



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 179 OF 2015**

**REV. PAUL R.C BUNAKI.....PLAINTIFF**

**VERSUS**

**NATIONAL TRANSPORT AND**

**SAFETY AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**HON. LEE KINYANJUI**

**THE CHAIRMAN, NATIONAL TRANSPORT**

**AND SAFETY AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Headline of yesterday's (18<sup>th</sup> October 2018) Daily Nation Newspaper read,

*"It's end of the road for rogue Matatus".*

It is in the Public Domain that Road Safety is a big issue in Kenya. Any person who promotes it is to be complimented.

2. Indeed in a letter dated 21<sup>st</sup> September 2005 addressed to Rev. Paul R.C Bunaki (the Plaintiff) in which he is described as Author/Chairman, Kenya Association Vehicle Owners & Drivers (KAVOD), Hon. John J. Michuki (now Deceased) the then Minister of Transport writes partly:-

*"Additionally, may I say that the partnership proposal plus the innovational concepts of the hand copy designed Forms that has provided space for; Drivers passport photo/particulars, make the Police book Traffic Offenders, warnings and Court convictions or fines, road corruption and Driver's demerit points etc, which we felt are useful to be incorporated into the new Generation Licenses, has been received well by the Ministry, hence I am indeed pleased with your efforts and that of your Organization's support in complimenting the Government's efforts in promoting Road Safety in our Country. Congratulations!*

3. That cozy relationship between the Plaintiff and the State seems to have come to an end and on 14<sup>th</sup> March 2015 the Plaintiff presented this Suit against the National Transport and Safety Authority (NTSA), Mr. Hon. Lee Kinyanjui and The Attorney General. In this Suit the Plaintiff asserts that he is the copyright owner of the Ideas and Concepts expressed in what is known as the Kenya Driver Handbook (KDH) and The Kenya Boda Boda Handbook.

4. It is his case that the Government of Kenya through its State Agency, NTSA agreed to publish the two Handbooks through a Public – Private Partnership Initiative. In breach of this arrangement NTSA put out a tender dated 23<sup>rd</sup> March 2015 for the Supply, Delivery, Installation and Maintenance of Second Generation Smart Card Based Driving License and Associated Services. This was in Tender No. NTSA/ICB-014/2014-2015. The Plaintiff avers that the Services advertised for supply and Delivery are contained in the two Handbooks which he had handed over to NTSA.

5. The Plaintiff's Cause of Action, as I can gather from his long-winded Complaint, is twofold, for the protection of what he asserts is his

intellectual property. Secondly to hold the Defendants to account for what he sees as a legitimate expectation to create a Public-Private Partnership in the Publication and Distribution of the two Handbooks. The Plaintiff bespeaks:-

- a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' acts above in its totality violated the Plaintiff's Copyright Rev. R.C Bunaki, 2008 to the extent that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants infringed concepts and ideas contained in the Kenya Driver Hand Book (KDH) and Kenya Boda Boda Handbook handed over to the National Road Safety Council in 2011 and to the NTSA on the 24<sup>th</sup> of October 2013 and that the said acts were illegal, unconstitutional and constitutes a violation and/or infringement of the Plaintiff registered and protected ideas and concepts under the Books and Newspapers Rules, Cap. 111, sub-lleg(Rule 2(2) of the Laws of Kenya.
- b) A declaration that the Plaintiff is entitled to the protection of this copyrighted concepts and ideas contained in the Kenya Driver Handbook (KDH) and Kenya Boda Boda Handbook copyrighted under copyright Rev. Bunaki 2008 and that protection ought to issue accordingly in terms of its registration of the said books under the Books and Newspapers Rules, Cap.111 sub-leg(Rule 2(2) of the Laws of Kenya.
- c) A permanent injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from using, infringing, violating the Plaintiff copyrighted ideas and concepts contained in the forms in the Kenya Driver Handbook (KDH) and Kenya Boda Boda Handbook and from awarding the International competitive Bidding tender NTSA-ICB-014/2014-2015 for the supply, delivery, installation and maintenance of second generation smartcard based driving license and associated services, from opening the tenders, from awarding the contract and from doing anything to give effect to the said tender carried out on the March 23, 2015 until the issues raised by the Plaintiff have been dealt with and/or sufficiently addressed.
- d) An order of specific performance ordering the 1<sup>st</sup> Defendant to enter in to the Public-Private Partnership regarding the concepts and ideas in the Kenya Driver Handbook (KDH) and Kenya Boda Boda Handbook (KBBN) as accepted in the Ministry of Transport letter dated 21<sup>st</sup> day of September 2005 and the 12<sup>th</sup> day of November 2012 to the Plaintiff and by the subsequently acts of estoppel by the NTSA regarding the said books.
- e) That in the alternative the Honourable Court do make an inquiry to the damages, the amount of profits and lost expected sums caused by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acts above and order that the Defendants do compensate the Plaintiff for the losses occasioned from the lost Public-Private partnership regarding each of the Kenya Driver Handbook and each of the Kenya Boda Boda Handbook.
- f) Additional damages as in the circumstances of the matter given the nature of the flagrant infringement.
- g) Costs of the suit.
- h) Interest thereof at Court rates.
- i) Any other or further orders.

6. The Defendants do not think much of this Suit and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in a Notice of Motion dated 8<sup>th</sup> October 2015 sought that the Plaintiff's suit dated 14<sup>th</sup> April 2015 be struck out. If I were to do so then the consequence would be that the Suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would be dismissed with costs. The Motion is said to be anchored on the provisions of order 2 Rule 15(c)(a)(b) and (d).

7. As I turn to discuss the various grounds put forward in support of the Motion, it must be ever present to the Court that striking out of an entire Plaintiff's suit is a drastic step which brings an end to the Plaintiff's action against the person in whose favour the Order is made. For that reason it is a power to be exercised sparingly and in the clearest of cases. Where a Court discerns disclosure of a Triable issue then the issue must be spared the summary onslaught and left to trial.

8. The criticism of the Plaintiff's cause of action is on at least three fronts. The Kenya Drivers Handbook and Kenya Boda Boda Handbook are registered as Books under the provisions of The Books and Newspaper Rules; a subsidiary legislation to the Books and Newspapers Act (Chapter 111 Laws of Kenya). The Certificate in respect to the Kenya Boda Boda Handbook is dated 2<sup>nd</sup> October 2013 and the entity named as the Publisher and deliverer of the Book is Blessing Hand African Foundation. In respect to the Kenya Drivers Handbook, it is dated 13<sup>th</sup> July 2011 with the Publisher and deliverer being Kenya National Association of Vehicle Owners and Drivers (KAVOD).

9. These two Handbooks are the works over which the Plaintiff claims copyrights. The argument by the NTSA and its Chairman is that the owners of the two works are persons other than the Plaintiff. On the face of it the Defendants are correct and may have a forceful point in view of the provisions of Section 16 of The Books and Newspapers Act:-

“16 (1) Every copy of an entry in, and every extract from, a register, certified under the hand of the Registrar to be a true copy or extract, shall in all legal proceedings be conclusive evidence of the contents of the register so far as the same appear in such copy or extract, and prima facie evidence of the facts appearing therein.

(2) A certificate under the hand of the Registrar stating that he has or has not received any notice or return under this Act or any rules made thereunder, or that he received such a notice or return on, or did not receive such a notice or return by or before, a specified date, shall in all legal proceedings be prima facie evidence of the facts stated therein.

(3) A certificate under subsection (1) or subsection (2), purporting to be signed by the Registrar, shall be presumed, until the contrary is proved, to have been signed by him.

(4) No process for compelling the production of any book, newspaper, register or document kept by, or in the possession or custody of, the Registrar shall issue from any court except with the leave of that court, and any such process issued with such leave shall bear a statement that it is so issued”.

10. The answer by the Plaintiff is that the Senior Deputy Registrar General, confirmed him to be the legitimate Author and owner of the two Handbooks and copyright in that respect. The letter is that dated 22<sup>nd</sup> October 2012. I have looked at the contents of that letter and it says exactly what the Plaintiff asserts. In addition in respect to the Kenya Driver Handbook, the Plaintiff has displayed the Return of Book form which was lodged with the Registrar of Books and Newspapers in which he is named as Author.

11. Given that under Sub Sections (1) and (2), the entry in the Certificates are prima facie evidence of the facts appearing therein, this Court would rather give the Plaintiff an opportunity to debunk the contents of the Certificate at Trial and to prove that, in line with the Registrar’s letter of 22<sup>nd</sup> October 2012, he is indeed the Publisher and owner of the two Handbooks.

12. It is also contended that the contents of the Tender Document were wholly based on the Traffic Act and the ISO Standards ISO/IEC 18013-2-2008 and could not infringe on the Plaintiff’s alleged Copyright.

13. At the time of presenting the Claim, the Plaintiff had sought Orders of Injunction vide a Notice of Motion dated 14<sup>th</sup> April 2015. In resisting that Motion, NTSA had made similar arguments under the Traffic Act. Hon. Justice Gikonyo who determined the Application reacted as follows:-

*“These are as they appear in the handbooks. As I have stated earlier, the tender documents draw directly and largely from Section 37 of the Traffic Act and contain the information set out in the Law. Therefore, such is adherence to the law by the 1<sup>st</sup> Respondent and cannot constitute an infringement of Copyright. With due respect to the Applicant, the tender itself is not even a derivative work of the books, and does not infringe the copyright thereto”.*

14. Before Judge Gikonyo, as he did before me, Counsel for NTSA asked this Court to give regard to Section 37 as had been amended by Section 3 of The Statute Law (miscellaneous Amendment) Act (No. 7 of 2007) which reads:-

“(1) A driving licence shall be in the form of a computerized smart card made of plastic material containing a micro-processor-based chip, and provisional licences shall be in the prescribed form, which shall be impressed with the official stamp of the issuing authority.

(2) The driving licence shall have—

(a) a front side, which shall contain the Personal Identification Number (PIN) and Identity Card Number, photograph, name, date of birth, sex, signature, and licence number of the licence holder, and the class of the vehicle to be driven or restricted; and

(b) a rear side, which shall contain the thumb print of the licence holder, the date of issue per class, the date of expiry per class, conditions and any other information, if any, and the signature and reference number of the issuing authority.

(3) The micro-processor based chip shall contain features for micro-printing, image hosting, ultra-violet printing (logo), the national coat of arms, hologram, and both side lamination.

(4) The micro-processor based chip shall contain the driver's name, biometric information, the photograph, signature, licence number, class of vehicle to be driven or restricted, the date of issue, the date of expiry, conditions or other information, if any, and the signature and reference number of the issuing authority”.

15. Cautioned by Counsel for the Plaintiff, it has come to light that the reading of Section 37 was different as at March 2015 when the Tender was advertised. Through my own inquiry, I have found that the commencement date of Section 3 of the Statute Law (Miscellaneous Amendment) Act No. 1 of 2007 was appointed to be 11<sup>th</sup> December 2017 through Legal Notice No. 11 December 2017. The truth of the matter then would be that Section 37 of the Act as existing at the material time read:-

“37(1) Driving Licences and provisional licences shall be in the prescribed form, and there shall be affixed to each driving licence a photograph of the licence holder which shall be impressed with the official stamp of the Registrar.

(2) The signature of the licence holder shall also be affixed to the licence.

(3) No person shall use a mutilated, or defaced driving licence or provisional licence.

(4) A driving licence issued to any person who is suffering from any disease or disability to whom under the provisions of Section 30 of this Act a licence has been granted shall be subject to such restrictions or conditions as may be decided by the Licensing Officer. Such restrictions or conditions shall be entered on the licence which shall not be valid unless such conditions or restrictions are complied with by the holder thereof”.

16. The effect of that finding is that the Tender Document as published does not follow any statute that then existed. For that reason an argument that the Tender Document simply adhered to Statute and could therefore not breach the alleged Copyright cannot be available.

17. In passing I must hope that the wrong citation of the Statute by Counsel for NTSA before Gikonyo J. was a genuine slip and not a deliberate attempt to mislead.

18. The intent of ISO/IEC 18013 is to allow the issuance of one Document to serve the purpose of both an International Driving permit (IDP) and a Domestic Driving Permit (DPP) (see Annexure FM-02 to affidavit of Francis Meja sworn earlier on 8<sup>th</sup> May 2015). It is argued by NTSA that the Tender it put out was towards making Kenya compliant with these International Standards. I have looked at that Document and whether the contents of the Handbook simply copy those standard is a matter that requires testing of evidence. It is a matter that requires Trial.

19. It is common ground that the Tender Document was published under the direction or control of Government, NTSA being a State Agency (so would Driving Licenses produced pursuant to the tender). An argument set up by NTSA is that even if the Handbooks were indeed Copyright works of the Plaintiff the reproduction of their contents is not protected. This is said to be the effect of Section 26(1) (h) of the Copyright Act which reads:-

“26(1) Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original; but copyright in any such work shall not include the right to control—

(a) the doing of any of those acts by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source;

(b) the reproduction and distribution of copies, or the inclusion in a film or broadcast, of an artistic work situated in a place where it can be viewed by the public;

(c) the incidental inclusion of an artistic work in a film or broadcast;

(d) the inclusion in a collection of literary or musical works of not more than two short passages from the work in question if the collection is designed for use in a school registered under the Education Act (Cap. 211) or any university established by or under any written law and includes an acknowledgement of the title and authorship of the work;

(e) the broadcasting of a work if the broadcast is intended to be used for purposes of systematic instructional activities;

(f) the reproduction of a broadcast referred to in the preceding paragraph and the use of that reproduction in a school registered under the Education Act (Cap. 211) or any university established by or under any written law for the systematic instructional activities of any such school or university;

(g) the reading or recitation in public or in a broadcast by one person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement of the author;

(h) the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived therefrom”.

For the protection to be excluded under these provisions, two elements must both exist. That the reproduction is in Public interest and secondly no revenue is derived therefrom.

20. That a work is published or produced to enhance safety on our roads can easily pass the test of Public interest, but whether or not revenue is derived or to be derived from its publication/production is another matter and may call for receiving of evidence. It is clear to this Court that a Section 26(1) (b) argument cannot defeat the Plaintiff's claim at this interlocutory stage.

21. I turn to the submission that the Plaintiff's Cause of Action does not demonstrate a Cause of Action founded on legitimate expectation. This again I have to find in favour of the Plaintiff and in doing so I cannot do any better than reproduce the following passage of the Decision of Gikonyo when he dealt with the Injunction application:-

*“The letter by the late Hon. John Michuki dated 21<sup>st</sup> September 2005 has alluded to two points which were being discussed between the parties. The first one is the partnership proposal plus motivational concepts on hard copy designated Forms. The second is the incorporation of information found in the handbook to the New Generation Drivers License. The latter was dependent upon some financing arrangement being concluded with a Belgium Consortium. The letter by Hon. Amos Kimunya directed the Applicant to the newly created KNTSA on the matter. The letter talks largely about PPP on the Handbooks and their distribution. There is sufficient information that the government made promises to enter into a PPP with the Applicant on the production and distribution of the handbooks to the targeted recipients. And on that basis, the Applicant may have a legitimate expectation for the Government to honour the promises it has made in writing on a PPP Agreement on the production and distribution of the handbook and I think they cannot run away from that fact. I should say here that, the Government should know that people of goodwill approach it on good faith in making such wonderful proposals on road safety as the ones in the Handbooks, and the Government is expected to keep the promises it makes. But, this is quite apart from the tender herein which is not about or the envisaged PPP. Similarly, it will be remote to found relief of injunction on the broken promise on PPP against a tender which is not an infringement of Copyright”.*

It is a view that the Cause of Action based on legitimate expectation raises a Triable issue, a view that I share.

22. Yet, that may not be the end of the matter. NTSA argues that any complaint by the Plaintiff under the expectation of a Public Private Partnership Venture should have been raised before the Petition Committee established under Section 67 of The Public Private Partnership Act. Section 67 of that Act provides that the Committee is to consider all Petitions and Complaints submitted by a Private Party during the process of Tendering and entering into a Project Agreement under the Act. Under Sub Section 5 thereof the Decision of the Committee is final and binding on the Parties. It is an argument as, I understand it, that this Court is bereft of jurisdiction to hear and determine the limb of the Plaintiff's claim touching on an expected Public Private Partnership.

23. That may not be so! The jurisdiction of the Petition Committee appears to cover Petitions and Complaints submitted by a Private Party during the process of tendering and entering into a Project Agreement. This Court has familiarized itself with the contents of the impugned Tender No. NTSA/ICB-014/ 2014-2015. I do not read it as a Tender inviting a Public Private Partnership Venture. It is simply an invitation for persons to supply, deliver, install and maintain Second Generation Smartcard Based Driving Licenses and Associated Services. I have not understood it as an invitation to provide these services on the model of a Public-Private Sector Partnership.

24. The true character of the Plaintiff's grievance under the Legitimate Expectation Doctrine is that the Defendants, through representations and promises, led him to believe that he will enter a Public Private Partnership with a State Agent for purposes of Publication and Distribution of the two Handbooks. The arguments invoking the Provisions of Public Private Partnership Act are therefore misplaced.

25. I do not think that the Plaintiff's Cause of Auction is so hopeless as to deserve imminent dismissal. Let the Plaintiff have his day at Trial. The Notice of Motion dated 8<sup>th</sup> October 2015 is dismissed with Costs.

**Dated, delivered and signed in open Court at Nairobi this 19<sup>th</sup> day of October 2018.**

**F. TUIYOTT**

**JUDGE**

**Present:-**

**Odhiambo for Ochieng for 1<sup>st</sup> and 2<sup>nd</sup> Applicant**

**Kamau for 3<sup>rd</sup> Respondent**

**N/a for Plaintiff**

**Nixon-Court Assistant**