



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 599 OF 2010
HOSWELL MBUGUA NJUGUNA T/A
FISCHER AND FISCHER MARKETING CONCEPTS.....PLAINTIFF
VERSUS
EQUITY BANK LIMITED.....1STDEFENDANT
SAFARICOM LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's Complaint was dated 6th September 2010 and filed on 7th September 2010. It sought judgment against the Defendant (sic) for:-
 - a. **An injunction to restrain the Defendant by itself, its servants or agents or otherwise howsoever from using the confidential information of the Plaintiff or any part thereof for any purpose other than for the purpose for which it was supplied, and from using or marketing the Concept branded "M-Kesho" or otherwise exploiting the said information or any part thereof.**
 - b. **An inquiry as to damages for breach of confidence.**
 - c. **Further or alternatively, an account of all the profits made by the Defendant from the use of the said confidential information of the Plaintiff.**
 - d. **An order for the appointment of a receiver to collect and receive all the profits made by the Defendant from the use of the confidential information of the Plaintiff and an order for the giving of proper direction for that purpose.**
 - e. **An order for payment of all sums found to be due to the Plaintiff together with interest thereon at court rates.**
 - f. **The Defendant be ordered to pay the Plaintiff costs of this suit together with interest therein at court rates.**
 - g. **The Defendant be ordered to pay the Plaintiff costs of this suit together with interest thereon at court rates from the date of filing of this suit until payment in full.**
 - h. **Any such or further relief as this Honourable court may deem appropriate.**
2. The 2nd Defendant's Statement of Defence dated 11th March 2013 was filed on even date while that of the 1st Defendant was dated and filed on 21st March 2013. The Plaintiff's Reply to the 1st

- and 2nd Defendants' Statements of Defence was dated 19th April 2013 and filed on 22nd April 2013. The Plaintiff amended his Complaint on 25th January 2013. The same was filed on 28th February 2013.
3. The Plaintiff's List and Bundle of Documents were also dated 25th January 2013 and filed on 28th January 2013. His Written Submissions and List of Authorities were both dated 3rd March 2013 and filed on 6th March 2013. The 1st Defendant filed its Written Submissions and List of Authorities both dated 16th April 2013 on even date.
 4. Notably, the Plaintiff's reliefs in the Amended complaint were directed solely against the 1st Defendant. It was for this reason that the 2nd Defendant's advocates merely observed the proceedings and called no witness to testify in the case herein.
 5. Parties informed the court that they did not wish to highlight their respective written submissions. The judgment herein is therefore based on the said written submissions.

THE PLAINTIFF'S CASE

6. Hoswell Mbugua Njuguna (hereinafter referred to as "PW 1") adopted his Witness Statement dated 25th February 2013 and filed on 28th February 2013 as his evidence-in-chief. He identified himself as the proprietor of M/S Fischer and Fischer Marketing Concepts (hereinafter referred to as "the Firm"). He testified that he was the author of original work entitled "Weka Usaidike" (hereinafter referred to as "the Concept") which targeted low income earners and small amounts saving (sic). He was issued with a Certificate of Registration of a Copyright Work on 19th November 2009.
7. His case was that between on or about 10th August 2006 and August 2009, he forwarded to the 1st Defendant a Written Proposal which contained confidential information regarding the Concept. During this time, he held several meetings with the 1st Defendant's representatives where the Concept was discussed. However, the negotiations were terminated on or about end of August 2009.
8. Despite knowing that the information was confidential, the 1st Defendant utilised the same and created and marketed a product known as "M-KESHO" in partnership with the 2nd Defendant as a result of which the 1st Defendant had unjustly made profits.
9. It was therefore the Plaintiff's contention that he had made out a good case for an order of an enquiry as to damages for breach of confidence and/or an account of all the profits made by the 1st Defendant and a further order for the appointment of a receiver to collect and receive all the profits that had been made by the 1st Defendant from the use of the confidential information.

THE 1ST DEFENDANT'S CASE

10. Eric Karobia, a former Project Manager of the 1st Defendant (hereinafter referred to as "DW 1") testified on behalf of the 1st Defendant. He also adopted his Witness Statement dated and filed on 24th June 2014 as his testimony herein.
11. The 1st Defendant's argument was that due to exponential growth of its customer and deposit base amongst other growths, it introduced a mobile solution that enabled its customers to perform banking facilities using mobile phones. Its first SMS Banking was in 2005 and the same provided services where customers could enquire about their balances, forex rate, request for Mini Statements, top up Airtime, effect limited bill payments and accessed various alerts.
12. In 2007, it introduced "EZZY 24/7 Benki Yangu Mkononi" to its existing customers within Kenya and micro clients within Kenya, East Africa and Southern Sudan. In addition to the services that were provided in the SMS Banking, customers could now block a card, change the mobile pin number, transfer funds or request for cheque books. This solution was accessed by UDDD (*127#) channel and SMS for alerts.
13. On the M-Commerce platform, it linked up with existing platforms of M-Pesa, ZAP, Orange Money and Yu Cash and had since then achieved several initiatives, being M-Pesa Agency, M-Pesa Paybill, M-pesa ATM Withdrawal and M-KESHO. The M-KESHO was initiated in

- partnership with the 2nd Defendant and was approved by the Central Bank of Kenya (hereinafter referred to as “CBK”) and registered as a trademark. It was launched in May 2010 and had a subscription base of 679,020 as at 14th September 2010.
14. It was emphatic that its M-KESHO product was fundamentally different from the Plaintiff’s concept which was very basic and limited to scratch cards that were to be sold by agents and that in any event, that the Plaintiff’s Product was merely a write up. It pointed out there was no legislation in place that allowed agency banking at the time PW 1 presented it with his proposal.
 15. It denied that the Plaintiff’s Concept was original or that there was confidential information as in 2005, Wizzit Bank, a division of the Bank of Athens in the Republic of South Africa, had launched a full transactional bank account in which its customers would transact by use of a low-cost mobile phone. It was its contention that M-KESHO had targeted the unbanked population similar to what was happening in South Africa.
 16. It therefore urged the court to dismiss the Plaintiff’s suit with costs to it.

LEGAL ANALYSIS

17. The 1st and 2nd Defendants did not file any Statement of Issues. The Plaintiff’s undated Statement of Issues were filed on 20th September 2013. The same were as follows:-
 1. **Whether “Weka Usaidike” was an original(hereinafter ‘the concept’).**
 2. **Whether the Plaintiff was the originator of the concept.**
 3. **Whether the Concept M-Kesho had any similarities with the concept.**
 4. **Whether the 1st Defendant used the concept to build the M-Kesho product.**
 5. **Whether the Concept M-Kesho was originated jointly by the 1st and 2nd Defendants.**
 6. **Whether the 1st Defendant breached any confidentiality of the information relayed to it by the Plaintiff relating to the concept.**
 7. **If the answer to 5 above is in the affirmative, whether the Plaintiff was entitled to an inquiry as to damages.**
 8. **Whether the 1st Defendant was obligated to render accounts to the Plaintiff in respect of profit made from the product M-Kesho.**
 9. **Whether the Defendant (sic) was entitled to payment of any sums from the profit made from the product M-Kesho.**
 10. **If the answer to 8 above was in the affirmative, how much was the Plaintiff entitled to.**
 11. **Whether the Plaintiff had any claim against the 2nd Defendant.**
 12. **Who will bear the costs of this suit.**
18. It was PW 1’s testimony that by the time he approached the 1st Defendant with his concept in 2006, the 1st Defendant did not have the facility for its customers to deposit money in their accounts with the 1st Defendant and that the EAZZY 24/7 only dealt with checking of balances.
19. On his part, DW 1 stated that M-KESHO was a more refined concept that involved depositing of money in a phone while that of the Plaintiff’s Product was rudimentary involving depositing of money in a customer’s account. He differentiated the two (2) products being that in M-KESHO, the user did not have to be the 1st Defendant’s customer and only needed to be a subscriber to the service while the Plaintiff’s Concept required the user to be a customer of the 1st Defendant, a fact that was confirmed by PW 1 during his cross-examination.
20. In its submissions, the Defendant differentiated its product from that of the Plaintiff. It argued that the Plaintiff’s Concept had not defined its features, it did not have features for withdrawal of money, balance and mini-statement requests or registration. In addition, it stated that the Plaintiff’s Concept was to use a pre-defined scratch card that it was to issue. It was its further contention that there was no requirement of technology in the Plaintiff’s Concept but that it was to be sold by its agents. It also said that although the users could deposit money in any Equity Account, it was not clear how the delivery was to be achieved.
21. On the other hand, it averred that its transactional account was interest earning, deposits were through M-pesa, registration was at its branches and agent locations, subscribers could only

deposit in or withdraw from their M-KESHO accounts, it was a joint partnership with the 2nd Defendant, it developed its technology with the 2nd Defendant, it used its bank and M-pesa agent for account origination and that the M-pesa system was supported by back-end M-KESHO integration that it developed with the 2nd Defendant herein.

22. The court deemed it necessary to set out what the Plaintiff's Concept entailed with a view to establishing the similarity or otherwise with M-KESHO. In pg 19 of his Bundle of Documents, it had been stated as follows:-

“...My concept Weka Usaidike will revolve between bank, mobile provider outlets and the depositors. The Bank shall print their own scratch cards with the logos, having inserted different denomination from shs. 100 and so on. This shall be distributed to agents all over the country...The cards shall be sold at the bank outlets. Serial numbers shall be printed on them for tracking purpose and easier distribution in the market. The head office/center shall be responsible for the dispatch of all the scratch cards to the outlets. When printing the cards, the bank shall at all times set a target of the amount it wants to float in the market. The cards shall become money only when a customer has actually transferred the scratched number to his/her account. Hence a suspense Account shall be created at the center for the sole purpose of trading. The dealers shall buy the scratch cards at a discounted fee of an agreed amount which shall be 5 shillings...This system shall operate the same way the existing credit card facilities are managed...”

23. Evidently, the Plaintiff's Concept entailed a voucher with ascribed values by the 1st Defendant's customer to deposit money in their accounts. There was no additional platform to transmit the customer's instructions or indication that a user could transfer the money back to himself or herself. It seemed to be a one (1) way traffic transaction.

24. Although the Plaintiff's idea was a banking concept, it was abundantly clear it was not in the least similar to M-KESHO as he had contended. In fact, the two (2) products were so fundamentally different as was rightly pointed out by DW 1. M-KESHO was connected to a platform owned by the 2nd Defendant that transmitted the financial transaction through technical protocols.

25. The Plaintiff's concept entailed a user scratching a card to reveal a number that would be used to send a text message that would show how much money was deposited in the user's account. PW1 admitted during his cross-examination that M-KESHO did not use scratch cards and that his contentions in Paragraph (9) of his Complaint that his concept utilised M-pesa was introduced by his advocates and was not in his manuscript.

26. It was evident from DW 1's evidence that M-KESHO was a partnership between the 1st and 2nd Defendants and entailed several instructions through the M-Pesa sim by a subscriber using a mobile handset in which the user would do particular actions. The subscriber could transfer money from his or her bank account to M-pesa and from M-pesa to his or her bank account.

27. It was the view of the court that the 1st Defendant's failure to present any evidence to show that M-KESHO was an idea borne from Michael Joseph and Dr James Mwangi did not negate the fact that the Plaintiff's and 1st Defendant's products were so distinct in their mode of operation.

28. Indeed, PW 1 admitted during cross-examination that he did not have the technical know-how and that there was software that was to be developed for his concept to become workable. His role was that of a creator of a product. He also agreed with the 1st Defendant's assertions that by 2005, banks had mobile banking and that M-pesa was in existence by 2009.

29. PW 1's assertion that he was the one who brought the idea of sheds to the 1st Defendant was not material in the circumstances of the case herein as he seemed to admit that several other banks had those sheds. The Pre-fab structure that he alluded to on pg 26 of his Bundle of Documents was thus not an original idea that he could purport to have been utilised by the 1st Defendant. In any event, all M-KESHO transactions did not require any sheds to be operated and the 1st Defendant never operated through sheds. Rather, the mobile phone was the medium through which the transactions were being effected in the M-KESHO Product.

30. The court found and held that the Plaintiff did not show that the Model of Banking on pp 17- 31 of his Bundle of Documents that the 1st Defendant breached such confidence. There was no evidence of use of the Plaintiff's material by the 1st Defendant and further, there was no proof that the

- material was confidential or that the material created an obligation of confidence on the 1st Defendant as was held in the case of **Faulu Kenya Deposit Taking Microfinance Limited vs Safaricom Limited [2013] eKLR** that was relied upon by the 1st Defendant.
31. In view of the disparity of the concepts, the court found that the Plaintiff's contentions that the 1st Defendant breached the confidence he purported to have bestowed upon it was not sufficiently proven. The Plaintiff's reliance of several cases and that of **Fraser & Others vs Thames Television Limited & Others (1984) 1 Q.B. 44** in which it was held that a person who has received information in confidence from another must not take unfair advantage of it or wrongful use or publication of it were clearly distinguishable from the circumstances of this case. The Plaintiff failed to demonstrate that he had a proper cause of action founded on the developing equitable doctrine of breach of confidence.
 32. Be that as it may, the Plaintiff could rely on his copy rights over his proposed Model of Banking. It meant that no one could purport to use his Model of Banking without his authority to do so. It was, however, not lost to the court that several mobile service providers did utilise scratch cards for the purchase of airtime. Unless he was the creator of the concept of use of scratch card with denomination printed thereon, he could not claim copy rights on the same.
 33. Accordingly, having considered the pleadings, the evidence, written submissions and the case law that was relied upon by the parties, the court did not find it necessary to dwell into the legality or otherwise of the Plaintiff's Product as it was not an issue for determination by the court. What emerged from the facts of this case was that the Plaintiff's Concept had no similarities with M-KESHO, whatsoever.
 34. As the 1st Defendant did not adduce any documentary evidence having been given an opportunity to do so, the court could not conclusively determine whether or not the 1st and 2nd Defendants originated M-KESHO or if it was an upgrade of EAZZY 24/7. The most the court could do was to accept DW 1's evidence that the 1st Defendant was continuously looking for ways to make it easier for its customers to access financial services and that M-KESHO was a result of those innovations as this evidence was not rebutted by the Plaintiff.
 35. Having said so, the court could conclusively and firmly make a definite finding that M-KESHO was not the Plaintiff's product that was envisaged in his proposed Model of Banking. His submissions that there was infringement of his works were therefore of no assistance to him. There was no evidence, whatsoever that was furnished to the court by the Plaintiff to show that there was any breach of confidence by the 1st Defendant or that it used private or secret information for its benefit and to his disadvantage.
 36. Copy rights protect the process in which an idea comes to fruition. It does not protect the idea itself. It is the copying of the process of attaining that idea which is protected. The Plaintiff's **idea**(emphasis court) to assist the "**common mwananchi**", which was the 1st Defendant's target market, through the use of scratch cards could not therefore be said to have been solely owned by him.
 37. Indeed, different people have similar ideas in respect of or about similar issues. It would be creating a dangerous precedent if a person who thinks of an idea seeks to restrain others from entertaining a similar idea in their minds where different methods could be utilised to conceptualise that idea. The Plaintiff failed to show a nexus between his Model of Banking and his claim against the 1st and 2nd Defendants as far as the idea of M-KESHO transactions was concerned.
 38. Evidently, the burden of proof was on the Plaintiff to prove his case but he failed to discharge the same. He did not prove his case to the required standard of proof. His claim against both the 1st and 2nd Defendants appeared remote and unsubstantiated. In fact, his claim against the 2nd Defendant was not proven at all as, in his Amended Plaintiff, he had sought reliefs against the 1st Defendant only. This lends the court to come to only one conclusion, which was that the Plaintiff's case had to fail in its entirety.

DISPOSITION

39. Accordingly, the Plaintiff's suit dated and filed on 6th September 2010 and filed on 7th September

2010 is hereby dismissed with costs to the 1st Defendant. The 2nd Defendant was not awarded any costs as it did not participate in the proceedings herein.
40. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of June 2015

J. KAMAU

JUDGE