



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 258 of 2012

**RHODA ONDENG WILHELMSSEN.....PLAINTIFF**

**VERSUS**

**DR. SARAH A. CHUCHU.....DEFENDANT**

**R U L I N G**

1. The Application before me is a Notice of Motion dated 17<sup>th</sup> April, 2012 by the Plaintiff (“the Applicant”). The same primarily seeks a temporary injunction to restrain the Defendant (“the Respondent”) whether by herself and or her agents and or her assigns from infringing on the copyright production known as **“ONDIEKI THE FISHERMAN” NUMBER KCB 0667** and in anyway claiming ownership of the copyright **“ONDIEKI THE FISHERMAN”** pending the hearing and determination of this suit. The Applicant has further sought the cost of the application. The grounds for the Application are enumerated on the face of the Application.

2. In support of the Motion is an Affidavit by the Applicant, Rhoda Ondeng Wilhelmsen, sworn on 17<sup>th</sup> April 2012 as well as written submissions dated 16<sup>th</sup> October, 2012. It is contended that the Applicant is the copyright owner of the production **ONDIEKI THE FISHERMAN** under number **KCB 0667** in the musical category, through a certificate issued by the Kenya Copyright Board on the 28<sup>th</sup> of February, 2012. She contended that she was a former student of Limuru Girls High School and had organized the aforementioned production for the purposes of raising funds for her former school. It was also contended that the production had been slated for performance at the Braeburn Theatre from the 20<sup>th</sup> -22<sup>nd</sup> April, 2012 having been publicized through various media campaigns and advertisements. The Applicant further averred that on 11<sup>th</sup> April, 2012 during a promotional campaign for the production on the Radio Station Kiss 100 FM , the Respondent contacted the legal department of the aforesaid Radio station and warned them of dire consequences if they did not stop publicizing the production. The Defendant also alleged that she had obtained an injunction to stop the production’s performance slated for 20<sup>th</sup> -22<sup>nd</sup> April, 2012. A demand letter by her Advocates to that effect was subsequently sent to the Applicant urging her to cancel the production’s performance until the copyright issues were resolved. It is the contention of the Applicant that the Respondent had no right to claim copyright ownership of the production even though the same was inspired by the Respondent’s essay written while a student at the Limuru Girls High School in 1973. It is also contended that the Applicant was not exploiting the production for commercial purposes but rather for a charitable cause aimed at raising funds for her former school. The Applicant therefore urged the court to grant the orders prayed for.

3. The Application stands opposed by the Defendant, through her Replying Affidavit that was filed in Court on 23<sup>rd</sup> May, 2012 and written submissions filed on 18<sup>th</sup> March, 2013. The Respondent contended that she was yet to be served with summons to enter appearance and on that premise she had been unable to enter appearance or file a statement of defence. The Respondent further averred that she was a former student of Limuru Girls High School where she authored an essay titled **“Ondieki the Fisherman”**. She contended that without her consent or approval, a Mr. Frank Chandler, her then Teacher in that School, used the said essay for a school musical production entitled **“Ondieki the Fisherman”**. That in the said musical production, the said Mr. Chandler duly acknowledged the Respondent as the author of the original story. It was also contended that the Applicant had also acknowledged the same through an email dated 5<sup>th</sup> December, 2011. That the original work of the Respondent had been modified in such a way as to distort the main character of her story, Ondieki the fisherman, so as to portray him as a village fool far from what was intended in her original work. The Respondent opined that the serious distortion, modification and original alteration of the original story was prejudicial to her honour and reputation and as a result greatly disparaged her character. The Respondent further contended that the Applicant clandestinely went ahead to copyright the title **“Ondieki the Fisherman”** knowing fully well that the said title and storyline was her original creation.

4. The respondent also contended that she has not claimed the copyright of the musical production by the Applicant, but what she has only protested as the plagiarizing of her original creation by the Applicant without her authorization. The Respondent denied ever calling KISS 100FM radio station or any other radio station or person claiming to have an order of injunction. The Respondent had claimed a right to claim interest in her original literary work and that consequently, that was the purpose of her lawyer’s demand letter dated 17<sup>th</sup> April 2012 to the Applicant. That therefore the suit does not disclose any reasonable cause of action against her as it has not been disputed that she authored the original story in which the title and the production has been based on. It is also contended that it is not in dispute that her original work of authorship was taken from her by her teacher who was in a position of authority at the time, and passed over to the Plaintiff under unclear circumstances. Due to the foregoing reasons the Defendant prayed that the Application be dismissed.

5. I have considered the affidavits on record and the written submissions by Counsel. I have also considered the authorities and law relied on by the respective counsel. The conditions for the grant of interlocutory injunctions are now well enunciated in **GIELLA v. CASSMAN BROWN & CO. LTD (1973) EA** whereby the applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. The issue that I therefore discern for determination is whether the plaintiff is entitled to an interim order of injunction. In determining that issue it will be necessary to answer the question on whether a copyright subsists in regard to the musical production referred to as **“ONDIEKI THE FISHERMAN”**.

6. It is not denied that the Respondent, while a student in the Limuru Girls High School authored an essay titled **“Ondieki the Fisherman”**. The same was later adapted into a Libretto and Score of an Opera, comprising of stage directions, poetry and music by an English Teacher known as Mr. Frank Chandler. Thereafter, the Applicant submitted that she “took over” the libro and score (“the musical production”) from the aforesaid Mr. Chandler and came to Kenya and registered the Copyright in the musical category at the Kenya Copyright Board.

7. In rebuttal the Respondent contended that her essay, which she wrote as a student in Limuru Girls High School, was a literary work and therefore protected by copyright. In the foregoing, she contended that there was infringement of Copyright of her essay when both her former teacher, Mr. Chandler, and the Applicant proceeded to adapt the essay and turn the same into a musical production without her prior authorization. Counsel for the Defendant submitted that the substance of the instant suit is speculative as the Applicant has failed to illustrate to the court on how the Respondent intends to or has caused infringement of the musical production. The Respondent further contended that she is not claiming a copyright of the musical production, but is only protesting the plagiarizing of her original work without her consent.

8. The Law with regard to Copyright is enshrined in the Copyright Act of 2001 Laws of Kenya. Section 22(1) of the Copyright Act provides that:-

***“Subject to this section, the following works shall be eligible for copyright:-***

- (a) literary works;***
- (b) musical works;***
- (c) artistic works;***
- (d) audio-visual works;***
- (e) sound recordings; and***
- (f) broadcasts.”***

From the foregoing, it is clear that copyright existed in Respondent’s essay which she authored while a student at Limuru Girls High School. The said essay which was entitled **“Ondieki the Fisherman”** existed under the category of a literary work and was therefore a subject matter eligible for copyright. As a student, the Respondent did not fall within the exceptions found in Section 31 of the Copyright Work as her essay was not a commissioned work nor was it produced during an employment contract. In the American case of **Burrow-Giles Lithographic Co. –v- Sarony 111 US 52 at 58 (1884)**, the Supreme Court held that the author is ‘he to whom anything owes its origin; or the originator or maker’. In my view therefore, the Respondent was the author of the essay and indeed the owner of the Copyright in that essay.

9. In this regard, the Respondent, being the owner of the Copyright in the essay **“Ondieki the Fisherman”** she had certain rights with regard to her work. Such rights are classified into either economic or moral rights. Under Section 26 of the Copyright Act, the Copyright Owner has the exclusive right to do certain acts in Kenya. The said proviso states that;

***“Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the 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, 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 recognizably derived from the original;” (emphasis added)***

To this end, the Respondent would have exclusive rights over the copyright in her essay as a student including that of adaptation. The Plaintiff has admitted that the musical production was an adaptation of the essay **“Ongeri the Fisherman”**. This adaptation has in essence given rise to a separate copyright in the musical production. The question that then follows is whether the Applicant or Mr. Frank Chandler sought the authorization of the Respondent in adapting her essay into a musical production. Nothing was produced to indicate that such authorization was obtained. The lack of authorization could therefore mean that the Respondent’s copyright in the essay may have been infringed when the same was adapted into a musical production. However, this does not mean that the musical work was ineligible for copyright protection as Section 22 (4) of the Copyright Act states that;

***“A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.”***

10. Having established that the musical production is protected by copyright, it is critical to determine whether the Applicant is indeed the owner of that copyright. It is not clear from the record how the Applicant *“took over”* the musical production from Mr. Frank Chandler. However there is a Certificate issued by the Kenya Copyright Board dated 28<sup>th</sup> February 2012 indicating that **“ONDIEKI THE FISHERMAN”** was registered as a copyright work under registration number **KCB 0667** in the name of the Applicant. This certificate is therefore prima facie evidence under the Copyright Regulations of 2004 that the Applicant is indeed the owner of the copyright in the musical production. The lack of a certificate of registration by the Respondent does not however mean that the Respondent did not have a copyright in the essay she wrote while she was a student. It is essential to note that Copyright protection arises

automatically by operation of law, so long as the basic criteria of fixation and originality are met. This is by virtue of Article 5 (2) of the Berne Convention 1882, to which Kenya is a signatory to. That Article provide to the effect that copyright protection must not be subject to any formality or subject to conditions of obtaining prior regulatory approval. In a nutshell, both the Applicant and Respondent are the owners of the Copyright, but in two separate works, that is the essay and the musical production.

**11.** That being the case, has it been shown that the Respondent will infringe upon the Applicant’s copyright in the musical production. The Respondent contended that she is not claiming copyright in the Applicant’s musical production. That her actions were simply a protest on how her original creation was plagiarized. This would explain why the Defendant sought to stop the performance of the production slated for 20<sup>th</sup> - 22<sup>nd</sup> April, 2012 until issues involving copyright were resolved. The demand letter by her lawyers is clear on that fact. The allegation that she called a radio station and warned them to stop media campaigns on the musical production was not proved. Even if such was the case, I entertain doubts if such would amount to infringement as the Applicant contends. Under Section 33(1) of the Copyright Act, it is important for the Plaintiff to demonstrate that the defendant has done or caused to be done an act that falls within the exclusive control of the Copyright owner as espoused in Section 26 (1) of the Copyright Act. In the alternative, she must show that the Respondent has imported or caused to be imported otherwise than for her private and domestic use, an article which she knows to be an infringing copy. In the absence of infringing acts by the Respondent, it is clear that on the facts presently before this Court, the Applicant has not demonstrated that she has a prima facie case with a probability of success to warrant the court to issue any injunction against the Respondent. I need not deal with the other two (2) principles of **Giella –vs- Cassman Brown**.

**12.** The upshot is that the Application dated 17<sup>th</sup> April, 2012 is dismissed with costs.

DATED and DELIVERED at Nairobi this 19<sup>th</sup> day of April, 2013.

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**A. MABEYA**

**JUDGE**