 2018 the Defendant avers that the Plaintiffs submissions are to amend the Plaintiffs pleadings; they have created a new cause of action called infringement of copy right, with the intention of defeating the defendant’s application. There is no single paragraph in the Plaint that raises a dispute as to Copyright Ownership. It is trite law that parties are bound by their pleadings. The only cause of action brought out throughout the Plaint is Breach of the terms of the Employment Contract. They further submitted that the orders sought for by the Plaintiffs in the Plaint seek enforcement of the Employment Contract as a cause of action.

It is on this basis that the Defendant submitted that the High Court lacks jurisdiction to hear the matter and relied on the case of Charles Oyoo Kanyangi & 41 Others v Judicial Service Commission of Kenya [2018] eKLR where it was held that:

“... Court relating to employment and labour relation including- disputes relating to or arising out of employment between an employer and an employee.”

The defendant further submitted that the Civil Division of the High Court deals with issues of defamation.

DETERMINATION

The issues for determination are;

1. Whether this court has jurisdiction to hear and determine the this matter?
2. Whether the Complaint contains cause of action or should be struck out with costs?

The written agreement in this case was/is the Employment Contract dated 30th September 2013. It was an express term under clause **16.1 of the said Employment Contract** that all rights to any copyright work produced by the Executive in the course of his employment with the company shall belong to the Company. The **Employment Contract also provides under clause 16.4.2**, that all rights and obligations under that clause shall continue to be in force even after the termination of the said Agreement.

The foundation of this suit as read in the Complaint is the alleged breach of **Clause 9 and 16 of the Employment Contract** between Plaintiffs and Defendant. Any issues concerning enforcement of an Employment Contract fall within the jurisdiction of the Employment and Labour Relations Court as provided by **Section 12 of the Employment and Labour Relations Act, 2011** which reads:

“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to Employment and Labour Relations including:-

a. Disputes relating to or arising out of employment between an employer and employee..”

The locus classicus on jurisdiction is *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal held as follows:

“...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

In *Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011*, the Supreme Court delivered itself as follows on the issue of jurisdiction:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law... where the Constitution exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits...”

The Supreme Court reiterated the same in its decision in *Re The Matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR* where it held that:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient- court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors....”

The jurisdiction of the Employment and Labour Relations Court emanates from the Constitution and the Employment and Labour Relations Act. **Article 162(2) of the Constitution** provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.”

In *Charles Oyoo Kanyangi & 41 Others v Judicial Service Commission of Kenya [2018] eKLR* the Court held that:-

“...According to section 12 (1), ELRC has jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to that court relating to employment and labour relation including –disputes relating to or arising out of employment between and employer and an employee. The section does not state what kind of dispute it must be as long as it is a dispute between an employer and employee relating to employment...”

The Supreme Court in *Republic v Karisa Chango & Others [2017] eKLR* observed that:

“...Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, and it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court...”

In Seven Seas Technologies Limited v Eric Chege [2014] eKLR the court held that:

“..The Industrial Court is a superior court and has the same status as the High Court. It is among equals when it stands with the Environment & Land Court and the High Court with all its divisions. It is imbued with all the powers of the High Court. The High Court has extensive jurisdiction in matters except those that fall under Article 162. As the High Court is expressly excluded by the Constitution to deal with matters under Article 162, there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to labour and employment matters wherever they arise within Kenya. To hold otherwise would be anathemic to the Constitution and would abridge the rights of parties to access justice. It would run counter to the principles set out in Article 159(2) of the Constitution if I ordered that the Applications for transfer of suits relative to labour issues be heard by the High Court. Article 162(2) shuts the door on the High Court as far as labour and employment matters go. Why would the High Court entertain such an application while this Court is seized of all matters under Article 162(2)? Can a court split a cause of action into various parts depending on what portions the Claimant or Respondent is challenging? Would a dispute relating to an employee’s housing and the employer’s buildings and land be referred to the Environment & Land Court if the employee and employer are tussling over termination of employment and the unpaid rent, illegal occupation by the staff member and the like? Or would such a suit be transferred to the Commercial division? I think not. There has to be a purposive interpretation of the Constitution. I am not persuaded that the Industrial Court cannot determine whether a suit relating to employment matters can be transferred to it or not. Similarly, where an issue of employment rights under Article 41, for example, arises, I cannot refer parties to the High Court to determine the constitutional question before returning to this Court for determination of the labour dispute..”

From the above authorities, it is agreed that jurisdiction of the Court emanates from Constitution and other legislation. Employment and related matters are within the purview of and should be dealt with by Employment and Industrial Relations Court. In the instant matter, the Plaintiff discloses issues of breach of contract being the Employment contract between the Plaintiffs and Defendant. Yet the Plaintiff also discloses that the dispute herein arises from intellectual property dispute; alleged infringement of copyright and/or trademark. This calls for hearing and determination of who created /invented the registered trademark; the 2nd Plaintiff, the defendant or both? Therefore, under Contract of employment who is entitled to what in terms of ownership of intellectual property, confidentiality and /or compensation of the trademark/copyright?

With respect, The case-law cited above is applicable in principle on the question of jurisdiction. However, this Court finds that the matter started as an employment dispute between the Plaintiffs and Defendant due to contested terms of the Employment Contract which issues are rightly placed before **Employment and Industrial Relations Court in ELRC 164 of 2018**. The matter matured to include other issues arising among them disputed terms of contract that form part of Intellectual Property under the **Copyright Act, Trademark Act & Intellectual Property Act**. These are issues within the purview of the Commercial & Tax Division of the High Court and ought to be heard and determined as such. Whereas, the Employment and Labour Relations Court has jurisdiction to hear employment and related matters with regard to employment; the germane issue here is whether during Defendant’s employment; whether the Defendant had/has rights over creation and/or invention in form the 2 Apps registered as Trademarks. Although, the dispute oscillates under the Contract of Employment, the creation/invention of 2 Apps is what is contested by parties. The same ought to be canvassed within Commercial Division of the High Court.

In the case of; The Riara Group of School Ltd Vs Lucas Kimani Hccc 704 of 2012 which had/has similar facts to the present case; the Commercial Court heard and determined the matter of intellectual property.

With regard to the issue of whether the Plaintiff should be struck out; this Court relies on the case of;

Transcend Media group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR where the Court held:

- “a. The Court should not strike out suit if there is a cause of action with some chance of success;***
- b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;***
- c. The power should only be used in cases which are clear and beyond all doubt;***
- d. The court should not engage in a minute and protracted examination of documents and facts;***
- e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”***

The Defendant/Applicant claimed that the cause of action in the Plaintiff is/was breach of contract but subsequent to filing submissions the Plaintiff/Respondent brought in new claims in form of ‘infringing of copyright. The effort was/is to amend pleadings through submissions and parties are bound by pleadings and not ambush.

This Court gleaned the Plaintiff and found the following paragraphs 15,17, 19, 20 & 21 outlined hereinabove disclose the cause of action;

“The 1st Plaintiff carried on with the development of the App “Naked Groove” which was subsequently renamed “Songa”. the It registered Trade Marks as depicted in the Certificates of Registration of Trade Marks Nos. 94347 and 92093, in respect of the “Songa” and “Naked Grove” Apps respectively.”

“At all times, the Defendant knew or ought to have known that all details regarding the development of the App which came into

knowledge as the 1st Plaintiff's Senior Manager (Web & Graphic Design) were confidential to the 1st Plaintiff under the Contract and were intended solely for the use and benefit of the 1st Plaintiff."

"By reason of his disclosures to Safaricom PLC, Standard Group Limited, Nation Media Group, Royal Media Services Limited and Magnate Ventures Limited the Defendant acted in breach of the obligation of confidence as set out in the Contract to the detriment of the 1st Plaintiff."

"Further and in addition to the foregoing, the Defendant has breached the express provisions of the contract in respect of the 1st Plaintiff's copyright to the App and has infringed/ threatened to infringe on the 1st Plaintiff's Trade Mark No. 94347 as particularized."

"All of the aforesaid acts of the Defendant were done without the consent of the 1st Plaintiff and in breach of the express provisions of the contract which vested in the 1st Plaintiff the rights to any copyright works produced by the Defendant in the course of his employment."

The Plaintiff discloses course of action in form of breach of employment contract and the creation/invention and/or ownership of the trademarks in form of the 2 applications developed/launched during the Defendant's employment, clearly there are triable issues for hearing and determination.

DISPOSITION

1. The Application to transfer the matter to Employment & Industrial Relations Court and/or strike off the Plaintiff is dismissed with Costs.

2. Parties through advocates to take date from the Registry for hearing of the application/substantive suit after filing and exchanging all relevant documents in case management process before Deputy Registrar Commercial & Tax Division.

DATED, SIGNED & DELIVERED IN OPEN COURT ON 12TH APRIL 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

KAPLAN AND STRATTON ADVOCATES FOR THE PLAINTIFF

NGERI, OMITI & BUSH ADVOCATES FOR THE DEFENDANT

MS JASMINE COURT ASSISTANT