



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 866 of 2010

NJERI WANGARI 1ST PLAINTIFF

NSEMIA INC. PUBLISHERS 2ND PLAINTIFF

VERSUS

OXFORD UNIVERSITY PRESS (E.A) LIMITED DEFENDANT

R U L I N G

Before me is an application dated 19th July, 2011 strike out the defence and for judgment on admission under Order 2 Rule 15 (1) (c) and (d) and Order 13 Rule 2 of the Civil Procedure Act.

The Plaintiffs contend in the Affidavit of Njeri Wangari sworn on 19th July, 2011 that the 1st Plaintiff is an author by profession, the author of and copyright holder in a literary work titled “**mines and mind fields MY SPOKEN WORDS**” whilst the 2nd Plaintiff is the exclusive world-wide publisher and distributor of the said work published in 2010 pursuant to an agreement between the 1st and 2nd Plaintiff, that in May 2010 the Defendant infringed the Plaintiff’s intellectual property in the said works by copying a poem entitled “my eyes” into its book titled “**counterpoint and other poems**” without the authority of the Plaintiffs, that on being served with the Plaint the Defendant admitted the said publication, that there having been admission of publication, the Defence is meant to delay the determination of the suit.

Mr. Mureithi, learned Counsel for the Plaintiff submitted that there were five broad issues to be considered here, these were, whether the Defendant had copied the works complained of, whether the Defendant had any authority to do so, whether there was any admission of infringement in the Defence, whether the assignment by the 1st Plaintiff to the 2nd Plaintiff satisfied the provisions of Section 33 of the Copyright Act and whether the Plaintiffs have any locus standi to bring the present suit.

Counsel submitted that the works by the Plaintiffs satisfied the provisions of section 22(3) as being copyrightable having been reduced to some material form, that by bringing this suit the Plaintiffs had demonstrated that they had not authorized the copying complained of, that paragraph 6 of the defence had

clearly admitted the copying and reproduction of the said works and the only defence offered was that the Defendant had made reasonable efforts to trace the author for compensation, that his was untrue as there was no compensation that was paid upon receiving the first demand by the Plaintiff's Advocates, that the Defendant's contention that they were the first publishers cannot hold since publication is not publication if not authorized under the Berne Convention for Protection of Literally and Artistic Works. Counsel submitted that the assignment of the 1st Plaintiff's works to the 2nd Plaintiff satisfied the provisions of Section 33(3) of the Copyright Act. Counsel urged that the application be allowed.

The Defendant filed a Replying Affidavit of Peter Nyoro sworn on 19th October, 2011 in opposition to the application. The Defendant contended that when it published its anthology titled '**counterpoint and other poems**' in February, 2010 the Defendant was not aware of the publication of the 1st Plaintiffs' works titled "**mines and mind fields MY SPOKEN WORDS**". It was unaware of the assignment of the said works to the 2nd Plaintiff, that paragraph 6 of the Defence was not an admission since the Defendant had asserted that its publication was first in time and that the issue of locus is triable.

Mr. Michuki, learned Counsel for the Defendant submitted that for there to be an infringement the Defendant's work must be the same or substantially similar to the Plaintiff's, that the poem complained of was only 2 pages out of 110 pages of "**mines and mind fields MY SPOKEN WORDS**", that it is a triable issue whether the taking of such a portion was substantial, the text **INTELLECTUAL PROPERTY LAW by Lionel Bentley & Brad Sherman** was relied on, that the court's jurisdiction was denied on the basis that it is not the lowest pecuniary jurisdiction to try the suit, that the agreement produced as "NW2" was for a book known as "fading faces" thereby raising the issue whether the 2nd Plaintiff has any locus standi as a triable issue, that the court should be slow to conclude a matter in a summary manner, Counsel submitted that there were triable issues and this case was not so clear as to warrant summary determination.

I have carefully considered the pleadings, the Affidavits on record and the submissions of counsel. I have also considered the authorities relied on.

The principles applicable to an application to strike out a pleading are well known. In the case of **D.T Dobie & Company (K) Ltd -vs- Muchina (1982) KLR 1** at page 9 Madam JA observed:-

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way"

As regards admissions, the case of **Choitram -vs- Nazari (1984) KLR 327**, at page 333 the Court of Appeal delivered itself thus:-

"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the fact of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties."

That then is the law relating to summary procedure. The question therefore this court has to ask itself is:-

(1) Is the Defendant's Defence so hopeless that it is unarguable.

(2) Is the admission contained at paragraph 6 of the Defence so clear and unequivocal that judgment should be forthwith entered for the Plaintiffs ?

In my view one thing that is clear from the pleadings and the Affidavits on record is that the 1st Plaintiff is the writer and originator of the poem entitled **“Their eyes”** in the 2nd Defendant's publication known as **“mines & mind fields MY SPOKEN WORDS”** and **“Eyes”** in the Defendants' publication known as **“Counterpoint and other poems.”** Both these works were produced sometimes in the year 2010.

On the foregoing, my view is that the Defendant may have no defence to the claim by the 1st Plaintiff. This is so for the reason that in paragraph 6 it stated:-

“(vi) Even before filing of this case, the Defendant did as reasonably as practically possible contact the 1st Plaintiff with a view to agreeing on a reasonable compensation. The Defendant therefore has acted in good faith.”

Since the 1st Plaintiff has brought this suit for, inter alia, compensation, then in my view, there may be no issue which can be said to be bona fide that need to be tried as between the 1st Plaintiff and the Defendant. The alleged defence of bona fides cannot hold as against the 1st Plaintiff's claim. What will be tried at the trial where there is such a glaring admission? I see none.

Accordingly, on the foregoing, the 1st Plaintiff's claim against the Defendant may in the circumstances be irresistible and I would have struck out the same and entered judgment for the 1st Plaintiff against the Defendant save for what I would state hereafter.

As regards the 2nd Plaintiff's claim, the Defendant's defence is that it did not know that the works complained of had been published by any other party, that there is no agreement between the 1st Plaintiff and the 2nd Plaintiff as regards **“Mines and mind fields MY SPOKEN WORDS”** and that if the same exists, it does not satisfy the provisions of Section 33 (3) of the Copyright Act and that therefore the 2nd Plaintiff lacks locus standi to bring the present proceedings.

Section 33 (3) of the Copyright Act provides:-

“33. (3) No assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing signed by or on behalf of the assignor, or by or on behalf of the licensor, as the case may be and the written assignment of copyright shall be accompanied by a letter of verification from the Board in the event of an assignment of copyright works from outside Kenya.”

I have looked at the agreement produced as “NW2” in the Supporting Affidavit of Njeri Wangari sworn on 19th July, 2011. It is an agreement between the 1st and 2nd Plaintiff. The Agreement reads, inter alia,:-

“The Parties agree to the terms set forth in this agreement as follows:-

- 1. Judy Njeri Wangari is the Author of the Book entitled Fading Faces hereinafter referred to as “the Book”.***
- 2. The author hereby grants and Assigns to the publisher exclusive world rights to produce, publish and sell the book in all editions (including in digital format E-book) to be distributed worldwide by the publisher.....”***

That agreement was executed between the 25th November and 2nd December, 2009.

In paragraph 4 of the Plaint the Plaintiff pleaded:-

“4. The 1st Plaintiff is a literary author by profession and is the author and copyright holder in a literary work titled “Mines and Mind Fields MY SPOKEN WORDS” and the 2nd Plaintiff is the exclusive world-wide publisher and distributor of the said literary work published in 2010 by virtue of an agreement between the 1st Plaintiff and the 2nd Plaintiff.”

From the foregoing, my view is the cause of action pleaded by the Plaintiffs in the Plaint is in respect of the works known as **“Mines and mind fields, ‘MY SPOKEN WORDS”** wherein the poem **‘Their Eyes’** is found. There was no agreement that was produced by the Plaintiffs that relate to the works **‘Mines & Mind Fields, ‘ MY SPOKEN WORDS’ but rather “FADING FACES”**. Are these one and the same works? Was the poem **“Their eyes”** which is the subject of the copyright infringement contained in the said works **“Fading Faces”**? What is the connection between the agreement executed by the Plaintiffs on 25th November, and 2nd December, 2009 respectively and the works **“Mines and mind fields MY SPOKEN WORDS”** whose copyright was infringed and is the subject of this suit?

My view is that, the evidence produced by the Plaintiffs in the Supporting Affidavit did not address or answer these issues. For that reason, my view is, these issues are triable and must be established at a trial. For this alone, I feel that I need not address all the other issues raised by the parties in the application as they will have no impact either way.

Accordingly, I find that the 2nd Plaintiff’s application against the Defendant is unmeritorious. Since the claim by the Plaintiffs is intertwined, on the issue of copyright I will dismiss the entire application with costs.

Orders accordingly.

DATED and delivered at Nairobi this 15th day of June, 2012

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A. MABEYA
JUDGE