



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 490 OF 2013

NONNY GATHONI NJENGA.....1ST PLAINTIFF

JANE WAMBUI ODEWALE.....2ND PLAINTIFF

VERSUS

CATHERINE MASITSA.....1ST DEFENDANT

STANDARD MEDIA GROUP.....2ND DEFENDANT

BAUHAUS LIMITED.....3RD DEFENDANT

R U L I N G

INTRODUCTION

1. The application before the Court is the Plaintiffs' Notice of Motion dated **8th November 2013** and amended on **17th November 2014**. It was filed in Court the day it was amended. It is expressed to be brought pursuant to an Order of this Court delivered on the **4th of December, 2013** and under **Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 1 Rule 10 (1), (2) and (4), Order 40 and Order 51 Rule (1) of the Civil Procedure Rules; Article 40(5) of the Constitution, 2010; as well as Section 26(1) of the Copyright Act, 2001.**
2. The application seeks for the following orders:-
 1. *(Spent)*
 2. *That an order of temporary injunction restraining the Defendants either acting by themselves, their directors, officers, servants, agents, employees or workmen or otherwise howsoever from infringing in any way on the Plaintiffs Literary Copyrighted work "WEDDINGS WITH NONNY GATHONI" and dubbed "THE BAILEYS WEDDING SHOW WITH NONI GATHONI".*
 3. *(Spent)*
 4. *That this Honourable Court be pleased to issue an order of temporary injunction restraining*

the Defendants either acting by itself, their directors, officers, servants, agents, employees or workmen or otherwise howsoever from reproducing 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 or otherwise causing such broadcasting to of a television show that infringes on the Plaintiffs Literary Copyrighted work, pending the hearing and determination of the main suit or further orders of the court.

5. *That costs of this Application be in the cause.*
3. The application is premised on the grounds stated therein and is supported by the amended affidavit of **the 2nd Plaintiff** sworn on **17th November 2014** as well as her further supporting affidavit sworn earlier on 3rd December 2013.

THE APPLICANT'S CASE

4. It is averred by the 2nd Plaintiff that the Plaintiffs' right over the Copyright Work is anchored in law, which law confers sole and exclusive proprietorship over this Work. The deponent avers that the 1st Plaintiff, Ms Noni Gathoni Njenga, is at all material times the lawful proprietor of the Copyright Work, under the Literary Work category entitled "**WEDDINGS WITH NONNY GATHONI**". The 1st Plaintiff did proceed to register her work with the Kenya Copyright Board [KECOBO], under registration number **LT-11447**, against which a Certificate of Registration of Copyright Work dated **17th May, 2013** was duly issued. Consequently, the 1st and 2nd Plaintiffs entered into a contractual relationship with the East African Breweries Limited [EABL], as sponsors of their Literary work, dubbed "**THE BAILEYS WEDDING SHOW WITH NONI GATHONI**". It is the deponent's assertion that the sponsor has invested well over Kenya Shillings Forty Million (KShs. 40,000,000/=).
5. It is the Plaintiffs' case that they have a *prima facie* case with probability of success, having acquired lawful proprietary interest in their registered literary work titled "**WEDDINGS WITH NONNY GATHONI**" and dubbed "**THE BAILEYS WEDDING SHOW WITH NONI GATHONI**" under the Kenya Copyright Board [KECOBO]. It is the Plaintiffs' contention that the Defendants continue to irregularly, unjustly and unlawfully infringe upon their copyright work through the continued promotion of a television show that infringes on the said copyright. According to the Plaintiffs, the infringement has exposed them and their sponsors to severe financial losses.
6. It is also the Plaintiffs' case that they enjoy sole and exclusive rights to 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. The Plaintiffs further aver that they enjoy exclusive rights over 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, subject only to them assigning the said Works or licensing any such use of the Copyrighted Work to any Party.
7. It is the Plaintiffs' contention that the 1st, 2nd and 3rd Respondents, in utter disregard of the express provisions of law and particularly the Plaintiffs' rights as enshrined under Article 40(5) of the Constitution and Section 26(1), of the Copyright Act have unduly, irregularly and illegally made copies of the Plaintiffs' Copyrighted work.
8. The Plaintiffs are apprehensive that if the injunctory reliefs sought are not granted then the Defendants will unjustly continue to infringe upon and threaten further infringement upon their Intellectual Property Rights.
9. With regard to the claims of ownership of the copyrighted work by one David Kiprono, the 2nd Plaintiff averred that they were strangers to the same. The deponent averred that they had met Mr. Kiprono at their Studio in Ridgeways Estate Nairobi. The Plaintiffs contracted Mr. Kiprono through his production company JayDay Magic Studios for some of their productions. The deponent stated that Mr. Kiprono was duly paid for his services and that he could therefore not

claim to have acquired any proprietary rights over the expression in the copyrighted works.

THE 1ST AND 3RD DEFENDANTS' CASE

10. The 1st and 3rd Defendants opposed the application vide the Replying affidavit of the 1st Defendant sworn on 25th November 2013 and filed in Court the following day. The 1st Defendant is described as the director of a TV show known as the SAMANTHA'S BRIDAL SHOW which broadcasts various aspects of weddings including bridal fairs, bachelorette parties, weddings, and the preparations before and after weddings. It is the deponent's assertion that she is not the Proprietor of SAMANTHA'S BRIDAL SHOW which show is the property of Bauhaus Ltd.
11. The 1st Defendant averred that at the beginning of November 2013 she was approached by one David Kiprono, who introduced himself as the director and producer of the work entitled "**WEDDINGS WITH NONNY GATHONI**". She further averred that the said Kiprono informed her that the 1st Plaintiff had unlawfully, irregularly and unethically proceeded to register the Work entitled "**WEDDINGS WITH NONNY GATHONI**" and dubbed "**THE BAILEYS WEDDING SHOW WITH NONNY GATHONI**" with the Kenya Copyright Board (KECOBO) misrepresenting it as her own. Mr. Kiprono further informed the 1st Defendant that proceedings had been instituted with KECOBO to challenge the validity of the Certificate of Registration of Copyright issued and dated 17th May 2013. *The 1st Defendant annexed a copy of the official letter of complaint dated 21st November 2013, supported by a sworn statement by David Kiprono made before a Commissioner for Oaths marked and produced as "CM 1" and "CM 2" respectively.*
12. It is therefore the 1st Defendant's case that she has not promoted a television show that infringes on the Work dubbed "**THE BAILEYS WEDDING SHOW WITH NONNY GATHONI**". In addition, it is the 1st Defendant's case that none of the promotions have in any way infringed any person's copyright, and have all constituted works which have been independently created and produced from the start to the end by Bauhaus Ltd.
13. It is the Defendants' contention that the Plaintiffs are not entitled to copyright in the Work entitled "**WEDDINGS WITH NONNY GATHONI**". According to the Defendants, the said Work only covers the category of "Literary Work" and therefore does not extend any protection to AUDIO-VISUAL works as well as BROADCASTS.
14. It is also the Defendants' case that the application before Court is without merit and ought to be dismissed because Plaintiffs cannot enjoy exclusive rights to wedding show concepts, and that the suit herein is based on a total misunderstanding of what is actually copyrightable. It is further the Defendants' contention that a Broadcast shall not be eligible for copyright until it has been broadcasted, and that copyright in a Broadcast actually belongs to the Author of the Broadcast, who is the first person to Broadcast the Work. The Defendants are also of the view that the Plaintiffs have failed to prove how they will suffer irreparably in the event that this application is dismissed.

THE 2ND DEFENDANT'S CASE

15. The 2nd Defendant opposed the application vide the Replying Affidavit of its Programs Manager, STELLA NJOKI, sworn on 25th November 2013 and filed on the same day.
16. The deponent averred that the 2nd Defendant denied that it had unduly, irregularly and illegally made copies of the Plaintiffs copyrighted work. The 2nd Defendant also denied the allegations that it had promoted a television show that infringed on the Plaintiffs' literary work titled "**WEDDINGS WITH NONNY GATHONI**" dubbed "**THE BAILEYS WEDDING SHOW WITH NONI GATHONI**".
17. The deponent stated that on 11th December 2012, the 2nd Defendant entered into an agreement with Bauhaus Limited for the collaboration in production of the television program dubbed Samantha's Bridal Show. The deponent further stated that as part of the contract, it was agreed that the producer was the author and copyright owner of all intellectual property rights relating to the show and that the 2nd Defendant was granted licensing rights to broadcast the show.

18. It is therefore the 2nd Defendant's case that they have broadcasted the agreed shows pursuant to the agreement it entered into with Bauhaus Limited. It is also the 2nd Defendant's case that they have not infringed upon the Plaintiff's Intellectual property rights while in the process of making their profits from the show.

SUBMISSIONS

19. In support of their application, the Plaintiffs filed their written submissions dated 17th November 2014 on the same day. The Plaintiffs also filed their further submissions dated 23rd January 2015 on 27th January 2015.

20. On 3rd December 2014, the 1st and 3rd Defendants filed their submissions dated 2nd December 2014 while the 2nd Defendant filed their written submissions dated 15th December 2014 on the same day. The 2nd Defendant fully supported and associated itself with the 1st and 3rd Defendants' submissions.

21. Counsel for the parties highlighted the submissions before the Court on 27th January 2015.

ANALYSIS

22. I have carefully considered the pleadings on record as well as the submissions by Counsel, and I take the following view of the matter.

23. The main issue for determination is whether the Defendants have infringed on the Plaintiffs' Literary Copyrighted work '**WEDDINGS WITH NONNY GATHONI**' and dubbed '**THE BAILEYS WEDDING SHOW WITH NONI GATHONI**'.

24. The Plaintiffs maintain that they lawfully secured copyright registration over their literary work entitled 'Weddings with Nonny Gathoni' which is the Running Order for the show dubbed "The Baileys Wedding Show with Nonny Gathoni". The same is certified by the Kenya Copyright Board [KECOBO] as a copyrighted literary work under registration number LT-11447, issued on **17th May, 2013**.

25. It is the Defendants' submission that the works the Plaintiffs are seeking to restrain the Defendants from infringing do not fall under the category of literary work but in the category of artistic works, audio visual, sound recordings and broadcasts. It is therefore the Defendants' case that the certificate of registration attached by the Plaintiffs is in relation to different works under the copyright regime and that the prayers as sought by the Plaintiff are incapable of being granted. At this point, it is my position that this argument as raised by the Defendants is beside the point. The pertinent issue is whether or not there is a copyrightable work by the Plaintiffs that is capable of infringement.

26. It is not in dispute that the Literary work dubbed "WEDDINGS WITH NONNY GATHONI" was registered by the copyright board under registration number LT-11447, issued on **17th May, 2013**. The contention that the 1st and 3rd Defendants seem to raise is that the copyrighted Literary work does not belong to the 1st Plaintiff but that it belongs to one Mr. David Kiprono.

27. It is further submitted by the 1st and 3rd Defendants that in the case of broadcast the copyright belongs to the first person to broadcast the work. According to the 1st and 3rd Defendants' submissions the copyright works dubbed "THE BAILEYS WEDDING SHOW WITH NONNY GATHONI" belongs to David Kiprono who was the first to broadcast the works. It is further the 1st and 3rd Defendants' submission that David Kiprono has registered a complaint at the copyright board awaiting determination.

28. I have seen the said complaint as received by the copyright board on 25th November 2013. There is no evidence on court record of any response from the copyright board or any determination on the said complaint. I will therefore not say much. However, I would like to point out that the Plaintiffs' case, as I understand it, is not based on the infringement of a broadcast as submitted by the 1st and 3rd Defendants but on the literary works dubbed "WEDDINGS WITH NONNY GATHONI" which culminated in the "BAILEYS WEDDING SHOW WITH NONI GATHONI". Indeed even the complaint registered at the copyright board by the said David Kiprono is with

- regard to the said literary works and not the broadcast. The broadcast is a direct result of the literary works. Having said that and in view of the foregoing it is clear that the Defendants have disputed the 1st Plaintiff's ownership of the literary works in question. The copyright board is yet to make a determination of the complaint registered by Kiprono with regard to ownership of the same.
29. Nevertheless, for purposes of these interlocutory proceedings, the 1st Plaintiff is *prima facie* the owner of the literary works dubbed "**WEDDINGS WITH NONNY GATHONI**". I say so because the Plaintiffs attached to their application a Certificate of Registration of the said Literary Works. It is important to note that the said Certificate, as at the time of this ruling continues to subsist. The same has not been revoked.
 30. It is the Plaintiffs' case that the Defendants, deliberately and without authorization from them, illegally and irregularly proceeded to adopt, modify and/or otherwise replicate the said literary works and/or a significant part thereof in utter disregard of the Plaintiffs' intellectual property rights. This was through the Defendants' distribution and broadcast of the copyrighted literary work in a show dubbed '**SAMANTHA BRIDAL SHOW**'.
 31. It is the 1st and 3rd Defendant's submission that they entered the wedding show way before the Plaintiff and they have their own copyrighted works known as Samantha Bridal. I do not think this is in dispute. The issue the Plaintiffs are raising is the 'running order' of the said show. The Plaintiffs' contention is that the Defendants changed their old running order and copied the Plaintiffs'.
 32. The 1st and 3rd Defendants' case is that it is misguided of the Plaintiffs to suggest that they are the only persons entitled to broadcast wedding shows featuring hen parties, limousine rides and gifts from the show's host. It is further the Defendants' submission that the Plaintiffs' claim of infringement against the Defendants is mischievous and amounts to unfair trade practice with a view to eliminating competition.
 33. The Plaintiffs produced to this court side by side comparison clips of the Applicant's show and that of the 1st and 3rd Defendants' show demonstrating the apparent similarities in the works. On the face of it, anyone can easily dismiss the similarities on the basis that there are certain features that are obvious in a wedding show for example the use of a limousine. However, the following submissions by the Plaintiff which are uncontroverted by the Defendants prove otherwise and shed more light on the issue of infringement as raised by the Plaintiffs.
 34. It was the Plaintiffs' submission that the Defendants had previously jointly or otherwise produced the Samantha Bridal Show which over the years had a clear and set format [**running order**] and content. However, it is the Plaintiffs' contention that the Defendants, upon illegally obtaining their copyrighted work, made a deliberate shift in their television show by substantially copying and adopting their copyrighted running order. According to the Plaintiffs their running order posited a novel format and content of a wedding-celebration show.
 35. The Plaintiffs submitted that Baileys Weddings with Nonny Gathoni was a show whose concept was fixated in a Running Order. According to the Plaintiffs the content of the said show was a glamorous, cutting edge reality show sequentially documenting a **woman's celebration of her bachelorette party, her fairytale wedding, and culminating with the evening party** in a deliberate set out format.
 36. It was the Plaintiffs' submission that Samantha Bridal Show on the other hand, had been described by its founder, the 1st Defendant, during its launch on or about the 9th of August, 2010 as a show which followed a couple for about three months during the couple's wedding preparations and documented the ups and downs of the planning process. It is therefore the Plaintiffs' case that the Samantha's bridal show running order has from the launch of the show and over the last three [3] years been standard, definite and well known, as can be seen in the promotional clips posted on the Samantha Bridal Show's website, up until November 2013 when their running order drastically changed and was a copy of that of Baileys Weddings with Nonny Gathoni which was at the time being aired.
 37. As regards whether there was access to the Plaintiffs' work, it is evident that the 1st and 3rd Defendant's accessed the literary works of the Plaintiffs through the running order of **BAILEYS WEDDING SHOW BY NONI GATHONI**.
 38. It is the Plaintiffs' submission that they contracted and retained one David Kiprono, of JayDay

Magic Studios Production Company, to provide various services including the production of the pilot for the Weddings with Nonny Gathoni show. Mr. Kiprono provided the said services and was duly paid for as shown in the several receipts produced by the 2nd Plaintiff in her further supporting Affidavit dated 4th December, 2013. The said receipts were acknowledged and executed by Kiprono and it is therefore the Plaintiffs' argument that he cannot claim to have developed the copyrighted work or acquired any proprietary claim over the same.

39. It is the Plaintiffs' submission that the 1st Defendant has admitted to meeting the said David Kiprono and more importantly has confirmed to having received the copyrighted running order through him. It is therefore the Plaintiffs' case that following the 1st Defendant's engagement with Kiprono, who pitched the 1st Plaintiff's concept to the Defendants either jointly or separately, the Samantha Bridal Show's format and running order drastically changed to one that was obviously a copy of the Plaintiffs'.
40. In light of the above findings, it is my view that the Plaintiffs have established a *prima facie* case, one of the conditions for grant of an interlocutory injunction as laid down in the case of **Giella Vs Cassman Brown & Co. Ltd [1973] E.A 358**. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 1215** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiffs having secured copyright registration over the literary work and having shown that the Defendants adapted the said literary works in their Samantha bridal show, have established a *prima facie* case. The law under Section 22 and 23 of the Copyright Act expressly precludes everyone including the Defendants herein from in any way adapting the literary work of the Plaintiffs, into any subsequent work and deriving commercial gain therefrom without their consent.

41. As to whether the Plaintiffs will suffer irreparable harm that would not be adequately compensated for in damages, these Courts have held time and again that damages are not always an adequate remedy in determining whether or not to grant an injunction and especially where there has been a breach of the law. In the case of **Waithaka –vs- Industrial and Commercial Development Corporation (2001) KLR 374 Ringera J (as he then was)** in granting an injunction went ahead and delivered himself thus at page 381:-

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust.”...

See also: Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207.

42. On the issue of balance of convenience, the same tilts in favour of the Plaintiffs at this stage for the reason that the 1st Plaintiff is the registered proprietor of the copyrighted literary works. The Defendants have also not shown that they will suffer any prejudice if the Plaintiffs are granted the injunctive reliefs herein.

DISPOSITION

43. In view of the foregoing, the order that commends itself to this Court is that the Plaintiffs' Notice of Motion dated **8th November 2013** and amended on **17th November 2014** is hereby allowed as

prayed. The costs of the application shall be in the cause.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Ogot for the Plaintiffs

M/s Ochieng for the 2nd Defendant

Wawire holding brief for M/s Karen for the 1st and 3rd Defendant

Teresia – Court Clerk