



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Civil Case 833 of 2010**

**PARITY INFORMATION SYSTEMS LIMITED..... PLAINTIFF**

**VERSUS**

**VISTA SOLUTIONS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CHUKA UNIVERSITY COLLEGE ..... 2<sup>ND</sup> DEFENDANT**

**MOMBASA POLYTECHNIC**

**UNIVERSITY COLLEGE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this Court is a Notice of Motion dated 21<sup>st</sup> December 2010, brought by the Plaintiff seeking injunctive orders against all three Defendants, for breach of copyright works in relation to software computer systems. The Application contained two main prayers apart from prayers (1 and 2) sought under the Certificate of Urgency, as follows:-

*“3.(a) An ANTON PILLAR ORDER do issue directing the Defendants and each of them to permit not more than 2 persons as may be duly authorized by the Plaintiff and/or not exceeding 2 no. advocates from the firm of Kigano & Associates, Advocates and/or other persons duly authorized by the said firm of advocates to enter forthwith the Defendant’s premises as follows:*

1<sup>st</sup> Defendant

*At Buru Buru, Nairobi and elsewhere in Niarobi.*

2<sup>nd</sup> Defendant

*The offices located at Chuka University College, Chuka Tharaka, Nithi County.*

### 3<sup>rd</sup> Defendant

*The offices located at Mombasa Polytechnic University College, Mombasa, Mombasa County.*

*And any other premises under the control of the Defendants between the hours of 8 o'clock in the forenoon and 5 p.m. in the afternoon between Mondays and Fridays for the purposes of:*

*Inspecting and/or making copies (as applicable) at the aforesaid premises and/or within any computer and all appliances prints invoices bills statements documents and materials or articles as may relate to the systems or used or being used or made in breach of the copyright works.*

*(b) Removing into the custody of the firm of Kigano & Associates, Advocates, the Plaintiff's advocates herein, all or any of the articles appliances and documents referred to in the sub-paragraph 2(a) hereinbefore of the systems related to the copyright works.*

*4. AN INJUNCTION restraining the Defendants and each of them (or as the case may be) their directors servants or agents or any of them or otherwise howsoever from the following acts or any of them that is to say:*

*(a) Parting with the possession power custody or control (save as herein before bespoken by prayer 1) of any nature of pirated/infringed works of the systems or copyright works or works which are infringing the systems and/or copyrights works as defined by the Plaintiff herein and protected as bespoken by the Affidavit of James Wang'ombe in support herewith or any one or more of them;*

*(b) In any way defacing destroying altering or erasing any of the works specified under sub-paragraph 3 (a) herein before;*

*(c) Reproducing pirating or counterfeiting the whole or part of any of the systems or copyright works;*

*(d) Selling or by way of trade offering or exposing for sale or distributing or howsoever dealing in the aforesaid systems and/or works."*

2. Prayers 1 -3, including the Anton Pillar Order were granted on 21<sup>st</sup> December 2010 and the Order in respect thereof has been executed. What is now before Court is prayer 4 as above and the Plaintiff is seeking an injunction against the Defendants restraining them from dealing with six computer programmes (or "systems") being:

- (a) Imprest Management System (2006)
- (b) Payment Voucher (2005)
- (c) Internal Requisitions and Issues (2006)
- (d) Vote Book (2007)
- (e) Student Finance (2006)
- (f) Receipting (2006).

It would appear to be the Plaintiff's case that the systems (a) to (f) aforesaid ("the systems") were developed by it hence it has copyright in them. It also maintains that due to infringement, of the systems by the Defendants, it has and continues to suffer loss and damage.

3. The Application is brought before this Court on the following grounds:-

(a) Irredeemable and irreversible loss and damage will entail unless this Application is heard forthwith

during this Christmas Vacation;

- (b) The Plaintiff is duly licensed by Softline ACCPAC (Pty) Ltd., a company situated in Durban, South Africa, to deal with Sage ACCPAC, a computer programme/software in Kenya;
- (c) Under the aforesaid licence, the Plaintiff developed the systems bespoken by the Plaintiff herein;
- (d) The systems are duly registered with the Kenya Copyright Board as protected copyright works and are owned by the Plaintiff;
- (e) Without license from the Plaintiff, the Defendants have infringed the copyrights by copying, pirating, buying, selling and using the systems;
- (f) Consequently, the Plaintiff has suffered loss and damage;
- (g) The Defendants intend, unless restrained by this court, to continue the aforesaid acts of infringement to the detriment of the Plaintiff and
- (h) It is in the interest of justice that the orders sought are granted.

4. The Application is supported by the Affidavit of James Wang'ombe dated 21<sup>st</sup> December 2010. He deponed to the fact that the Plaintiff was duly licensed by Softline ACCPAC (Pty) Ltd of South Africa, to exclusively deal in Kenya with SAGE ACCPAC, a computer systems programme/software as its representative in Kenya *“with the full mandate to further develop, improve and or adapt as necessary the systems so as to conform to the circumstances dictated by the Kenya market.”* The deponent attached two letters each dated 11 October 2010 from Softline ACCPAC in Durban, South Africa, the first confirming that the Plaintiff was a registered ACCPAC certified solution provider in both ACCPAC and Third Party Solutions in Nairobi and the second confirming that the 1<sup>st</sup> Defendant was not a registered ACCPAC solution provider. Thereafter, Mr. Wang'ombe stated that as such licensee, the Plaintiff had developed the systems as listed above specifically for use in financial management for universities and colleges in Kenya. He maintained that the systems were duly registered by the Kenya Copyright Board under the provisions of the Copyright Act 2001 and annexed Certificates of Registration of Copyright Works for the 6 systems.

5. Later in his said Affidavit, Mr. Wang'ombe detailed that Kevin Mwangi Wanjiru and David Ombaba Mokoro promoted and incorporated the 1<sup>st</sup> Defendant but that prior to the 25 August 2008 they were employed by the Plaintiff as its consultants in all matters relating to the acquisition and development of the systems. On that date, the deponent discovered that Messrs Wanjiru and Mokoro (“the promoters”) were in his words: *“sabotaging the Plaintiff’s business by covertly setting competition to the Plaintiff’s operations and supply of the systems”*. The promoters were subsequently summarily dismissed from employment with the Plaintiff Company. The deponent maintained that the promoters through the 1<sup>st</sup> Defendant had stolen, violated, infringed and pirated the systems and had installed and sold the same to the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants as admitted to the deponent by the Finance Officer, one Joseph Muthama, of the 2<sup>nd</sup> Defendant and one Gaireth Kingi, the Senior Accountant with the 3<sup>rd</sup> Defendant. Thereafter the Plaintiff had written a letter of protest dated 27 October 2010 to the Copyright Board which the deponent exhibited to his said Affidavit.

6. The 1<sup>st</sup> Defendant responded via a Replying Affidavit sworn by Kevin Mwangi (Wanjiru?) on the 21 January 2011. He stated that the Plaintiff was not an exclusive licensee of Softline ACCPAC (Pty) Ltd and maintained that it was not affiliated with that company other than as a reseller, installer or consultant therefore. He maintained that the systems were built primarily with the “macros” contained in the SAGE ACCPAC Application and hence the code for the Plaintiff’s alleged systems had originated from the SAGE ACCPAC Application. Further, the deponent averred that Softline ACCPAC (Pty) Ltd. had publicly stated that it had granted multiple licences to a number of solution providers in Kenya via a posting on its website. I noted that none of such listed by the deponent was the 1<sup>st</sup> Defendant.

7. However, it was the deponent's view that the Plaintiff had no capacity to sue the 1<sup>st</sup> Defendant or anyone else for infringement of the copyright in SAGE ACCPAC. As regards the position of the 2<sup>nd</sup> Defendant, Mr. Mwangi noted that the 1<sup>st</sup> Defendant had been retained to undertake the installation, implementation, commissioning of and training in the ACCPAC ERP system which it had bought, through the 1<sup>st</sup> Defendant, from another authorized dealer in Sage ACCPAC. The deponent detailed that the ACCPAC ERP system contained programme tools and "macros" that had been deliberately included by Softline ACCPAC to enable the end-user of the system to develop, improve or adapt the system to end-user specifications and to allow third party applications to run on the system. The 1<sup>st</sup> Defendant had made use of such tools to develop its own applications called Vista Management Information Systems. Such had been registered with the Copyright Board earlier in time to that of the Plaintiff's systems and he attached a copy of the Certificate issued by the Board accordingly. He continued by detailing that its system had an original software code that it had written plus a unique system interface both of which are different from the systems of the Plaintiff.

8. Similarly for the 3<sup>rd</sup> Defendant, Mr. Mwangi related that it had purchased the ACCPAC ERP system from Sabis UK an authorized dealer of SAGE ACCPAC based in the U.K. Again, the 1<sup>st</sup> Defendant was providing implementation, commissioning and training on the system to the 3<sup>rd</sup> Defendant. The deponent detailed that the same parameters as for the 2<sup>nd</sup> Defendant applied in the 1<sup>st</sup> Defendant's relationship with the 3<sup>rd</sup> Defendant. In his opinion, the Plaintiff by bringing this suit at all, was reacting to fierce business rivalry from the 1<sup>st</sup> Defendant. He reiterated that the 1<sup>st</sup> Defendant's Vista Management Information System had no similarity whatsoever from the Plaintiff's systems in terms of copyrightable code or interface.

9 Professor Stanley Kagwanja, on behalf of the 2<sup>nd</sup> Defendant swore a Replying Affidavit to the Plaintiff's Application dated 4 February 2011. As per Mr. Mwangi's said Affidavit, the deponent detailed that the Plaintiff did not hold an exclusive licence from Softline ACCPAC to deal in Kenya with the SAGE ACCPAC software. He noted a number of solution providers other than the Plaintiff who appeared on the Softline ACCPAC web site. Professor Kagwanja stated that the 2<sup>nd</sup> Defendant had entered an Agreement dated 23 March 2009, with the 1<sup>st</sup> Defendant for the supply, installation, training and commissioning of a financial management system, after a competitive bidding process. The purchase price was Shs 1,048,000/- and had been paid in full, by way of 2 instalments. Professor Kagwanja attached to his Affidavit a copy of the Agreement that the 2<sup>nd</sup> Defendant had entered into with the 1<sup>st</sup> Defendant detailing that the 2<sup>nd</sup> Defendant had contracted the 1<sup>st</sup> Defendant as its consultant after it had received proposals from 4 other companies. The 1<sup>st</sup> Defendant had come in with the lowest bid of Shs 1,048,000/-. Professor Kagwanja believed that in entering the said Agreement with the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant was purchasing all title and intellectual property rights to the software as provided by the 1<sup>st</sup> Defendant, who, in turn, undertook not to sell, rent or let the same to any other party. The 2<sup>nd</sup> Defendant was informed that the Agreement had been devised specifically for it and the contents thereof were not to be disclosed to anyone else. The Agreement stipulated that the 2<sup>nd</sup> Defendant would not be held at fault from issues arising out of the 1<sup>st</sup> Defendant's bad faith or wilful default.

10. Professor Kagwanja noted that the Plaintiff's systems had been registered with the Copyright Board long after the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had entered into their Agreement which was dated 23<sup>rd</sup> March 2009. He maintained that the 2<sup>nd</sup> Defendant could not be said to have infringed the Plaintiff's alleged copyright. Thereafter, the deponent listed the specific modules that were covered by the Agreement with the 1<sup>st</sup> Defendant. He reiterated Mr. Mwangi's position as detailed in the 1<sup>st</sup> Defendant's Replying Affidavit, that the ACCPAC ERP system contained programming tools and "macros" proprietary components that had been deliberately included in the ACCPAC ERP system so as to enable the end user to develop, improve or adapt the system to cover end user specifications and to allow 3<sup>rd</sup> party systems to be able to run side by side, on the system. Such components had been deliberately put into the public domain by the developers of the SAGE ACCPAC system. Professor Kagwanja concluded his Affidavit by categorically denying that the 2<sup>nd</sup> Defendant had infringed the Plaintiff's protected and registered copyrights and that

the financial software system purchased by the 2<sup>nd</sup> Defendant had been done in good faith. It had been installed soon after the entering into the Agreement with the 1<sup>st</sup> Defendant, was still functioning properly and continued to be maintained by the 1<sup>st</sup> Defendant.

11. Dr. Muhammad A. Swazuri, the Deputy Principal of the 3<sup>rd</sup> Defendant swore to a Replying Affidavit dated 19 January 2011. As Deputy Principal, Dr. Swazuri was in charge of Administration, Finance and Planning at the 3<sup>rd</sup> Defendant College known as "MPUC". He deponed to MPUC purchasing a standard financial management information system called ACCPAC which he understood meant "Accounting Package from Sabis Consulting" of the United Kingdom in September 2009. MPUC paid GBP 33,750 for the same and the sale was exclusive of the services of customizing it for the use of the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant bought 10 user licences from Sabis Consulting, whose personnel trained its staff on how to customize the same. Then, in August 2010, MPUC acquired 15 more Softline ACCPAC licences and sent out invitations to bid for customization services to 4 companies including the Plaintiff and the 1<sup>st</sup> Defendant, who eventually was awarded the contract. The 1<sup>st</sup> Defendant offered price was Shs 2,036,298/- for the contract, while the Plaintiff tendered for the same at Shs 4,402,652/-. Dr. Swazuri detailed that the tenderers were requested to submit the details of the system software that they were proposing for the 3<sup>rd</sup> Defendant as one of the MPUC requirements was that the system should integrate with its existing computer system known as COLEMIS. The 1<sup>st</sup> Defendant was awarded the contract which was reduced into writing and signed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants on 6 September 2010 while work thereon commenced at the MPUC's premises on 29 June 2010.

12. Dr Swazuri then listed in paragraph 19 of his Affidavit, the 9 modules which the 1<sup>st</sup> Defendant detailed that it had developed and were prepared to supply to MPUC. In fact, MPUC bought and is in possession of 10 modules and the 1<sup>st</sup> Defendant was responsible for implementation, training and commissioning the same, including System Manager, General Ledger, Accounts Payable, Accounts Receivable, National Accounts Management, Cash Book, Purchase Orders, Inventory Control, Internal Requisition & Issues and Transactional Analysis & optional field creator. The extra modules supplied by the 1<sup>st</sup> Defendant as per the contract with the 3<sup>rd</sup> Defendant were Budgetary Control Management, Payment Processing, Vista Payroll and HRM, Fixed Assets, Internal Requisition and Usage, Student Accounts Management and Staff Debtors Management. As for the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> Defendant believed that by signing the contract with the 1<sup>st</sup> Defendant, all title and intellectual property rights to ACCPAC software plus the accompanying printed materials belonged to ACCPAC International and the authors of the software. MPUC believed that all title and intellectual property rights in the content of Vista software is the property of the 1<sup>st</sup> Defendant. However, according to Dr. Swazuri, MPUC has the source code and can modify the software and further it had undertaken not to sell or rent it to any other party. MPUC also believed that the applications supplied to it by the 1<sup>st</sup> Defendant, including any images, texts or screen layouts were protected by the Kenya copyright laws and international treaties. Indeed, the MPUC was supplied with a Certificate of Registration of Copyright Work by the Copyright Board which Dr. Swazuri annexed to his said Affidavit dated 6 October 2010.

13. Dr Swazuri went on to state that the MPUC had no knowledge of any claim by the Plaintiff until the filing of this suit. He maintained that the Plaintiff's claim that it had the sole right to deal in Kenya with the ACCPAC system software was incorrect as other companies so licensed included ACCFIN and JKUAT. He categorically denied that MPUC had in any way whatsoever infringed and/or pirated the Plaintiff's protected and registered copyrights. The system as purchased by MPUC was installed and is still undergoing customization by the 1<sup>st</sup> Defendant. Dr. Swazuri denied any knowledge of a conversation that had allegedly taken place as between Mrs. Kingi and Mr. Wang'ombe of the Plaintiff Company. Mrs. Kingi was not a Senior Accountant with MPUC and no such position exists at MPUC. Further Dr. Swazuri was unaware of any complaint by the Plaintiff to the Copyright Board and he pointed out that the MPUC's Certificate for its system as issued by the Board, was registered on 6 October 2010 while the Plaintiff's Certificates Nos. 000576,000577,000578,000579,00580 and 000581 were all registered between the 15<sup>th</sup> and 25<sup>th</sup> October 2010. MPUC was not aware of any copyright works that the Plaintiff laid claim to and requested a full hearing on the merits. Finally, the deponent stated that MPUC would

suffer irreparable loss if its operations were to be halted by the granting of the Plaintiff's prayers sought herein. 3000 students would be affected, as well as over 1000 employees and 2000 suppliers of various goods and services.

14. The said James Wang'ombe swore a Supplementary Affidavit on the 3<sup>rd</sup> March 2011, in response to the Affidavits sworn by Mr. Mwangi, Professor Kagwanja and Dr. Swazuri. His Affidavit concentrated on what the Plaintiff had discovered as a result of the Anton Pillar raid on the premises of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants. Based on the 6 systems developed by the Plaintiff in 2005-2007, the deponent referred the Court to the copy of the Compact Disc containing the 6 programmes from the Plaintiff as per the list in paragraph 2 above. Mr. Wang'ombe detailed that the 6 programmes had taken time, money and effort to develop and that between the years 2006 – 2008, the Plaintiff sold the systems to several clients including the Kenyatta University. He annexed to his said Affidavit a copy of the Compact Disc containing the 6 systems that the Plaintiff had installed at Kenyatta University in 2006/7 when the said directors of the 1<sup>st</sup> Defendant, Messrs Mwangi and Mokoro were employed by the Plaintiff. In that regard, the deponent attached copies of the Plaintiff's records for P.A.Y.E., N.H.I.F., N.S.S.F & H.E.L.B.(Higher Education Loans Board) deductions for the two for the period 2003 until August 2008.

15. Possibly the most important aspect, from an evidential point of view, as regards the said Supplementary Affidavit of Mr Wang'ombe was the attachments "JW-3" and "JW-4" thereof. These were said to be true copies of the Compact Discs containing information copied from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' computers. These are to be read in conjunction with the letters signed by the agents of the parties as exhibited as "JW-5" confirming information obtained from the 1<sup>st</sup> & 2<sup>nd</sup> Defendants. The deponent clarified that copyright was not being claimed in respect of the macros availed by the Softline ACCPAC modules for they were "tools" like any other programming language. The Plaintiff was claiming copyright in respect of the interface and sample code for the Payment Voucher system and the Imprest Management system. The deponent stated that a comparison of the printouts clearly show that the source code and the interface from the 1<sup>st</sup> Defendant's computer is substantially similar to the source code and interface from the Kenyatta University sample. In fact, the deponent maintained, it was the same code as evidenced by annexures "JW-7(a) and (b)" as well as "JW-8 (a) and (b)". The deponent confirmed that the laptop of the 1<sup>st</sup> Defendant was returned to it after copying the data therefrom as per Exhibit "JW-3".

16. As regards, irreparable loss should the injunctive orders be granted, Mr. Wang'ombe maintained that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants would not suffer any, as they could easily source and buy other genuine computer programmes/systems suitable for the same purpose. The deponent went onto maintain that both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were aware of the infringement and explained the circumstances in that regard. Mr. Wang'ombe insisted that Gaireth Kingi, an officer of the 3<sup>rd</sup> Defendant had sought to know the difference between Sage ACCPAC and a system known as Uni-Plus at a conference held in May 2010 and he had personally explained to the officer that Uni-Plus incorporates all the modules/systems developed by the Plaintiff including the 6 systems. As far as the 2<sup>nd</sup> Defendant was concerned, Mr. Wang'ombe explained that the Plaintiff had installed its 6 systems at Egerton University in 2007 when 2 officers of the 2<sup>nd</sup> Defendant were employed there being one James Muchiri and one Rhoda Nzovilla. He attached a copy of the contract as between the Plaintiff and Egerton University dated 18 July 2007.

17. Kevin Mwangi swore a Replying Affidavit to that of Mr. Wang'ombe's Supplementary Affidavit dated 3 March 2011, on the 8 April 2011. He adopted the contents of his previous Affidavit dated 21 January 2011. He reiterated that the Plaintiff is and was not an exclusive licensee of Softline ACCPAC (Pty) Ltd. He attached a copy of the SAGE ACCPAC End User Licence Agreement (as "KM -1") which he said outlined the implications of being a registered ACCPAC certified solution provider. He further stated that the Plaintiff's systems were built primarily from the "macros" contained in the SAGE ACCPAC application. The code for the 6 applications also originated from the SAGA ACCPAC application. He maintained that the "macros" and codes contained in the SAGE ACCPAC application was licensed to purchasers of the application. Consequently, the deponent maintained that any copyright claimed by the Plaintiff on derivative works from the SAGE ACCPAC application should rightly belong to SAGE ACCPAC.

18. As regards the print out of the system installed by the Plaintiff at Kenyatta University referred to and exhibited to Mr. Wang'ombe's Supplementary Affidavit, Mr. Mwangi stated that it was installed at Kenyatta in 2006 and he maintained that it has since been modified by the Plaintiff or recently reinstalled at Kenyatta University. He also maintained that there is no evidence to show that was the system interface prior to the institution of this suit. As regards the code attached by Mr. Wang'ombe to his said Affidavit as "JW -7(b)", Mr. Mwangi stated that such was not the correct code for the interface for Kenyatta as it contained lines of code for certain functionalities which do not appear on the annexed interface . As far as annexures "JW-7 (b)" and "JW-8(b)" to Mr. Wang'ombe's Supplementary Affidavit are concerned, Mr. Mwangi maintained that the Payment Voucher System and the Imprest Management System installed and commissioned by the 1<sup>st</sup> Defendant for the 3<sup>rd</sup> Defendant in no way resembled the printouts from the Kenyatta University Systems, going to the extent of attaching copies of the Payment Voucher and Imprest Management Systems installed by the 1<sup>st</sup> Defendant in the 3<sup>rd</sup> Defendant's computer systems. Mr. Mwangi attempted to explain the terms "macro", "statement" and "variable" as not being programming language but rather a tool used in a customization framework like ACCPAC Visual Basic for Application. He detailed that Mr. Wang'ombe's annexure "JW-6" shows a list of key words that are built in a programming language but do not constitute a statement or a variable.

19. At paragraph 14 of Mr Mwangi's Replying Affidavit, the deponent dwelt upon the source of the lines of code that the Plaintiff was maintaining had been copied by the 1<sup>st</sup> Defendant. I took heed particularly of sub-paragraph (c) thereof which reads:

**"That the accounting profession worldwide operates and is governed by standard rules, principles and nomenclature, and therefore the nature of accounting software is that their lines of code for automated accounting procedures will necessarily share common attributes, especially the codes for commands associated with undertaking accounting procedures."**

Mr. Mwangi also pointed out there are standard accounting guidelines for government institutions like the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, which guidelines formed part of the client's instructions given to the 1<sup>st</sup> Defendant in adapting and configuring their 3<sup>rd</sup> Party applications. He attached to his said Replying Affidavit, copies of the "Request for Imprest" form and the "Payment Voucher" form selected by the 3<sup>rd</sup> Defendant for its use. The deponent further detailed that like in any other industry, the software programming industry has, over time, developed, shared and established standard programming language and codes that are in the public domain and is freely accessible to any software programming practitioner. The deponent gave examples of this by annexing as "KM-6(a)" and "KM-6(b)" true copies of the Wang'ombe annexures "JW7(a)" and "JW8 (b)" highlighted with orange for the code originating from SAGE ACCPAC, green for code constituting standard accounting software and pink for code in the public domain.

20. Paragraphs 15 & 16 of Mr. Mwangi's Replying Affidavit detailed that when the Plaintiff was undertaking the software development programme for the Egerton University, it had re-negotiated the employment contracts for the deponent and Mr. Ombaba Mokoro. It had been agreed with Mr. Wang'ombe that as the Plaintiff could no longer sustain their employment contracts, the two would be engaged as independent contractors. As regards the statutory payments made on behalf of Mr. Mokoro and Mr. Mwangi by the Plaintiff, the latter commented, rather off-handedly, that they were neither aware of nor sanctioned such deductions being made. If the Plaintiff had done so, Mr Mwangi maintained that such was a way of avoiding Withholding Tax on the payments made to him and Mr. Mokoro as independent contractors and also for processing tax compliance certificates.

21. The Plaintiff's submissions were dated 3 March 2011 and commenced by commenting on various aspects of the Defendants' Replying Affidavits and the Plaintiff's Supplementary Affidavit. It then outlined what it saw the issues as follows:-

**“(a) Were the 6 systems developed by the Plaintiff?**

**(b) Whether the 6 systems or part thereof are in possession and use by the Defendants?**

**(c) Whether copyright is an automatic right?**

**(d) Whether Kevin Mwangi and Daniel Mokoro Obamba (1<sup>st</sup> Defendant's directors) were independent contractors or employees of the Plaintiff in the period between 2003 and 2008?**

**(e) Whether injunction order should issue against the Defendants as prayed:**

- i. Prima facie case with a probability of success**
- ii. The likelihood of suffering irreparable harm that cannot be compensated by way of damages**
- iii. Balance of convenience"**

In answer to issue (a), the Plaintiff submitted that it had developed the 6 systems between 2005 and 2007 and it had annexed a Compact Disc as "JW-2" containing the 6 systems sold to Kenyatta University. It had also annexed copies of contracts with other clients in relation to the 6 systems. As regards the issue as to whether the 6 systems are in whole or in part in the possession of the Defendants, the Plaintiff submitted that after the Anton Pillar order was issued by this Court, it was able to copy systems in use by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It claimed that the systems were found on the 1<sup>st</sup> Defendant's laptop computer and data from the 3<sup>rd</sup> Defendant's computer proved that there was no doubt that the systems were in the possession of and used by the 3<sup>rd</sup> Defendant. The Plaintiff maintained that the annexed (to the Supplementary Affidavit) sample printouts of the source code and interface obtained from the 1<sup>st</sup> Defendant's computer show that the source code and the interface are the same or substantially similar to the source code and interface used by Kenyatta University the same having been sold by the Plaintiff to that university in 2006 and 2007.

22. Thereafter, the Plaintiff referred to the definition of "Computer Program" as per the Copyright Act, 2001 as well as similar definitions in relation to the *Berne Convention for the Protection of Literary and Artistic Work*, the *Agreement on Trade Related Aspects in Intellectual Property (TRIPS)* and the *World Intellectual Property Organisation Copyright Treaty (WIPO)* all of which had been ratified and/or signed by the Kenya Government. Taking into account these definitions, the Plaintiff urged this Court to find that the Plaintiff owns the copyright in the 6 systems as it originally developed the source code, interface and database structure for the systems. The Plaintiff went on to submit that in its opinion, copyright is an automatic right governed by international conventions, more particularly, the Berne Convention.

Although the 1<sup>st</sup> Defendant had intimated that it has copyright by registering the Vista Management Information System, the Plaintiff asked the Court to reject this contention as copyright is automatic. The Plaintiff had demonstrated that it has developed the systems prior to 2010 and thus ownership of the copyright was first (equity) in time even without or with later registration. As to whether Messrs Mwangi and Mukoro were employees or independent contractors, the Plaintiff pointed to annexure "JW-10" of the Supplementary Affidavit as proof in terms of the statutory and other deductions that they were employees of the Plaintiff until August 2008.

23. Finally, as regards the issue of an injunction, the Plaintiff pointed at the principles in that regard in ***Giella v Cassman Brown (1973) EA358***. It pointed to the sample printouts of the interface and source code of the 2 X 6 systems from Kenyatta University as compared with the information extracted from the 1<sup>st</sup> Defendant's laptop computer after the Anton Pillar raid. The Plaintiff submitted that as will be demonstrated in court by displaying annexures "JW -1", "JW-2", "JW-3" and "JW-4" on a computer, the interface and source code systems in the possessions and use of the Defendants are the same or substantially the same as the interface and source code of the Plaintiff's 6 systems. As to the likelihood of suffering irreparable harm or damage, the Plaintiff submitted that it had cost a lot of time, effort and money (without saying how much) for the Plaintiff to develop the 6 systems. In the meantime the 1<sup>st</sup> Defendant had been selling its packages including the Plaintiff's 6 systems to 3<sup>rd</sup> parties at between Shs. 4 – 5 million. The Defendants, according to the Plaintiff, have no justification whatsoever to continue to use the infringed systems at the expense of the Plaintiff. The Plaintiff further submitted that public

interest underlying copyright law requires a presumption of irreparable harm, otherwise the rationale for protecting copyright that of encouraging creativity, would be undermined.

24. In its submissions, the 1<sup>st</sup> Defendant detailed the grounds of the Plaintiff's said Notice of Motion and addressed the issues which had been raised by it in its submissions. To these it added issues of its own as follows:

**“(a) Whether the Plaintiff/Applicant owns copyright in SAGE ACCPAC ERP software system?**

**(b) Whether the Plaintiff/Applicant owns copyright in the 1<sup>st</sup> Defendant's Vista Management Information System?**

**(c) Whether there is any infringement by the 1<sup>st</sup> Defendant/Respondent of any copyright vesting in the Plaintiff/Applicant?**

**(d) Whether the Plaintiff has succeeded in proving the three elements necessary for the granting of an injunction.....”**

As regards copyright in SAGE ACCPAC ERP software system, the 1<sup>st</sup> Defendant submitted that the Plaintiff was only licensed as a representative in Kenya for Softline ACCPAC (Pty) Ltd. with the full mandate to *“to further develop improve and or adapt as necessary the systems as to conform to the circumstances dictated by the Kenyan market”*. The 1<sup>st</sup> Defendant went on to quote clause 4 of the

**SAGE ACCPAC End User Licence Agreement** and maintained that the Plaintiff could not claim any copyright on derivative works adapted from SAGE ACCPAC. Any such copyright should rightly belong to Softline. The 1<sup>st</sup> Defendant denied the Plaintiff's assertion that it had acted as a licensee of Softline or any other proprietors of ACCPAC in Kenya. It had merely assisted its clients, which included the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants to buy the SAGE ACCPAC systems as end-user licensees. The Defendant submitted further that it had used the services to buy such ACCPAC products through ANTWAN t/a as iLink, which was a South African based licensee of Softline. It had been appointed by iLink to represent it in Kenya for sales and support of Softline ACCPAC and related 3<sup>rd</sup> party products. It maintained that the Plaintiff under **section 34(1)** of the *Copyright Act (2001)*, had no right of action on behalf of Softline.

25. As regards the position of Messrs. Mwangi and Mokoro, the 1<sup>st</sup> Defendant submitted from the bar (as it were) matters that were not detailed by Mr. Mwangi in his 2 Affidavits and thus must be discounted as regards the Plaintiff's installation of systems at Egerton University. However, as regards whether they were employees or independent contractors, the 1<sup>st</sup> Defendant drew the attention of the Court to **section 10(7)** of the *Employment Act (2007)* to the effect that:

**“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.**

This Court does indeed find it strange that the Plaintiff, although being able to produce copies of statutory deduction forms in respect Messrs. Mwangi & Mokoro, did not produce any letter of appointment or employment contract for the two. What is also puzzling to this Court is why neither the Plaintiff nor the 1<sup>st</sup> Defendant submitted as to why the distinction as between employee on the one hand and independent contractor on the other should have any bearing upon the matter of copyright herein.

26. As to whether the Plaintiff owned copyright over the 1<sup>st</sup> Defendant's Vista Management Information System, the 1<sup>st</sup> Defendant repeated its submissions as to how it acquired the ACCPAC ERP system from iLink and that thereafter it made use of the tools within the system to create macros into its own application. The said Vista Management Information System held a Certificate of Registration of a Copyright Work from the Copyright Board numbered KCB 0562, dated 6 October 2010, earlier in time to

those of the Plaintiffs which were registered on and after the 15 October 2010. The 1<sup>st</sup> Defendant maintained that its System has an original software code written by it and an unique system interface, both features which are different from the Plaintiff's alleged systems and were, in fact, dictated by the 2<sup>nd</sup> Defendant's own organizational needs.

27. The 1<sup>st</sup> Defendant then submitted as to its contract with the 3<sup>rd</sup> Defendant, noting that its role was to assist the 3<sup>rd</sup> Defendant in implementation, training and commissioning the ACCPAC ERP System which the 3<sup>rd</sup> Defendant had acquired from Sabis UK, an authorized dealer of SAGE ACCPAC in the United Kingdom. In addition, the 1<sup>st</sup> Defendant stated that it had acquired additional components as regards the SAGE ACCPAC system from iLink on behalf of the 3<sup>rd</sup> Defendant. It maintained that the 3<sup>rd</sup> Defendant had been granted serial numbers and activation codes by Sabis UK and iLink but again the 1<sup>st</sup> Defendant was submitting on matters that had not been revealed in the Replying Affidavits. Again the 1<sup>st</sup> Defendant repeated that as for the 2<sup>nd</sup> Defendant's applications and requirements, it had made use of the tools in the SAGE ACCPAC system to create macros into its own Application – Vista Management Information System. Finally, under this heading, the 1<sup>st</sup> Defendant submitted that the Payment Voucher and Imprest Management System installed and commissioned by the 1<sup>st</sup> Defendant for the 3<sup>rd</sup> Defendant do not in any way resemble the annexures "JW-7(b)" and "JW-8(b)" which the Plaintiff alleges to be printouts from the Kenyatta University Payment Voucher system and Imprest Management System.

28. The 1<sup>st</sup> Defendant then proceeded to submit as to similarities in the code lines as between the Plaintiff's system and its own. It identified the following lines of code:-

“ (i) first, lines of code written using the SAGE ACCPAC macros in Visual Basic Applications (VBA);

(ii) second, lines that constitute standard commands for any standard accounting software and which are therefore not original lines of code; and

(iii) third, lines of code that are standard to the software programming industry and therefore in the public domain.”

Thereafter, the 1<sup>st</sup> Defendant's submissions repeated what Mr.Mwangi had deponed to in his second Replying Affidavit as regards the nature of the SAGE ACCPAC compilation and adaption tools, standard accounting guidelines and industry practice.

29. As regards the Plaintiff's claim in relation to breach of copyright, the 1<sup>st</sup> Defendant referred this Court to **Ibcos Computers Ltd. v Barclays Mercantile Highland Finance Ltd. (1994) FSR 275** as reproduced in **Intellectual Property Law (2006) 4<sup>th</sup> Edition** edited by **Tina Hart & Ors** at P. 184. In that case copying was proved by the existence of marked and unexplained similarities between the claimant's and the defendant's code, including spelling mistakes and unused lines of code. Justice Jacob set out the test for copyright infringement in cases where there occurred non-literal copying as being:

**“(a) Is there a work?; (b) is it original?; (c) has there been copying?; and (d), if so, was this of a substantial part?”**

The learned Judge also detailed that it was not only right to consider “literal similarities” but also the structure of the programme and design features. In answer to the above, the 1<sup>st</sup> Defendant submitted that the systems were literary works but that such were not original as the originality lay with SAGE ACCPAC ERP. It further submitted that as the works were not original there could be no copying. However, if the Court was inclined to find that there had been copying, then the 1<sup>st</sup> Defendant submitted that in line with the case of **Designers Guild Ltd v Russell Williams (Textiles) Ltd (2001) FSR 11** as referred to in the **Intellectual Property Law** volume above referred to, the Court should consider whether such copying constituted not only a substantial but an important part of the 1<sup>st</sup> Defendant's Vista Management Information System.

30. Perhaps of greater consideration for this Court was for it to take into account the 1<sup>st</sup> Defendant's submissions as regards whether the Plaintiff had succeeded in satisfying the 3 principles to justify an injunction as per **Giella v Cassman Brown** (supra). The 1<sup>st</sup> Defendant relied upon the finding in that regard in **Microsoft Corporation v Mitsumi Computer Garage Ltd (2001) EA 127** as well as **Giella and East African Industries Ltd v Trufoods Ltd (1972) EA 558**. It was the 1<sup>st</sup> Defendant's submission that the Plaintiff had not proved a *prima facie* case with a probability of success and quoted from the case of **Music Copyright Society of Kenya Ltd. v Safaricom Ltd and Cellulant Kenya Ltd HCCC No. 507 of 2009** as per the finding of the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125** as follows:-

**“A prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.”**

Further, the 1<sup>st</sup> Defendant suggested that in line with the finding in **Alternative Media Limited v Safaricom Limited HCCC No. 263 of 2004**, at this stage of the proceedings, the nature of the case is too technical for the court to determine the ownership of the copyright in the source codes. The 1<sup>st</sup> Defendant had already produced before Court a certificate of copyright from the Copyright Board in relation to its Vista Management Information System dated 6 October 2010 ahead of the Plaintiff's Copyright Certificates dated as between 15<sup>th</sup> and 25<sup>th</sup> October 2010.

31. In any event, it was the 1<sup>st</sup> Defendant's further submission that the Plaintiff had failed to show that it would suffer irreparable damage in case the injunction was not granted by the court. It was also of the opinion that the Plaintiff could be adequately compensated for in damages and cited the court's finding in the **Alternative Media** case (supra) as reiterating the judgement of **Chanan Singh J** (as he then was) in **Sapra Studio v Tip-Top Clothing Co. (1971) EA 489** as follows:-

**“an interlocutory injunction will not be granted where the Plaintiff can be properly protected by the Defendant being ordered to keep an account and the Defendant might suffer an irreparable injury from an injunction restraining him from publishing pending the trial ....”**

The 1<sup>st</sup> Defendant submitted that it can keep an account of all the profits materializing from the sale and installation of its Vista Management Information System to its clients. It warned that if this Court was to issue an injunction as requested by the Plaintiff, it would be forced to shut down and would open itself up to liability from its existing clients whose business currently depended upon the 1<sup>st</sup> Defendant's software platforms. The 1<sup>st</sup> Defendant stated that in that regard, the balance of convenience would have to lie in its favour as the shutting down of its business and the knock-on effect to the operations of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants would affect large numbers of Kenyans. It again referred to the **Alternative Media** case (supra) where the Court held:

**“However, for the avoidance of doubt, the balance of convenience would undoubtedly fall in favour of the defendant not because it is a big man or a big corporation, but because of the larger public interest...”**

32. The 2<sup>nd</sup> Defendant filed its submissions to the Plaintiff's Application on 22 March 2011. They commenced with a summary of the contract/agreement as between the 2<sup>nd</sup> and 1<sup>st</sup> Defendants. They continued with reference to the Plaintiff's Application and the prayers sought therein. The submissions followed on with a summary of the 2<sup>nd</sup> Defendant's case and identified the following issues for determination by court:-

*“3.2.1 Whether the 2<sup>nd</sup> Defendant was an innocent purchaser for value*

*3.2.2 Whether the 2<sup>nd</sup> Respondent (if there was an infringement which is denied) was/is an innocent*

possessor

3.2.3 Whether the 2<sup>nd</sup> Defendant was required to lift the corporate veil to verify where the Directors of the 1<sup>st</sup> Defendant were previously employed

3.2.4 Whether the applicant has succeeded in showing that its systems were copied resulting in an infringing copy

3.2.5 Whether in the circumstances, the Applicant has satisfied the minimum threshold for the grant of an injunction. More specifically;

a) Does the Applicant have a prima facie case with a probability of success?

b) If this remedy is not accorded to them, will it suffer irreparable damage?

c) In the instance of success on the part of the Applicant, can it be compensated by way of damages?"

33. As to issue no. 1, the 2<sup>nd</sup> Defendant submitted that it obtained the software in good faith for value upon the understanding that the 1<sup>st</sup> Defendant had a right to the software. As to issue no. 2, the 2<sup>nd</sup> Defendant felt that it was necessary to understand what is meant by "source codes". It submitted that a source code is the instructions or programme given to the computer in a language known to the computer which is not seen by the users of the computer. The 2<sup>nd</sup> Defendant detailed that the **Copyright Act (2001)** recognizes such a code under **section 2** thereof as a computer programme. The 1<sup>st</sup> Defendant noted that the Plaintiff was relying upon works commissioned for other institutions of learning (presumably Kenyatta and Egerton Universities?) that it was the owner of the copyright for its 6 listed programmes or systems. The 2<sup>nd</sup> Defendant bought the software that it did from the 1<sup>st</sup> Defendant on 23 March 2009. At that time and at the time of commissioning, it was unaware of any copyright subsisting in the programmes. In any event, the 2<sup>nd</sup> Defendant relied upon **section 35** of the **Copyright Act (2001)** which states:

**"Where in an action for infringement of copyright it is proved or admitted-**

**(a) That an infringement was committed; but**

**(b) That at the time of infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement whether or not other relief is granted under this section."**

34. As regards the lifting of the corporate veil, the 2<sup>nd</sup> Defendant submitted that in the absence of an agreement to the contrary, the owner of copyright in software was the individual who made it, unless that person was employed, in which case, the employer owns the copyright. So far as the Plaintiff was concerned, the 2<sup>nd</sup> Defendant submitted that it had failed to prove that so far as the directors of the 1<sup>st</sup> Defendant were concerned, that they were employees or independent contractors. The Plaintiff's case was arguable and not straightforward in that regard. Thereafter, the 2<sup>nd</sup> Defendant quoted the definition of a computer programme as per **section 2** of the **Copyright Act (2001)** as:

**"a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result."**

The 2<sup>nd</sup> Defendant detailed that whereas copyright automatically arises upon the creation of a work, the Plaintiff had to prove ownership and in so doing, must produce the original and preferably dated evidence of the creation of the work and the proof of the authorship. The Plaintiff had not done so

and it would prejudice the 2<sup>nd</sup> Defendant if an injunction were to be granted.

35. It attached an extract from **Butterworth's Forms and Precedents Issue 4 -11/2005 on Intellectual Property 1** and referred to para 3.1.3 thereof which reads as follows:-

**“Copyright and infringement. The principles of law relating to the infringement of copyright in a computer program are similar to general copyright principles. An important point to note is that copyright does not protect ideas but merely the expression of ideas. Thus if a computer program embodies novel business concepts or creative programming techniques, the concepts or techniques themselves are not protected by copyright, no matter how original they might be. Any other person may use the same concepts or techniques in developing new, even similar, programs as long as the program which has been developed is such person's own work.”**

The 1<sup>st</sup> Defendant continued by detailing that to prove infringement, it is not necessary to prove copying of the whole programme or exact copying of the same. The test that the court applies is **qualitative, not quantitative**. The Court garnered further assistance in its quest to understand the principles involved in the copyright of software processes from the same volume of **Butterworth** (supra) as follows from **paragraph 3.1 Copyright Law**:

**“Within the context of developing software, it must be borne in mind that from the early stage of the development process documents embodying what will ultimately become the source code or object code, as well as flow charts, documents embodying the ‘architecture’ of a software and other writings and illustrations may qualify for copyright protection as original literary or artistic works. Only the end product of software development falls outside the definition of literary work – without, however, depriving the above documentation and illustrations of its independent copyright protection. Other copyright protected works may in fact be embodied or distributed within or alongside a software product, e.g. a video game (protected as a cinematographic film), electronic databases (protected as literary works) or a software instruction manual (protected as a literary work).”**

The **Butterworth** volume also provided insight as to the question of copyright ownership as regards employees as follows at **para. 3.1.2**:

**“A difficult question arises when software is developed by employees, each under a contract of service. For instance, an employee might develop a program in ‘own time’ and the employer might then claim to be the owner of the copyright in the program. Where there is no doubt that the software development is undertaken in the course and scope of employment of the developer, the employer will own the copyright.”**

The whole question of whether the directors of the 1<sup>st</sup> Defendant were employees of the Plaintiff at the time when the development of the Plaintiff's 6 schedules was being undertaken at Kenyatta and Egerton Universities will have to be gone into further at the hearing of this suit in due course, bearing in mind the ramifications of what has been referred to above in terms of an employer owning the copyright of programmes developed by employees.

36. The 2<sup>nd</sup> Defendant further submitted that the Plaintiff had not satisfied what it termed as the “general threshold for the grant of an injunction in the circumstances”. In that vein, the 2<sup>nd</sup> Defendant cited the case of **American Cyanamid Co. v Ethicon (1975) AC 396** in which the English House of Lords decided that in order to establish whether an injunction should be granted or otherwise, 3 points should be considered: (a) whether the Applicant has established a prima facie case with a probability of success (b) whether an award of damages would be an adequate remedy and (c) what would be the balance of convenience if the Court remained in doubt. As regards (a), the 2<sup>nd</sup> Defendant referred this Court to the finding of **Koome J** (as she then was) in **Margaret Soares & Anor. v Simon K Njau t/a Bomas Interior Designs & 3 Ors (2010) eKLR** in which the learned Judge felt guided by the **Mrao Ltd** case (supra and as quoted). In terms of (b) above, it was the 2<sup>nd</sup> Defendant's opinion that the Defendants

would be in a financial position to pay damages and consequently, however strong the Plaintiff's case appeared to be, no injunction should normally be granted. The 2<sup>nd</sup> Defendant referred to the Certificates of Registration that the Plaintiff had registered commencing 15 October 2010 and that of the 1<sup>st</sup> Defendant registered on 6 October 2010. It was obvious that by the time the Plaintiff had registered its 6 systems, the 1<sup>st</sup> Defendant had already sold and installed its financial system to the 2<sup>nd</sup> Defendant. In any event, the 2<sup>nd</sup> Defendant pointed out that it was unclear from the material before court how the copyright of the Plaintiff's systems had been infringed. Finally, the 2<sup>nd</sup> Defendant drew the Court's attention to the case of **Cayne v Global Natural Resources (1984) 1 All ER 225** in which the English Court of Appeal had observed that an injunction could be refused if, by granting it, there would be no prospect of a trial. The 2<sup>nd</sup> Defendant submitted that such would be the case in this Application before court.

37. The 3<sup>rd</sup> Defendant filed its submissions herein on 12 May 2011. It detailed the prayers and grounds of the Plaintiff's Notice of Motion dated 21<sup>st</sup> December 2010. It also referred to the contents of the Plaintiff's 6 systems were duly registered by the Copyright Board and all rights and benefits appertaining thereto are exclusively conferred on the Plaintiff. The 3<sup>rd</sup> Defendant submitted that in order to establish a *prima facie* case, the Plaintiff has to demonstrate that it is exclusively licensed to deal with SAGE ACCPAC programmes/software in Kenya with the full mandate to further develop, improve and adopt as necessary the systems so as to conform with the circumstances pertaining in Kenya. In the 3<sup>rd</sup> Defendant's view, the extra modules to its existing system supplied by the 1<sup>st</sup> Defendant were not the same nor were substantially copied from the Plaintiff's products. In its opinion, the 3<sup>rd</sup> Defendant felt that this could only be established at a full trial with expert evidence to prove copying or substantial copying or reproduction of the Plaintiff's literary works. As both the Plaintiff and the 1<sup>st</sup> Defendant had obtained Certificates for their products from the Copyright Board, such denotes that the products were different and separate literary works. I was again referred to **section 2** of the **Copyright Act (2001)** as to the various definitions of "author", "computer programme", "copy", "copyright" and "infringement". I was also referred to **sections 22 (1) (a) and section 31 of the Act**. The 3<sup>rd</sup> Defendant posed 8 questions of the Plaintiff which it felt should have disclosed by the Plaintiff to the Court. Such involved the authorship of the Plaintiff's 6 systems and their relationship to the Plaintiff. The 3<sup>rd</sup> Defendant then outlined its case as per the Replying Affidavit of Dr. Swazuri. It maintained that the main issue arising is whether the Copyright Board registered and issued copyright certificates to identical literary works to both the Plaintiff and the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant maintained that such wasn't the case. The works were different and distinct so as to attract individual recognition of originality, ownership and authorship. The Plaintiff, it maintained, had nowhere attacked the Certificate issued to the 1<sup>st</sup> Defendant. The Plaintiff was not seeking any declaration of rights or injunction or the cancellation of the 1<sup>st</sup> Defendant's rights and consequently, the 3<sup>rd</sup> Defendant's rights under the Certificate. It reminded court that the 1<sup>st</sup> Defendant's works were registered first.

38. Thereafter, the 3<sup>rd</sup> Defendant's submissions also went into the test to determine the issue of infringement as has been referred to in the **Ibcos Computers** case (supra) as cited by the 1<sup>st</sup> Defendant (see paragraph 29 above). The court would have to consider the literal similarities, the programme structure and design features. This is because copyright protects the structure or architecture of the work rather than the facts or ideas contained in it. In the 3<sup>rd</sup> Defendant's view, this can only be done by the benefit of a full inquiry by way of a trial. No *prima facie* case can be established where the Court has to be put to an elaborate inquiry. The court was again referred by the 3<sup>rd</sup> Defendant to **section 35** of the **Copyright Act (2001)**, adopting the same position as regards that section as had the 2<sup>nd</sup> Defendant in its submissions (see paragraph 33 above). Finally, the 3<sup>rd</sup> Defendant wound up its submissions herein by answering the issues as raised by the Plaintiff in paragraph 21 above. It maintained that no conclusive evidence had been put before the court to show that the 6 systems claimed as having been developed by the Plaintiff had, in fact, been so developed. No evidence had been brought to show that the 6 systems or part thereof are in the possession or use of the Defendants. No evidence of any material collected from any computer belonging to the 3<sup>rd</sup> Defendant was exhibited before Court. Copyright is an automatic right

vested in the author of the subject literary work. However, the copyrights in this case were disputed as the 3<sup>rd</sup> Defendant maintained that as a result of the conferment of distinct and separate Registration Certificates denoting that the systems are not one and the same thing. They are different literary works authored by different people. As to whether Messrs Mwangi & Mokoro were independent contractors or employees of the Plaintiff, the 3<sup>rd</sup> Defendant maintained that the payment of statutory levies is not conclusive proof of contracts of service. It commented that the 1<sup>st</sup> Defendant was a separate legal entity and that no suit had been brought as against Messrs Mwangi & Mokoro. As to whether an injunction order should issue as prayed in the Plaintiff's Application, the 3<sup>rd</sup> Defendant submitted that it could only issue in line with the **Giella v Cassman Brown** (supra) principles as read with **sections 1A and 1B of the Civil Procedure Act**. In the 3<sup>rd</sup> Defendant's opinion, the Plaintiff had not established the requisite standard in that regard.

39. The Plaintiff's submissions in reply were filed on the 17 May 2011. As far as the 1<sup>st</sup> Defendant's contention that the copyright in the 6 systems belonged to SAGE ACCPAC, the Plaintiff urged the court to disregard such averments as they were only intended to deviate the court from determining the real question as to whether it is the Plaintiff that owns the copyright to the 6 systems. It noted that it did not claim copyright in the general applications/macros or codes in the public domain as per Annexure "JW-6" of the Supplementary Affidavit but rather what it developed using the said macros and codes. It also criticized the 1<sup>st</sup> Defendant's contention that clause 4 of the SAGE ACCPAC End User Licence Agreement means that the Plaintiff cannot claim copyright in the 6 systems. The said clause does not take away the right of a SAGE licensee from developing its own applications from the SAGE ACCPAC base in which it can claim copyright. To this end, the Plaintiff pointed out that at paragraph 7 of the 1<sup>st</sup> Defendant's Replying Affidavit, the 1<sup>st</sup> Defendant admits that the Plaintiff used what is in the public domain as the "backbone of developing the said application". The Plaintiff maintained that the issue of the Vista Management System is by the way. The true issue for decision is as regards the information obtained and seized which reveals the usage of the Plaintiff's 6 systems. The Plaintiff continued to contend that the codes in the programmes seized from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the same or substantially similar to the codes in the Plaintiff's 6 systems. The Court was also asked to disregard the 1<sup>st</sup> Defendant's allegations that the systems put forward in evidence by the Plaintiff as from Kenyatta University had been modified. The 1<sup>st</sup> Defendant has not brought any proof before court that such is the case.

40. As regards the employment position of Messrs Mwangi and Mokoro, the Plaintiff detailed that a contract of employment may be written or implied and that it had clearly indicated the existence of implied contracts of employment as between it and Messrs. Mwangi and Mokoro by reference to the evidence of statutory deductions. The 1<sup>st</sup> Defendant at paragraph 15 of its first Replying Affidavit had admitted that the two gentlemen had been employed by the Plaintiff by stating that the Plaintiff had "renegotiated the employment contracts" for the two. The Plaintiff urged this Court to find as a fact, that the two had been employees of the Plaintiff at the time the 6 systems were developed.

41. In reply to the 2<sup>nd</sup> Defendant's submissions as regards the application of section 35 of the Copyright Act (2001) to it (and by extension the 3<sup>rd</sup> Defendant's submissions on the point), the Plaintiff submitted that the section did not apply as the 2<sup>nd</sup> Defendant was aware of the subsistence of the copyright in the 6 systems. It referred to the fact that 2 of the 2<sup>nd</sup> Defendant's employees had been employed at Egerton University when the said 6 systems were sold to that institution in 2007. Finally in this regard, the Plaintiff maintained that indeed, it had satisfied the test enunciated on the **Ibcos Computer** case (supra).

42. Turning to the Plaintiff's reply to the 3<sup>rd</sup> Defendant's submissions herein, it reiterated that the 3<sup>rd</sup> Defendant's employee Gaireth Kingi had sought to know the difference as between the SAGE ACCPAC and the Uni-Plus systems while at a conference in May 2010. Mr. Kingi, so the Plaintiff said, had been informed by Mr. Wang'ombe that the Uni-Plus contained systems developed by the Plaintiff including its copyrighted 6 systems. Therefore protection under section 35 of the Copyright Act did not apply to the 3<sup>rd</sup> Defendant. As to the usage by the 3<sup>rd</sup> Defendant of the Plaintiff's said 6 systems, the Plaintiff has

clearly stated that the information obtained from the 1<sup>st</sup> Defendant's computer which was seized from the 3<sup>rd</sup> Defendant's offices during the *Anton Pillar* raid contained the 6 systems. Such were in use by the 3<sup>rd</sup> Defendant, a fact that has been uncontroverted. It was the Plaintiff's view that the 3<sup>rd</sup> Defendant was aware that the copyright in relation to the 6 systems was infringed when it bought the same from the 1<sup>st</sup> Defendant.

44. Finally, the Plaintiff submitted that it had established a *prima facie* case by showing prior ownership of copyright in the 6 systems. It maintained that following upon the *Anton Pillar* orders issued by this Court and the raids upon the Defendants' premises, the programmes obtained from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's computers leave no doubt that they are the same or substantially the same as the 6 systems. The Plaintiff maintained that it had shown that the damage that it will suffer is irreparable and that it has spent considerable money (without saying how much), time and effort in developing the 6 systems. It detailed that even if the test of the balance of convenience was to be applied, it would tilt in favour of the Plaintiff which continues to suffer loss while the Defendants will suffer no prejudice if the injunction was granted as, in the Plaintiff's view, similar genuine software/programmes could easily be obtained (without saying from where at and what cost). (Bracketing above mine). The Plaintiff requested the Court to grant the orders prayed for in its Application dated 21 December 2010

45. The principles outlined by the Court of Appeal in the **Giella v Cassman Brown** case (supra) have always been the standard guidelines to the granting of interlocutory injunctions. The same have been preferred in Kenyan Courts to those outlined in the **American Cynamid** case as cited by the 2<sup>nd</sup> Defendant as above. In this matter, I must necessarily consider as to whether the Plaintiff has put forward a *prima facie* case with a probability of success. (Underlining mine). I don't think that it has. The principle reason for my view in this is that I am concerned as to just why the Plaintiff found it necessary to exhibit to Mr. Wang'ombe's Supplementary Affidavit printouts from the systems applied at Kenyatta University. To my mind, if I wanted, as an ordinary or even institutional customer, to purchase the Plaintiff's systems I would expect its representatives to come to my premises armed with compact discs or whatever other means of data storage, and install the same onto my hardware. In other words, I would be purchasing the systems readymade. Thereafter such may well have to be adapted to what I particularly wanted generated. Here, however, the Plaintiff is producing material as evidence of a *prima facie* case which, by its own admission was purchased and installed at Kenyatta University in 2006/2007, now 5 years ago. The 1<sup>st</sup> Defendant says that such has been modified since then, I should be very surprised if it hasn't. Software programmes are living applications that necessarily must have the facility for alteration, change and improvement. This is the reason why software providers, like Microsoft and Hewlett Packard, are constantly sending updates to their programme users.

46. I also take cognizance of the fact that if the Plaintiff's 6 systems were developed as long ago as 2006/2007, why did it wait for so long before seeking and obtaining the Certificates of Registration of Copyright Works from the Kenya Copyright Board in October 2010? The Defendants have all pointed out that the 1<sup>st</sup> Defendant's said Certificate for its Vista Management Information System, was obtained and dated 6 October 2010, 10 days prior to the first of the Plaintiff's said Certificates. Then there is the suggestion by the Plaintiff that despite registration in 2010, the copyright in the 6 systems existed before that date, indeed when such were written. However, no evidence or authority has been put before this Court that an action for breach of copyright can be maintained prior to copyright registration – a matter in my view, that's best dwelt upon at length at the hearing of this case. I also consider that there is merit in the submissions of the Defendants as to the position of Messrs. Mwangi and Mokoro in relation to the Plaintiff and its claimed copyright. Were they employees of the Plaintiff at the time the systems were developed or were they independent contractors? If the latter, such will have a bearing on the authorship of the systems upon which the Plaintiff claims copyright. If the systems were developed as long ago as 2006/2007, then the two gentlemen may have been employees of the Plaintiff. However, it seems quite clear from the affidavit evidence before Court, that as at October 2010, they were operating under the aegis of the 1<sup>st</sup> Defendant and were its first directors. Again, in my view, this is a matter which will be clarified at the hearing of this suit in due course.

47. I have carefully perused both Exhibits "JW- 7(a)" and "JW-7(b)" as well as "JW-8(a)" and "" JW-8(b)"

as annexed to the Supplementary Affidavit of James Wang'ombe. I have also examined Exhibit "JW-6" annexed thereto. There are similarities in the programme wording as between the two exhibits which do require further explanation/examination, once one has taken out the statements and variables in the public domain referred to in "JW-6". I believe that such will be better canvassed at the hearing of this suit in due course with expert and technological assistance as necessary. I find myself, at this stage of these proceedings, thinking very much along the lines of the views expressed by **Emukule J.** in the **Alternative Media** case (supra). This Court is dealing with an interlocutory application, with long and complex issues of whether the 1<sup>st</sup> Defendant has copied intricate computer programmes and systems from work originated by the Plaintiff. **Emukule J.** utilized the following quote from **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol.9(2) at paragraph 406** entitled **Interlocutory Injunctions:-**

**"It is often of importance for a Plaintiff to obtain immediate protection from a threatened infringement of his copyright. In such a case he should apply for an interlocutory injunction for the purposes of preserving his rights from further interference pending the trial of the injunction. The normal principles for the granting of interlocutory injunctions apply. The Plaintiff must show that there is a serious issue to be tried and, for this purpose, the court should try not to resolve disputes on affidavit evidence or difficult questions of law. If damages would be an adequate remedy for the Plaintiff and the Defendant is in a position to pay, an interlocutory injunction should not be granted. Conversely, if damages would be an adequate remedy for the Defendant and the Plaintiff would be able to pay them then interlocutory injunction should be granted. If damages would not be an adequate remedy for either party, the court should attempt to assess whether the grant of or the withholding of an injunction is likely to cause the greater harm and act accordingly."**

In this matter, although I am satisfied that the Plaintiff herein has in its Application put up a *prima facie* case, I remain unconvinced for the reasons stated above, as to its probability of success. In any event and dealing with the second principle established by the **Giella v Cassman Brown** case (supra), I am of the belief that the Plaintiff will not suffer irreparable harm that cannot adequately be compensated for in damages. I have no problem at the very least in being convinced that certainly the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, if not the 1<sup>st</sup> Defendant, will have the ability to pay any damages that may be awarded to the Plaintiff in due course.

48. I also take full cognizance of the finding of **Chanan Singh J.** (as he then was) in the **Sapra Studio** case (supra) that a defendant may be ordered to take an account, where an injunction is not granted. The learned Judge quoting from **Halsbury's Laws of England 3<sup>rd</sup> Edition Vol. 8 pages 444-5** detailed:

**"An interlocutory injunction will not, however, be granted where the Plaintiff can be properly protected by the Defendant being ordered to keep an account and the Defendant might suffer irreparable injury from an injunction restraining him from publishing pending the trial, nor will an interlocutory injunction be granted if the Plaintiff has been guilty of undue delay in coming to the court or if his conduct has amounted to an acquiescence in the infringement, or there is any substantial doubt as to the Plaintiff's right to succeed".**

This then is the position as the Court sees it in this case. I believe that there is sufficient doubt as to whether the Plaintiff will succeed at the trial in due course. I do not consider that the balance of convenience tilts in favour of the Plaintiff in this Application and, to my mind, the Plaintiff has not succeeded in satisfying the 3 principles necessary for the granting of an interlocutory injunction. Consequently, I refuse the Plaintiff's Application for an injunction to issue in this matter but I order that the 1<sup>st</sup> Defendant herein will keep an account of all transactions involving the sale, installation, commissioning and training in relation to its Vista Management Information System as well as any dealings that it may have with customers as regards SAGE ACCPAC applications. The Defendants will have the costs of the Application.

**J. B. HAVELOCK**  
**JUDGE**

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of May 2012.**

**G. V. ODUNGA  
JUDGE**

**In the presence of:**

Mr. Onyango for Plaintiff.

Mr. Okonjo for 1<sup>st</sup> Defendant.

M/s. Yator for W. Gatonye for 2<sup>nd</sup> Defendant.

No appearance for 3<sup>rd</sup> Defendant.