



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 567 OF 2011

ORACLE PRODUCTIONS LIMITED.....PLAINTIFF

• VERSUS

DECAPTURE LIMITED.....1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

RADIO AFRICA LIMITED t/a KISS TV.....3RD DEFENDANT

KENYA BROADCASTING CORPORATION.....4TH DEFENDANT

RULING

1. The plaintiff asserts its copyright to a reality game show styled *Young Entrepreneur*. The plaintiff claims that the copyright is contained in a filing with the Kenya Copyright Board. It alleges that the defendants have infringed on the copyright by reproducing a broadcast titled *The Cfc Magnate* which featured the plaintiff's works at length. The defendants flatly deny it.
2. The plaintiff issued a notice to the defendants to produce at the trial the audio visual production of all the episodes carried by the 3rd and 4th defendants. The notice was filed on 10th January 2013. There was no compliance. The plaintiff has thus presented a notice of motion dated 19th February 2013 to compel the defendants to make the discovery on oath. The motion is contested by the defendants. At the time the motion was taken out, the suit had been set for hearing on 13th March 2013 but was taken out of the cause list.
3. The 1st defendant has filed grounds of opposition dated 5th November 2013 and a replying affidavit sworn by its director Leakey Nduati. Its tenor is that the defendant should not be compelled to hand over its intellectual property to its competitor. At paragraph 5, it is deposed that the production, "if any, will [be made] only in court and not to the plaintiff and only on the day of the hearing". It is further averred that since the plaintiff did not answer item 4 in the pretrial questionnaire in the affirmative, the motion is an afterthought. That question had asked the plaintiff to confirm whether it required inspection of documents. At paragraph 9, the 1st defendant contends that it has incurred a lot of expenses and cannot therefore provide the materials sought for free.
4. The 3rd defendant has filed grounds of opposition. The key objections are three-fold: first, that the notice to produce is vague; secondly, that the 3rd defendant did not make or *produce* the impugned materials and cannot therefore deliver them to the plaintiff; thirdly, that the application is frivolous and an abuse of process. In the written submissions, the 3rd defendant also contended

- that the materials sought are *unnecessary* and *irrelevant* since no copyright subsists in the plaintiff's concept or idea.
5. The 2nd defendant associated itself fully with the submissions by the 3rd defendant. Its learned counsel stated he had nothing useful to add.
 6. The 4th defendant filed a replying affidavit sworn by Chris Mutungi on 23rd December 2013. The 4th defendant conceded that it broadcast the material programme on 29th September 2011 and 22nd December 2011. However, it returned all the audio visual materials to the 1st defendant as per the annexed agreement.
 7. On 6th November 2013 directions were granted to determine the motion by written submissions. The plaintiff filed its submissions on 18th November 2013; the 1st respondent on 22nd November 2013; the 3rd defendant on the same date; and the 4th defendant on 3rd February 2014. On 13th February 2014, the parties addressed the court on those submissions save for the 2nd defendant for the reason I gave earlier. I have considered the pleadings, depositions and rival submissions.
 8. This matter is pending hearing. There is thus a general caveat on making findings that would embarrass the trial court. The veracity of the plaintiff's claims and the rebuttals by the defendants will be tested by evidence. That will be the true *province* of the trial court. As a corollary, the *relevance* and *admissibility* of documents, recordings, materials and broadcasts will depend on the rules of *evidence* and the *pleadings* by the parties. The issue for determination now is whether the defendants should be compelled to deliver the impugned materials to the plaintiff before or at the trial.
 9. The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. This is aptly captured in *Halsbury's Laws of England* Vol 13 paragraph 1:

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”.

10. That position was aptly captured by Havelock J in *Concord Insurance Co Limited Vs Nic Bank Limited* Nairobi, High Court case 175 of 2011 [2013] eKLR. Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the *Concord Insurance* case (supra) that discovery should be *limited solely to the matters in contention*. Relevance can only be gauged or tested by the pleadings or particulars provided. *Halsbury's Laws of England* (supra) paragraph 38. See also *Kahumbu Vs National Bank of Kenya Limited* [2003] 2 E.A 475, *Oluoch Vs Charagu* [2003] 2 E.A 649.
11. I would then return to the pleadings. The plaintiff's case is that the 1st defendant in concert with the co-defendants infringed on the plaintiff's copyright, *Young Entrepreneurs*. The 1st defendant's retort is that it has exclusive copyright to the literary works entitled *The Cfc Stanbic Bank Magnate*. I have seen exhibit “LM 1” to Leakey Nduati's deposition showing the certificate from the Kenya copyright Board. But I equally note that the plaintiff's literary works are registered by the same board. I have also seen a letter dated 31st October 2011 from the Kenya Copyright Board comparing De-capture Limited's *KCB 0963* and Wide Trendsetter's *KCB 0831* and finding no similarity. Like I said, I cannot comment further to avoid embarrassing the trial court.
12. The 3rd defendant has cited the decision in *Green Vs Broadcasting Corp of New Zealand* [1989] 2 ALL ER 1056 for the proposition that the defendants carried a *broadcast* in a television show which is at variance with the plaintiff's *concept* or *idea*. Accordingly, the plaintiff's claim of

copyright is remote at best. I think that may be a suitable submission at the trial. The case of the plaintiff may unravel and collapse in pieces at the trial. And so can the defendants' case. With respect, that will be the proper timing and forum to canvass the arguments whether *copyright* has attached under section 22 or whether *infringement* has occurred under section 35 of the Copyright Act. At the moment, I can only gauge *relevance and necessity* of the materials sought from the pleadings or particulars.

13. From the competing claims disclosed in the *pleadings*, the plaintiff obviously requires full *discovery* of the disputed materials to get a fair trial. I thus find the materials sought on discovery are *relevant* and *necessary*. The materials have been broadcast and I am at a loss how the intellectual property of the 1st defendant will be lost merely by *discovery*. The proposal by the 1st defendant to *only* play the productions in court on the date of the trial would ambush the plaintiff. It would leave the plaintiff holding the short end of the stick. The question of costs of making the copies is not beyond recompense if the 1st defendant or any other defendant prevails at the trial. In a synopsis, the defendants will not suffer prejudice not compensable in costs. The rights of the plaintiff to discovery outweigh that inconvenience.
14. This court is now enjoined to do substantial justice to the parties: it must disregard technical procedures and aim at settling the *root* of the dispute. That is the spirit and letter of article 159 of the Constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC case 633 of 2011 [2012] e KLR, Chimanlal K.N. Shah & others Vs Trust Agencies Limited Nairobi, High Court case 1387 of 2001 [2012] e KLR, Unga Limited Vs Magina Limited Nairobi, High Court case 1250 of 1999 [2014] e KLR.

15. The plaintiff served a notice to produce. Paragraph 1 in that notice seeks production of the audio visual recordings made by the 1st defendant and broadcast by the 3rd and 4th defendants. It is not ambiguous as urged by the learned counsel for the 3rd defendant. None of the defendants has contested service of the notice and all of them have not complied. Save for Kenya Broadcasting Corporation, the 4th defendant, none of the other defendants has denied possession of those materials. It would be gainsaid that those three defendants have *power* or possession over those documents. The materials sought are *a species not genus*. Oluoch Vs Charagu (supra). I have already stated that from the pleadings, the materials, on the face of it, are *relevant* and *necessary*. I am thus inclined to order discovery on oath against the 1st, 2nd and 3rd defendants. The motion against the 4th defendant is accordingly dismissed with no order as to costs.
16. In the result, the 1st, 2nd and 3rd defendants shall make discovery on oath and deliver to the plaintiff at least 14 days before the trial copies of all documents relating to the matter in issue and in particular the audio visual production of all the episodes of the programme styled *The Cfc Stanbic Magnate*. I award the plaintiff costs of the motion to be met by the 1st, 2nd and 3rd defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 25th day of February 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Ms.....for the Plaintiff instructed by Igeria & Ngugi Advocates.

Ms.....for the 1st Defendant instructed by Nyaguthie Njuguna & Company Advocates.

Mr.....for the 2nd Defendant instructed by Walker Kontos Advocates.

Mr.....for the 3rd Defendant instructed by Mohamed & Muigai Advocates.

Ms.....for the 4th Defendant instructed by Paul B. Jilani Advocates.

Mr. C. Odhiambo, Court clerk