



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 364 OF 2008

PROF. NZELE DAVID NZOMOPLAINTIFF

VERSUS

MOSES NAMAYI ANYANGU 1ST DEFENDANT

COMPETITIVE EDGE KENYA 2ND DEFENDANT

RULING

The plaintiff filed an application dated 11/7/2005 seeking to restrain the defendants from publishing, selling or otherwise distributing a book titled “Financial Accounting Revision Manual” and that the defendants do provide proper accounts of all sales of that book.

On 27/3/2006, the defendants through their advocates served a notice of Preliminary Objection on the ground that applicant does not have locus standi to prosecute the suit and that the plaintiff’s suit does not disclose any or any cause of action known by law. Also, the suit is misconceived and an abuse of court process.

The plaintiff’s application was based on the ground that the plaintiff is the author of two books, the first being “Advanced Financial Accounting” and the second being “Basic Accounting Principles and Procedures”.

It is also said that the first defendant is the author of a book entitled “Financial Accounting Revision Manual” which is published by 2nd defendant. Both defendants have infringed the copyright of the plaintiff in his two books aforesaid in publishing the book “Financial Accounting Revision Manual”. This is denied by the defendants.

Both parties proceeded through the process of discovery and it is on 27/3/2006 that the defendants filed notice of Preliminary Objection and served upon the plaintiff. The plaintiff argues that he owns the copyright materials which form the subject matter of this suit. And that whether or not he owns the copyright is a matter of fact and law. The same can only be determined by evidence adduced at a trial.

In the case of **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696** – the Court of Appeal said:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop,” as per Sir Charles Newbold.

In the present case the facts relied upon are facts from one side. The facts are disputed. It would require an investigation to find the truth. Furthermore, the evidence offered by the defendants and the annexures are not proved.

A Preliminary Objection cannot be supported by evidenciary documents. It would be necessary to place the witness in the witness box to give sworn evidence and be cross-examined on the documents. In the **Mukhisa Biscuits vs. West End Distributors** aforementioned, Law, J.A. at page 700 observed:-

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit.”

The defendants’ submissions are that there is NO dispute that the plaintiff authored the two books. But it was during his employment in the University of Nairobi. The first defendant was also teaching at University of Nairobi at the same time. However, whether the plaintiff is the owner of the copyright, subject of suit is disputed. The plaintiff states he is the owner while the defendants state it is not so but is owned by University of Nairobi. This is a matter to be proved by evidence.

Furthermore, issues raised by plaintiff of ownership, and infringement can only be determined by the court of law at a trial hearing evidence. Matters raised by “MNA 2” at paragraph disclose that a committee sat and made a decision. The legality of such a decision can only be determined by a court of law. Therefore, it is my view, that the plaintiff cannot be shut out of seat of justice simply by pointing out to him the provisions of **Copyright Act**.

The defendants have relied on the **Copyright Act** and the **Mukhisa Biscuits Manufacturers Ltd. vs. West End Distributors Ltd** and also **Niazons (K) Ltd. vs. China Road Bridge Corporation (K) [2001] 2 E.A. 502**. This last authority was discussed by Court of Appeal which held that that:-

“A Preliminary Objection is a pure point of law which is resolved without considering the merits of the application before the court.”

It is my opinion that the plaintiff has locus standi “the right to bring an action or to be heard” in this suit. He has clear claims in respect of his desire to be heard on the ownership and infringement of the copyright he claims to own.

It is arguable that his claims do not disclose a cause of action with regard to copyright and I would not say his suit and application is an abuse of due process of law.

I therefore do not uphold the Preliminary Objection which is dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 8th day of June 2009.

JOYCE N. KHAMINWA

JUDGE