



**Solut Technology Limited v Safaricom Limited (Civil Case E352 of 2019)  
[2024] KEHC 11002 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E352 OF 2019  
FG MUGAMBI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**SOLUT TECHNOLOGY LIMITED ..... PLAINTIFF**

**AND**

**SAFARICOM LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The dispute before court arises from alleged copyright infringement of a software application known as the Wavu application developed by the plaintiff. The plaintiff contends that the defendant owned and administered the Zindua Café portal (the portal) as an online submission portal through which it received prototype concepts, innovation and creative ideas from external software developers interested in partnering with defendant.
2. The plaintiff contends that on 31/10/2016, he uploaded his software application to the portal for consideration, purchase, and potential exploitation and implementation by the defendant. Subsequently, on 11/11/2016, the plaintiff met with the defendant's officials to demonstrate the operational concept of the control program. After evaluating the presentation, the defendant issued a regret letter, stating that the solutions provided by the Wavu application program were not a priority for the defendant at that time.
3. The plaintiff however claims that the defendant, after reviewing the Wavu application through its portal, developed and launched a similar application named Thibitisha. The plaintiff terms the same an infringement of its intellectual property. It further contends that the defendant's application is based on its proprietary work in breach of the defendant's duty of confidence.



4. Aggrieved by the actions of the defendant, the plaintiff, through the plaint dated 7/10/2019 seeks various reliefs, including declarations of copyright ownership and infringement by the defendant, damages, rendering of accounts and an injunction against the defendant.
5. The defendant, by a statement of defense dated 15/11/2019, denies these claims, arguing that the Thibitisha program was independently developed and that the plaintiff waived any rights to the Wavu application by submitting it through the portal, which, according to the defendant, granted them irrevocable and unrestricted rights to the idea. The defendant faults the plaintiff for not protecting its program before uploading it, arguing that the plaintiff's idea may have been submitted by other users on the portal.
6. PW1, Jimnoon Magolo testified in support of the plaintiff's case. His testimony follows his witness statement dated 7/10/2019 and substantiated by his bundle of documents. DW1, Isaac Kibere the defendant's Senior Legal Counsel, testified on behalf of the defendant. He relied on and adopted on his witness statement dated 12/10/2022 together with the bundle of documents dated 26/5/2020.
7. I shall avoid regurgitating the testimony by the witnesses which I have carefully considered alongside the pleadings, submissions, authorities and evidence presented by the adverse parties. Instead, I shall refer to specific segments of the testimonies in my analysis that follows.

### **Analysis and determination**

8. In my view, the following issues arise for determination:
  - i. Whether the defendant infringed on the plaintiff's copyright;
  - ii. Whether the defendant is guilty of breach of confidence;
  - iii. Whether the defendant's Zindua café terms and conditions were unconscionable;
  - iv. Whether the plaintiff should be granted the orders sought.
9. On the issue of infringement, the same is predicated on the existence of a valid copyright in the Wavu application which the plaintiff must prove to succeed in its claim. The plaintiff appropriately describes its work at paragraphs 3 and 8 of the plaint as a "control program" or a "software application". Under section 22 of the Copyright Act (the Act), the Wavu application would typically be protected as a literally work, since software applications are considered part of computer programs within this definition.
10. Section 2 of the Act defines a literary work to include any work, irrespective of literary quality, including computer programs. A "computer program" is in turn defined as a...

"Set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result";
11. The defendant contends that since the Wavu application is not registered in the Register of Copyright works, it is not entitled to protection under Section 22 of the Act. The lack of registration was confirmed by PW1 during cross examination.
12. In response to this assertion it is important to clarify that under the Act, ownership of copyright is not solely established through registration. Section 22(5) provides for automatic protection. Section 22(3) provides that for a literary work to be eligible for protection it must amongst others, be written down, recorded or otherwise reduced to material form. This means that copyright in a work, such as the Wavu



application, arises at the moment of its creation, provided the work is fixed in a tangible medium of expression.

13. Once these conditions are met, the plaintiff is presumed to be the copyright owner unless evidence to the contrary is provided. This presumption aligns with the broader framework of copyright law, which aims to protect creators' rights from the moment of creation, without requiring formal registration.
14. This interpretation is further reinforced by Section 22A (2) of the *Act*, which makes registration optional and states that works eligible for copyright may be entered into the Register. While registration is therefore not mandatory, it provides prima facie evidence of the details of the protected work.
15. That said, the medium of expression required for computer programs so as to entitle a work to protection is clarified in Section 2 of the Act. It describes a "computer program" as set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result.
16. The need for the work to be fixed in a tangible medium ensures that software works, such as the Wavu application in this case, can be identified, preserved, and protected. It also ensures that the work can be communicated to others, which is crucial for effective copyright enforcement. Fixation also provides a concrete and verifiable record of the work.
17. Based on my findings regarding the lack of registration and fixation, I conclude in concurrence with the defendant's submissions that the plaintiff has not sufficiently proven ownership of a protected copyright in the Wavu application. The plaintiff therefore lacks the standing to bring a copyright claim. Nevertheless, for the sake of completeness, I will address the other substantive issues.
18. The plaintiff confirms that what was presented to the defendant was a concept note. More specifically, PW1 confirmed during cross-examination that:

“...Apart from the documents paper I submitted, I had the prototype to illustrate the process. I submitted the document but portal had no space for submitting the coded prototype. For Wavu to work it needs a code in the defendant's platform. I did not provide the codes to the defendant.... I did not share the code that could give effect to the paper I presented. I am not aware of the source code used by the defendant to give effect to Thibitisha...the defendant did not take my source code.”
19. The plaintiff contends that despite not having provided the Wavu application prototype codes to the defendant, the defendant still copied the underlying concept and idea and forwarded the same to Vodacom for implementation which resulted to the creation of the Thibitisha program. This assertion, I note, is the basis of the plaintiff's case, founded on a claim of infringement based on the unauthorized use of its original ideas, even in the absence of direct access to the prototype codes.
20. It is a well-known principle of copyright law that copyright infringement revolves around the fundamental distinction between ideas and their expression. Copyright law protects the expression of ideas, not the ideas themselves. The reason for this is that copyright aims to foster creativity by allowing others to build upon existing ideas. If ideas were protected under copyright, it would stifle creativity and innovation, as others would be prevented from using or expanding upon those ideas to create new works.



21. This fundamental principle of copyright law was affirmed in *Jack J. Khanjira & another v Safaricom PLC*, HCCC No. 231 of 2011, where the Court held:

“Copyright law is only intended to protect the expression of ideas, not the ideas themselves. An idea can be expressed and implemented in various ways, resulting in different copyrights coexisting on the same idea without any infringement.”
22. The defendants also referenced the decision in *Samuel Otieno Omondi v Safaricom (K) Limited*, [2020] eKLR in which the court also confirmed that:

“...It is noteworthy that, ideas cannot be protected by copyright, although the form in which they are expressed can be. This is referred to copyright circles as the “idea-expression dichotomy” or the “idea-expression divide.” Indeed, it’s not always easy, however, to distinguish an idea and the expression of an idea and the reproduction of a detailed pattern of incidents or ideas could constitute copyright infringement.”
23. The crux of this discussion is that in the context of computer software, the expression of ideas is manifested through source codes. The plaintiff has failed to demonstrate that the defendant had access to the application or that they copied the protected elements of the work, given that the source code - the tangible expression of the software - was not disclosed to the defendants.
24. This means that even if there may be certain similarities in the general ideas behind the two applications, it is not possible to tell whether the expression of the ideas is similar and therefore whether the innovation by the plaintiff is original.
25. The *Halsbury’s Laws of England* Vol. 9(2) [2006] at paragraph 318 confirms this proposition as to what would constitute copyright infringement in the following words:

“Loading a program into a computer memory, saving the program or running it without authority may infringe copyright. Making an arrangement or altered version of the program or converting it into or out of one computer language or code is also an infringement... when considering whether a substantial part of the program has been copied, the correct approach is to consider the similarities between the two programs individually and then to assess whether the entirety of what has been copied is a substantial part of the program. In this regard, regard should be had not only to the literal similarities in the text of the code but also to the program structure and to specific design features.”
26. I cannot over emphasize the effect of the above proposition which is that without the defendants having been supplied with the source code to the plaintiff’s application, it is not possible to demonstrate the literal similarities or the structural and design features that have allegedly been copied by the defendants. The source code serves as the primary evidence for showing how the defendant’s program may have infringed on the claimant’s software.
27. It also means that since the determination of infringement requires a detailed comparison of the original and allegedly infringing programs, the absence of the source code denies the court an opportunity to properly assess whether the defendant’s actions would have resulted in copying a substantial part of the original program.
28. The plaintiff argues that the concept note presented to the defendant contained a set of instructions expressed in words and which is capable, when incorporated in a medium that the computer can read



- to cause a computer to perform or achieve particular task/result and that it had duly complied with stringent requirements of section 22(3) of the *Copyright Act*, 2001.
29. I have looked at the concept note found at pages 53 to 62 of the defendants bundle of documents. The said concept note details the functionality and working of the Wavu application as well as statistics and case studies in support of its development.
  30. My understanding of Section 22(3) of the *Act* is that for a concept note to qualify for protection as a computer program, it must go beyond merely expressing instructions in natural language. The instructions must be incorporated into a medium that a computer can directly read and execute to perform a specific task or achieve a particular result. If the concept note remains in its original form without this transformation, it does not meet the legal requirements for protection as a computer program under Section 22(3).
  31. This transformation is crucial, as it is the process of converting the concept into a functional, executable format that elevates it to the status of a protectable computer program.
  32. I am therefore not satisfied that the plaintiff has demonstrated that there was an infringement of its expression in the Wavu application. To rule otherwise would set a dangerous precedent, suggesting that merely thinking of an idea could enable someone to prevent others from independently conceptualizing similar ideas using different methods. Such a precedent would stifle innovation and unfairly extend the scope of copyright protection beyond its intended limits. Consequently, the claim of infringement fails for the reasons outlined above.
  33. Alternatively, the plaintiff contends that the defendants breached the obligation of confidence which they owed to the plaintiff. The plaintiff claims that the defendants took unfair advantage of the confidential information provided to them and used this information in an unauthorized manner, thereby exploiting it to the plaintiff's detriment. The plaintiff argues that the defendants' actions resulted in harm to the plaintiff by allowing the defendants to benefit from the information without proper consent or compensation.
  34. As correctly submitted, the law of confidence and the principles of protection of confidential information have no statutory foundation. They are rooted in equity and common law principles. The defendant has relied on a number of authorities including the case of *Fraser & Others v Thames Television Limited & Others*, [1984] 1 Q.B. 44 which was cited with approval by the Court of Appeal in *Hoswell Mbugua Njuguna T/A Fischer and Fischer Marketing Concepts v Equity Bank Limited & Another*, [2017] eKLR.
  35. The Court of Appeal summed the principle of confidentiality as follows:

“under the general law of confidence, the information relied upon may be either written or oral. It protects against those who receive information or ideas in confidence but the obligation in confidence ceases the moment the information or idea becomes public knowledge.”
  36. The Court of Appeal further referenced the case of *Fraser & Others*, (*Supra*) where it was held that:

“There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it... If, therefore, a defendant is proved to have used confidential information, directly or indirectly obtained



from a plaintiff, without his consent, express or implied, he will be guilty of an infringement of the plaintiff's rights...To succeed in his claim the plaintiff must establish not only that the occasion of communication was confidential but also that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realized in actuality..."

37. Arising from these decisions and as outlined in *Halsbury's Laws of England*, 4th Edn. Vol 8(1), at paragraph 401, the elements necessary to prove a claim based on breach of confidentiality are as follows:
- a. The material communicated had the necessary quality of confidence:  
The information must be of a confidential nature, meaning it is not public knowledge and has been disclosed in a context that suggests it is to be kept private.
  - b. It was communicated or became known to the defendant in circumstances entailing an obligation of confidence:  
The information must have been shared in a situation where it was clear or should have been clear to the recipient that the information was confidential, thus creating an obligation to maintain that confidence.
  - c. There was an unauthorized use of the material:  
The defendant must have used or disclosed the confidential information without permission, to the detriment of the party that originally provided it. This unauthorized use must breach the duty of confidence that was understood to be in place.
38. On the first point, the plaintiff has not provided any evidence to substantiate the claim that the details regarding the Wavu application were not already in the public domain. The burden of proof rests with the plaintiff to demonstrate that the information was indeed confidential. In the absence of clear evidence proving that the details of the Wavu application were not publicly available, I find that the plaintiff has failed to establish that the information possessed the necessary quality of confidence. Without this proof, the foundation of the plaintiff's confidentiality claim is not sufficiently supported.
39. Even supposing I was wrong on this, it is important to note that by accepting the defendant's terms and conditions on the Zindua Café platform—a mandatory step before submitting any concept note—the plaintiff expressly agreed to be bound by those terms. This acceptance was signified by the plaintiff's registration on the portal. (A copy of the Terms and Conditions can be found at pages 80 to 84 of the plaintiff's bundle of documents.)
40. Clause 3 of the Terms and Conditions outlines the specific instances in which the defendant is permitted to disclose or share the information submitted on the Zindua platform. Clause 3.1, in particular, makes it clear that the information provided by the plaintiff was not submitted under confidential terms. Therefore, the plaintiff cannot claim that the information was intended to be kept confidential when they agreed to terms that explicitly allowed for its disclosure.
41. It is a well-established principle in law that parties are bound by the strict terms of their contract. This court cannot and will not rewrite the terms of an agreement freely entered into by the parties. The court's role is to enforce the contract as it stands, provided that it is lawful and does not contravene public policy. Therefore, when the plaintiff agreed to the terms and conditions of the Zindua Café platform, including the clauses concerning the disclosure of submitted information, they accepted the legal consequences of those terms.



42. This view is well supported in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another*, [2001] eKLR. The Court of Appeal held that:

“A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract, unless coercion fraud or undue influence are pleaded and proved.”

43. On the last element the defendants emphasize that there has been no unauthorized use of the information to the detriment of the plaintiff. In my view, the plaintiff has not provided any evidence to prove that the defendant used the information outside the scope outlined in the terms and conditions. For these reasons the plaintiff’s argument on breach of confidentiality must similarly fail.

44. Finally, regarding the issue of unconscionability, the plaintiff argues that the terms and conditions of the platform were structured in such a way that left the plaintiff with no real choice but to accept them, given its weaker bargaining position. The plaintiff contends that the only alternative was to forgo engaging with the defendant entirely, which was not a viable option. As a result, the plaintiff prays that the court intervenes and modifies or sets aside the contract due to its inherently unfair terms.

45. The question of unconscionableness of terms has been interpreted through judicial pronouncements to occur where one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.” (For this analysis see *LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Entwicklungsgesellschaft (‘Deg’) & 2 Others*, [2011] eKLR where the court cited with approval from *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326 and *Schroeder Music Publishing Co v Macanlay*, [1974] 1 W.L.R 1308).

46. The parties have both referred to the Canadian Supreme Court decision in *Uber Technologies Inc. v Heller*, [2020] SCC 16 which was upheld by Mativo J (as he then was) in *Polyphase Systems Limited v Sterling & Wilson Solar Limited; Malindi Solar Group Limited, (Interested Party)* [2021] eKLR.

47. The court stated as follows:

“The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weaknesses or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party’s ability to freely negotiate a contract, compromised a party’s ability to understand or appreciate the meaning and significance of the contractual terms or both.

A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances for example, almost any agreement would be an improvement over status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price.



Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.”

48. The Learned Judge went on to state that:

“Unconscionability, consists of the two-pronged test that prevails in most jurisdictions today. One, procedural unconscionability which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Two, substantive unconscionability which arises when a term is “overly-harsh” or “one-sided.” But more importantly, unconscionability isolates terms to which parties do not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Indeed, modern unconscionability empowers courts to strike down provisions that “fall outside the ‘circle of assent’ which constitutes the actual agreement”.”

49. Following the thorough analysis in these decisions, the question arises: can the agreement between the parties be characterized as overly harsh, unfair, unreasonable, or one-sided? Specifically, did the defendant gain an undue advantage due to an imbalance of power between the parties?

50. I would answer this question in the negative for several reasons. Firstly, the plaintiff had access to legal representation and consultation before registering on the portal, and there is no indication to the contrary. Therefore, it is unlikely that the plaintiff was misled or did not fully understand the terms of the agreement. This proposition is buttressed by the finding of the Competition Authority of Kenya (in a letter at page 24 of the plaintiff’s bundle) that:

“Solut was aware of the terms and conditions of the Zindua Café platform prior to its engagement with Safaricom. Therefore, Safaricom did not engage unilaterally to impose unfair trading conditions since it had disclosed all the terms and conditions for use of its platform.”

51. Secondly, the platform was a public forum, and there is no evidence to suggest that the plaintiff was compelled to submit their idea under time constraints, threats, or any other form of undue pressure. Furthermore, with regard to bargaining power, there is no presumption that the plaintiff was an inexperienced or unsophisticated party in comparison to the defendant that would justify concerns about inequality in bargaining power. The plaintiff had the option to review the terms and conditions and could have chosen not to engage with the platform if they found the terms unacceptable.

52. I further note that the terms and conditions explicitly warned members of the public about the importance of protecting their work before sharing it on the platform. Had the plaintiff complied with this precaution, they would have been in a stronger position to protect their intellectual property. The issue that befell the plaintiff was, therefore, a consequence of their own actions.



53. In fact, it is undisputed that the plaintiff had not taken steps to protect their work at the time it was submitted on the Zindua platform, despite the clear guidance to do so. This fact was acknowledged by the plaintiff during cross-examination, and no reasonable explanation was provided for this omission.
54. The terms and conditions also clearly define the defendant's liability and its obligation to compensate innovators for ideas that have been submitted and approved. Additionally, the terms provide for arbitration as the designated method for resolving disputes, indicating a structured and fair approach to addressing any potential conflicts.
55. Given these provisions, I find that the terms and conditions are not unreasonable or unfairly skewed in favor of the defendant. They establish reciprocal obligations for both parties, rather than granting the defendant extreme, one-sided advantages.
56. For these reasons, I am satisfied that the terms and conditions were not unconscionable.

### **Disposition**

57. Accordingly, and for all the reasons that I have stated, the suit against the defendant fails. It is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

