



**Murage v Jiffy Pictures Limited (Civil Appeal E204 of 2023)
[2024] KEHC 2500 (KLR) (Civ) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2500 (KLR)

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

**CIVIL
CIVIL APPEAL E204 OF 2023**

**DAS MAJANJA, J
MARCH 12, 2024**

BETWEEN

SUSAN WANJIRU MURAGE APPELLANT

AND

JIFFY PICTURES LIMITED DEFENDANT

RULING

Introduction and Background

1. Before the court for determination is the Plaintiff's Notice of Motion made under section 35(1) and 38(2) of the Copyright Act and Article 11(2) (c) of the Constitution seeking the following orders:
 1. Spent
 2. Spent
 3. That pending hearing and determination of the suit filed herewith, this Honourable Court be pleased to issue orders restraining the respondent, employees and/or agents from airing the said Telenovela on Citizen Television and all affiliated platforms.
 4. That pending hearing and determination of the suit filed herewith, this Honourable Court be pleased to issue orders compelling the respondent to produce before this Honourable Court all the coverage of the Telenovela titled "Becky" whether in both print, audio and/or video footage.
 5. That this Honourable Court be pleased to issue any Orders that it may deem fair and just.
 6. That the Costs of this application be provided for.



2. The application is supported by the grounds set out on its face together with the Plaintiff's affidavits sworn on 29.11.2023 and 23.01.2024. It is opposed by the Defendant through the replying affidavits of its director, Khadija Hassan Musa sworn on 22.12.2023 and 29.01.2024. The parties have also supplemented their arguments by filing written submissions. Since much of the parties' positions in this matter are disputed, I will set out their arguments as stated in their pleadings.
3. According to her plaint, the Plaintiff avers that she is the copyright holder of the literary work "Beckys Fortune" and that the same is registered with the Kenya Copyright Board ("KECOBO") and a certificate of registration number LT-12400 issued. She claims that on 31.07.2023, a telenovela titled "Becky" produced by the Defendant started airing on Citizen TV, Viu-Sasa and the YouTube channel of Citizen TV. She avers the Defendant's literary work including the storyline and other essential elements of the literary work are an adaptation of her literary work, without her permission or acknowledgement to her as the original owner of the story. She thus contends that this is an infringement of her rights as a copyright holder and unless restrained, the Defendant's on-going and continuous infringement cause her to suffer loss and damage and render the suit moot.
4. The Defendant oppose the suit and application on the ground that the Plaintiff has not satisfied the conditions for the grant of an injunction. It avers that the Plaintiff has not produced a certified copy of the literary work entitled Beckys Fortune and that Citizen TV, Viu-Sasa and YouTube channel of Citizen TV are not owned by the Defendant but by Royal Media Services which is not a party to this suit and that no orders can be issued against it. The Defendant claims that Beckys Fortune is also yet to be published and is not available in any bookstore or online platform and that the Defendant only became aware of it once this suit was filed. It denied that Beckys Fortune inspired the Defendant's television series Becky. The Defendant contends that the Plaintiff has not alleged or provided any evidence to demonstrate that it has ever published its purported literary work entitled Beckys Fortune.
5. The Defendant states that the Plaintiff is a stranger to it and that they have never met and the Plaintiff has not alleged that the Defendant had access or were aware of her literary work titled Beckys Fortune making it impossible for the Defendant to infringe on what they had no notice of. That the Plaintiff has also not shown how the Defendant modified, adapted her literary work and how the Defendant's television series Becky is a direct replica of her literary work. The Defendant asserts that Becky does not have any resemblance in its storyline or essential elements with the Plaintiff's literary work Beckys Fortune and that it is not an adaptation of the Plaintiff's work Beckys Fortune. The Defendant contends that it does not need the permission of the Plaintiff as the television series Becky is owned by Royal Media Services who can upload it on Citizen TV, Viu-Sasa and the YouTube channels of Citizen TV and Viu-Sasa as they please.
6. The Defendant avers that on 05.12.2023, its advocates requested KECOBO for the registered and certified true copy of the original literary work entitled Becky's Fortune submitted by the Plaintiff. On 18.12.2023, KECOBO issued it with a certified copy of the registered literary work entitled Becky's Fortune containing Forty-Three (43) chapters. Upon conducting a preliminary review Beckys Fortune, the Defendant notes that the work submitted by the Plaintiff to the court is not a replica of the registered work in the custody of KECOBO. That Page 4 for instance contains a 25-sentence paragraph that is not in the one in the custody of KECOBO.
7. According to the Defendant, nobody reading the Plaintiff's Becky's Fortune will see any resemblance with the Defendant's television series titled Becky as they do not have the same theme, characters, plot, message, synopsis, genre, components or storyline. That what the Defendant merely does is to tell Kenyan real-life stories that are authentic to Kenya, family friendly, exceptionally entertaining and speak of our cultural and societal nuances while creating thousands of direct and indirect jobs for



actors, actresses, chefs, transporters, drivers, real estate owners, make-up artists, video editors, sound producers, legal advisers, camera crew, set designers, script writers, equipment providers, content creators among others in the film ecosystem. The Defendant therefore states that the Plaintiff cannot claim a monopoly or copyright over Kenyan real-life stories, themes and experiences such as love, marriage, children, poverty, slum life, affairs, betrayal, corruption among others as she did not invent the same and other authors have written about these topics. Furthermore, that the Plaintiff's claims would also destroy creativity as writers in Kenya would be forced to write things alien to them as writing about Kenyan real-life stories would be prohibited.

Analysis and determination

8. The main issue for determination is whether the court ought to grant the injunctive relief sought by the Plaintiff and whether the Defendant should be ordered to produce before the Court all the coverage of Becky whether in both print, audio and/or video footage. I propose to first deal with the prayer for an injunction.
9. The parties agree that the three requirements the Plaintiff has to satisfy in order to obtain an injunction were settled in *Giella v Cassman Brown* [1973] EA 348 where it was held that a plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* [2014] eKLR the Court of Appeal reiterated these conditions and further clarified that they are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
10. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is, "... a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter." Thus, in order to succeed in getting an injunction, the Plaintiff is expected to demonstrate that she has a copyright which the Defendant has been infringing by adapting and modifying without her permission or acknowledgement to her as the original owner of the story.
11. I note the parties have gone to great lengths to demonstrate and prove to the court that each of their works bear no resemblance to the other. However, the court, at this juncture, can only make a prima facie finding whose conclusiveness will be determined at trial where the parties will adduce evidence and lay out their cases in full.
12. The Defendant has not denied that the Plaintiff is the holder of the copyright holder of the literary work Beckys Fortune which is registered with KECOBO. Whereas it states that the said work has since been altered and are different from what was submitted, it still remains and it does not negate the fact that the Plaintiff is the owner of this copyright. It denies that its television series Becky is in any way a replica or bears some semblance with the Plaintiff's Beckys Fortune.
13. Going through the parties' pleadings however, I cannot help but notice that at face value there are some similarities between the two works and it cannot be said that the two works are so dissimilar in their characteristics. However, I am not convinced, at least at this stage, that the Plaintiff has demonstrated that the Defendant outrightly adapted and modified the Plaintiff's literary work Beckys Fortune for its television series Becky. I am of the view that this is an intricate matter that can only be determined after



a full trial and the burden of proof will be upon the Plaintiff to prove that the Defendant's screenplay was originally from the Plaintiff's protected literary work. It will also require both parties to show the Court how they came up with their respective scripts works and the Defendant will also demonstrate that it is just a coincidence and generic that part of its screenplay bears some similarities to that of the Plaintiff's literary work. That cannot be discerned simply by reading the parties' comparisons in the pleadings of the two works (see *Nonny Gathoni Njenga & Another v Catherine Masitsa & Another* ML HCCC No. 490 of 2013 [2014] eKLR).

14. It is for this reason that I find that the Plaintiff has not demonstrated a prima facie case as she has not demonstrated or shown that the Defendant adapted her literary work Beckys Fortune into its television series Becky and hence, her quest for an injunction comes to a halt at this point in line with the dictum in *Nguruman Limited v Jane Bonde Nielsen* (Supra).
15. In addition, I am reluctant to issue an injunction at this stage as the totality of evidence on record shows that the platforms over which the Becky series are broadcast belong to Royal Media Services. It would be in the interest of justice and for full and proper investigation of the matters in issue for Royal Media Services to be joined to this suit for full and effectual determination of the dispute.
16. As regards the prayer for production of all the coverage of the Telenovela titled "Becky" whether in both print, audio and/or video footage as prayed by Plaintiff, I do not think it is in doubt that the court has broad powers to order disclosure of documents in a suit in order to prevent surprise at the trial, give parties adequate opportunity to prepare for their respective cases and ultimately ensure that there is a fair trial.
17. The Defendant has resisted this prayer by claiming that Royal Media Services has absolute ownership of the copyright over the series 'Becky' and it needs permission of the copyright holder to produce the evidence. As I have held, the joinder of Royal Media Services is necessary for full and effectual determination of the dispute. Thereafter the court may reconsider the application for discovery.

Disposition

18. For the reasons I have outlined, I dismiss the Plaintiff's Notice of Motion dated 29.11.2023 save that the Plaintiff may renew the application for discovery at the appropriate time. I order that Royal Media Services Limited be joined to this suit as the Second Defendant. The Plaintiff shall file and serve the Amended Plaint within 14 days from the date hereof.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Wanjohi instructed by Mundui Murai Advocates for the Plaintiff.

Mr Ahmed instructed by Adam Sharmarkay for the Defendant.

