



Mathew Peevers v Leo Slingerland & Another

REPUBLIC OF KENYA
High Court Of Kenya At Nairobi

March 16, 2000.

Milimani Commercial Courts
T Mbaluto, Judge

Civil Case No. 2112 Of 1996

March 16, 2000 T Mbaluto, Judge delivered the following judgment.

The plaintiff filed this suit against the defendant on August 23, 1996 seeking damages for infringement by the defendant of his copyright in the music entitled "For Crying Out Loud". On being served with summons to enter appearance, the defendants filed their joint defence to the claim on November 22, 1996. That defence was however struck out on February 11, 1999 on the ground that it disclosed no defence and was an abuse of the process of the court. In the event, the matter came before me for formal proof.

The effect of striking out of the defence is that the averments made by the plaintiff in the plaint in law stand uncontroverted and admitted except with regard to damages. In those circumstances, it is not open to the defendants to dispute, as they have attempted to do through their submission, the issue of liability. In my view, that issue was decided and determined by the order of Mbogholi Msagha, J. made on February 11, 1999 when he struck out the defence. Accordingly, the position in law is that the defendants are liable to the plaintiff for the infringement of his copyright in the music entitled "For Crying Out Loud". My task therefore in this matter is to assess the damages, if any, arising from that infringement.

Damages are claimed under two heads, namely:-

(a) Damages for flagrant infringement of copyright; and

(b) Outstanding licence fee, The evidence available reveals that the plaintiff is a music and film producer with 25 years experience in the field. In 1996, he composed a piece of music under the title "For Crying Out Loud" which he intended to use for a television commercial. Some time in 1996, the music was delivered to the 1st defendant in connection with a pilot programme which both were producing for both audio and visual and in respect of which both the plaintiff and the 1st defendant were collaborating. The pilot programme was however never published.

On or about March 1996, the plaintiff found, through television and from friends that his music "For Crying Out Loud" was being used in a programme which had been produced by the 2nd defendant, a company owned by the 1st defendant. The plaintiff said that he "saw" the production on KTN Television once. When contacted by the plaintiff's advocate about the infringement for the plaintiff's copyright in the music, the 1st defendant sent a fax on April 18, 1996 to the advocate (Musalia Mwenesi Esq.) clearly admitting the infringement and at the same time informing Mr. Mwenesi that he had taken the music off air the moment he received the plaintiff's complaint.

According to the plaintiff, the music was aired for two minutes on television. At the going rate of Kshs 85,000 per minute, this works out at Kshs 170,000 for the two minutes the plaintiff's music was being aired in KTN. Although in his submissions learned counsel for the defendants attacked the claim for Kshs 170,000 as being one for general damages disguised as the special damages, in my view the claim is nonetheless recoverable as a loss, by whatever name one calls it which the plaintiff has incurred arising from the defendants infringement of his copyright and in respect of which, in my opinion, he is entitled to compensation from the defendants. For that reason, the decision in *Mwatsahu v Maro* (1967) EA 42 has no application. There is no evidence to disprove or challenge the evidence tendered by the plaintiff on the claim of Kshs 170,000. I find it proved on a balance of probability. Regarding the claim for damages for flagrant infringement of copyright, the matter is a bit problematic. This is because there isn't a lot of evidence or legal authority to go by. That is however not to say that the plaintiff is not entitled to any damages at all; clearly he is because it is generally accepted that the infringement of copyright, particularly in musical works and sound recordings can be pervasive and extremely injurious to the owner thereof. Accordingly, the courts should be concerned to protect owners of copyright by awarding appropriate damages which will serve as both a deterrent and compensation in suitable cases.

With respect to the instance case, the 1st defendant in his fax to the plaintiff's advocates clearly demonstrates that he does not care much as

to who is injured by his illegal acts. The tone of the fax is sufficient evidence of his arrogance and condescending attitude. Instead of apologising to the plaintiff for the illegal use of the plaintiff's music, the defendants boisterously state in the fax that they have "enough music of their own that they have produced". That is clearly not an acceptable response from someone who had been caught red handed using someone else's music. As to the actual measure of damages, the general principle is that:-

"The measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action. Thus there will be taken into account any loss which the copyright owner has suffered by reason of the diminution of the sales of his work, or the loss of profit which he might otherwise have made, but there will not be taken into account under this head any benefit which may have accrued to the defendant by the use of his work. The fact that the pirated work may have injured the reputation of and vulgarised the original is also a fact that may be taken into consideration in assessing the amount of damages, and generally the damages may be said to be at large."

The evidence by the plaintiff was that once his music had been aired in the KTN, he could not use it any more. This means that the infringement by the defendants of the plaintiff's copyright rendered the music valueless. The plaintiff is therefore entitled to damages equivalent to the full value of the music. Regarding this the plaintiff stated that though potential earnings of a piece of music is limitless, it was difficult to give a specific figure to any particular piece. He said that some of his pieces had earned as much as Shs.1 million. On the basis of the evidence available and doing the best I can in the circumstances, I assess general damages for the infringement of the copyright at Kshs 300,000.

For the above reasons, there will be judgement for the plaintiff against the defendant as follows:-

- (a) As prayed in paragraph (b) of the prayers in the plaint.
- (b) For Kshs 170,000 in respect of unpaid fees.
- (c) For Kshs 300,000 being damages for infringement of the copyright.
- (d) Costs of the suit.
- (e) Interest on (b) and (c) above at court rates.