



Kagundu & 2 others v Kenya Commercial Bank Limited & another (Commercial Case E208 of 2019) [2025] KEHC 12514 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E208 OF 2019
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

**GABRIEL KAGUNDU 1ST PLAINTIFF
BONIFACE CHEGE 2ND PLAINTIFF
FRANCIS AMIS T/A PUNIT 3RD PLAINTIFF**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT
SCANAD KENYA LIMITED 2ND DEFENDANT**

JUDGMENT

Introduction and Background

1. By a Plaint dated 3rd July 2019, the Plaintiffs state that they are an award-winning pop group known as P-Unit and that they have sued the Defendants for copyright infringement. They state that they have released two albums, "Wagenge Hao" and "Wagenge Hao Tena," and are working on a third, which includes their popular 2015 song "Weka Weka", which song is central to the litigation and has over 600,000 views on YouTube. The Plaintiffs aver that around May 2019, they discovered a commercial titled "Weka Weka Na KCB Mpesa" running on TV, radio, and social media platforms, which they believed infringed on their copyright to the song "Weka Weka". The plaintiffs claim the commercial sampled their lyrics and interpolated their melody without obtaining a custom license, as required by the Kenya Copyrights Act(Chapter 130 of the Laws of Kenya).
2. They assert that the Defendants used their catchphrase and that the Plaintiffs have suffered loss and harm and that after sending a demand letter to the Defendants, which was not met, they filed the suit seeking a permanent injunction, mandatory injunction for delivery or destruction of infringing



copies, general and aggravated damages, an account of profits, and costs, among other reliefs, for alleged copyright infringement of their song "Weka Weka".

3. In response, the Defendants filed a Defense dated 2nd August 2019, denying these allegations. The 1st Defendant does not deny that it launched a "Weka Weka Promotion" on 29th August 2011, with the objective of increasing deposits and that this promotion was widely broadcast across television, radio, print, and outdoor media. The Defendants contend that the only similarity between their "Weka Weka Na KCB Mpesa" commercial and the Plaintiffs' "Weka Weka" song is the phrase "weka weka." They argue that "weka" is a common Kiswahili word meaning "to put" and therefore not an original word that can be copyrighted. Furthermore, the Defendants state that the beat, melody, chord progression, arrangement, and genre of their commercial are distinct from the Plaintiffs' song. They deny illegally profiting from the Plaintiffs' song and conclude that there is no copyright infringement, thus the Plaintiffs are not entitled to the reliefs sought.
4. When the matter was set down for hearing, the Plaintiffs, GABRIEL KAGUNDU and FRANCIS AMISI testified on their own behalf(PW 1 and Pw 2) and they also called Eric Musyoka, a music producer, as their witness(PW 3). The Plaintiffs also relied on the List and Bundle of Documents dated 3rd July 2019 containing the Plaintiffs' demand letter to KCB dated 29th May 2019, the Plaintiffs' letter to Scanad & KCB dated 13th June 2019, the Plaintiffs' response to Defendant's lawyers letter 26th June 2019, an Online Article by Nairobi News on KCB responding to P-unit, Screenshots of the Google searches for "Weka Weka Na KCB Mpesa", Advertisements in newspapers and televisions and online by the Defendants, Media Clips by the Defendants and the Plaintiffs' music (PEXhibit 1-8). The Plaintiffs also produced an audio visual commercial as their evidence (PEXhibit9).
5. On their part, the Defendants presented three witnesses; Gideon Kimanzi, a music producer (DW 1), Jimmy Mnene, the 2nd Defendant's Legal Manager (DW 2) and David Kamau, the Operations manager at IPSOS Limited (DW 3). They also relied on documentary and electronic evidence including the Lists and Bundles of Documents dated 24th January 2020, 21st September 2021 and 22nd September 2023 (DEXhibit 1-23. The same contained a write-up from August 2011 on the 1st Defendant's "Deposit mobilization training," , an M&E WekaWeka Campaign report for the period of 29th August to 26th November 2011, an IPSOS KE KCB Weka Weka Brand Report Monitoring Period indicating that the KCB "weka weka" campaign ran from October to December 2011 across various broadcasting stations, a letter from the Executive Producer of Mojo Productions, Newspaper excerpts from 2011 demonstrating the use of the "Weka Weka" slogan in KCB's campaign, a video recording of an interview with PW 3 and Sample music beats and loops.
6. After the hearing, the parties filed written submissions which together with the pleadings and evidence I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

7. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the Evidence Act(Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is



said that the burden of proof lies on that person". In *Miller v. Minister Of Pensions* 1947 ALL E.R. 372, Lord Denning aptly summarised the application of the standard in the following terms:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

8. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
9. From their submissions, I find that the following are the abridged issues falling for the court's determination:
 - a. Do the Plaintiffs own copyrights to the song "Weka Weka"?
 - b. Are the Plaintiffs' song and the Defendants' Advert similar?
 - c. Did the Defendants infringe on the Plaintiffs' copyrights?
 - d. Have the Plaintiffs proved their case to the required standard and should the reliefs sought by them be granted?
 - e. Who should bear the costs of this suit?

Do the Plaintiffs own copyrights to the song "Weka Weka"?

10. The Plaintiffs assert that their ownership of copyrights to the song "Weka Weka" is undisputed, as it satisfies the two essential doctrines for copyright ownership: originality and tangibility. This means the work was originally created and fixed in a tangible form. The Plaintiffs argue that copyright automatically accrues upon the affixation of a work in a material form, and non-registration does not bar a claim, citing section 22(5) of the Kenya [Copyright Act](#) and therefore, the Plaintiffs should earn royalties for every use of their music. The Plaintiffs argue that sampling and interpolation are legal if done correctly by obtaining a license from the master copyright owner, and the creator of the derivative work then owns copyrights to it. They maintain that from the discourse, it is clear the Plaintiffs own the copyright to "Weka Weka" and the Plaintiff also explains that content ID systems on platforms like YouTube are designed to identify and takedown infringing works, but they chose to let the Defendants' content remain to pursue an accounting of profits.
11. On their part, the Defendants submit that the Plaintiffs have not provided a Certificate of Registration from the Kenya Copyright Board (KECOBO) to prove copyright ownership over the song "Weka Weka" and that while section 22 of the [Copyright Act](#) states that copyright accrues automatically upon fixation of a work in material form, and non-registration does not bar a claim, the Defendants emphasize that a KECOBO certificate serves as evidence of ownership in court. Furthermore, the Defendants contend that the word "weka" is a common Kiswahili word meaning "to put" and therefore cannot be copyrighted, as no artist can claim custodianship over a language. They assert that the phrase "weka weka" originated from the 1st Defendant's "Weka Weka Na KCB Promotion" campaign launched in August 2011, preceding the Plaintiff's song, which was released in 2014.



12. Regarding the musical elements, they submit that the song "Weka Weka" and the "Weka Weka na KCB MPESA" jingle have distinct chord progressions, beats, and genres and that genres, beats, and rhythms cannot be copyrighted, and that the musical loop used in the Plaintiffs' song is a common loop available in "sample packs" for musicians to use, often for a fee or even free.
13. As submitted by the Plaintiffs, this court, in *Simon Otieno Omondi v Safaricom (K) Limited* [2020] KEHC 10062 (KLR) held that copyright is legal protection for an author/creator which restricts the copying of an original work they have created, the key word being "original". In the same vein, literary, dramatic, musical and artistic works will only be original, if they are the result of independent creative effort and they will not be original if they have been copied and that the key to protection is independent creation. It is also correct and as admitted by the Defendants that registration of the copyright, though desirable is not mandatory to establish copyright protection and that such copyright is conferred automatically on eligible works such as literary, musical, artistic, audio-visual, sound recordings, broadcasts and the likes. This is the import of section 22 of the *Copyright Act* which provides at subsection 5 that "Rights protected by copyright shall accrue to the author automatically on affixation of a work subject to copyright in a material form, and non-registration of any copyright work or absence of either formality shall not bar any claim from the author." This is also in line with international copyright principles, such as those in the Berne Convention, to which Kenya is a party, which stipulates that copyright protection does not depend on formalities like registration.
14. While registration is not mandatory, the *Copyright Act* as amended, in 2019, mandates KECOBO to maintain a register of copyright works under section 22A. This register, known as the National Rights Registry, serves as a databank for authors and their works. The Copyright Regulations, 2020 further clarify that registration is voluntary as Regulation 4 states that the Kenya Copyright Board maintains a Copyright Register, and owners of copyright works "may" elect to register their works.
15. From the evidence, it was not really in dispute that the Plaintiffs are the authors and owners of the song "Weka Weka" created with the help of PW 3 and I have little difficulty finding that the song enjoys automatic copyright protection even though they did not register the same with KECOBO.

Are the Plaintiffs' song and the Defendants' Advert Similar

16. The Defendants stated that the only similarity between the Plaintiffs' song "Weka Weka" and the "Weka Weka Na KCB Mpesa" advertisement is the phrase "weka weka." They reiterated that the beat, melody, chord progression, arrangement, structure, and genre of the two musical works are different. On their part, the Plaintiff stated that the Defendant's adverts copied their lyrics "Weka pesa kwenye banki" found in the song. However, PW 1 and PW 2 stated that the word "weka" is a common Swahili phrase used by Kenyans and that they did not invent the word. They also admitted that the lyrics "Weka weka kwenye banki" does not feature in KCB Advert and that the Plaintiffs' song does not have the lyrics "weka weka pesa na KCB".
17. The Defendants also produced their advertisement with words "Weka Weka upate acre" which mention that the promotion was to run from August to November 2011. PW 1 admitted that these adverts by the Defendants came before the release of their song in 2015 and that the phrase "weka weka" was used to capture the target market back in 2011. He also admitted that you cannot copyright the words "weka weka". On the music elements used in the adverts, PW 1 stated that beats can be copyrighted by the ones who created but PW 3 admitted that he sampled the beat for the song from elsewhere. PW 2 differed and stated that a beat cannot be copyrighted and that the beat to their song is not unique and was not created by them. PW 1 and PW 2 also admitted that the beat, tempo, time



signature, rhythm, melody, chord progression, arrangement of the structure and genre of their song and those in the adverts were different.

18. From the above evidence and having listened to the Plaintiffs' song and the impugned Defendants' adverts in court, it is my finding that the two compositions are not similar in very many aspects. When two musical works have different beats, melodies, chord progression, arrangement, structure, and genre, it is unlikely, at least from an intrinsic sense, to be considered similar or infringing on each other's copyright, as these elements are fundamental to determining musical similarity and copyright infringement. Further, the court, as an "ordinary listener" or observer could not be able to determine any similarity between the two musical works. It is for these reasons that I answer this issue in the negative that the Plaintiffs' song and the Defendants' advert are not similar.

Did the Defendants infringe on the Plaintiffs' copyrights?

19. I have already found that the Plaintiffs had copyrights to their song "weka weka" and that this is protected by law regardless of non-registration. However, having also found that the Plaintiffs' song and the Defendants' advert are not similar in the intrinsic and ordinary sense, I find that there is no basis to hold that the Defendants infringed on the Plaintiffs' copyright. There was no evidence of copying as the major aspects of the two musical works substantially differ including the Plaintiffs' song having sampled beats which is a non-protectable element as they are not original. I therefore answer this issue in the negative that the Defendants did not infringe on the Plaintiffs' copyrights.

Have the Plaintiffs proved their case to the required standard and should the reliefs sought by them be granted?

20. Based on my findings above, it is my conclusion that the Plaintiffs have not proved their case to the required standard and that the reliefs they seek cannot be granted. The Plaintiffs have failed to prove that the Defendants' Advert was similar to their song and that it infringed on their copyrights. PW 1 also admitted that they had no proof to demonstrate the financial loss they are claiming or that the Defendants profited from their song. Their entire claim therefore fails at this point.

Who should bear the costs of this suit

21. As the Plaintiffs have been unsuccessful in their suit and the Defendants have expended effort and resources defending the same, it is only fair that the Plaintiffs, as the losing party should bear the financial burden of this litigation.

Conclusion and Disposition

22. In the upshot, the Plaintiffs' suit is dismissed with costs being awarded to the Defendants. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025

J.W.W. MONGARE

JUDGE

In the presence of

Mr. Katee for the Plaintiff.

Ms. Dave for the Defendant.



