



**Radio Africa Limited v Standard Group PLC & another (Commercial Case E253 of 2019)  
[2024] KEHC 11429 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E253 OF 2019**

**MN MWANGI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**RADIO AFRICA LIMITED ..... PLAINTIFF**

**AND**

**THE STANDARD GROUP PLC ..... 1<sup>ST</sup> DEFENDANT**

**KENYA BROADCASTING CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**Unauthorized broadcasting and commentary on English Premier League matches constitutes a copyright infringement against the exclusive broadcasting license holder.**

*The case involved a dispute between Radio Africa Limited and The Standard Group PLC over alleged copyright infringement of exclusive broadcasting rights for live audio commentary of the 2019/2020 English Premier League matches in Kenya. Radio Africa claimed it held exclusive, non-assignable rights and seeks damages for unauthorized broadcasts by the defendant. The Standard Group argued that live broadcasts lacked copyright protection and challenged the exclusivity as anti-competitive. The court found that the plaintiff's exclusive license did not violate competition laws and that the 1st defendant infringed on the plaintiff's copyright. While the plaintiff was awarded damages for the infringement, the court declined to award aggravated damages, noting that the defendant ceased unauthorized broadcasts after initial warnings.*

Reported by John Ribia

***Intellectual Property Law*** – copyright – broadcasting rights – infringement of exclusive nontransferable rights - whether the actions of broadcasting and commentating on English Premier League matches without authorization from a licence holder who had an exclusive, non-assignable, and non-transferable broadcasting license infringed on the plaintiff's exclusive broadcasting rights, and was a copyright infringement - whether the actions of broadcasting and commentating on English Premier League matches without authorization from a licence holder who had an exclusive, non-assignable, and non-transferable broadcasting license infringed on the plaintiff's exclusive broadcasting rights, and was a copyright infringement - Copyright Act (cap 130) sections 2, 22, 26, and 35; Kenya Information and Communications Act (cap 411A) section 84T.



**Competition Law** – *unfair market disadvantage* - allegation that an exclusive and non transferable broadcasting licence of a popular product in Kenya created an unfair market disadvantage - whether the grant of an exclusive, non-assignable, and non-transferable broadcasting license for English Premier League matches via analogue radio to one media company for the 2019/2020 season constituted a violation of competition laws by creating an unfair market disadvantage for other media players – Competition Act (cap 504) sections 21, 25, and 26; Kenya Information and Communications Act (cap 411A) section 84T.

**Jurisdiction** – jurisdiction of the High Court vis-à-vis the jurisdiction of the Competition Authority of Kenya - whether the determination of the anti-competitive nature of a product fell within the jurisdiction of the Competition Authority of Kenya or the High Court - Competition Act (cap 504) sections 21, 25, and 26.

**Intellectual Property Law** – copyright law – copyright infringement – aggravated damages - under what conditions would courts award aggravated damages for infringement of a copyright - whether the action of broadcasting and commentating on English Premier League matches without authorization from the exclusive licence holder constituted a flagrant infringement that entitled the licence holder to aggravated damages - Copyright Act (cap 130) sections 2, 22, 26, and 35.

### **Brief facts**

The plaintiff, Radio Africa Limited, held an exclusive, non-assignable, and non-transferable license from Wireless Group Media (GB) Limited to broadcast live audio commentary of the 2019/2020 English Premier League matches in Kenya. Despite notifying the defendants of its rights, the 1st Defendant, The Standard Group PLC, allegedly broadcasted EPL matches with live commentary without authorization on August 11, 2019. The plaintiff claimed this amounted to copyright infringement, causing financial loss and reputational harm.

The 1<sup>st</sup> defendant argued that live audio transmissions were not protected under Kenyan copyright law and that the plaintiff's exclusive license violated competition laws by disadvantaging other media players. The 1<sup>st</sup> defendant admitted to broadcasting two matches initially without authorization but claimed subsequent broadcasts were through a rebroadcasting agreement with the BBC. The plaintiff sought a declaration of its exclusive rights, damages, and a permanent injunction.

### **Issues**

- i. Whether the grant of an exclusive, non-assignable, and non-transferable broadcasting license for English Premier League matches via analogue radio to one media company for the 2019/2020 season constituted a violation of competition laws by creating an unfair market disadvantage for other media players.
- ii. Whether the determination of the anti-competitive nature of a product fell within the jurisdiction of the Competition Authority of Kenya or the High Court
- iii. Whether the actions of broadcasting and commentating on English Premier League matches without authorization from a licence holder who had an exclusive, non-assignable, and non-transferable broadcasting license infringed on the licence holder's exclusive broadcasting rights, and was a copyright infringement.
- iv. Under what conditions would courts award aggravated damages for infringement of a copyright?
- v. Whether the action of broadcasting and commentating on English Premier League matches without authorization from the exclusive licence holder constituted a flagrant infringement that entitled the licence holder to aggravated damages.

### **Held**

1. The plaintiff had an exclusive, non-assignable, non-transferable, non-sub-licensable license to use, communicate to the public, broadcast and transmit the content via analogue Radio Broadcast on the English Premier League Matches for the year 2019/2020. The English Premier League was very popular in Kenya.



2. Section 26(1)(f) of the Copyright Act provided that copyright in a literary, musical, artistic or audiovisual work shall be the exclusive right to control the doing in Kenya for the act the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original. The license acquired by the plaintiff from the Wireless Group Media (GB) Limited found backing in section 26(1)(f) of the Copyright Act.
3. The agreement between the plaintiff and TalkSport did not violate sections 21, 25 and 26 of the Competition Act for creation of an unfair market disadvantage for other players, including the 1<sup>st</sup> defendant, due to the exclusive nature and restrictive trade practices. The 1<sup>st</sup> defendant and any other media player in the country had the liberty of getting into a rebroadcasting Agreement with any entity with a broadcasting license, to rebroadcast the English Premier League matches. The 1<sup>st</sup> defendant admitted that it was able to rebroadcast the said matches following a rebroadcasting agreement it entered into with the BBC.
4. No evidence has been led to the effect that that the validity of the broadcasting agreement was challenged on grounds of creation of an unfair market advantage, was declared to be anti-competitive and/or that the 1<sup>st</sup> defendant lodged a complaint with the Communications Authority of Kenya.
5. Section 22(2) of the Copyright Act provided that a broadcast shall not be eligible for copyright until it had been broadcasted. The plaintiff informed the 1<sup>st</sup> defendant that it had exclusive radio broadcast and commentary rights for the English Premier League 2019/2020 season in Kenya and warned it not to infringe on the said rights. The 1<sup>st</sup> defendant did not heed to the warning as it readily admitted that on August 11, 2019, it broadcasted three matches and asserted it had the right to do so under article 33 of the Constitution of Kenya, 2010, which provides for freedom of expression. The 1<sup>st</sup> defendant's broadcasting of the 3 Premier League matches amounted to an infringement of the plaintiff's copyright in view of the License Agreement between the plaintiff and the Wireless Group Media (GB) Limited dated May 17, 2019.
6. The Copyright Act defined "rebroadcasting" as simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcast of another Broadcasting Authority. When rebroadcasting the English Premier League matches broadcasted by the BBC, the 1<sup>st</sup> defendant was not allowed to include its own live commentaries from its commentators, but rebroadcast the content from the BBC as was, without any amendments or additions.
7. In order to successfully defend itself against a claim for copyright infringement, a defendant must demonstrate that it acquired the right to broadcast its matches from another source, other than the complaining plaintiff. Based on its own admission, the 1<sup>st</sup> defendant had fallen short in defending itself against the allegations brought against it on infringing the rights of the plaintiff's copyright. The 1<sup>st</sup> defendant infringed on the plaintiff's copyright.
8. Section 35(4) of the Copyright Act provided for the remedies and/or relief available to the plaintiff in the case of infringement of a copyright. The plaintiff notified the copyright's holder of its intention to move the court for an injunction barring two media houses, and any other media house from infringing on its rights. The plaintiff is entitled to an award of damages on account of the said infringement.
9. Aggravated damages went beyond compensation. They were meant to punish the wrongdoer and act as a deterrent from similar conduct in the future. Aggravated damages were awarded in actions where the damages are at large, where the damages were not limited to the pecuniary loss that could be specifically proved. They were normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages were part of, or included in, the sum awarded as general damages and were therefore at large. As such they needed not be specifically pleaded or included in the prayer for relief.
10. Aggravated damages were provided for under section 35(6) of the Copyright Act. The court granted the plaintiff an order of injunction against the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant stopped the



live broadcasting of the English Premier League matches for the 2019/2020 Season. Damages for infringement of the plaintiff's copyright were sufficient.

11. Section 35(4)(d) of the Copyright Act allowed the High Court to make an order for an enquiry to be conducted for purposes of determining the amount of damages to be awarded to a successful party. An order for enquiry was necessary to enable the court to determine the amount of damages that may be adequate to compensate the plaintiff for the loss suffered as a result of the 1<sup>st</sup> defendant's infringement of its copyright.

*Suit allowed.*

### **Orders**

- i. *Declaration made that the plaintiff was the only local broadcaster that had the exclusive right to broadcast Live Audio transmissions with commentary on the 2019/2020 English Premier League within Kenya.*
- ii. *An enquiry as to damages for infringement of copyright or, at the option of the plaintiff, and account of the profits made by the 1<sup>st</sup> defendant by virtue of its infringement of the plaintiff's copyright.*
- iii. *Payment of all sums found to be due to the plaintiff upon taking such inquiry.*
- iv. *Costs of the suit were awarded to the plaintiff.*
- v. *Interest was hereby awarded to the plaintiff for orders (c) & (d) above at court rates from the date of filing suit until payment in full.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *747 Freighter Conversion Llc v One Jet One Airways Kenya Ltd, Arjun Ruzaik, Air Asia Lanka (Private) Limited & Bankim Manibhai Patel* Civil Case 445 of 2012; [2014] KEHC 5239 (KLR) - (Explained)
2. *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* Civil Suit 290 of 2000; [2004] KEHC 1984 (KLR) - (Explained)
3. *Attorney General v Law Society of Kenya & Central Organization of Trade Unions* Civil Appeal 133 of 2011; [2017] KECA 176 (KLR) - (Explained)
4. *British United Provident Association Limited v Bupa Kenya Limited* Civil Case 936 of 2001; [2020] KEHC 9972 (KLR) - (Explained)
5. *British United Provident Association Limited v Bupa Kenya Limited* Civil Case 936 of 2001; [2020] KEHC 9972 (KLR) - (Explained)
6. *Choitram & another v Nazari* Civil Appeal 8 of 1982; [1984] KECA 116 (KLR)
7. *Commissioner of Income Tax & another v M/s Synopsis International Old Ltd* [2010] eKLR - (Explained)
8. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
9. *Franz Frederichs v Kenya Medical Supplies Agency* Civil Case 38 of 2013; [2019] KEHC 5744 (KLR) - (Explained)
10. *George Ngige Njoroge v Attorney General* Civil Case 205 of 2013; [2018] KEHC 7243 (KLR) - (Explained)
11. *Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex parte KTDA Management Services Limited* Petition 18 of 2014; [2016] KEHC 2278 (KLR) - (Mentioned)
12. *Mount Kenya Sundries Ltd v Macmillan Kenya (Publishers) Ltd* Civil Appeal 318 of 2010; [2016] KECA 377 (KLR) - (Explained)
13. *Optima Sports Management(UK) Limited v Kenya Broadcasting Corporation* Civil Suit 686 & 687 of 2009; [2020] KEHC 8514 (KLR) - (Explained)
14. *Seven Seas Technologies Limited v Commissioner of Domestic Taxes* Income Tax Appeal 8 of 2017; [2021] KEHC 358 (KLR) - (Explained)



## ***United Kingdom***

*Holman v Johnson* [1775 – 1802] All ER 98 - (Explained)

## ***India***

*RG Anand v M/S Delux Films & ors* [1978] A 1 R 1613, [1979] SCR (1) 2018 [1978] SCC (4) 118 - (Explained)

## **Statutes**

### ***Kenya***

1. Civil Procedure Act (cap 21) section 27 - (Interpreted)
2. Competition Act (cap 504) sections 21, 25, 26 - (Interpreted)
3. Constitution of Kenya article 33 - (Interpreted)
4. Copyright Act (cap 130) sections 2, 22(1),(2); 26,(1)(f); 35,(4)(e)(6) - (Interpreted)
5. Kenya Information and Communications Act (cap 411A) section 84T - (Interpreted)

## **Advocates**

*Mr. Kabura* for the plaintiff

*Mr. Ochieng* for the 1st defendant

## **JUDGMENT**

1. The plaintiff instituted this suit against the defendants vide a plaint dated August 16, 2019 seeking in the following terms -
  - i. A declaration that the plaintiff is the only local broadcaster that has the exclusive right to broadcast Live Audio transmissions with commentary on the 2019/2020 English Premier League within Kenya;
  - ii. A permanent injunction restraining the defendants (whether acting by their servants or agents or any of them or otherwise howsoever) from making Live Audio transmissions with commentary on the 2019/2020 English Premier League and thus (sic) infringing on the plaintiff's exclusive right;
  - iii. An inquiry as to damages for infringement of copyright or, at the option of the plaintiff, and account of the profits made by the defendants by virtue of their infringement of copyright;
  - iv. An order for the payment of all sums found to be due to the plaintiff upon the taking of such inquiry together with interest;
  - v. Aggravated damages for flagrant infringement;
  - vi. Costs of this suit; and
  - vii. Any further or other order as this Honourable Court may deem fit.
2. The plaintiff claims to be a leading media company whose brands include radio stations; Kiss 100, Classic 105, Radio Jambo, East FM, Smooth FM, Homeboyz Radio and Gukena FM; a National Newspaper - the Star Newspaper; and a TV station - Kiss Television. It further claims to be the exclusive licensee in Kenya for broadcasting and transmitting Live Audio commentary of the 2019/2020 English Premier League season. It states that the right was granted by the Wireless Group Media (GB) Limited through a written license dated 17<sup>th</sup> May, 2019, for which the plaintiff paid a significant amount. That the only other entities with similar broadcasting rights in Kenya are TalkSport, the BBC, and the Premier League Member Clubs. The plaintiff asserted that the Wireless Group Media (GB)



Limited holds certain audio rights for English Premier League Matches through an Agreement with the Football Association Premier League Limited. The plaintiff emphasized the significant interest in the Premier League among the Kenyan public, who rely heavily on radio and television coverage due to the inability to attend Matches in person.

3. The plaintiff claimed that its license from the Wireless Group Media (GB) Limited grants it the exclusive rights to broadcast and transmit Live Audio Programs in English, including live commentary and related programming for up to 5 Premier League Matches each week, as well as similar Live Audio Programs in Swahili for up to 5 Matches per week. The plaintiff contended that on August 9, 2019, it informed the defendants of its exclusive rights to broadcast the English Premier League, but received no response. On August 11, 2019, the defendants allegedly infringed on the plaintiff's copyright by broadcasting two Premier League Matches, "Arsenal v Newcastle United" and "Manchester United v Chelsea," with commentary, thereby communicating them to the public through electronic transmission. The plaintiff claims this unauthorized broadcasting caused it loss and damage, and seeks an inquiry into damages or an account of profits.
4. The plaintiff argues that having paid for the license, it is entitled to the exclusive use of the rights, but the defendants are unlawfully profiting from advertisements and betting services in their broadcasts. That despite warnings and demands, the defendants have refused to stop, and unless restrained by an injunction, the plaintiff fears further infringement, which could result in irreparable damage. It asserted that the defendants were previously warned about similar infringements during the 2018/2019 season by the Football Association Premier League Limited, the rights holder, but did not comply.
5. In opposition to the plaintiff's suit, the 1<sup>st</sup> defendant filed a statement of defence dated November 18, 2019 where it denied all the averments in the plaintiff's plaint and averred that as part of its portfolio, it carries out the business of radio broadcasting including but not limited to the broadcast of Live Audio Commentary on Matches through its Radio Station, Radio Maisha. It further averred that the rights to broadcast the English Premier League Matches are governed by regulations, including the [Competition Act](#). The 1<sup>st</sup> defendant contended that Live Audio Transmissions, do not fall under copyright protection in Kenya because copyrights in broadcasts apply only after an event has been broadcast, not to live transmissions, thus the plaintiff's cause of action herein is invalid. It asserted that the Agreement granting exclusive rights to transmit Live Audio Programs and restricting other media outlets from broadcasting the Premier League Matches for three seasons (2018/2019 to 2021/2022) is anti-competitive and violates the [Competition Act](#) and the [Kenya Information and Communications Act](#).
6. The 1<sup>st</sup> defendant argued that the alleged rights holder did not conduct an open and competitive bidding process for the broadcasting rights, thus denying other media players in Kenya a fair opportunity to bid, which amounts to restrictive trade practices under the [Competition Act](#). The 1<sup>st</sup> defendant acknowledged broadcasting three Matches on August 11, 2019 being 'Leicester v Wolves,' 'Newcastle United v Arsenal,' and 'Manchester United v Chelsea'. It contended that it had the right to do so under article 33 of the [Constitution of Kenya, 2010](#), and its listeners had the right to receive information concerning the Matches in view of the popularity of the English Premier League in Kenya. The 1<sup>st</sup> defendant maintained that any revenue generated from these broadcasts was lawful and justified, given the widespread interest in the English Premier League in Kenya.
7. The plaintiff filed a Notice of Withdrawal of suit dated April 23, 2024, seeking to withdraw the suit against the 2<sup>nd</sup> defendant with no order as to costs. On June 13, 2023, the plaintiff withdrew its suit against the 2<sup>nd</sup> defendant



8. This matter proceeded to hearing where the plaintiff called one witness in support of its case. The 1<sup>st</sup> defendant also called one witness to ventilate its case.

### **Plaintiff's Case.**

9. Mr Steve Agembo testified as PW1. He adopted his witness statement dated October 11, 2022 and produced the documents in the plaintiff's bundle of documents filed on September 16, 2019 as the plaintiff's exhibit Nos 1 to 5, the documents filed on June 6, 2023 as plaintiff's exhibit Nos 6 & 7, and recordings of the infringed Matches as the plaintiff's exhibit Nos 8 & 9. He testified that the plaintiff was the exclusive licensee in Kenya for broadcasting and transmitting Live Audio Commentary of the 2019/2020 English Premier League Season, a right that was granted by the Wireless Group Media (GB) Limited through a written license dated May 17, 2019, for which the plaintiff paid a significant amount.
10. It was his evidence that on August 9, 2019, it notified the defendants of this right, but in complete disregard of the Notice, on 10<sup>th</sup> & August 11, 2019, the 1<sup>st</sup> defendant through its social media platforms announced that it would be broadcasting live Matches from the English Premier League. He stated that the defendant infringed on the plaintiff's copyright by broadcasting with commentary two English Premier League Matches on August 11, 2019 and August 31, 2019, and three English Premier League Matches on August 17, 2019 and August 24, 2019. He stated that the plaintiff has suffered loss and damage and is entitled to, and claims an inquiry into damages or an account of profits.
11. On being cross-examined, Mr Agembo could not confirm how much was paid for the rights for the license. He confirmed that there are over a hundred media houses in Kenya and most of them would be interested in airing the English Premier League. He stated that he was not aware whether there was competitive bidding, but the plaintiff researched on who the rights holders in Africa were, and it placed a bid for the rights and got them. He referred to Clauses 2.1 and 3.1 of the License Agreement, stated that their license was exclusive, non-assignable, non-transferable, and non-sub-licensable. He expressed the view that said clauses did not amount to restrictive trade practices. He denied knowledge of an exemption being issued by the Competition Authority. Mr. Agembo contended that the plaintiff's competitors are Radio Maisha, Radio Citizen, Milele FM and KBC Taifa, thus broadcasting by any of the five aforementioned Radio Stations amounted to an infringement of the plaintiff's copyright.
12. In re-examination, PW1 stated that he has no knowledge of the 1<sup>st</sup> defendant having filed a complaint with the Competition Authority or pursuing any of the dispute resolution mechanisms.

### **Defendant's Case.**

13. Mr Tom Jappani testified as DW1. He adopted his witness statement dated February 25, 2021, and produced the documents filed by the 1<sup>st</sup> defendant as the 1<sup>st</sup> defendant's exhibits. He testified that the plaintiff did not have exclusive rights to Live Audio Transmissions with commentary on the 2019/2020 English Premier League in Kenya. He argued that these alleged exclusive rights raise significant competition concerns within the radio broadcast industry. It was his evidence that the Agreement between the plaintiff and the Wireless Group Media (GB) Limited was characterized as a restrictive trade practice because it prohibits healthy competition by granting an exclusive license for a popular product to one player, disadvantaging other Radio Stations in Kenya.
14. He asserted that the said practice had not been exempted by the Competition Authority and that neither the 1<sup>st</sup> defendant nor other industry players were invited to participate in an open and competitive bidding process for these exclusive rights. The witness claimed that this practice unfairly restricts and distorts competition among Radio Broadcasters in Kenya. He asserted that the 1<sup>st</sup> defendant has a separate Standard Rebroadcast Agreement with the British Broadcasting



- Corporation (BBC), which grants it a non-transferable and non-exclusive right to rebroadcast BBC's live programming of the English Premier League on Saturdays and Sundays for the duration of the license.
15. In cross-examination, he contended that they obtain rights from the copyright holder before airing copyrighted content. He testified that the first Matches of the 2019/2020 season were broadcast live on 10<sup>th</sup> and August 11, 2019 with commentary, and subsequent Matches were rebroadcasted from the BBC. He explained that a rebroadcast involves three stages: pre-match analysis by their commentators, taking a feed from the BBC to go on air, and post-match analysis by their sports commentators. Mr. Jappani mentioned that in 2019/2020, the 1<sup>st</sup> defendant approached the plaintiff for a sub-license to air the Matches, as they initially broadcasted them without one, but the plaintiff had not granted the 1<sup>st</sup> defendant a sub-license to air the English Premier League Matches to date.
  16. In re-examination, he asserted that the BBC was airing different Matches other than the ones aired by the plaintiff, thus after the initial two Matches and receipt of the plaintiff's letter, they fell back to their contract with the BBC.
  17. I directed the parties herein to file written submissions upon the closure of the plaintiff's and the 1<sup>st</sup> defendant's case. The plaintiff's submissions were filed on September 14, 2023 by the law firm of Kaplan & Stratton Advocates, whereas the 1<sup>st</sup> defendant's submissions were filed by the law firm of TripleOKLaw Advocates LLP on 22<sup>nd</sup> January, 2024.
  18. Mr Kahura, learned Counsel for the plaintiff submitted that the plaintiff held exclusive rights to broadcast and commentate on live football Matches during the 2019/2020 English Premier League Season, granted by a license from the Wireless Group (GB) Media. He submitted that the 1<sup>st</sup> defendant infringed on the plaintiff's copyright by broadcasting and transmitting Live Audio Programs of the Matches. Counsel referred to section 26 of the [Copyright Act](#) and the Supreme Court of India case of *RG Anand v M/S Delux Films & ors* [1978] A 1 R 1613, [1979] SCR (1) 2018 [1978] SCC (4) 118, as cited by the Court of Appeal in [Mount Kenya Sundries Limited v Macmillan Kenya \(Publishers\) Ltd](#) [2016] eKLR, to support his argument.
  19. He submitted argued that the 1<sup>st</sup> defendant was not permitted to commentate on the Matches during rebroadcasts, which they did, violating the plaintiff's exclusive rights. He cited section 35 of the [Copyright Act](#), arguing that the plaintiff did not authorize or consent to the 1<sup>st</sup> defendant's live broadcasting of the football Matches.
  20. Mr Kahura referred to the case of *Commissioner of Income Tax & another v M/s Synopsis International Old Ltd* [2010] eKLR, cited by the Court in [Seven Seas Technologies Limited v Commissioner of Domestic Taxes](#) [2021] KEHC 358 (KLR), to support his contention that the 1<sup>st</sup> defendant lacked a license or sub-license to broadcast, transmit, or commentate on the Matches, therefore, the 1<sup>st</sup> defendant infringed on the plaintiff's copyright.
  21. Counsel submitted that during cross-examination, the 1<sup>st</sup> defendant's witness admitted to broadcasting and transmitting Live Audio Programs of the Matches without consent. He supported his submission by citing the decisions in [Choitram v Nazari](#) [1984] KLR 327, and [47 Freighter Conversion Lle v One Jet One Airways Kenya Limited & 3 others](#) [2014] eKLR. Mr Kahura argued that the authority to license, assign, or transfer broadcasting and transmission rights lies solely with the licensor.
  22. He stated that under Clause 2.1 of the License Agreement, the plaintiff is the exclusive licensee for the specified territory and is prohibited from assigning, transferring, or sub-licensing these rights to other media players. He cited the case [Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex parte KTDA Management Services Limited](#) [2016] eKLR, to support his argument



- and contended that if the 1<sup>st</sup> defendant believed that the License Agreement was anti-competitive, it should have filed a complaint of unfair competition with the Communications Authority of Kenya, as outlined under Section 84T of the [Kenya Information and Communications Act](#). Mr. Kahura noted that the 1<sup>st</sup> defendant has neither lodged such a complaint nor served the plaintiff with an order restricting it from engaging in unfair competition.
23. He cited the decisions in [Franz Frederichs v Kenya Medical Supplies Agency](#) [2019] eKLR, and [British United Provident Association Limited v Bupa Kenya Limited](#) [2020] eKLR, to support his argument that an inquiry into damages is necessary to determine the royalties paid for the license rights by the plaintiff, as it would enable the Court to calculate a reasonable royalty for the copyright infringement. In submitting that the plaintiff is entitled to the orders of damages sought, Mr Kahura cited the provisions of Section 35 of the [Copyright Act](#).
  24. Mr. Ogutu, learned Counsel for the 1<sup>st</sup> defendant submitted that other than the plaintiff, there are other entities in Kenya such as the British Broadcasting Corporation (BBC) that held the relevant broadcasting rights at the material time. He further submitted that the 1<sup>st</sup> defendant held a separate Standard Rebroadcasting Agreement with the BBC dated 25<sup>th</sup> September, 2018, which granted it a non-transferable and non-exclusive right to rebroadcast BBC's live programming of the English Premier League on Saturdays and Sundays for the duration of the License. He stated that the 1<sup>st</sup> defendant did not interfere with the rights allegedly held by the plaintiff nor did it interfere with or rely on content of the plaintiff in their broadcast of the English Premier League Matches in question. To buttress the said submissions, Counsel relied on the Supreme Court of Kenya case of [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR and the case of [Optima Sports Management \(UK\) Limited v Kenya Broadcasting Corporation](#) [2020] eKLR.
  25. He argued that, under section 2 of the [Copyright Act](#) and Clause 2 of the Rebroadcasting License Agreement with the BBC, the 1<sup>st</sup> defendant was permitted to comment on the football Matches it rebroadcasted, which did not infringe on the plaintiff's copyright. He also noted that other radio stations, such as Citizen Radio, Mulembe FM and West FM also broadcasted the English Premier League Matches without facing legal action from the plaintiff. He contended that the plaintiff unfairly targeted the 1<sup>st</sup> defendant, which had its own rebroadcasting rights under a separate Agreement.
  26. The defendant's Counsel contended that the Agreement between the plaintiff and TalkSport violated sections 21, 25 and 26 of the [Competition Act](#), as it created an unfair market disadvantage for other players, including the 1<sup>st</sup> defendant, due to its exclusive nature and restrictive trade practices. He expressed the view that the said exclusive Agreement prevented other players from securing rights to a popular product in the industry.
  27. Mr Ogutu referred to the English contract law case of *Holman v Johnson* [1775 – 1802] All ER 98, cited with approval in the case of [Attorney General v Law Society of Kenya & another](#) [2017] eKLR, to support the claim that the said Agreement was illegal and should not be enforced. Furthermore, he stated that the request for a permanent injunction against the 1st defendant for broadcasting live commentary on the 2019/2020 English Premier League Season is moot since the League is now in the 2023/2024 Season.
  28. In citing the case [George Ngige Njoroge v Attorney General](#) [2018] eKLR, he argued that the plaintiff is not entitled to aggravated damages. He suggested that if this Court finds the 1<sup>st</sup> defendant liable, a sum of Kshs 150,000 per Match, for each of the ten disputed matches should be sufficient damages. He stated that the said amount was based on evidence from the plaintiff's witness showing that during out-of-court negotiations, the parties had agreed on a sub-licence fee of Kshs 150,000 per Match for the proposed sub-licensing of broadcasting rights for the 2022/2023 English Premier League Season.



### **Analysis and Determination.**

29. I have considered and analyzed the evidence adduced by the two (2) witnesses in line with the pleadings filed, alongside with the written submissions by Counsel for the parties. The issues that arise for determination are -
- i. Whether the plaintiff's exclusive license constitutes restrictive trade practices, thus being anti-competitive;
  - ii. Whether the 1<sup>st</sup> defendant infringed on the plaintiff's copyright; and
  - iii. Whether the plaintiff is entitled to the reliefs sought in the plaint.

### **Whether the plaintiff's exclusive license constitutes restrictive trade practices, thus being anti-competitive.**

30. The plaintiff adduced evidence in support of the fact that it had an exclusive, non-assignable, non-transferable, non-sub-licensable license to use, communicate to the public, broadcast and transmit the content via analogue Radio Broadcast on the English Premier League Matches for the year 2019/2020. The parties herein agree that the English Premier League is very popular in Kenya. I note that the 1<sup>st</sup> defendant does not dispute that the plaintiff possesses the aforesaid license. Instead, it asserts that granting the plaintiff an exclusive, non-assignable, non-transferable, non-sub-licensable license, amounts to restrictive trade practices, which places other media players such as the 1<sup>st</sup> defendant at an undue disadvantage hence being anti-competitive.
31. Section 26(1)(f) of the [Copyright Act](#) provides that –
- Copyright in a literary, musical, artistic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts –
- ... the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original. (Emphasis added).
32. The license acquired by the plaintiff from the Wireless Group Media (GB) Limited finds backing in section 26(1)(f) of the [Copyright Act](#) reproduced hereinbefore. It was submitted by the 1<sup>st</sup> defendant's Counsel that the Agreement between the plaintiff and TalkSport violated sections 21, 25 and 26 of the [Competition Act](#), as it created an unfair market disadvantage for other players, including the 1<sup>st</sup> defendant, due to its exclusive nature and restrictive trade practices. He contended that the exclusive Agreement prevented other players from securing rights to a popular product in the industry.
33. Upon perusal of the provisions of the [Competition Act](#) relied on by the 1<sup>st</sup> defendant's Counsel, I am not persuaded that is the case, because the 1<sup>st</sup> defendant and any other media player in the country had the liberty of getting into a rebroadcasting Agreement with any entity with a broadcasting license, to rebroadcast the English Premier League Matches. The 1<sup>st</sup> defendant admitted that it was able to rebroadcast the said Matches following a Rebroadcasting Agreement it entered into with the BBC.
34. Nonetheless, in as much as the 1<sup>st</sup> defendant's Counsel claims that the Agreement between the plaintiff and TalkSport violated sections 21, 25 and 26 of the [Competition Act](#), as it created an unfair market disadvantage for other players due to its exclusive nature and restrictive trade practices, no evidence has been led to the effect that the validity of the said Agreement was challenged on the said ground, was declared to be anti-competitive and/or that the 1<sup>st</sup> defendant lodged a complaint with the



Communications Authority of Kenya as provided for under section 84T of the [Kenya Information and Communications Act](#), which states the following –

Any person having a complaint of a breach of fair competition against a licensee shall lodge a complaint to the Commission and the Commission shall, if it appears that a breach of fair competition has been or is being committed, investigate the act and omission and give written notice to the licensee stating -

- a. that the Commission is investigating a possible breach of fair competition;
- b. the reasons for the suspicion of contravention or breach, including any matter of facts or law which are relevant to the investigation;
- c. further information required from the licensee in order to complete the investigations; and
- d. where appropriate, the steps to be taken in order to remedy breach.

35. In light of the above provisions, it is my finding that a determination of whether or not the Agreement between the plaintiff and TalkSport was anti-competitive is a preserve of the Communications Authority of Kenya, which is charged with the responsibility of conducting investigations on the same, either on its own motion or on application by an individual.

#### **Whether the 1st defendant infringed on the plaintiff's copyright.**

36. Works that are eligible for copyright are provided for under section 22(1) of the [Copyright Act](#) as hereunder –

Subject to this section, the following works shall be eligible for copyright or related rights -

- a. literary works;
- b. musical works;
- c. artistic works;
- ca) dramatic works;
- d. audio-visual works;
- e. sound recordings; and
- f. broadcasts.

37. The above notwithstanding, section 22(2) of the [Copyright Act](#) provides that a broadcast shall not be eligible for copyright until it has been broadcast. Copyright infringement is provided for under section 35(1) of the [Copyright Act](#) which states that -

Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights -

- a. does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or
- b. imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.



38. It is evident from the documents produced by the plaintiff that it entered into an Agreement dated May 17, 2019 with the Wireless Group Media (GB) Limited, granting the plaintiff exclusive, non-assignable, non-transferable, non-sub-licensable license to use, communicate to the public, broadcast and transmit the content via analogue Radio Broadcast. Clause 3.1 of the said Agreement provides that TalkSport shall not for the duration of the term, grant any other license of the broadcast rights to a third party in respect of the territory. This means that in Kenya, it was only the plaintiff who had the rights to broadcast and commentate on the English Premier League Matches for the year 2019/2020 via live and recorded radio transmissions.
39. Vide a letter dated August 9, 2019, the plaintiff informed the 1<sup>st</sup> defendant that it had exclusive radio broadcast and commentary rights for the English Premier League 2019/2020 Season in Kenya and warned it not to infringe on the said rights. I am persuaded that the 1<sup>st</sup> defendant received the said letter since on the face of a copy of that letter as produced before this Court, there is the 1<sup>st</sup> defendant's stamp confirming receipt of the said letter. It is however evident that the 1<sup>st</sup> defendant did not heed to the warning as it readily admitted that on August 11, 2019, it broadcasted three Matches being 'Leicester v Wolves,' 'Newcastle United v Arsenal,' and 'Manchester United v Chelsea', and asserted it had the right to do so under article 33 of the Constitution of Kenya, 2010, which provides for freedom of expression. It is my finding that the 1<sup>st</sup> defendant's broadcasting of the said three (3) Premier League Matches amounts to an infringement of the plaintiff's copyright in view of the License Agreement between the plaintiff and the Wireless Group Media (GB) Limited dated May 17, 2019.
40. The 1<sup>st</sup> defendant's witness during cross-examination testified that other than the three (3) Matches broadcasted on August 11, 2019, the subsequent Matches were rebroadcasted with a license from the BBC. In support of this testimony, the 1<sup>st</sup> defendant produced a Radio Broadcasting Agreement between the 1<sup>st</sup> defendant and the BBC World Service dated September 25, 2018. Upon perusal of the said Agreement, it is manifest that the BBC World Service licensed the 1<sup>st</sup> defendant to rebroadcast the English Premier League Matches on Saturdays and Sundays Live. The 1<sup>st</sup> defendant's witness explained that a rebroadcast involves three stages: pre-match analysis by their commentators, taking a feed from the BBC to go on air, and post-match analysis by their sports commentators.
41. The Copyright Act defines "rebroadcasting" as simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcast of another Broadcasting Authority. It therefore follows that when rebroadcasting the English Premier League Matches broadcasted by the BBC, the 1<sup>st</sup> defendant was not allowed to include its own live commentaries from its commentators, but rebroadcast the content from the BBC as was, without any amendments or additions.
42. After listening to the recordings of the infringed Matches produced by the plaintiff as exhibit Nos 8 and 9, I agree with Counsel for the plaintiff that in as much as the 1<sup>st</sup> defendant has demonstrated that it had obtained the rights to rebroadcast the English Premier League Matches from the BBC, the 1<sup>st</sup> defendant made its own commentaries on the Matches during rebroadcasts, thus infringing on the plaintiff's copyright. In the case of Optima Sports Management (UK) Limited v Kenya Broadcasting Corporation (supra), it was held that in order to successfully defend itself against a claim for copyright infringement, a defendant must demonstrate that it acquired the right to broadcast its Matches from another source, other than the complaining plaintiff. In this instance, based on its own admission, the 1<sup>st</sup> defendant has fallen short in defending itself against the allegations brought against it on infringing the rights of the plaintiff's Copyright. In the premise, I am satisfied that the 1<sup>st</sup> defendant infringed on the plaintiff's copyright.



**Whether the plaintiff is entitled to the reliefs sought in the plaint.**

43. As was correctly submitted by Mr Ogutu for the 1<sup>st</sup> defendant, the order for a permanent injunction restraining the 1<sup>st</sup> defendant from making Live Audio Transmissions with commentary on the 2019/2020 English Premier League has since been overtaken by events since the English Premier League is currently in the 2023/2024 Season.

44. Section 35(4) of the [Copyright Act](#) provides for the remedies and/or relief available to the plaintiff in the case of infringement of a copyright. It states that-

Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for infringement the following reliefs shall be available to the plaintiff -

- a. the relief by way of damages, injunction, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights;
- b. delivery up to the plaintiff of any article in the possession of the defendant which appears to the court to be an infringing copy, or any article used or intended to be used for making infringing copies;
- c. in lieu of damages, the plaintiff at his option, be awarded an amount calculated on the basis of reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned;
- d. for the purpose of determining the amount of damages or a reasonable royalty to be awarded under this section or section 33(2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiries as the court considers necessary; and
- e. before the owner of the right institutes proceedings under this section, he shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he may have suffered as a result of the infringement concerned or a reasonable royalty to which he may be entitled.

45. The plaintiff demonstrated compliance with the provisions of section 35(4)(e) of the [Copyright Act](#), since vide an email sent to the copyright's holder on August 14, 2019, it notified the copyright's holder of its intention to move the Court for an injunction barring two media houses, and any other media house from infringing on its rights.

46. In this case, the plaintiff prays for an order for aggravated damages for flagrant infringement and payment of all sums found to be due to the plaintiff upon the taking of an inquiry as to damages for infringement of copyright and account of the profits made by the 1<sup>st</sup> defendant by virtue of its infringement of copyright. Having found that the 1<sup>st</sup> defendant infringed on the plaintiff's copyright, I am satisfied that the plaintiff is entitled to an award of damages on account of the said infringement.

47. As for aggravated damages, they go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in the future. In determining whether to award aggravated



damages or not, the court held as hereunder in the case of [Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa](#) [2004] eKLR-

Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.

48. Aggravated damages are provided for under section 35(6) of the [Copyright Act](#) which states as follows-

Where in an action under this section an infringement of copyright protected under this Act is proved or admitted, and the court, having regard (in addition to all other material considerations) to -

- a. the flagrancy of the infringement; and
- b. any benefit shown to have accrued to the defendant by reason of the infringement is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, may award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.

49. From the above provisions of the law, I am not persuaded that this a proper case for making an award for aggravated damages. This is because after the court granted the plaintiff an order of injunction against the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant stopped the live broadcasting of the English Premier League Matches for the 2019/2020 Season. In the premise, I am satisfied that damages for infringement of the plaintiff's copyright are sufficient in this case.

50. Section 35(4)(d) of the [Copyright Act](#) allows this court to make an order for an enquiry to be conducted for purposes of determining the amount of damages to be awarded to a successful party. In the case of [British United Provident Association Limited v Bupa Kenya Limited](#) [2020] eKLR, the court in making an order for enquiry held that –

A Plaintiff bringing an action for infringement of intellectual property may choose to prove damages contemporaneously with liability. But it may, like here, first seek to establish infringement and once infringement has been determined to move to the next step of proving damages. It seems to me that this latter approach could be a more efficient way of use of the court's time. Parties should allow the court to make a decision as to whether there is infringement in the first place, so that an inquiry of damages is undertaken only if necessary. The parties and court should strive to make the proceedings on liability efficient and expeditious.

As to the taking of account of profits of an infringer, the philosophy behind the remedy is that a party who has profited unlawfully from using or riding on another's intellectual property should not be allowed to keep the profits made from such venture. To permit that would be to allow for unjust enrichment.



51. In the premise, an order for enquiry is necessary to enable this court to determine the amount of damages that may be adequate to compensate the plaintiff for the loss suffered as a result of the 1<sup>st</sup> defendant's infringement of its copyright.
52. It is my finding that the plaintiff's suit against the 1<sup>st</sup> defendant is successful. Section 27 of the Civil Procedure Act provides that costs follow the event. The costs of this suit shall therefore be borne by the 1<sup>st</sup> defendant.
53. In the circumstances, I make the following orders: -
- i. A declaration is hereby made that the plaintiff is the only local broadcaster that had the exclusive right to broadcast Live Audio transmissions with commentary on the 2019/2020 English Premier League within Kenya;
  - ii. An enquiry as to damages for infringement of copyright or, at the option of the plaintiff, and account of the profits made by the 1<sup>st</sup> defendant by virtue of its infringement of the plaintiff's copyright;
  - iii. Payment of all sums found to be due to the plaintiff upon taking such inquiry;
  - iv. Costs of the suit are hereby awarded to the plaintiff; and
  - v. Interest is hereby awarded to the plaintiff for orders (iii) & (iv) above at court rates from the date of filing suit until payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Kahura for the plaintiff

Mr. Ochieng for the 1<sup>st</sup> defendant

Ms. B. Wokabi – Court Assistant.

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