



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO.154 OF 2011

JOEL GICHANA NYAMIGWA.....PLAINTIFF/APPLICANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH (E.A) UNION LTD.....DEFENDANT/RESPONDENT

RULING

1. The application for determination before the court is the Notice of Motion dated 19th October 2011 brought pursuant to the provisions of **Order 40 Rules 1, 2, 4 and 10** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act** and **Sections 22 and 23** of the **Copyright Act No.12 of 2001** in which the applicant prays for orders, *inter alia*:-

1. *The application herein be certified urgent and the same be heard Ex-parte in the first instance.*
2. *Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an Interim Order of Injunction, restraining the defendant/respondent either by herself, agents, servants and/or anyone claiming under the said defendant/respondent, from printing, publishing, selling, distributing, using and/or in any other way dealing with “Nyimbo Za Kristo and Ogotera Kw’ogotogia Nyasae,” books, which are the literary works of and/or belonging to the plaintiff/applicant, who is also the Copyright holder thereof, whatsoever and/or howsoever.*
3. *The honourable court be pleased to grant an Order of Temporary Injunction, restraining the defendant/respondent by herself, agents, servants and/or anyone claiming under the said defendant/respondent, from printing, publishing, selling, distributing, using and/or in any other way dealing with “Nyimbo Za Kristo and Ogotera Kw’ogotogia Nyasae,” books, which are the literary works of and/or belonging to the plaintiff/applicant, who is also the Copyright holder thereof, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.*
4. *The Orders of this honourable court be enforced and/or implemented by the O.C.S., Kisii/Nyamira police stations, respectively.*
5. *Costs of this application be borne by the defendants/respondents.*
6. *Such further and/or other orders be made as the court may deem fit and expedient.*

2. The application is predicated upon the grounds set out in the main application and on facts deponed to

in the supporting affidavit of Joel Gichana Nyamigwa sworn on the 19th October 2011. In the said affidavit the plaintiff/applicant states that in the year 1973 he commenced to collect, arrange and translate various songs which he later compiled, culminating into the Hymn books known as **NYIMBO ZA KRISTO** and **OGOTERA KW'OGOTOGIA NYASAE**. He thereafter entered into an agreement with the defendant/respondent where they (defendant/respondent) were to assist in the sale and distribution at a commission.

3. He states further that he also retained the services of M/S AFRICA HERALD PUBLISHING HOUSE a subsidiary of the defendant/respondent to print and publish the said hymn books which they did. He adds that he also caused the literary works herein to be registered with the Copyright Board of Kenya whereupon he was issued with the copyright over **NYIMBO ZA KRISTO** and **OGOTERA KW'OGOTOGIA NYASAE**.

4. That notwithstanding the fact that he holds a copyright over the said hymnbooks, the defendants/respondents have continued to print, publish and distribute the literary works through her agents, servants and outlets. The defendants have also continued to use the hymn books in their church despite the plaintiff/applicant's copyright.

5. It is also the applicant's contention that the usage of the said hymn books without his permission amounts to violation of his rights under the **Copyrights Act No.12 of 2001** and that pursuant to the actions by the defendant/respondent he lodged a complaint with the Copyright's Board who warned the defendant/respondent of the infringement, but they remained adamant.

6. He states further in his affidavit that the defendant/respondent only facilitated the review of one of the hymn books (Ogotera Kw'ogotogia Nyasae) which action did not give him (defendant/respondent) the authority or mandate to appropriate the plaintiff/s/applicant's rights over and ownership in respect of the same. He states that by virtue of being the copyright holder over and in respect of the hymn books herein, he is vested with exclusive rights over the printing, publication, distribution, and/or use of the said literary works. He believes that he has established a *prima facie* case to warrant intervention by this court to abate the interference by the defendant/respondent. He states that he has suffered irreparable loss and is likely to continue to suffer more loss unless the court herein intervenes by granting the injunctive reliefs sought herein. He also says that because of the defendant's/respondent's actions, he tends to suffer undue prejudice and loss not capable of being compensated in monetary damages whatsoever. That the defendant will not suffer any loss or prejudice if the orders sought are granted and finally that this is a fit application to be allowed.

7. In buttressing its application the plaintiff/applicant has come up with the following issues for determination:-

- a. *Whether the plaintiff/applicant has a prima facie case against the defendant/respondent.*
- b. *Whether the plaintiff/applicant would suffer irreparable loss.*
- c. *Whether the defendant/respondent has any tenable and/or lawful rights over the two (2) song books.*
- d. *Whether circumstances exist to warrant a temporary injunction.*

8. To support his arguments for injunction, the plaintiff/applicant relies on the following authorities:-

Jiwani –vs- Going Out Magazine & another [2002] 1 KLR 856-866

- **Beiersdorf –vs- Emirchem Products Ltd [2002] 1 KLR 876-884**
- **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 others [2003] KLR 125-139**
- **Music Copyright Society of Kenya Ltd –vs- Parklands Shade Hotel Ltd [2000] KLR 569-574**

9. The application is opposed. In the replying affidavit of Paul Muasya, the Executive Director of the Seventh Day Adventist Church (E.A) Union Ltd. sworn on the 25th November 2011 the deponent avers that at all material times to this suit and application the plaintiff/applicant has been an employee of the defendant/respondent being a music teacher at Nyanchwa Adventist Teachers Training College until he was terminated for gross misconduct.

10. In the affidavit the deponent denies that the applicant herein commenced the compilation of the Hymn books “**Nyimbo Za Kristo** and **Ogotera Kw’ogotogia Nyasae**” at the alleged times and the same have been and are still official Hymn Books for use by the Seventh Day Adventist Church all over Kenya being the respective Gusii and Kiswahili version of the seventh Day Adventists Hymnal the official song book of Seventh Day Adventists Worldwide.

11. He adds that the **African Herald Publishing House** is the publishing division of the Seventh Day Adventist Church (E.A.) Union Ltd and has been in existence since the late 1940’s mainly publishing the respondent’s publications for the church use.

12. He goes further and states that the first Gusii Hymn Book the precursor of the present day “Ogotera Kw’ogotogia Nyasae” was first published in the 1950’s under the title “**Ogotera Kwa Gusii**” and the Kiswahili version of the same title also published by the Advent Press under the title “**Nyimbo Za Kristo**” was published in 1950 and that the same has been translated in many local languages spoken throughout Kenya.

13. The deponent also states that the Seventh Day Adventist Church (E.A) Union Limited has retained the copyright of all material and song books produced by the African Herald Publishing House including the two song books “**Ogotera Kw’ogotogia Nyasae**” and “**Nyimbo za Kristo**” since the 1940's and that the Respondent is not bound by the dealings of the Seventh Day Adventist Church South Kenya Conference and the seventh day Adventist Church Nyamira Conference as they do not exist on their own. He adds that a team was formed in 1983 by the Seventh Day Adventist Church South Kenya Conference to expand the Kisii song book, write solfa notes, include bible verses, edit and submit the same for publication by African Herald Publishing House.

14. The panel of reviewers produced the 1984 edition of “**Ogotera Kw’ogotogia Nyasae**” which was published by the African Herald Publishing house; but had so many mistakes that it had to be revised and enlarged in 1998 and again published by African Herald Publishing House who reserved the copyrights.

15. He states that in the acknowledgement section dated March 1998 in the revised and enlarged version of the song book, the applicant was acknowledged as being a member of the review panel among other members and nowhere did the publisher state that the applicant was the owner of the copyright. He states that the 1998 revised edition has been the official song book for the congregational singing of the Seventh Day Adventist church for Ekegusii speakers in the whole of Gusii land.

16. The deponent alleges in his affidavit that the applicant sometime in 2008 plagiarized the 1998 Edition of “**Ogotera Kw’ogotogia Nyasae**” and has never published any of his own edition of Kisii song book by name “**Ogotera Kw’ogotogia Nyasae.**”

17. He has further stated that the applicant herein was merely a member mandated by the respondents subsidiaries to review the Song Book “**Ogoterea Kw’ogotogia Nyasae**” and for his efforts he was rewarded together with other panel members by payment of Kshs.150,000/= of which the applicant received Kshs.34,553/= in the year 2001.

18. That the plagiarism was discovered by other panel members who brought the same to the attention of the respondent herein who wrote letters of complaint to that effect.

19. The deponent of the Replying Affidavit further states that the applicant was duly summoned by the Africa Herald Publishing House and warned of the plagiarism in 2010 but he did not desist from further acts and as a result he was dismissed from the service of the respondent herein. From information by

Pastor Shem Ngoko the Executive Director Nyamira Conference the deponent state that the applicant's annexure "JGN-2" was concerned with distribution of the respondent's 1998 Edition of "Ogotera Kw'ogotogia Nyasae" wherein the applicant was earning a commission from marketing the song book within Nyamira Conference in the then Nyamira Administrative District and in no way did the agreement confer the respondent's copyrights to the applicant herein. He denies annexure "JGN 4 (a) (b) and (c)" on the ground that the Seventh Day Adventist Church Nyamira Conference cannot enter into an agreement on behalf of the Seventh Day Adventist Church (E.A) Union Ltd. He also denies annexure "JGN-3" and states that from the information he got from the General Manager of Africa Herald Publishing House the annexure was concerned with songs for children which were never published.

20. He continues by stating that the applicant falsely presented himself to the Kenya Copyright Board as the owner of the works on "Ogotera Kw'ogotogia Nyasae" and "Nyimbo za Kristo" on the 28th April 2008 but the respondent challenged the same by way of a counterclaim.

21. He adds that the said hymn books are congregational song books for use by over Two Million Five Hundred Thousand Seventh Day Adventists and injuncting the members from using their own song books would not only be unfair but would be tantamount to rewarding the applicant for his plagiarism of the respondent's works. The Defendant/Respondent urges the court to make a finding that the instant application is unmeritorious and an abuse of the process of this honourable court as the applicant is seeking to retain unlawfully what does not belong to him.

22. To buttress their arguments and/or submissions the respondent have placed reliance on the following authorities:-

- **Giella -vs- Cassman Brown & Co. Ltd. [1973] E.A. 358**
- **Ibrahim -vs- Sheikh Bros Investment Ltd. [1973] E.A. 118**
- **Waithaka -vs- Industrial and Commercial Development Corporation [2001] KLR 374**
- **Aikman -vs- Muchoki [1984] KLR 352**
- **Janet Oburu Odhiambo -vs- Catholic Diocese of Homa Bay T/A St. Joseph Mission Hospital – Kisii HC ELC No.442 of 2013**
- **Yego -vs- Tuiya & another [1986] KLR 726**

23. I have carefully read through all the authorities relied upon by both the plaintiff/applicant and the defendant/respondent. I commend both counsel for their thoroughness and diligence in their research.

24. The general principles governing injunctions were well set out in the case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] E.A. 358** in which Spry V.P (as he then was) held at page 360:-

"The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience."

25. To succeed on an application for injunction, the applicant has to show what irreparable loss he stands to suffer should the order not be granted and must also demonstrate to the court that he has established a *prima facie* case with a high probability of success. The court has to look at the merits of each application and the circumstances peculiar to the particular matter.

26. In the case of **Eleonora Cozzi -vs- Ali Hussein Motors – HCCC Malindi NO.16 of 2001** Onyancha J noted the following:-

"Therein (Belle Maison Ltd -vs- Yaya Towers Ltd) he (Bosire J) thoroughly examined the circumstances under which the court has and will grant the remedy. I concur and adopt his reasoning therein. As I understand it, the jurisdiction must be exercised only in special

circumstances which will obviously depend on the circumstances of each case. It is available not under Order 39 or under any order of the same but under the inherent power of this court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of this court as provided under Section 3A of the Civil Procedure Act.”

27. The particular circumstances of the instant application are that the injunctive orders are sought arising out of a disputed copyright, which copyright the applicant claims to have the exclusive right on two hymn books namely **“Ogotera Kw’ogotogia Nyasae”** and **“Nyimbo Za Kristo.”** The plaintiff/applicant contends that he started the collection, compilation and translation of various songs, as early as 1973 after which he requested M/s Africa Herald Publishing House to publish on his behalf.

28. The plaintiff submitted as regards his claim against the defendant that it had infringed on his copyrights in that the plaintiff/applicant had entered into an agreement with the defendant/respondent to publish the said hymn books on his behalf but they have gone ahead and against the said agreement used the said books for their own benefit and have also sold and/or distributed the same without consulting with the plaintiff/applicant. He therefore says he has suffered loss/prejudice and damage which cannot be compensated by the respondent.

29. On the contrary the defendants/respondents have alleged plagiarism on the part of the applicant herein. They have shown that they have since 1950 been the ones who published, produced, distributed, sold the said hymn books. They have given a history of the various editions they have produced and have stated that the plaintiff/applicant was one of its employees who was contracted together with others to do translations for which he was fully paid and his contribution duly acknowledged by the defendant/respondent.

30. They have also denied having entered into a contract with the applicant and have demonstrated that they counterclaimed on the allegations made to the copyrights board by the applicant.

31. The up-to-date position as regards the issue of preliminary injunction in relation to patents and copyrights was considered by the United States Court of Appeals for the Federal Circuit in the case of **Apple Inc. –vs- Samsung Electronics Co. Ltd. (2012) Case No.12-CV-00630-LHK**. That case involved the alleged breach by the defendant of four patents held by the plaintiff **Apple Inc.** In a seeming extension of the **Giella Principles** the Appeals Court held that:

“When ruling on the motion for a preliminary injunction, a district court must consider and analyze four factors:-

- 1. Whether the mover is likely to succeed on merits;**
- 2. Whether the mover is likely to suffer irreparable harm in the absence of injunctive relief;**
- 3. The balance of hardships; and**
- 4. Whether issuance of an injunction is in the public interest.”**

32. The Kenyan Court of Appeal in **Sanitam Services (E.A.) Ltd. –vs- Rentokil (K) Ltd (2007) 1 EA 362** found as follows:-

“The burden of proof in matters relating to infringement of industrial property rights lie with those who claim their rights have been infringed.”

33. Applying both the **Giella principles** and the **Apple Inc. case** expanded principles, I do not find that the plaintiff/applicant herein has discharged his burden of proof that he owns the hymn books and that he has a copyright of the same. It is my considered view that the differences in the evidence of the parties herein cannot be resolved by affidavit evidence and the plaintiff has not put before the court any evidence

that would enable the court to reach the conclusion on a balance of probability that his case against the defendant/respondent shall succeed. I have also considered the issue of public interest which involves over two million plus Seventh Day Adventists countrywide who use the said hymn books.

34. In my humble opinion, the plaintiff/applicant is undeserving of the injunctive relief at this stage. Apart from his failure to prove his alleged copyright, I find that the plaintiff's/applicant's case based on infringement of copyrights is unlikely to succeed. From the evidence on record, even the balance of convenience tilts in favour of the defendant/respondent.

35. The upshot of the foregoing is that the plaintiff has failed to establish a *prima facie* case that would result in this court granting the injunctive orders that he seeks. The plaintiff has also failed to show what irreparable loss he stands to suffer as a result of the said orders not being granted. As earlier stated, the orders which the plaintiff/applicant has sought are discretionary and, as with all such orders the court must exercise extreme caution in granting the same, lest an injustice is caused to either one or other of the parties. As a result the Notice of Motion dated 19th October 2011 is dismissed with costs to the Defendant/respondent.

Dated and delivered at Kisii this 24th day of September, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Moracha h/b for Oguttu Mboya for the Plaintiff/Applicant

Mr. Soire h/b for Abisai for the Defendant/Respondent

Mr. Bibu - Court Assistant