



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

**Civil Case 3428 of 1988**

**PRITT NYALE  
ANWAR JUMA  
ALFRED ILAMBO  
SAMMY WANJE  
KENNETH NZARO  
ALFRED KUDUKU.....PLAINTIFFS**

**VERSUS**

**POLYGRAM RECORDS (EA) LIMITED.....DEFENDANT**

**JUDGMENT**

The plaintiffs are a musical band carrying on business in Kenya in the name of **FOREST PEOPLES' BAND** while the defendant is a company incorporated in Kenya and carries on business of producing and handling the distribution of records, tapes and cassettes in Kenya.

On the 1<sup>st</sup> April 1984 the defendant company and the plaintiff duly into entered and signed an agreement to produce and distribute the hit song "**HARUSI**" under the band's own label or mark FPB 001 and not in any other form.

It was further agreed that the other compilations written by the band would be produced and distributed by the defendants under the defendant's label namely POL but subject to royalties being paid to the plaintiff.

On 15<sup>th</sup> June 1984 the plaintiffs and the defendant signed an agreement terminating the 1<sup>st</sup> April 1984 Agreement. In breach of the said agreement of 1<sup>st</sup> April 1984 which was mutually terminated the defendant refused to pay royalties on the said musical works under the label and the same works are being sold without the plaintiffs' authority. The defendants have further wrongfully and unlawfully continued to produce and market the song '**HARUSI**' whose copyright exclusively belongs to the plaintiffs without any permission whatsoever.

The plaintiff filed this suit against the defendant seeking:-

- (i) An injunction to restrain the defendant from doing whether by itself, servants, agents or in any other way to produce and distribute the song "**HARUSI**" without the plaintiff's authority,

- (ii) An order for the delivery up of all the royalties due to them.
- (iii) An enquiry into damages (including additional statutory damages) or at the plaintiff's option an account of profits and payments of all sums found due taking such inquiry on account.
- (iv) Costs and interest.

The defendant which seems to have relocated from Kenya could not be traced and it was served through the post C/of P.O. Box 30333 Nairobi. This was presumed proper service and the suit proceeded *ex parte* since there was no appearance by the defendant.

Mr. Kimani learned counsel for the plaintiffs called the 1<sup>st</sup> plaintiff **PRITT NYALE** to give evidence on behalf of the other plaintiffs. He told the court that he is the leader of the **FOREST PEOPLES BAND** which has since disbanded due to lack of funds. They had produced some of the most popular songs i.e. Harusi, Kenya Nchi Nzuri, Hatosheki, Malaika, and Going to Music Land. Particularly "Harusi" was very popular and attracted many listeners including the defendants.

They entered into an agreement with the defendant to produce and distribute their records on payment of royalties which was agreed at Shs.10/= per record. He told the court that he knew the defendant had sold about 1,000,000 copies of Going to Music Land and in all about 1,500,000 records were sold but he was not able to know the exact number of sales as the records of the sales were with the defendant and the figure he gave was just an estimate.

It is unfortunate that the plaintiffs were not able to get the record of the sales. This being a claim for special damages, the plaintiffs ought not only plead, but must prove their special damages. This was so stated by the Court of Appeal in the case of **SHABANI V. NAIROBI CITY COUNCIL [1982-1988] 1KLR 681** when the following passage from Lord Goddard L CJ's judgment in **BONHAM V. HYDE PARK HOTEL LTD [1948] 64 TLR 117** at 178 was approved:

"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damages; it is not enough to write down particulars and, so to speak, throw them at the head of the court saying "This is what I have lost, I ask you to give me these damages. They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory."

And in the case of **DAVID KINYANJUI AND OTHERS V. MESHACK MONYORO – CIVIL APPEAL NO. 121 OF 1993**. The Court of Appeal had this to say:-

This court has said in no uncertain terms in its earlier decisions that special damages must not only be specifically pleaded but must also be strictly proved. Strict prove of special damages is necessary.

In the instant case they were neither specifically pleaded nor were they proved and therefore the plaintiff's claim must fail and there is no evidence adduced to show that the defendant company is still operating 18 years along the line nor could it be traced.

For the above reasons the plaintiff's suit fails and is dismissed. I make no order as to costs

Dated and Delivered at Nairobi this 23<sup>rd</sup> February, 2007.

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J.L.A. OSIEMO

**JUDGE**