



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 566 of 2003

ALBERT GACHERU KIARIE *t/a*

WAMAITU PRODUCTIONS..... PLAINTIFF

VERSUS

SIMON MUIRURI KIREHU *t/a*

ONE STOP NDUTI MUSIC STORE DEFENDANT

J U D G M E N T

Albert Gacheru Kiarie, a businessman carrying on business under the name of “Wamatitu Production” filed this plaint originally on 15/9/2003. The plaint was served and was amended on 24/2/2004 and further amended on 28/7/2005. The defendant filed statement of defence and amended defence and counter-claim on 12/8/2005. The counter-claim alleges that the plaintiff has claimed to hold rights to produce, market and distribute musical works by stated artistes and the plaintiffs claims have caused great loss of business and he claims damages.

On the day fixed for hearing of the suit which was by the consent of the parties the defendant or his advocate did not appear. The plaintiff proceeded to prove his case. His evidence on oath was that he carried his business of production, distribution and promotion of music at Three Ways House, Room 307 Luthuli avenue. His claim was against the defendant for infringement of the copyright of Music Recordings he had recorded which they reproduced without his permission. The plaintiff had already acquired by transfer the copyrights.

The copyright agreements are exhibited between the artist Jane Nyambura Kinyua *alias* Queen Jane of Queenja Les Les Band. The consideration for transfer is stated and the rights sold are specified namely; to produce and/or reproduce the said songs in any form, compact disc music cassettes, gramophone records or in any manner at his own convenience and discretion and can damage the titles of any songs if need be without reference to any person. The artist agreed not to interfere in any way with the production or distribution of the songs. The agreements are exhibited and numbered Exht. 1 – 18. The plaintiff first reproduced the songs into cassettes titled Mwendwa K.K. and NDI MUNOGU, all the rights transferred to the plaintiff by Artist Jane Nyambura *alias* Queen Jane.

The defendant has reproduced songs from these two cassettes into CD’s without the authority or permission of the plaintiff. The defendant has similarly reproduced songs by Shari Martin from 4 cassettes into 2 CD’s containing therein with his other popular songs from other producers without the authority of the plaintiff.

The plaintiff's cassettes were titled:

(1990) Tangazo La Ajabu

(1992) Dunia Imeisha

(1992) Christmas-Christmas

(1996) Nimekutambua Shetani

The defendant also without plaintiff's authority reproduced plaintiff's cassettes into CD named:

“The Best of John De’Mathew songs by Mary Wambui”.

“Cassettes Peris Nduku 1998”

“Mathiko ma Peris Nduku 1998”

“Ahadi ya Bwana 1990”

“Ntaingia Lango Lake 1996”

“Songs by Mary Wanjiru Ndore”

“Cassettes “Ngwihitha thakameini ya Jesu”

The plaintiff pleads that by the act of the defendant in making the reproductions of these cheap CDs the plaintiff's market for the original cassettes has been taken over by the defendant and the plaintiff's business has been destroyed and the plaintiff's investment in purchasing these compositions from the Artistes has resulted in loss.

The plaintiff therefore seeks injunction against the defendant from infringing the copyright in respect of the listed and sale of CDs. The plaintiff claims special and general damages, costs and interest, loss of profits, loss of royalties, punitive and exemplary damages and that the defendant do surrender all material in his possession and that there be an inquiry as to damages.

In answer to these claims the defendant pleaded that he is a music retailer and distributor and has marketing and distribution agreements with many composers and publishers among the Jane Nyambura *alias* Queen Jane and Shari Martin who are composers of the songs mentioned in this suit. The defendant denies having reproduced any songs by John Mwangi *alias* Ndemethiu and Mary Wambui and Mary Wanjiru Ndore *alias* Mary Githinji. The defendant denies privity of contract between him and the plaintiff. The defendant counter-claims for loss of business and profits and damages. As stated above the defendant failed to appear when the suit was called for hearing. Therefore no evidence was led to support his defence or counter-claim.

The evidence adduced in court by the plaintiff is that he produced the cassettes and then the defendant took the same and converted them into CDs and started selling them. The plaintiff demonstrates by playing the cassettes and the CDs he is complaining about and showed the court the covers of the actual music. The defendant used the shelf copy and produced for example CD Mwendwa K.K. by Queen Jane and had sold the same without permission. The defendant lost sales because the consumers changed from cassettes to CDs and the defendant was selling cheaply. The cassettes were selling at 80/=on wholesale and Shs.150/= retail but when the defendant released CD the prices in the market were Kshs.500/= wholesale and Shs.700/= retail. The defendant's reproductions were sold at 180/= wholesale and Shs.250/= retail price and therefore because of his cheap prices the plaintiff lost sales. He denied that the defendant was given permission to copy by the original Artistes. The original artistes could not have done so as they had already sold their rights to the plaintiff.

Under agreement afore-mentioned the plaintiffs obligations were to provide studios for recording, he was to do song editing, changing words or produce melody and he met expenses of the musicians' to organize the launch and promote the songs. Of the counter-claim, he said he is the only one entitled to deal with the songs having purchased the copyright from the original artistes.

I have considered the evidence of the plaintiff and his exhibits and it is my finding that he owned the copyright of songs complained of. Through his demonstrations in court, I am satisfied that the defendant reproduced the songs from cassettes to CDs without permission and without permission or consent of the plaintiff he sold them cheaply thus destroying the cassette sales of the plaintiff, thus cause loss of business and profits.

The plaintiff' claim is not opposed.

The defence filed by the defendant is only a sham. The defendant admits that he dealt with some songs by Artistes complained of but the truth is that once the original owner has transferred his/her copyright , the copyright becomes the property of another person who has the rights as owner. The defendant knew that the cassettes were produced by the plaintiff. The cassettes were labeled.

The remedies for a plaintiff who claims his copyrights are infringed are damages, injunction accounts or other relief available, delivery up to the plaintiff for destruction or for his benefit of any article which appears to be infringing copy or any article used or intended to be used to making infringing copies, damages calculated on basis of reasonable roalty which would have been payable by a licensee in respect of type of work concerned taking into consideration the amount which the claimant would have earned in profits if he had been in charge of work in question.

In this case the plaintiff applied and was granted an interlocutory injunction on 6/4/2004. The order was re-affirmed by a further court order made by the court on 23/7/2004 directing court bailiff to visit shops in Nairobi Central District to determine the level of the sales and distribution of CDs. It is not clear if the Bailiffs did file the report as ordered.

From the evidence before the court and the pleadings filed by the parties the defendant is clearly liable for infringing the copyrights of the songs pleaded which are held by the plaintiff. He was well aware of the plaintiff's rights as the same carried sufficient information to indicate the producer of the cassettes from where he converted the same to CDs. I hold him liable.

On issue of remedies, it is clear the plaintiff is entitled to injunction. The record shows that since 6/4/04 the defendant should not have been dealing with the songs as complained of. I confirm the injunction in terms of prayer 3 (a) of the plaintiff. Regarding loss of business and profits and damages and royalties claimed, I find no sufficient evidence to enable the court to reach a fair assessment of the same. I therefore order an inquiry into damages to be undertaken before the Deputy Registra of this court. The inquiry shall take into account the claims made under paryers (b), (e), (f) and (i) in the plaint.

It is so ordered.

DATED and DELIVERED at Nairobi this 23rd day of September 2008.

JOYCE N. KHAMINWA

JUDGE