



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 364 OF 2008
(FORMERLY HCCC 866 of 2005)

PROF. NZELE DAVID NZOMO.....PLAINTIFF

VERSUS

MOSES NAMAYI ANYANGU.....1ST DEFENDANT

COMPETITIVE EDGE KENYA.....2ND DEFENDANT

JUDGEMENT

Introduction

1. This case substantially pits two University Dons against each other. Both the plaintiff, **Prof. Nzele David Nzomo** and the 1st Defendant, **Moses Namayi Anyangu**, were accounting lecturers at the University of Nairobi. The 2nd Defendant on the other hand is a business development and financial firm incorporated under the *Companies Act*, Cap 486 Laws of Kenya (it is hereinafter referred to as “the Firm”).

2. The suit revolves around the publication of a book, *Financial Accounting Revision Manual* (Exhibit 3) by the 1st Defendant through the 2nd Defendant which the Plaintiff alleged infringed upon the Plaintiff’s books *Advanced Financial Accounting* (Exhibit 1) and *Basic Accounting, Principles and Procedures* (Exhibit 2).

Plaintiff’s Case

3. By a plaint dated 11th July, 2005 filed in Court on 12th July, 2005 the Plaintiff herein seeks the following orders:

- a) **A permanent injunction to issue restraining the Defendants from publishing, selling or otherwise distributing the said Financial Accounting and Revision Manual.**
- b) **An order that the defendants herein provide accounts of all of the sales of the book titled Financial Accounting and Revision Manual.**
- c) **Costs of this Suit.**
- d) **Any other or further relief as this honourable court may deem fair and just.**

4. According to the plaint, at all material times to this suit, the Plaintiff was an accounting lecturer at the University of Nairobi and the author of two books the first being ***Advanced Financial Accounting***, first published by the Kenya Literature Bureau in 1985 and revised in 1992, and the second being ***Basic Accounting, Principles and Procedures***, published in 2002 by the University of Nairobi press. On the other hand the 1st Defendant was at all material times to the suit an accounting lecturer at the University of Nairobi and the author of a book entitled ***Financial Accounting Revision Manual*** published in the year 2004 by the 2nd Defendant herein.

5. It was pleaded that the 1st Defendant in compiling the said book, ***Financial Accounting Revision Manual***, substantially copied and reproduced the work of the plaintiff in the plaintiff's said books, ***Advanced Financial Accounting***, and ***Basic Accounting, Principles and Procedures***, thereby infringing on the Plaintiff's copyright to the two books. The particulars of the said infringement were given as follows:

a. Copying verbatim substantial portions of ***Advanced Financial Accounting*** and ***Basic Accounting, Principles and Procedures*** and using the same in his book, ***Financial Accounting Revision Manual***.

b. Copying with slight modification, substantial portions of ***Advanced Financial Accounting*** and ***Basic Accounting, Principles and Procedures***, and using the same in his book, ***Financial Accounting Revision Manual***.

6. It was pleaded that the 2nd defendant caused to be published the 1st Defendant's book as described above and holds the copyright in the 1st Defendant's book, ***Financial Accounting Revision Manual***.

7. As a result of the foregoing, the plaintiff pleaded that he had suffered loss and damages.

8. In his evidence the Plaintiff testified that he was a teacher at the University of Nairobi where he had taught since 1971 in the Faculty of Commerce, now known as the School of Business. At the time of his testimony the plaintiff disclosed that he was co-ordinating programmes for the University's PhD at the School. It was the plaintiff's evidence that he had a Bachelors Degree, Masters Degree (MBA) and a PhD. He was also a Certified Public Accountant and a Fellow of the Institute of Bankers and a Professor at the University on Nairobi in the Department of Accounts.

9. The plaintiff admitted that he knew the Defendant, **Moses Anyangu**, who was one of his students in the undergraduate and post-graduate programme before becoming the Chairman of the Department and a teaching colleague.

10. The Plaintiff averred that he had authored several books and specifically in accounts he authored ***Basic Financial Accounting*** and ***Advanced Finance Accounting***. His first book, the ***Advanced Finance Accounting***, was first published in 1985 and it had taken him some years to prepare the current revised edition which was published in 1992. His evidence was that the current reprint was done in 2004 and it had been revised and was expected to be available in 2012.

11. As regards the second book, ***Basic Financial Accounting***, the Plaintiff averred that the same was published in 2002 and had not been revised but had been reprinted a number of times. That book, he disclosed, took 13 years to prepare. It was the Plaintiff's case that the contents of the said books were his original thoughts and ideas. He testified that as a teacher, as time goes by you find better and more effective ways of teaching and the best way to do that is to put them in book form. In this case his ideas grew from his teaching notes based on examination questions from the Certified Public Accountants. He disclosed that the questions are locally based, applying local law and circumstances.

12. According to him the Defendant has published a book called ***Financial Accounting Revision Manual – Questions and Answers*** which according to the Plaintiff was in the 1st Edition which was published in 2004 by Competitive Edge Kenya.

13. The Plaintiff emphasised that his books were the ones published first. However he had been acknowledged in the Defendant's book despite having not given his permission.

14. It was disclosed by the Plaintiff that at the end of the semester, they prepare exams which are accompanied by their solutions, a marking key which indicates the marks allotted to a question and the course outline issued to the students at the start of the course. He insisted that the Defendant did not seek his permission for the publication or use for his personal benefit. Referred to the Defendant's Statement the Plaintiff contended that the contents were what were submitted to the Defendant in his capacity as the Chairman of the Department which were the Plaintiff's original work as a teacher.

15. It was disclosed by the Plaintiff that he was also a chairman before the Defendant and that the materials were given to the Defendant for the purposes of processing and then to be used for examination of the students the Plaintiff was teaching. It was the Plaintiff's case that there was no consent that the same be converted for used for commercial purposes. He disclosed that when teaching he can refer to his book and pick any question, modify it so that he can gauge the students' understanding. He therefore averred that the questions came from his book into the examination. However in this case, the questions had come from the examination into the Defendant's book.

16. It was disclosed that the Vice-Chancellor wrote to the Defendant directing that the material be withdrawn from circulation and should not be marketed.

17. The Plaintiff referred to the first document in the defendant's list of documents filed in 31st March, 2008 and that the topic that was being referred to, was copyright infringement while the second page was a letter dated 5th April, 2005 with the same topic. The said letter was written two weeks later. The third letter was dated 12th January, 2005 from the Defendant to the Deputy Vice-Chancellor (DVC). The Plaintiff pointed out that at page 2 of the 1st paragraph of his book, the Defendant acknowledged the Plaintiff's contributions.

18. It was confirmed by the Plaintiff that the DVC tried to mediate the matter. The fourth document referred to was a letter dated 5th April, 2005 in which the then Chairman of the Department, the Defendant herein, according to him made erroneous conclusions as the materials were already in the Plaintiff's book and the Defendant was at one time his student. The Plaintiff however averred that the University had not complained of any infringement on the part of the Plaintiff.

19. It was the Plaintiff's case that it was resolved that the Defendant had no permission to publish the book and that he should withdraw the book from circulation and that the profits be surrendered to the University as well as the book. Further, the Defendant was to cease further publication. The Plaintiff was however unaware whether the Defendant complied.

20. It was his evidence that the Defendant's book was selling at Kshs 825/= as at 10th May, 2005 and that he purchased a copy after the letter dated 5th April, 2005 was written. Referred to the 5th document the Plaintiff confirmed that it was an internal memo dated 7th July, 2004 which was passed through the Principal, the Dean of the Faculty and the Departmental Chairman though the Plaintiff could not conform whether by that time the Defendant was the Chairman. According to the Plaintiff the Defendant was holding the position of the former Acting Chairman of the Department. He confirmed that this letter contained his complaints. He was referred to the sixth document which was a memo by himself to the University of Nairobi Press in which the Plaintiff complained that the materials in the Defendant's book were published from the Plaintiff's book. In his contention the Plaintiff referred to a table at page 3 which captures Financial Revision Accounting Manual and Basic Accounting Cycle as illustrated at page 46 of exhibit 2. At the end of the chapter question 6 of page 51 of exhibit 2 the Plaintiff disclosed that his question was "*Briefly narrate and explain each of the steps in the accounting procedure.*" In the Defendant's book the question is: "*Define the Accounting cycle and explain its main procedures, clearly specifying the purpose served by each.*" In the Plaintiff's view, the two questions are asking for the same cycle.

21. The Plaintiff similarly referred to the next question being question 6 in the defendant's book (exhibit 3) at page 124 and questions 1 and 7 in the BAC which in his view encompassed the same issue since the question is what the accounting cycle is all about. He disclosed that the answer to both questions is contained at page 46 of the *Basic Accounting*. The Plaintiff's complaints were therefore based on both the questions and the answers. In his view while the cycle is what is universally understood in accounting, the format was his original work. He further referred to page 158 of exhibit 2, question 4 and juxtaposed this with question 6 page 5 of the Defendant's book and averred that what the Defendant did was to take the Plaintiff's question and modify it slightly for purposes of publication. The Plaintiff was also of the view that the question at page 5 of exhibit 3 being question 3 juxtaposed with page 21 of exhibit 2 were the same but in different words. Similarly, page 5 of exhibit 3 question 7(b) of the Defendant's book was, in the Plaintiff's view, the same as the question at page 15 of his exhibit 2. In his further evidence the Plaintiff averred that question 9 at page 5 of Exhibit 3 and question 1 at page 86 of exhibit 2 were exactly the same.

22. The Plaintiff disclosed that with respect to exhibit 1 – *Advance Finance Accounting (AFA)*, contrary to the Defendant's statement, he did seek permission from Kenya Accountants and Secretaries National Examinations Board (KASNEB).

23. Based on the foregoing evidence the Plaintiff urged the Court to restrain the Defendant from publishing the material that came to him by virtue of his position as the Chairman and to provide account of monies earned as directed by the Vice Chancellor. The Plaintiff also sought an order that the Defendant should meet all the damages caused by his actions as well as the costs incurred. According to him, he prepared as a teacher through course outlines, finding the material to use in the class for the purposes of teaching and finding local examination questions for those candidates intending to practice accounts. Since these materials are locally based, it was the Plaintiff's view that the same would be most appropriate to use both in the classrooms and as examination questions. The Plaintiff insisted that it took him 10 years while the second book took him 13 years.

24. The Plaintiff produced *Advanced Financial Account* as exhibit 1; *Basic Accounting* as exhibit 2 and *Financial Accounting* as exhibit 3. He also relied on the documents annexed to his affidavits.

25. In cross-examination by **Mr Mutuli**, learned counsel for the Defendant, the Plaintiff explained that he started teaching at the University in 1971 at the time he had a Bachelor's Degree. A Masters Degree and MBA. He disclosed that the Bachelors Degree was in economics and Business Administration while the Masters was in teaching the same subject. Since 1971, the Plaintiff testified that he had spent his entire teaching career at the University of Nairobi.

26. In his evidence the 1st Defendant was amongst his first students though he could not remember the year. According to him, in the year 1985-86, the University had **Prof. J. H Kimula** as the Chairman of the Department apart from being a teacher in Financial Accounting and the Dean of the Faculty. According to the Plaintiff it was possible he could have taught the 1st Defendant in that year and that it was also a possibility that the Plaintiff never taught the 1st Defendant Financial Accounting in the years 1985-1986. The Plaintiff could not however remember the year the 1st Defendant did his MBA.

27. Asked whether he knew **Ignatius Baraza Omacha**, the Plaintiff admitted that he could recall him as he became one of the lecturers after finishing his course and could have been teaching Financial Accounting and may have taught the 1st Defendant during his MBA. The Plaintiff however admitted that the 1st Defendant would know whether the Plaintiff taught him Financial Accounting for his MBA since the Plaintiff had taught many students. The Plaintiff however insisted that his complaint was about copyright. To the Plaintiff he compiled of material by making course outline followed by lesson plans, lecture notes. It was his evidence that the materials are kept in his brief and that wherever his books are kept. The Plaintiff confirmed that Financial Accounting was there even before he graduated and that he learnt by reading books and got material and extracts from those books. It was therefore his evidence that he did not discover Financial Accounting. To him, the word copyright means claim of ownership in intellectual property. It was his evidence that whereas the owner of the set examination papers is the

University, the answers to the questions are the lecturer's.

28. The Plaintiff testified that he reported the complaint to the Dean, Faculty of Commerce and that he was not the only one who complained and that others who complained were **Essaji Lemunto** and **Odingo**.

29. Referred to document no. 5 in the Defendant's list, the internal memo, 2nd page paragraph 2, the Plaintiff confirmed the question is the property of the University while he insisted the answers are the lecturer's. He however averred that while they set exams, they release the questions and the answer to the University. However whereas the questions would be available, the answers would not be available to the public or the students. He however stated that they only explain the process of arriving at the answers. The Plaintiff confirmed that after the complaint the University's position was that the matter was left to them to take appropriate steps.

30. Referred to document no. 4 in the Defendant's list, a letter dated 5th April, 2005 addressed to him, at paragraph 4, the Plaintiff stated that the position of the University was that it was the University which should have complained. He confirmed that the University was however not joined as a party to the suit though he was unable to explain why this was so.

31. The Plaintiff admitted that there may be some correspondences between the 1st Defendant and the University and referred to document no. 8 in the Defendants', a letter dated 18th February, 2005, written by Moses Onyangos in form of an apology directed to the University of Nairobi. The Plaintiff however contended that he had not seen this letter before. According to him there were our complainants though he was unaware whether the others also filed suits though their inaction would not surprise him.

32. The Plaintiff however believed that a copyright belongs to the lecturers. According to the Plaintiff, he obtained authority from KASNEB for the questions he used in facilitating explanation to the students of the accounting process and methodology. KASNEB, he explained is not an individual but an umbrella body for examining accountants and is in the same position as the University in so far as examining examinations is concerned. According to him the authority from KASNEB was both oral and written. He however admitted that he would not be able to know who the individual examiners are and that his interest was the subject matter and the methodology and not the individual examiners with whom he had nothing to do. To him, he recognised the fact that KASNEB had the copyright to the questions but not the solutions though he had no document to that effect.

33. It was however his evidence that he can modify the questions from the books or set a totally different question. It was his evidence that it is up to other persons to modify his questions, camouflage them and use them to test students since the book is available as this is academic freedom that **Prof. Kaimenyi**, talked about when he referred to questions by examiners and questions in the book. According to him, he specified what was taken by the 1st Defendant from his books and that the 1st Defendant acknowledged the source in the preface to his book.

34. Referred to paragraph 2 of the statement of defence which mentioned papers from university, the Plaintiff admitted that with respect to Advance Financial Accounting, there were no offending passages and that the Court would not be able to tell which were the offending materials. He therefore admitted that the 1st Defendant had not infringed his copyright in respect of this book.

35. With respect to the accounting cycle, the Plaintiff at page 46 of exhibit 2, the Plaintiff contended that the same was infringed in question 6 in exhibit 2 at page 51. While admitting that the 1st Defendant had not produced a similar design, he contended that the 1st Defendant's question had broken the cycle. While admitting that the principles of accounting are universal, the Plaintiff contended that he had put them in a format that could be understood by the students. According to him, his complaint was with respect to question 6 at page 51 of Exhibit 2 as the one that had been infringed on page 5 of exhibit 3. According to him question 1 at page 124 of exhibit 2 and question 7 in his exhibit 3 at page 5 were in substance similar. According to him, his complaint was not with respect to word for word but the substance. In his view

what was unique to him was what was in his book. He however agreed that if a lecturer picked a question from his book and used it in teaching there would have been no problem. However examining students is different from copyright.

36. According to the Plaintiff in question 6 in exhibit 3, the accounting cycle is just one way of explaining the accounting procedure as there are other methods of doing so. In his evidence question 9 in exhibit 3 at page 5 as cross-referenced to question 1 at page 86 of exhibit 2 are word for word. He however admitted that this was an examination paper of 26th September, 2001 which was question 3(a). The Plaintiff insisted that it was the same question.

37. According to the Plaintiff his book came earlier than the 1st Defendant's book but though his book was published in 2002, the examination was in 2001. According to the Plaintiff, question 16 in exhibit 3 came from KASNEB paper. According to him, page 189 of exhibit 2 illustration "*bibi maridadi*" was at page 305 while question 2 in exhibit 3 was the same in KASNEB examination paper of 17th September, 2001 being question 4. The Plaintiff therefore admitted that it was possible that the 1st Defendant did not obtain the question from the Plaintiff's book since the Plaintiff himself obtained it from KASNEB. At page 278 of exhibit 2 was a narration of the same question as question 7 at page 255 of exhibit 3 as well as in KASNEB papers for 3rd December, 1993 which the Plaintiff acknowledged.

38. It was the Plaintiff's case that as a result of the Defendants' action he had lost his copyright which had been infringed. The Plaintiff stated that he was unaware that the 1st Defendant accounted to the University as he was not furnished with a copy thereof. He asserted that he bought a copy of the 1st Defendant's book at Kshs 825/=.

39. In re-examination by **Mr Chacha Odera**, the Plaintiff asserted that the question belongs to the University but not the answers. According to him, although the questions in both books may not be the same, the answers thereto would be similar.

40. Referred to item 4 in the Defendants' bundle, the memo dated 4th April, 2005 at paragraph 4, and in particular paragraph 5, the Plaintiff disclosed that there were recommendations including a reprimand and withdrawal of the books and surrender thereof to the University. However the 1st Defendant did not make amends with the Plaintiff and that item 8, the letter dated 18th April, 2005 was not copied to him. He explained that he purchased exhibit 3 on 10th May, 2005, a month after the 1st Defendant said he had ceased production of the same. According to him, his complaint was not confined to the three items contained in the table.

41. With that the Plaintiff closed his case.

Defendants' Case

42. In their statement of defence, the Defendant pleaded that the materials the subject of the 1st Defendant's book entitled "***Financial Accounting Revision Manual***" were obtained by the 1st Defendant from papers set for assignments, tests and examinations by the University of Nairobi and were not derived from the Plaintiff's books, as alleged or at all.

43. In their defence, the Defendants called **Moses Namai Anyangu**, the 1st Defendant who testified on behalf of himself and the 2nd Defendant as well.

44. According to him, the Plaintiff is a colleague and they both teach in the Department of Finance and Accounting at the University of Nairobi. According to him, he held a Bachelor of Commerce degree from the University of Nairobi, MBA from the same University and was a Certified Public Accountant, Kenya. He testified that he had taught at the University from 1993 and had extensive experience in the field having taught for over 20 years.

45. According to him, the genesis of the case was that the Plaintiff complained that in writing the 1st Defendant's book, Ex. 2 – Financial Accounting Revision Manual, he had infringed the Plaintiff's copyright implying that the 1st Defendant copied verbatim from his book, Basic Accounting and Financial Accounting, facts which according to him were incorrect. The 1st Defendant disputed the Plaintiff's contention because according to him, in writing his book, he based it on his years' of experience and used past papers set in examinations at the University of Nairobi as well as past papers in examinations done at KASNEB. According to him the exams at the faculty are set by lecturers teaching the course being examined and after setting they are submitted to the University which process and administer the same to the students. Once done, the papers are generally available to the public who can use them in any way as they now fall within the public domain for the students to walk away with, revise them and compare notes and discuss with other people.

46. To the 1st Defendant's knowledge, the Plaintiff complained about his book to the University of Nairobi alleging breach of copyright and plagiarism. He disclosed that he received a reply from the University dated 5th April, 2005 by the Deputy Vice Chancellor, Academic Affairs, **Prof. Kaimenyi** to the Plaintiff in which the University stated that the copyright belonged to the University. It was the 1st Defendant's case that that is the practice in all examinations bodies.

47. The 1st Defendant however disclosed that he was aware that the Plaintiff had published two books in the Financial Accounting and the Plaintiff acknowledged that he sourced the material from KASNEB as well as from the University of Nairobi without acknowledging any individual as the contributors of the questions. Instead he acknowledged the examination bodies whose past papers he relied on.

48. Referred to exhibits 2 and 3 alleging plagiarism, the 1st Defendant referred to page 3 of the letter to the Managing Editor of the University of Nairobi Press dated 10th September, 2004 in which the UON Press, who are the Plaintiff's Publishers at page 3 talked of accounting cycle question and compared his book at page 5 and the Plaintiff's page 46. According to the 1st Defendant a look at question 5 in his book and page 46 of the Plaintiff's book does not reveal such question but a figure that displayed what the Plaintiff called accounting cycle. According to the 1st Defendant, the two are different. To him, the term accounting cycle is a universal term. Again in the same letter of complaint, the Plaintiff talks of adjustments and refers to the 1st Defendant's book at page 6 and the Plaintiff's book at page 124. However according to the 1st Defendant, in his book question 6 deals with adjusting entries and closing entries and their functions and distinctions while in the Plaintiff's book the item deals with end of period adjustments. In the 1st Defendant's assessment the two questions are different as the word adjustments are procedures in accounting which is a universal concept.

49. With respect to page 5 of the 1st Defendant's book question 9 as compared with page 158 of the Plaintiff's book, the 1st Defendant averred that his book deals with the differences between accounting and bookkeeping while page 158 of the Plaintiff's book does not have a question that reads like that. With respect to question 7 of the 1st Defendant's book at page 25, the 1st Defendant testified that it covered two pages. However the question was obtained from KASNEB exams done on 30th December, 1993 from the Financial Accounting paper one. According to the 1st Defendant that was his source of the question as well as the Plaintiff's source. He therefore denied that he got it from the Plaintiff's book as the paper was done on 3rd December, 1993 and the Plaintiff's book was published in 2002 hence the paper preceded the Plaintiff's book by 9 years.

50. According to the 1st Defendant, he does not owe the Plaintiff any responsibility regarding the publication of his book. However, he did render an account to the University as requested which they agreed with and to him there is no conflict between him and the University as the issue was settled.

51. Apart from his oral evidence the 1st Defendant relied on his statement which he adopted as part of his examination in chief. In the said statement the foregoing was restated and it was averred that the Vice Chancellor responded to the Plaintiff's complaint that:

“...once an employee/lecturer in the service of the employer/University of Nairobi produces materials/examinations/markings scheme for use during certain period and passes to the employer/University of Nairobi, the said materials ceases (sic) to be his or her property but the employer’s property. In other words, it is the University of Nairobi which should have complained of academic/copyright infringement and not you.”

52. It was therefore contended that the permission of the Plaintiff was not to be sought but that of the University. To the Defendants the Plaintiff has himself copied a lot of questions from KASNEB and used them in his books as reported by himself without seeking permission from examiners who set the questions for KASNEB. According to the defendants, University of Nairobi examination questions are set by its lecturers from many sources and the lecturers are not required to disclose such sources. However, the questions belong to the University once presented. It was the defendants’ case that the acknowledgement of those who set University examination questions was in recognition of that role but did not mean bestowing University copyright to them as he did not have that power.

53. In cross-examination by **Mr Chacha Odera**, Learned Counsel for the Plaintiff, the 1st Defendant averred that being an academia, just like other academics, he prides himself in original scholastic works as a result of extensive experience which he has. He however did not agree that reproducing questions is not an original scholastic work because questions help in clarifying to the students how problems are handled and relate to what is being taught and the lecturer participates in getting a number of questions which are developed. According to him there is a lot of original work because the questions are selected to present a theme and the questions are pertinent. To the 1st Defendant, this was a common practice in the academic field and has been ongoing at all stages of academics.

54. Referred to his book at page (ii) he confirmed that he had drawn from the papers of the University of Nairobi and that he indicated that the papers used were obtained from various bodies. He acknowledged the exam papers are set by lecturers and that he sought permission from the lecturers. Referred to the letter from **Prof. Kaimenyi**, the 1st Defendant did not think that what was being presented was the position of the University and was demonstrating how it is done in the academia and not **Prof Kaimenyi’s** own opinion. The 1st Defendant averred that the Plaintiff also relied on exam questions but did not seek the permission of the lecturers. To the 1st Defendant it would not matter if the Plaintiff used his own questions he set for KASNEB. According to him, even in 1993, it was the 1st Defendant who set it for KASNEB and the Plaintiff did not obtain his permission. The 1st Defendant however admitted that he did not seek the University’s permission to use their papers but stated that he did apologise for the same.

55. The 1st Defendant however denied that his book was partly motivated by profit. To him Accounting exams give students problems and the best way to help is to generate exam course while relying on past papers with answers worked out. He however admitted that he incurred costs and sought to recover the same by charging modest fees. He admitted that there were other lecturers who complained but after discussing the reality of the manual, they stopped the course.

56. In re-examination by **Mr Akoto**, learned counsel for the Defendants, the 1st Defendant asserted that the Plaintiff in this case, **Prof. Nzomo**, is not the University of Nairobi. According to him, **Prof. Kaimenyi’s** opinion talked of a committee of experts to advise the Vice Chancellor on the subject and their advice was that the Plaintiff should not complain because he had no copyright.

57. According to the 1st Defendant, there was no disclaimer on the exam papers and it would not be normal to have such a disclaimer. In publishing the manual, it was the 1st Defendant’s case that it was to produce past questions and show how they can be worked out. The questions would ordinarily come from past papers. While not ruling out the originality of the accounting principle, he stated that the principles in use are universal now and they can be found in different books.

58. With that the Defence case was closed.

59. It was submitted on behalf of the Defendants that for one to be heard in any court of law he or she must first have locus standi to do so as was held in the case of **Law Society of Kenya versus Commissioner of Lands and Others, Nakuru High Court Case No. 464 of 2000, KLR 706.**

60. According to the defendant, from the above foregoing, for *locus standi* to exist a party should have sufficient interest in the suit. However in this particular case the plaintiff does not have sufficient interest as he does not own any copyrights against the materials used by the 1st defendant in compiling his book. It was reiterated that the 1st defendant used assignments, tests and examination papers set for the purpose of examining University of Nairobi students. Therefore the *locus standi* to bring this suit lies with the University as the Materials used in compilation belonged to it.

61. It was therefore the defendants; case that the plaintiff has no cause of action and relied on **Emukule, J's** decision in **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance vs. Mara Conservancy & 5 Others Civil Case No. 37 of 2013 [2014] eKLR,** where the Judge stated the definition and importance of a cause of action as a factual situation the existence of which entitles one person to obtain a remedy against another person.

62. In the defendants' submissions, the importance of a cause of action in the light of the foregoing is that it entitles a party to claim remedy from the other. It was the 1st and 2nd Defendants' submissions that the Plaintiff cannot claim any remedy from the defendants as he does not have any cause of action against them. This is because he lacks ownership or any claim to the materials used by the 1st defendant in compiling his book.

63. As regards the issue whether the Plaintiff's copyright was infringed by the defendant, the Defendants relied on section 33(1) of the **Copyright Act**, and averred that it is important for the Plaintiff to demonstrate that the defendant has done or caused to be done an act that falls within the exclusive control of the Copyright owner as espoused in section 26(1) of the **Copyright Act**.

64. In this case it was submitted that the Plaintiff has not demonstrated how the acts of the 1st and 2nd Defendants have violated his copyright ownership. He has failed to prove beyond any reasonable doubt that he owns copyright to the materials that were used to come up with the 1st defendant's book. It was the defendants' submission that the Plaintiff failed to do so since he clearly knew that the materials used were obtained from passed papers, assignments, tests and examinations set by the lecturers of Nairobi University to examine students which are under the control of the university and not the Plaintiff's books as alleged in the Plaintiff.

65. The Defendants therefore concluded that the defendant has already made good his wrong and has already withdrawn the publication and or selling of the book in line with the demand from the University of Nairobi who are the legal owners of the materials used to compile the 1st defendant's book. As this was well within the knowledge of the Plaintiff before bringing this suit through the various correspondences exchanged, it was submitted that the Plaintiff did not bring this suit in good faith and as such warrants a dismissal with costs.

Determinations

66. I have considered the pleadings herein, the evidence given by and on behalf of the parties herein as well as the submissions filed herein.

67. In my view the drat issues filed on behalf of the plaintiff disclose the matters that broadly fall for determination in this suit and these are:

1) Whether the 1st Defendant in compiling the book "*Financial Accounting Revision Manual*" copied and reproduced the work of the Plaintiff's two books i.e. *Advanced Financial Accounting* and *Basic Accounting and Principles and Procedure* and thereby infringing on the Plaintiff's copyright.

- 2) Whether the 1st Defendant's publication "*Financial Accounting Revision Manual*" is substantially if not wholly similar to the contents of the books published by the Plaintiff.
- 3) Whether the Defendants have infringed the Plaintiff's copyright.
- 4) What was the source of the material which the 1st Defendant used to compile his book "*Financial Accounting Revision Manual*"?
- 5) Who is the author of the papers set for assignments, tests and examination by the University of Nairobi Department of Accountancy?
- 6) Whether the University of Nairobi has or uses the contents of the Plaintiff's books for purposes of settings, assignments, tests and examinations.
- 7) Who owns the copyright of the materials used at the University of Nairobi Department of Accountancy?
- 8) Whether the Plaintiff has locus standi in the present suit.
- 9) Whether the Defendants' publication of the book "*Financial Accounting Revision Manual*" has caused the Plaintiff to suffer loss and damage.
- 10) Whether the Plaintiff is entitled to costs in this suit.

68. I wish to first deal with the issue of *locus standi* since it may dispose of this suit. The Court of Appeal in Alfred Njau & 5 Others vs. City Council of Nairobi [1982-88] 1 KAR 229; [1976-1985] EA 397; [1983] KLR 625 expressed itself on the matter as follows:

"Capacity to sue is a matter of mixed law and fact, which is to be decided on legal principles (with common sense coming into it) and not a matter of discretion...The term *locus standi* means a right to appear in court, and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings...Lack of *locus standi* and a cause of action are two different things. Cause of action is the fact or combination of facts, which give rise to a right to sue whereas *locus standi* is the right to appear or be heard, in court or other proceedings; literally it means a place of standing...To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he had no *locus standi*, means he cannot be heard, even on whether or not he has a case worth listening to...*Locus standi* involves the right to be heard and then determine whether there is or is no reasonable cause of action or defence."

69. Having considered the Plaintiff's case, it is my view that it cannot be said that the Plaintiff had no *locus standi* to institute these proceedings. Whereas his cause of action may be questionable, as was stated hereinabove, *locus standi* is not the same thing as a cause of action. While it may well be that the Plaintiff had no *locus standi* to claim copyright in respect of the questions set by the lecturers, the Plaintiff claimed that he was complaining about the answers as well. I therefore find that the Plaintiff had *locus* to institute these proceedings as he clearly had the right to be heard in these proceedings.

70. As regards the merits, **Ringera, J** in Nevin Jiwani vs. Going Out Magazine & Another Nairobi (Milimani) HCCC No. 336 of 2002 [2002] 1 KLR 856 held that no artistic or literary work is eligible for copyright unless sufficient knowledge, labour and skill has been expended on the making of such work to give it some original character. However **Ochieng, J** in Alternative Media Ltd vs. Safaricom Ltd [2005] 2 KLR 253, while relying on Guild Ltd vs. Russel Williams (Textiles) Ltd [2001] 1 All ER 700 at 708, *Halsbury's Laws of England*, 14th Ed, Vol. 9(2) Para 314 and *The Modern Law of Copyright and Designs*, expressed himself as hereunder:

"Under section 26(1) of the Copyright Act, the owner of the copyright is the only person who

may reproduce the material either in its original form or its translation or adaptation and if anybody else does any of those acts, he is deemed to have infringed the copyright. In effect the infringement of a copyright does not only mean the reproduction thereof in its original form but includes the translation or an adaptation of the copyright work. The gist of an action for passing off is the deceptive resemblance. The defendant is charged with deceiving the public into taking his goods as and for the goods of the plaintiff. A visual comparison of the competing articles is often all that is required...An action for infringement of artistic copyright, however, is different since it is not concerned with the appearance of the defendant's work but with its derivation. The copyright owner does not complain that the defendant's work resembles his but his complaint is that the defendant has copied all or substantial part of the copyright work. The reproduction may be exact, or it may introduce deliberate variations – involving altered copying or colourable imitation as it is sometimes called. Thus the overall appearance of the defendant's work may be very different from the copyright work; but it does not follow that the defendant's work does not infringe the plaintiff's copyright...The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges to have been copied from the copyright work. The Court undertakes a visual comparison of the two designs, noting the similarities and the differences, the purpose of the comparison being not to see whether the two designs are similar, but to judge whether particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than coincidence. It is at this stage that similarities may be disregarded because they are commonplace, original, or consist of general ideas. If the plaintiff features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the Judge that, despite the similarities, they did not result from copying. The fact that the defendant acted innocently is no defence, for copying is a proprietary right, and if it is invaded, the element of motive or intention on the part of the defendant is wholly irrelevant.”

71. In this case, it was admitted by the Plaintiff the questions set by the lecturers once submitted to the University become the property of the University. It follows that the Plaintiff could not claim copyright in respect of the same. This was the position of Spry, VP in *Systems Africa Ltd vs. Kalamazoo Ltd and Another Civil Appeal No. 34 of 1971 [1974] EA 21* where he relied on *Football League vs. Littlewoods Pools [1959] 2 All ER 546* and *Planck vs. Kolynos [1925] 2 KB 804* and expressed himself as follows:

“Accounting forms consist of merely of lined sheets bearing words of ordinary day-to-day use. They may be part of a system, but the system itself cannot be the subject of copyright. But time, skill and ingenuity may have gone into the composition of the forms. Indeed, the very art of designing forms is to achieve the end sought with the greatest simplicity. There may be originality in their lay-out. Therefore the learned trial Judge was right in holding that forms might be eligible for copyright... A person precluded by copyright from copying any particular forms can go to a rival producer and obtain comparable forms to meet his needs. Copyright in a form does not mean that another form cannot be designed to serve the same purpose...Whereas I have no doubt that a great deal of work and thought went into the design of the general forms, I am not persuaded, either from a study of the oral testimony or by inspecting the exhibits, that they have sufficient originality to be eligible for copyright. It is otherwise with the forms produced for particular customers. These are produced only after a study of each business concerned, its methods and its accounting needs. The forms prepared for one business would normally be of no use for another, except possibly where the nature of the business was very similar. I am satisfied that these forms are the result of time, skill and ingenuity and have sufficient originality to be eligible for copyright...If the forms are to be regarded as commissioned, the original copyright belongs, under section 11 of the Act, to the persons for whom the forms were prepared, otherwise it belongs to the respondents. The various draft forms were, certainly, not commissioned, because the word “commissioned” connotes a contractual relationship. However, the printed forms were commissioned at the time when the order for printing was placed and the printing plates (for which the customer

was charged) prepared...There is no suggestion in the present case that there was any agreement between the respondents and their customers as regards the copyright...To sum up the court holds that there was no copyright in the general forms and that the copyright in the special forms was vested in the persons for whom they were prepared. Therefore the respondents had no right of action and I would allow the appeal, set aside the judgement and decree of the High Court substitute an order dismissing the suit with costs.”

72. Similarly, the Plaintiff admitted that there was no infringement of his copyright with respect to *Advanced Financial Accounting*. That therefore only leaves *Basic Accounting and Principles and Procedure*.

73. In order for the Plaintiff to succeed in his claim he had to prove that he had expended sufficient knowledge, labour and skill in his publication of *Basic Accounting and Principles and Procedure* and in the result gave it an original character. In this case it was admitted and/or proved that most of the principles contained in the said work were universal while some were derived from past examination papers either from the University of Nairobi or from KASNEB. The Plaintiff however averred that he did modify them in order to meet local circumstances. If the Plaintiff's addition to the said universal principles had the effect of giving them an original character from the universal ones, then it may well be concluded that the Plaintiff acquired a copyright in his works. However mere modification of the original work however general will not suffice. This was the position adopted by **Duffus, P** in *Systems Africa Ltd vs. Kalamazoo Ltd and Another Civil Appeal No. 34 of 1971 [1974] EA 21* where he expressed himself as hereunder:

“In this case these forms and accounts forming part of the accounting system do not come within the meaning of “artistic works” and cannot be protected by the Copyright Act. These forms and cards cannot be said to be of an original character as to come within the meaning of section 3(2)(a). The court has no doubt that much work and expert knowledge must have gone into the preparation and design of the binders and the Collator and the “system” but there is no originality in the actual accounting sheets or cards for which protection is sought. They appear to be ordinary and general accounting forms but made to a specific size and punched in a particular manner. The actual headings columns could be easily changed and varied to suit any particular system and are not such as would be protected by the Copyright Act. The purchaser of the system which includes the binder, the Collator and the ledger posting tray must be able to have subsequent sheets prepared either by himself or by another printer, otherwise if the respondents were unable or refused to supply any further account sheets or cards or charged some quite exorbitant rate, the whole system could become useless to the purchaser. These forms or cards are merely forms to be filled in and used by the purchaser to keep his accounts. There are no unusual arrangements in the forms in themselves. In the court's view these simple statements, ledger or journal sheets could not possibly be described as “literary” or “artistic works” within the meaning of the Copyright Act...Where the art cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.”

74. In this case, I am not satisfied that the universal financial accounting as principles modified by the Plaintiff acquired such artistic originality in order for them to have acquired copyright. Therefore whereas it may well be that the 1st Defendant's publication *“Financial Accounting Revision Manual”* is substantially similar to the contents of the books published by the Plaintiff, the Plaintiff has failed to prove that his work, in themselves were the product of sufficient knowledge, labour and skill in order to give them some original character.

75. For the Plaintiff in a case of this nature the law is that the Plaintiff is required to prove his case on a “balance of probabilities”. This term was explained by **Kimaru, J** in *William Kabogo Gitau vs. George Thuo & 2 Others Nairobi (Milimani) HCEP No. 10 of 2008*, where the Court held that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

76. In this case, the Plaintiff, in my view has regrettably failed to prove that the contents of his two books had artistic originality as opposed to general modifications of universally acknowledged principles. Apart from that the 1st Defendant’s evidence that the materials the subject of his book **“Financial Accounting Revision Manual”** were obtained by the 1st Defendant from papers set from assignments, tests and examinations by the University of Nairobi and KASNEB and not from the Plaintiff’s books as alleged was largely unshaken.

77. Accordingly, I find that the Plaintiff has not proved that the Defendants infringed the Plaintiff’s copyright and that the source of the material which the 1st Defendant used to compile his book **“Financial Accounting Revision Manual”** was the Plaintiff’s said books.

78. As regards the authorship of the papers set for assignments, tests and examination by the University of Nairobi Department of Accountancy, it is not in doubt that the same are authored by the lecturers. However upon being transmitted to the University, the same become the property of the University which acquired copyright therein as opposed to the individual lecturers.

79. Whereas the Plaintiff may have suffered loss as a result of the 1st Defendant’s action in that the Plaintiff’s sales may have been reduced as a result, this is the kind of situation known in legal parlance as *injuria sine damnum* (injury without damages).

80. Consequently it is my view and I hold that the Plaintiff is not entitled to the orders sought herein.

Order

81. In the result, this suit is unmerited. The same fails and is dismissed with costs to the Defendants.

82. Orders accordingly.

Dated at Nairobi this 18th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kadima for Mr Chacha Odera for the Plaintiff

CA Ooko