



**Hussein v Abdullahi & another (Civil Suit E038 of 2022)
[2023] KEHC 1086 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1086 (KLR)

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

**CIVIL
CIVIL SUIT E038 OF 2022**

CW MEOLI, J

FEBRUARY 16, 2023

BETWEEN

FATMA ADAM HUSSEIN PLAINTIFF

AND

MISKY NUR ABDULLAHI 1ST DEFENDANT

SENEA ALEX T/A PROUFALME AFRICA 2ND DEFENDANT

RULING

1. Fatma Adam Hussein (hereafter the Plaintiff/Applicant) filed a plaint accompanied by a motion under certificate of urgency dated February 28, 2022 seeking an injunction to restrain both Misky Nur Abdullahi and Sened Alex t/a Proufalme Africa (hereafter the 1st & 2nd Defendant(s)/Respondent(s)) by themselves, their employees, agents or whomsoever acting under their authority, from printing, publishing selling and promoting in any way whatsoever the 1st Respondent's book titled 'RESET' pending the hearing and determination of the suit. The motion is expressed to be brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rule 2(1) of the Civil Procedure Rules, and Section 35(D) of the Copyright Act.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant who deposes to being the author and current copyright holder of the book titled 'The Africa I Want' Poems by Fatma Adam, published in the Republic of Kenya in September 2016 under certificate of registration issued by the Kenya Copyright Board on October 13, 2014. That the 1st Respondent book 'Reset' published in September 2019 has not only substantially plagiarized the Applicant's earlier book without due acknowledgment, but the said Respondent has also infringed and continues to infringe upon the Applicant's intellectual property rights by passing off and selling the same as her own works without authorization.



3. She asserts that the 1st Respondent has embarked on a local and international promotion campaign for the book 'Reset via various social media outlets. That the actions of the said Respondent had occasioned loss and damage. She urges the court to grant the motion.
4. The Respondents oppose the motion through a replying affidavit dated April 7, 2022 sworn by the 1st Respondent. She deposes to be the author of the book 'Reset' published by the 2nd Respondent in 2019 and bearing ISBN 978-9966-130-30-3 ; that she duly obtained registration of the copyright to the said book in the literary category number LT-015256 and that she was issued with a certificate by the Kenya Copyright Board on October 24, 2019. She asserts that prior to registration of the copyright she duly complied with all requirements of the copyright board for purposes of authentication and verification of her work.
5. Further that she had neither received any infringement complaint through the Copyright Board nor been issued with a notice of rejection of her book titled 'Reset' by the board. That the Copyright Board registered her copyright in respect of her book 'Reset' upon satisfaction that there existed no objection, infringement or violation of any existing copyright and the book was launched on September 3, 2019 following which she registered a foundation in furtherance of the launch theme and she was currently pursuing a Bachelor's Degree at Deakin College.
6. The deponent asserts that her book 'Reset' is an original expression of her thoughts and not plagiarized from the Applicant's or any other person's work. She emphasizes that her book bears no similarities as to title, content and arrangement to the Applicant's book and the Applicant has not demonstrated prima facie the alleged copyright infringement and therefore an arguable case that can succeed on trial. She further deposes that the Applicant has failed to demonstrate before the court the likelihood of irreparable loss, whereas the Respondents are more likely to be prejudiced by the orders sought as 'Reset' was published in 2019 and has been in circulation both locally and internationally. She therefore contends that the balance of convenience tilts in favour of the Respondents and it is in the interest of justice that the motion herein be dismissed with costs.
7. In a rejoinder by way of a further affidavit the Applicant asserts that there was no evidence tendered before the court on the conception and composition of the 1st Respondent's book as an original work published after her book. She contended that the mere fact that the Kenya Copyright Board issued the 1st Respondent with a registration certificate, is not proof that the 1st Respondent did not plagiarize or infringe upon her copyright; that the 1st Respondent has failed to provide any iota of evidence that she did not plagiarize and copy her book; and that the 1st Respondent did not appreciate that the Applicant's complaint on copyright infringement related to her re-arrangement of sentences with additional material, interspersed under the same concept, themes, thought patterns and sometimes sentence structure in her book. That the continued infringement and ensuing damage occasioned by the 1st Respondent cannot be easily quantified in damages hence it is in the interest of justice that the prayers sought are granted.
8. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the cases of *Giella v Cassman Brown* (1973) EA 358, *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR, *Nguruman Limited v Jan Bonde Neilsen & 2 Others* [2014] eKLR and *Suleiman v Amboseli Resort Ltd* [2004] 2 KLR 589 on the principles governing the grant of a temporary injunctive order. Counsel cited Section 22(4) of the [Copyright Act](#) to submit that issuance to the 1st Respondent of a certificate of registration is no defence to copyright infringement of the Applicant's work. He contended that the Kenya Copyright Board neither conducts a qualitative or quantitative analysis of any copyright application prior to issuance of a registration certificate nor publicly invites objections to such applications.



9. Calling to aid the decision in *Guild Ltd v Russel Williams (Textiles) Ltd [2001] 1 All ER 700* as cited in *Nzele David Nzomo v Moses Namayi Anyangu & Another [2018] eKLR* counsel submitted that the Applicant's contention is premised on 'colorable intimation' by the 1st Respondent's book. Counsel contended that that copyright infringement on artistic works is seldom verbatim but rather colorable intimation and hence a prima facie case with a possibility of success had been demonstrated. Concerning irreparable damage, it was submitted that the 1st Respondent has embarked on a promotion campaign on social media in respect of her book that emanates not only from blatant plagiarism but also copyright infringement for which damages in respect of years of skill and labour cannot easily be quantified in monetary terms.
10. Counsel argued that the balance of convenience tilts in favour of the Applicant as granting an interlocutory injunction will carry a lower risk on injustice should it turn out that the Applicant was wrong. For the reason that, the 1st Respondent had already sold and continues to sell numerous copies of the book 'Reset' on a false and misleading premise that the books constitutes her own original work. In conclusion it was submitted that a great injustice would be visited on the Applicant should an order of injunction not issue.
11. Counsel for the Respondents on his part equally anchored his submission on the oft-cited case of *Giella (supra)* on the prerequisites for grant of an interlocutory injunction. Firstly, counsel submitted that there was undue delay in filing of the instant motion as the 1st Respondent obtained a certificate of registration for her book 'Reset' on October 24, 2019 and the instant motion was filed more than two and half years later without any explanation for the delay. Counsel cited *Halsbury's Laws, 3rd Edition, Vol 8* at page 444-5 paragraph 808 and the decision in *Fanikiwa Ltd v Joseph Komen & 5 Others [2013] eKLR* in that regard.
12. Citing inter alia the cases of *Mrao (Supra)*, *Donald Mubonda Andolo v Pinnacle Developers Limited & 3 Others [2018] eKLR*, and *Kenya Commercial Finance Co Ltd v Afraha Education Society [2001] 1 EA 86* as cited in *Joseph Wambua Mulusya v David Kitu & Another [2014] eKLR*, counsel contended that the affidavit material in support of the motion does not demonstrate any alleged infringement of copyright. Nor has the Applicant described in her affidavit the alleged infringement or violation of her copyright. That an overview and comparison of the two books does not disclose any commonality as to content, context, themes or topics. That the books are distinct and the Respondents followed due procedure in ensuring that the 1st Respondent's literary works are original and do not infringe on any existing copyright.
13. Concerning irreparable loss and balance of convenience counsel placed reliance on the decisions in *Alternative Media Limited v Safaricom Limited [2004] eKLR* and *Music Copyright Society of Kenya Ltd v Parklands Shade Hotel Ltd t/a Klub House [2000] eKLR* to submit that the 1st Respondent through her book has created a brand which is internationally recognized, whose value cannot be assessed adequately in monetary terms. That the grant of an injunction is likely to cause greater harm to the 1st Respondent in the long term hence the balance on convenience tilts in favour of the Respondents. It was asserted finally that the Applicant's motion lacks merit.
14. The court has considered the material canvassed in respect of the motion and must determine whether the Applicant has made out a case for the grant of an interlocutory injunction. The motion invoked the provisions of Order 40 Rule 2(1) of the Civil Procedure Rules and Section 35D of the *Copyright Act*. Order 40 Rule 2 provides that;
 - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time



after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
15. Section 35D (1) & (2) of the [Copyright Act](#) on its part provides that;
- (1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.
 - (2) The High Court may, upon application under subsection (1), grant an order requiring—
 - (a) A person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;
 - (b) A person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or
 - (c) An internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

16. The principles governing the grant of an interlocutory injunction have since long been settled. In *Ngurumani Limited v Jan Bonde Nielsen & 2 Others* [2014] e KLR the Court of Appeal restated the principles enunciated in the locus classicus decision in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at page 360 where it was stated that;

' First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. (*EA Industries vs Trufoods* [1972] EA 420).'

17. The Court of Appeal further stated in *Nguruman Ltd* (supra) that;

' Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella* case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) Establish his case only at a prima facie level
- b) Demonstrated irreparable injury if a temporary injunction is not granted.



- c) Allay any doubts as to (b) by showing that the balance of occurrence is in his favor.'

18. In addition, the court emphasized that the three (3) conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy and that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not look into the question of irreparable loss or balance of convenience.

19. As to what constitutes a prima facie case, the Court of Appeal expressed itself as follows: -

' Recently, this court in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for 'prima facie case' in civil cases in the following words:

'In civil cases, a prima facie case 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

20. The Applicant's chief complaint against the 1st Respondent is that, the said Respondent has not only substantially plagiarized the Applicant's book titled 'The Africa I Want' Poems by Fatma Adam, without due acknowledgment through her own book titled 'Reset' published in September 2019, but has also infringed and continues to infringe upon her intellectual property rights by passing off and selling the same as her own works without authorization. Section 22 (1), (3) and (4) of the [Copyright Act](#) provides that literary works, inter alia, shall be eligible for copyright or related rights and that a work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

21. Section 2 of the [Copyright Act](#) defines the term 'author' to mean 'in relation to— (a) a literary, musical dramatic or artistic work, the person who first makes or creates the work;' and the term 'literary work' to mean, 'irrespective of literary quality, any of the following, or works similar thereto—



- a. Novels, stories and poetic works;'
 - b. .
 - c. .'.
22. As to what constitutes infringement of copyright, Section 35 (1) & (3) of the Copyright Act provides that:
- (1) 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.
 - (2) .
 - (3) Copyright and related rights shall be infringed by a person who—
 - (a) Circumvents any effective technological protection measure designed to protect works; or
 - (b) Manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technological protection measures designed to protect works protected under this Act; or
 - (c) Removes or alters any electronic rights management information; or
 - (d) Distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.'
23. In this case, both the Applicant and the 1st Respondent have tendered evidence of due registration of their respective books by the Copyright Board (See annexure FAH-1 and annexure MNA-2). While asserting that the 1st Respondent has plagiarized her work and infringed her copyright, the Applicant stated that the 1st Respondent has not shown how her book was composed as an original created after the publication of the Applicant's book in 2014. These claims are disputed by the 1st Respondent who reiterates her own copyright and denies any similarity in the wording and structure of the two books.
24. In *Mrao Ltd* (supra) the court emphasized that it was not merely sufficient to raise issues but to adduce evidence showing infringement of a right sufficient to call for an explanation or rebuttal from the opposite party and that the standard of proof required is higher than an arguable case. While the issuance of a copyright certificate does not necessarily immunize the 1st Respondent against a claim of this nature, the burden of proof rests with the Applicant to demonstrate a prima facie case in respect of alleged infringements.
25. Copyright infringement by definition constitutes a violation of copyright that is sanctioned by the law whereas plagiarism occurs when someone passes off the work of another person as his own or without acknowledgement of the original source. In my considered view, neither has been demonstrated herein and the uncanny similarity of the words, phrases or sentences, design, and poetic form in the two books relied on by the Applicant, without more, does not suffice. Under the Copyright Act one cannot copyright words in the English language or use of the language or the art of singing or art of



poetry or art of acting. One can only copyright the originality of the works of such art. Secondly, the alleged plagiarism or infringement of copyright through 'colorable intimation' does not emerge clearly from the Applicant's material. The initial onus of proof lay with the Applicant, but reviewing the Applicant's material it is difficult to conclude at this stage that there is prima facie demonstration of the alleged infringement of copyright or plagiarism calling for rebuttal by the 1st Respondent.

26. The Court of Appeal in Nguruman Ltd held that where no prima facie case is established, the Court need not consider the questions of irreparable damage or balance of convenience. The issues arising herein are primarily of a factual nature requiring an in-depth quantitative and qualitative analysis of the respective books and not merely generalized comparisons in words, phrases, style, or design as proffered here. It would be a perilous adventure for this court to attempt such an examination at interlocutory stage, and more so, in the circumstances of this case. The exercise must await the trial of the suit. Consequently, the motion dated February 28, 2022 must fail and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF FEBRUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Mocha

For the Respondents: Ms. Kemunto

C/A: Carol

