



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 GROUP KENYA ::::::::::::::::::::::::::::::: 2ND DEFENDANT

RULING

1. The application before the Court is the Plaintiffs’ Notice of Motion dated **19th November 2013** and amended on **17th January 2014**. It is expressed to be brought under Order 40 rule 3 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Act.
2. The application seeks to cite the 1st Defendant and the CEO of the 2nd Defendant for contempt of the Court Orders made on **8th November 2013**. The application is also seeking for Orders that the property of the 2nd Defendant and Bauhaus Limited be attached and sold in pursuance of an Order of sequestration on account of Contempt. The Plaintiffs are also seeking for an apology from the 2nd Defendant which should be published in its Newspaper, “The Standard” for the infringement and Contempt.
3. The application is based on the grounds stated on the face of the application and is supported by the amended affidavit of the 2nd Plaintiff, **JANE WAMBUI ODEWALE** sworn on **17th January 2014**.
4. The background of the application is that on **8th November 2013** pursuant to the Plaintiffs’ Notice of Motion dated on even date, this Court made orders directing and restraining the Defendants either by themselves or their agents from infringing in any way on the Plaintiff’s Copyright in the literary work “WEDDINGS WITH NONI GATHONI” dubbed “BAILEYS WEDDING WITH NONI GATHONI”.
5. The Court further made interim orders restraining the Defendants either by themselves or their agents from reproducing in any material form the original work to the public. The Orders also restrained the Defendants from broadcasting to the public the whole work or a substantial part thereof either in its original form or in any form recognizably derived from the original. The broadcasting was in relation to Television shows.
6. The substance of the orders was to restrain the Defendants from infringing on the Plaintiffs’ literary and copyright works known as “Weddings with Noni Gathoni”.
7. It is the Plaintiffs’ position that the said Orders were made in Court in the presence of the

- Advocates representing the Defendants. It is averred by the 2nd Plaintiff that the said Orders were served on the Defendants. To this end two affidavits of Service dated and filed on 14th November 2013 were sworn by a duly licensed process server and an Advocate of the High Court. It is the 2nd Plaintiff's assertion that the 1st Defendant, the director of the "Samantha's Bridal TV Show" and the proprietor of Bauhaus Limited (the owners of the said TV Show) together with Mr. Sam Sholei the Chef Executive Officer of the 2nd Defendant failed or neglected to take reasonable steps to prevent the infringement of the Copyright of the literary works of the Plaintiffs.
8. It is the Plaintiffs' case that, notwithstanding the said Orders and acting on the instructions of the Defendants, the Kenya Television Network ("KTN") brazenly aired and broadcasted the Samantha's Bridal Show on 17th November 2013 at about 5:00pm. According to the Plaintiffs the said show substantially adapted or otherwise copied the Plaintiff's copyrighted works. It is therefore the Plaintiffs' case that the 1st Defendant and the CEO of the 2nd Defendant have been and continue to be guilty of contempt of the Court orders. The Plaintiffs consequently urge the Court to grant the Orders as prayed in the current application.
 9. The application is opposed. On **4th December 2013** the 1st Defendant filed a Replying affidavit dated **3rd December 2013**. It is the 1st Defendant's assertion that she never disobeyed the Court Orders as alleged by the Plaintiffs.
 10. The 1st Defendant averred that she is not the proprietor of Samantha's Bridal TV Show and that the same is the property of Bauhaus Limited. She further avers that Bauhaus Limited acted in full compliance with the Court's orders and did not infringe on the Plaintiffs' Literary work. According to the deponent the show aired on 17th November, 2013 did not in any way infringe on the Plaintiffs' Copyright. It is her position that the said show was developed and recorded independently from the Plaintiffs' work. She also added that the show was developed and recorded with separate resources, equipment, concepts and script from that of the Plaintiffs.
 11. It is the deponent's assertion that the Applicant is not the lawful proprietor of the Copyright work dubbed "THE BAILEYS WEDDING SHOW WITH NONI GATHONI" but that the said work belongs to David Kiprono. The said Mr. Kiprono alleges that the 1st Plaintiff unlawfully and irregularly registered the copyright misrepresenting it as her own. Apparently, Mr. Kiprono filed a complaint with the Kenya Copyright Board to challenge the validity of the Certificate of Copyright issued to the 1st Plaintiff.
 12. The deponent states that apart from the literary works category, there are other separate and independent categories of copyright which include broadcasts. It is therefore the 1st Defendant's assertions that the Samantha's Bridal TV show as broadcast in November 2013 falls in the broadcast work category and not in the literary works category as claimed by the Plaintiff.
 13. With regard to the side by side comparison of the wedding shows in the clip marked as annexure JWO5, it is the deponent's assertion that the same is skewed, distorted and misleading. At paragraph 25 of her replying affidavit the deponent elaborately gave details as to why the said clip was distorted and misleading. She avers that several of the different scenes used for comparison are not picked from the Plaintiff's copyrighted work. She further avers that the separate, unrelated and independent episodes have been edited out of context and placed side by side to appear as though it is one seamless sequent of events that is reportedly similar to the Plaintiff's work.
 14. The 1st Defendant identified some features in the Samantha's Bridal show which were not contained in the Plaintiff's works. It was her position that the said show had many distinct and distinguishing elements from any of the Plaintiffs' claimed works. It is the 1st Defendant's case that the Plaintiffs cannot purport to exercise a monopoly or exclusive rights over wedding show concepts especially those that did not originate from the Plaintiffs. The 1st Defendant referred to a number of Wedding Show concepts among them the Limo-ride concept and the song choice.
 15. It was the 1st Defendant's assertion that the use of a limousine ride in a wedding show was not novel and that the Plaintiffs were not the first ones to use the same. She referred the Court to photos of Limousines used by Samantha's bridal way back in February 2009. (Annexure "CM 14"). On the song choice, she averred that the song titled "A thousand years" was not the Plaintiffs' original composition but that the same belonged to Christina Perri. She further averred that the said choice of song was not unique with respect to weddings and that the Plaintiffs were not the first ones to use it in a wedding show.

16. It is the 1st Defendant's case that the side by side comparison was done in bad faith by unlawfully cutting and editing segments of the Samantha's bridal show out of context and juxtaposing them with several shows taken on different calendar months of the year. It was also the 1st Defendant's case that the side-by-side comparison was a violation of the intellectual property work of Bauhaus Limited as the said segments of the Samantha's Bridal Show were recorded, tampered with rearranged and fixed in another format without the proprietor's permission.
17. The 2nd Defendant also opposed the application through the Replying affidavit of JOE MUNENE sworn on **29th November 2013** and filed in Court on **3rd December 2013**. The deponent avers that the 2nd Defendant never entered into a contract with the 1st Defendant. However, on 11th December 2012 the 2nd Defendant entered into a contract with Bauhaus Limited to broadcast the original recordings of their wedding events. It is therefore the deponent's position that the broadcasting works on 17th November 2013 was not in disobedience of the Court Order.
18. It is the deponent's assertion that the Court order issued on 8th November, 2013 was specific and only touched on one copyrighted work titled "Weddings with Noni Gathoni" and dubbed 'the Baileys Wedding Show with Noni Gathoni'. According to the deponent, the same did not relate to wedding broadcasts at the 2nd Defendant's television station in general. It was therefore his position that the said order did not prevent the 2nd Defendant from airing the Samantha's bridal show on 17th November 2013.
19. With regard to the clip in JWO5, it was the deponent's assertion that the works therein were not in any manner similar to the works broadcasted in the 2nd Defendant's television station. It is the 2nd Defendant's case that the 2nd Defendant's airing of the television show on 17th November, 2013 did not in any way infringe on the copyrights of the literary works of the Plaintiffs.

THE SUBMISSIONS

20. The application was prosecuted by way of oral submissions.
21. It was submitted by Counsel for the Plaintiffs that the issue for determination was whether or not there was a Court Order which was brought to the Notice of the Defendants and whether the same was blatantly breached. It was Counsel's position that with regard to the current application it was not of concern whether or not there were copyrights in favour of the Plaintiffs.
22. The Court was shown clips which according to Counsel for the Plaintiffs identified the instances of infringement by the Defendants. The 1st clip was annexure JWO2 showing the Plaintiffs' format *Vis-a-Vis* that of the Defendants. It demonstrated a promotion run by the Defendants advertising the intended breach of the Court Orders. The 2nd Clip was annexure JWO5 which captured the show aired on 17th November 2013 while the 3rd clip being annexure JWO1 captured the show aired on 24th November 2013.
23. With regard to annexure JWO2, it was Counsel's submissions that the orders of the Court enjoined the Defendants from broadcasting shows that were substantially similar to that of the Plaintiffs.
24. It was submitted for the 1st Defendant that she was not responsible for the acts complained of. It was further Counsel's submissions that the show was not the 1st Defendant's property and that she had no role to play in deciding whether or not to play the same. It was Counsel's submission that the party that was responsible for airing the shows was Bauhaus Limited.
25. Counsel submitted that the Orders of the Court were meant to stop the Defendants from infringing the Plaintiff's alleged literary works. According to Counsel, the evidence tendered by the Plaintiffs related to broadcasts which are a separate and distinct category of copyright from that of literary works.
26. With regard to annexure JWO2, it was Counsel's submissions that the side by side comparison in the said clip was misleading. The reason being it captured episodes taken on different dates over a period of 6 months and put side by side to create a false impression of similar sequencing. Counsel admitted that there were some similarities in the said shows. However, it was his submission that similarities did not necessarily constitute copyright infringement.
27. In reference to JWO2 Counsel for the Defendant also submitted that the parties had always used

- the same format as far back as the year 2010. Therefore, according to Counsel the broadcasts of 10th and 17th November 2013 were not an infringement of the Court Order.
28. Counsel for the 2nd Defendant associated herself with the submissions of Counsel for the 1st Defendant. It was submitted by counsel that the amendment to the current application to change the 1st Defendant to read as Bauhaus Limited came as an afterthought. According to Counsel, the amendment was made after the Defendants had filed their Defences. In the said Defence, the 2nd Defendant denied being in any contract with the 1st Defendant in her personal capacity.
29. It was further submitted by Counsel for the 2nd Defendant that the two DVDs played in Court depicted rivalries between the parties but did not prove any contempt action by the 2nd Defendant. According to Counsel, the Court Orders did not stop the 2nd Defendant from airing any wedding shows. It was her position that the shows aired by the 2nd Defendant did not touch on the works of the Plaintiffs.
30. In reply, Counsel for the Plaintiffs submitted that the 1st Defendant was directly related to this matter. Counsel submitted that the 1st Defendant had admitted in her affidavit that she was the Director of Samantha Bridal T.V show which according to Counsel was the subject matter of the Court Order. He further submitted that the Court Order was not restricted to specific individuals but to such individuals and their agents.
31. On the issue of the amendment of the current application, it was Counsel's submission that the same was moot as the amendment was made pursuant to the leave of the Court and in accordance with the law. In conclusion Counsel submitted that the Orders of the Court were clear and were brought to the attention of the persons to whom it was addressed. It was his submission that the said orders had been breached.

THE ANALYSIS

32. I have considered the application, the affidavits on record as well as the oral submissions by Counsel. Having done so, I take the following view of the matter.
33. In the current application the Plaintiffs have invoked **Order 40 rule 3** of the **Civil Procedure Rules** which deals with the consequences of breach of temporary injunctions and provides that an application under the said Order shall be brought by way of Notice of Motion. The application also invokes **Section 63 (c)** of the **Civil Procedure Act** which is the substantive provision giving jurisdiction to this Court to punish civil contempt in cases of breach of injunction orders. I am therefore satisfied that the Plaintiffs followed the right procedure in bringing the current application. I am also satisfied that the Defendants were served with the Court Orders and they are aware of the same.
34. I therefore turn to the merit of this application which is whether the Court Order of 8th November 2013 has been breached. The bone of contention is that the broadcasts of the Samantha's Bridal show by the 2nd Defendant on 10th and 17th November 2013 was an infringement to the 1st Plaintiff's copyright in the literary works "Weddings by Noni Gathoni".
35. The essence of the said Court orders was to restrain the Defendants from broadcasting to the public the whole work or a substantial part thereof either in its original form or in any form recognizably derived from the original. It is not in dispute that the Defendants did not broadcast the Plaintiffs' work dubbed "THE BAILEYS WEDDING SHOW WITH NONI GATHONI". The contention by the Plaintiffs is that the show aired on 17th November, 2013 substantially adapted or otherwise copied their works amounting to an infringement on their copyrights. Though the Plaintiffs did not give details of the infringement they produced in Court clips to show that the Defendants had infringed on their copyright.
36. It is worthy to note that Samantha's Bridal TV show preceded the Plaintiffs' wedding show. Therefore by airing the show on 17th November, 2013 the Defendants did what they had always done before. I have watched the clip that captured the show aired on 17th November 2013 as well

- as the clip that captured the show aired on 24th November 2013. From the said clips it is not apparent that the Defendants infringed on the Copyrights of the Plaintiffs. All that was clear was that the same was a wedding show by Samantha's Bridal as aired in the 2nd Defendant's Television Station.
37. I have also had the opportunity to watch the side by side comparison DVD. It is not in dispute that there are similarities in the said shows and Counsel to the 1st Defendant has admitted the same. However, I have noted that while the clips aired by the Plaintiffs are dated, most of the clips showing the Samantha's bridal show are not dated. In that case it is difficult to determine when they were exactly taken.
38. It is the 1st Defendant's case that the said show aired on 17th November, 2013 was developed and recorded independently from the Plaintiffs' work. This fact was not disputed by the Plaintiffs however the same is still subject to trial. The 1st defendant went ahead to identify features of the Samantha's Bridal show which were different and distinct from the Plaintiffs' wedding show.
39. The 1st Defendant has also raised the issue of wedding concepts. It is obvious from the shows aired by the respective parties herein that there are various similar wedding concepts. However, it is common knowledge that these concepts are common in most wedding preparations or to be more specific the wedding shows. The 1st Defendant referred to a number of Wedding Show concepts among them the Limo-ride concept and the song choice. The 1st Defendant went ahead to establish that the Samantha's bridal show had used the Limousine ride way back in 2010 before the Plaintiffs' show came into being. Therefore, it is my view that the said wedding concepts cannot be used as a yardstick to identify infringement of a copyright. The burden of proof will be upon the Plaintiffs to prove that any of the concepts was originally from them.
40. The other issue raised is with regard to the category of copyright in question. It is the 1st Defendant's case that the Samantha's bridal show falls under the broadcast category which has a totally independent criteria of eligibility and protection from literary works. I will not delve much into this issue as I may end up dealing with the substance of the suit. In any case, the orders of the Court also related to the broadcast of the works by the Plaintiffs. However, it is not in dispute that the 1st Plaintiff has a Certificate of Registration of Copyright LT-11447 registered in the literary works category. It is the 1st Defendant's case that the said certificate is challenged at the Kenya Copyrights Board. It is also clear under section 22 of the Copyright Act that there are categories of works that shall be eligible for copyright among them literary works and broadcast.
41. In light of the foregoing, it is plain that it is not apparent at this stage that the Defendants infringed on the Plaintiff's copyright. This is an intricate matter that can only be determined after a full trial. It will require both parties to show the Court how they come up with their respective scripts and the creative work that goes into it. That cannot be discerned simply by watching the clips produced before this Court by the parties herein. Subsequently, I am not convinced that the Defendants have breached the Court Orders by airing the show on 10th and 17th November, 2013 and that they should be held in contempt.
42. In the upshot, the Plaintiffs' Notice of Motion dated **19th November 2013** and amended on **17th January 2014** is hereby dismissed. The costs of this application shall be in the cause.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 21ST DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Ogot for Plaintiffs

Peter Kamero for 1st Respondent

Ochieng Oduol, Mrs. Oduol for 2nd Respondent

Teresia – Court Clerk