



Macmillan Kenya (Publishers) Ltd v Mount Kenya Sundries Limited (Civil Case 2503 of 1995) [2024] KEHC 3680 (KLR) (Civ) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3680 (KLR)

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

CIVIL

CIVIL CASE 2503 OF 1995

AN ONGERI, J

APRIL 2, 2024

BETWEEN

MACMILLAN KENYA (PUBLISHERS) LTD PLAINTIFF

AND

MOUNT KENYA SUNDRIES LIMITED DEFENDANT

JUDGMENT

1. Judgment was entered herein against the defendant on 23/10/2008 for infringement of the plaintiff's copyright in the Kenya Tourists Maps.
2. The defendant's appeal to the court of appeal was dismissed and the matter was remitted to the High Court for assessment of damages.
3. This matter proceeded only on assessment of damages on 16/11/2023.
4. The case proceeded *ex parte* since the defendant was served but did not appear in court on the hearing date.
5. The plaintiff called only one witness Stephen Osumba Muholo (PW1) who said he is the finance manager of the plaintiff.
6. He adopted his written statement dated 16/6/2011 as his evidence in chief. In the said statement, he said he is the finance manager of the plaintiff, having been with the plaintiff for the past 15 years, working in the finance department.
7. PW1 said he is aware that judgment was entered against the defendant for infringement of the plaintiff's copyright in the Kenya Tourists Map and an inquiry as to damages has been ordered for the loss suffered by the plaintiff.



8. He said that the plaintiff's main customers for the Kenya Tourists Maps were Frank Ltd (Mombasa), Text Book Centre and Safari Kit (Nairobi) had been their customers since the map was produced. There were other customers too.
9. PW1 said the map was sold to the customers at the recommended retail price less discount which varied from customer to customer.
10. He further said that they actually set the retail price for the map, then they offered a favourable trade discount to the retailers in order to cover their profit margins.
11. Most of the plaintiff's maps were sold on credit. They would buy on credit and pay us after 30 days. Cash sales were very minimal. The cash sales would be insignificant.
12. He produced a schedule which showed a reduction of maps sold per year. He said in the written submission that the plaintiff's customers were swayed to buy the defendant's maps and hence the reduction. He could not, however, tell for how long the defendant continued selling the infringing maps.
13. He said that when the sales went down, the profit margins also went down.
14. During the period between 1980 and 1995, they kept records through hard copies of documents. This was cumbersome and most documents could be missing.
15. PW1 was not able to find out sales projection for each year during the said period.
16. He further said that the plaintiff was not aware of the defendant's infringing map for a long time hence it was not in a position to take stock of drop in sales due to the introduction of the defendant's infringing map.
17. PW1 said that it was after about 1995 that the impact of the infringing maps ceased to affect the plaintiff's sale of its maps.
18. He also said that the sale of the map has declined in the recent years due to drop in tourism. The map was specifically intended for tourists, and its sale is therefore affected by fluctuation in number of tourists.
19. The plaintiff stated in their brief submissions that the judgement in the main suit was delivered on 23rd October 2008 by Alnashir Visram.
20. The judgement is attached at pages 185 to 200 of the exhibit annexed to the affidavit of Queenton Ochieng sworn on 6th June 2022 and filed on 7th June 2022 in support of the plaintiff's application dated 6th June 2022 asking the court to reconstruct the file.
21. The defendant's appeal to the court of appeal was dismissed and the matter was remitted to the High Court for assessment of damages.
22. A copy of the judgment of the Court of Appeal is at pages 74 to 92 of the exhibit annexed to the affidavit of Queenton Ochieng sworn on 6th June 2022.
23. At page 10 of the judgment delivered by Alnashir Visram, the judge found that the plaintiff having demonstrated that it had expended sufficient work in making the map to give it an original character, was eligible for Copyright and did in fact enjoy copyright over both its maps under section 4 and of the Copyright Act.



24. The judge further held that the defendant had substantially copied the plaintiff's work and an infringement had arisen because the defendant had copied all or a substantial part of the plaintiff's work.
25. The Court of Appeal said that an inquiry as to damages or alternatively an account of profits and payments of all sums found due upon making such inquiry would be conducted.
26. On 13th July 2023, this matter was mentioned in court and the court gave directions on the assessment of damages. The hearing on the assessment of damages proceeded on 15 November 2024 where the plaintiff's witness, Stephen Muholo testified and the plaintiff closed its case.
27. The plaintiff now seeks for the court to assess the damages resulting from the defendant's infringement of its copyright.
28. In *Copinger and Skone James on Copyrights* Volume 1, Sweets & Maxwell, at page 1055 it is stated that;

“For an action of infringement of copyright, design right and performers property right... damages is available to the plaintiff as is available in respect of the infringement of any other property right... If the plaintiff and the defendant are in competition, damages might be assessed by reference to the loss which the plaintiff as copyright owner has suffered by reason of diminution of sales of his work or the loss of profit which he might otherwise have made...”.
29. The plaintiff further submitted that Section 35(4) (a) of the *Copyright Act* provides that a relief by way of damages shall be available to the owner of a right. In the plaintiff's list and bundle of documents for the assessment of damages dated 2nd October 2023 the plaintiff through the witness statement of Stephen Muholo dated 16th June 2011 stated at paragraph 6 of the witness statement that between 1990 and 1995 the plaintiff did incur a diminution of sales due to the circulation of the defendant's map. The table at paragraph 6 of Mr. Muholo's statement shows the losses incurred and how the sum of Kshs. 5,918,623.00 has been arrived at.
30. That during the hearing, Mr. Muholo testified that the loss per year would be tabulated by multiplying the average price for the year and the deviation in sales per year from the base year being 1990.
31. In the case of *Franz Frederichs v Kenya Medical Supplies Agency* [2019] eKLR, the court held that the general rule is that the award of damages for a tort is to put the injured party back in the position he would have been in had the tort not occurred (see *General Tire and Rubber Co. vs. Firestone Tyre & Rubber Co. Ltd*) [1975] 1 WLR 819).
32. As would be the case in any tortious claim, the burden of proving the loss lies with the Plaintiff.
33. That the plaintiff therefore incurred a loss of Kshs. 5,918,623.00 for the five years and seeks that the court to award the loss amount as prayed.
34. The sole issue for determination is what quantum of damages the defendant is due to pay the plaintiff for infringement of the plaintiff's copyright in respect of the Kenya Tourists Maps.
35. This hearing proceeded ex parte since the defendant did not appear in court for the hearing.
36. The table produced by the PW1 shows how the figure 5,918,623 was arrived at.
37. The plaintiff's evidence was not controverted and in the circumstances, the plaintiff has proved that he suffered losses amounting to ksh.5,918,623.



38. Judgment be and is hereby entered in favour of the plaintiff against the defendant in the sum of ksh.5,918,623 plus costs of this case and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND APRIL , 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

