



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 525 OF 2013

KIBWANA MUDEGU ONGUSO.....PLAINTIFF

V E R S U S

KENYA BROADCASTING CORPORATION.....DEFENDANT

JUDGEMENT

1) **Kibwana Mudegu Onguso**, the plaintiff herein, filed an action vide the plaint dated 16.12.2013 and prayed for judgment in the sum of ksh.7,200,000/= plus costs and interest against **Kenya Broadcasting Corporation**, the defendant herein. The defendant filed a defence to deny the plaintiff's claim.

2) When this suit came up for hearing, both the plaintiff and the defendant each presented the evidence of a single witness. Kibwana Mudegu Onguso (PW1) testified in support of his case. He told this court that on 16.12.2013 he executed an agreement with the defendant whereby it was agreed inter alia, that the plaintiff would develop, produce and give to the defendant a drama show titled "**Nyundo Utosini**".

3) PW1 produced the agreement as an exhibit in evidence. It is his evidence that it was a term in the agreement that the defendant would air through its television channel with exclusive rights and that he would provide the drama episodes to the defendant for free until a sponsor was found whereby the defendant would pay him ksh.200,000/= per episode. PW1 claimed that he provided the defendant with 49 drama episodes which the defendant aired. He produced as an exhibit in evidence the defendant's routine sheets showing when the episodes of "**Nyundo Utosini**" were aired and the commercials transmitted within the programme.

4) The plaintiff averred that the defendant breached the terms of the aforesaid agreement by airing 49 episodes without paying the plaintiff. PW1 also stated that out of the 49 episodes the defendant aired, the defendant was entitled to air 13 episodes for free and to pay ksh.200,000/= per episode for 36 programmes making a total of ksh.7,200,000/=.

5) The defendant summoned Peter Muchiri Karoki (DW1) to testify in support of its defence. DW1 confirmed that he plaintiff and the defendant entered into an agreement as stated by the plaintiff. He stated that the plaintiff's programme was to be aired for free and that no payments were to be made until a sponsor was found. DW1 also stated that where a sponsor was found, the plaintiff would be paid ksh.200,000/= per episode.

6) It is the evidence of DW1 that no sponsor was found and therefore the plaintiff was not entitled to the episodes aired by the defendant. DW1 further stated that the advertisements that were aired during the said programme were normal commercials whose scheduling is determined by a time segment. He also stated that the commercials can air at any time within the said time segment at the discretion of the programming officer.

7) At the end of the evidence, learned counsels appearing in this case were invited to make final written submissions. The defendant was the only party which had filed its submissions by the time of writing this judgement.

8) Having considered the evidence tendered plus the written submissions, two main issues commend themselves for determination. **First** is **whether the defendant breached the terms of the agreement**. **Secondly**, whether the plaintiff is entitled to the reliefs sought in the plaint.

9) On the first issue, it is the submission of the defendant that it did not secure a sponsor of the plaintiff's programme and therefore the plaintiff was not entitled to be paid for any of the episodes aired. The defendant further pointed out that the plaintiff was unable to identify the alleged sponsors the defendant worked with. The plaintiff is of the submission that the defendant sold airtime in between his programmes and therefore he was entitled to payment as indicated in the agreement.

10) It is not in dispute that the defendant aired 49 of the plaintiff's drama episodes as shown in the defendant's television routine sheets. It is also not in dispute that there were commercial advertisements aired at the breaks during the airing of the plaintiff's drama episodes.

11) It is not in dispute that those commercials are not aired for free but are aired at a fee. This court is not in a position to believe the

defendant's assertion that the commercials were normal advertisements aired during programmes. In the arrangement between the plaintiff and the defendant, the defendant was bound to disclose to the plaintiff the sponsors of the plaintiff's programmes. It is inconceivable that a total of 49 of the plaintiff's episodes would be aired for free without attracting a sponsor. This court is entitled to infer that the clients who aired their commercials in between the plaintiff's drama episodes were the sponsors of the plaintiff's programme. I am therefore convinced that the defendant breached the terms of the agreement and therefore plaintiff has established his claim for payment of ksh.7,200,000/= on a balance of probabilities.

12) The second issue is heavily dependent on the outcome of the first issue. Having found the defendant to be in breach of the agreement, it goes without saying that the plaintiff is entitled to the reliefs sought in the plaint.

13) In the end, I enter judgment in the sum of ksh.7,200,000/= in favour of the plaintiff and against the defendant.

The aforesaid sum should attract interest at court rates from the date of judgment until the date of full payment.

The plaintiff to have the costs of the suit.

Dated, Signed and Delivered in open court this 19th day of December, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant