Netresource Limited v Ministry of Education & 3 others (Miscellaneous Application E236 of 2022) [2023] KEHC 2425 (KLR) (Commercial and Tax) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E236 OF 2022

PN GICHOHI, J

MARCH 23, 2023

BETWEEN

NETRESOURCE LIMITED ..... PLAINTIFF

AND

THE MINISTRY OF EDUCATION ..... 1ST DEFENDANT

THE MINISTER FOR EDUCATION ..... 2ND DEFENDANT

THE HON ATTORNEY GENERAL ..... 3RD DEFENDANT

BENSON OMONDI ..... 4TH DEFENDANT

RULING

1. Under a certificate of urgency, the Plaintiff filed the Notice of Motion dated March 23, 2022 through the firm of J Mburu & Co Advocates seeking orders ;

    1. Spent

    2. Spent.

    3. That a temporary injunction be issued restraining the Defendants/Respondents from using, passing off, selling, offering for sale, broadcasting , advertising , or making available to the public ,or in any way from further infringing upon the Plaintiff's copyright and / or intellectual property over the computer program and /or software known as National Education Management Integrated System herein referred to as "NEMIS" in any manner whatsoever pending the hearing and determination of this suit.

    4. That a mandatory injunction be issued to direct and /or compel the Defendants/Respondents to deliver up to Court any article in their possession which appears to the Court to be used

for making infringing copies of the Plaintiff's protected and /or copyrighted works over the computer program and /or software known as "National Education Management Integrated System" and records of such data , server credentials and any item which constitutes or could constitute evidence necessary to prove its claim and for purposes of preserving such evidence.

5. That in the alternative to prayer 4 above, the Inspector of Kenya Copyright Board be authorised to enter the Defendants' premises to inspect machines , gadgets and take such data , access servers and server credentials and any item which constitute or could constitute evidence necessary to prove its claim and for purposes of preserving evidence.

6. That the Plaintiff's representatives in company of the Inspector of Kenya Copyright Board to enter the Defendants' premises to seize and keep such record, data , documents and materials relating to the NEMIS computer program and /or software.

7. That the Court grants Anton Pillar orders to enter the premises of the Defendants and 3rd Party to seize , collect, and keep machines , data , documents or storage material relating to its copyright in the NEMIS Computer programme and /or software

8. That the Officer Commanding Central Police Station do provide security to the effect the orders of Anton Pillar.

9. That the court declares the Plaintiff 's intellectual property rights in the computer program, and /or such Software known as "NEMIS " have been and are likely to continuously infringed, contravened and /or violated and therefore the Plaintiff needs protection.

10. The costs of this application be provided for.

2. The application is supported by the affidavit sworn on March 23, 2022 by George Kamau in his capacity as the Director of the Applicant, a limited liability company. He depones that the Applicant is the registered owner of copyright and/ or intellectual property over a computer program software known as "Institutions Network."

3. The Applicant then approached the 1st Respondent expressing its interest in engaging in partnership to implement the Applicant's computer software. Thereafter, the Applicant made presentations in form of a Concept Note to all primary and secondary schools on the application of the copyrighted software while intending to licence the said software to the 1st Respondent at Ksh 50,000.00.

4. The Applicant therefore intended to install, implement and institutionalise the said software , provide systems update, developments and upgrades at an agreed rate during the partnerships. In these engagements, the correspondences between the Applicants and the officials of the 1st Respondent were mostly in form of personal emails and phone numbers. The letters to the 1st Respondent were not received by official stamp . The Applicant believes that these were ill motives maliciously intended to fraudulently infringe its proprietary rights in the software.

5. The Applicant's formal request to the to the Principal Secretary 1st Respondent was received by the 4th Respondent who sought clarifications and gave the Applicant directions to proceed. Subsequently, the 4th Respondent invited the Applicant to Kenya Science for a preliminary presentation and directions to make consequent presentations to various dockets in the ministry of Education.

6. It was then that without prejudice, George Kamau (the Applicant's Director) summitted the codes to the copyrighted software together with the data base to the 4th Respondent. They also submitted the Concept Note to one Mrs Kemunto Kenani and Mr Milton Nzioka and other officials using their emails.

7. After a series of presentation on the Concept Note and a preliminary report made by the officials of the 1st Respondent , appraising it and capturing the Applicant's aspiration to partner with the 1st Respondent , it was recommended that the Applicant continues making further presentations which was done. Through numerous correspondences, which were followed with telephone calls, a meeting was set up for presentation to the to the Cabinet Secretary, the Principal Secretary and the Director General but this was not to be. The Applicant was finally informed that its software had been overtaken by events since the Ministry of Education was working on their system known as National Education Management System (NEMIS).

8. The Applicant then learnt that the 1st Respondent had acquired a USD $ 88,400,000.00 grant from Global Partnerships for Education (GPE) to support the implementation of the program software as published in the Global Partnerships for Education (GPE) website. Then in January 2018, the 1st Respondent rolled out NEMIS countrywide to capture over eighty Thousand (80,000) primary and secondary schools as captured in 1st Respondent's Sector Strategic Plan for the period 2018- 2022 .

9. The 1st Respondent then implemented the Applicant's software under NEMIS to all primary and secondary schools in the country and published part of the information contained in the Applicant's Concept Note without any licence or assignment from the Applicant, an act that the Applicant terms as unlawful and illegal.

10. The Applicant states that there are glaring similarities between the information contained in the Applicant's introductory letters to the 1st Respondent together with the Concept Note presented by the Applicant to 1st Respondent at various stages in operation of the Applicant's software as seen in the application of NEMIS to all primary and secondary schools and the publication of the User Guide.

11. The Applicant terms the acts of commission and omissions of the 1st Respondent as negligent and deliberate infringement of the Applicant's copyright thus denying the Applicant its proprietary rights causing the applicant to lose out on its legitimate expectation of financial returns.

12. By a statement of grounds opposition dated April 22, 2022 and filed by Emmanuel Kiarie, Principal State Counsel for the Attorney General, the Respondents state that NEMIS has been in use in the country since the year 2018 capturing details of millions of Kenyan students and therefore, there is need for the 1st and 2nd Respondent to safeguard and ensure safety of the personal data of the students and their parents/guardians. He further states that the orders sought by the Applicant will greatly prejudice the hundreds of thousands of students expected to be moving to Grade 1, upper Primary and Form 1 and that the said orders are contrary to the principles of utilitarianism.

13. Further, he states that the Applicant has failed to demonstrate that there is a reasonable cause of action against the Respondents as a main suit has not been filed in court against the Respondents and no such plaint and documents have been served on the Respondents relating to this claim. He terms the application as having been fled in bad faith and therefore seeks for its dismissal with costs.

14. In his supplementally affidavit sworn on May 10, 2022 by George Kamau in response to the 3rd Respondent's statement of grounds of opposition, the Applicant states that it is not interested in any other use of the personal data entered and captured in the NEMIS and does not seek to restrain the students from promotion but such data is crucial in evidence to prove their case in the main suit.

15. Confirming that the main suit has not been filed in the relevant courts, the Applicant denies that its claim lacks reasonable cause of action. He maintains that they have locus to approach this court for redress and that the court should dispense with the application first before a main suit is filed. Lastly, he states that the Respondents, in the grounds of opposition, have failed to demonstrate any legal or

procedural shortcomings in this application. He therefore urges the court to allow the application as prayed.

Applicant's Submissions

16. In submissions dated May 11, 2022, the Applicant recaptures the material set out in the application and affidavits and while relying on the *Joseph Nyoike v Regina Njeri Gacheru & another*[2015]eKLR, counsel submits that he has established the principles of granting injunctive orders. On *prima facie* case, counsel submits that the 1st Respondent supposedly turned down the Applicant's Concept Note, the 1st Respondent went ahead and procured a system similar to the Applicant's except for the name. On irreparable loss, counsel submits that the Applicant will suffer loss that cannot be sufficiently compensated by an award of damages.

17. On a balance of convenience, counsel submits that same tilts in the Applicant's favour in that if not granted, and the matter proceeds later and finds that the Respondents were in violation, then larger injustice will have been occasioned by the to a bona fide inventor who owing to the 1st Respondent's position of influence, the Applicant will have been denied the fruitful utility of its intellectual property rights.

18. On mandatory injunction, counsel submits that the Applicant has established through the evidence availed before court that there are exceptional circumstances to warrant granting of the same at this stage. In support, he cites the case of *Nation Media Group & 3 others v John Harun Mwau* [2014] eKLR where the Court of Appeal stated that such an order can only be granted at the interlocutory stage where the Applicant has demonstrated existence of special and exceptional circumstances, and only in clearest of cases.

19. On Anton Piller Orders, counsel cites the case of *Soroya Investments Limited v Barclays Bank Kenya Limited* [2017]eKLR and submits that the Applicant has fulfilled the conditions to be met before the said order can be granted.

Respondents' Submissions

20. Counsel for the Respondents filed submissions dated August 17, 2022 and in support of their grounds of opposition dated April 22, 2022 lists three issues for determination;

    i. Whether the Applicant has demonstrated a reasonable cause of action against the respondents.

    ii. When the Applicant's prayer for Anton Piller Order is justified.

    iii. Whether the court should issue a declaration that the Applicant's intellectual property rights have been infringed by the Respondents.

21. On the first issue, counsel cites the case of *Giella V Cassman Brown & Company limited* (1973) EA 358 on conditions and test for granting injunction. He submits that in the instant application, the Applicant does not allude to existence of a contract between itself and the 1st Respondent or any government entity and does not point to subsequent breach of contract by the Respondents giving rise to a cause of action.

22. Further, he submits that the Application does not disclose any copyright registration details relating to NEMIS in favour of the Applicant and no documents have been availed to prove the Applicant is registered as having the copyright relating to NEMIS, or any documents to show that the Applicant is registered as having copyright in relation to Institutions Network. He further submits that the Applicant has failed to demonstrate how NEMIS used by the 1st Respondent infringes copyright work

relating to Institutions Network. Counsel therefore submits that there is no reasonable cause of action to warrant orders of injunction.

23. On Anton Piller Orders, counsel cites the case of *Anton Piller KG v Manufacturing Processes Ltd and others* (1976) 1 All ER on conditions to be met before granting of this order and submits that the Applicant does not warrant granting of this drastic order for reasons that the Applicant failed to disclose a reasonable cause of action against the Respondents; does not have an extremely strong prima facie case against the Respondents; has failed to prove that the alleged damage, mental or actual is very serious for the Applicant and that the remedy for damages cannot suffice and, has failed to demonstrate that the Respondents are likely to destroy the NEMIS system.

24. On the third issue, counsel submits that there is no document to prove that the Applicant has a copyright to Institutions Network and that, in event the Applicant has the registered copyright, then he has failed to give details or demonstrate how NEMIS infringes on Institutions Network. Counsel therefore urges the court to dismiss the application with costs.

Determination

25. A look at the application herein, the affidavit in support, the statement of grounds of opposition and the submissions by parties shows that the parties have aptly captured the issues for determination which can broadly be summarised as:-

    1. Whether the Applicant has a copyright to a computer software program known as Institutions Network.

    2. Whether the Respondents have infringed on that copyright by use of NEMIS hence warranting the court to grant the Applicant the orders sought in the application dated March 23, 2022.

26. On the issue of whether the Applicant has a copyright to a computer software program known as Institutions Network, the annextures to the Applicant's supporting affidavit show that the Applicant is a limited liability company incorporated under the *Companies Act* on July 16, 2014. There is also a Certificate of Registration of a Copyright Work issued by Kenya Copyright Board on July 28, 2014. It certifies that copyright work in the literary work category that is Institutions Network is registered in the name of Netresource Limited in Nairobi. On that ground, the argument by the Respondent questioning registration of that copyright has no basis.

27. The issue then is whether the Respondents have infringed on that copyright by use of NEMIS. What the Applicant is seeking is both injunctive orders and Anton Piller Orders. The principles for granting injunction are well settled in the case of *Giella V Cassman Brown & Company limited* (1973) EA 358 aptly cited by the parties and that is:

> " 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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."

28. As to what a *prima facie* case is, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR stated:

> " The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case.... So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

29. The Applicant herein has not hinged his application on any pleadings. He has not filed a plaint upon which he has based his claim as he prays for "a temporary injunction.... pending the hearing and determination of this suit." Indeed, he has admitted to that fact. That means that there is nothing on which it can be established whether he has a prima facie case or not. An interlocutory application cannot be issued in vacuum.

30. There is no doubt from the annexures that the Applicant did engage various stakeholders in the education sector including the 1st Respondent. That was in a bid to have a partnership with the Applicant on the employment of Institutions Network. The Respondents do not deny such engagements whether formal or informal.

31. Further, there is no denial that the Applicant also did some presentations in form of a Concept Note to in a bid to win the said partnership with the 1st Respondent. The Applicant however does not say, and there is no evidence, that it ever entered into any partnership or contract with the 1st Respondent or any other Government Institution over this soft are or at all which resulted in a breach.

32. Whereas it is clear that prestation were done severally on the Concept Note, it was not finally presented as planned before the Applicant was informed that Institutions Network had been overtaken as the 1st Respondent had developed software called NEMIS. It is the duty of the Applicant then to demonstrate how NEMIS used by the 1st Respondent infringes copyright work relating to Institutions Network but he has failed to do so.

33. The Applicant has also failed to demonstrate details of its intellectual property rights in NEMIS which it says has been and are likely to be continuously infringed contravened or violated so that he can seek protection.

34. Even if this court goes further to the issue as to whether the Applicant has suffered irreparable harm that cannot be compensated with an award for damages, George Kamau deponed that the Applicant was intending to licence the said software to the 1st Respondent at Ksh 50,000.00. He has not demonstrated that damages would not be adequate remedy if he ever suffered any loss.

35. It is admitted by both parties that NEMIS is being used by students in primary and secondary schools. There is nothing to show that the 1st Respondent is using NEMIS for commercial gain. On a balance of convenience, it is demonstrated that NEMIS is already in use by hundreds of students in primary and secondary schools since 2018. Granting the orders sought would be detrimental to the said students yet the applicant has failed to demonstrate that it has a cause of action against the Respondents. The balance of convenience tilts against the Applicant and favours the principle of utilitarianism in the circumstances.

36. Regarding the sequence to follow when the court is dealing with the said conditions, the Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR had this to say:

> "...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration." [Emphasis mine]

37. In regard to prayer for a mandatory injunction, such an order can only be given is the clearest cases. The Applicant has failed to demonstrate that it has a prima facie case to warrant the mandatory injunction orders which it refers as "crucial data to be used in evidence to prove its case in the main suit."

38. In regard to payer for Anton Piller Order, the principles guiding issuance of such an order were long settled in the case of *Anton Piller Kg v Manufacturing Processes Ltd and oothers* (1976) 1 ALL ER where it was held that;

> "There are three essential pre-conditions for the making of such order in my judgment. First, there must be an extremely strong *prima facie* case. Secondly, the damage, mental or actual, must be very serious for the Plaintiff. Thirdly, there must be clear evidence that the Defendants have in their possession incriminating documents or things, and that there is real possibility that they may destroy such material before any application inter parties can be made."

39. Having failed to demonstrate that it has a prima facie case to want the order of temporary injunction, it is needless to say that even its pursuit of an Anton Piller Order would also fail. The Applicant has failed to demonstrate that the damage he is likely to suffer is very serious. There is nothing to show that the Respondents are likely to destroy any material likely to be in its possession and relating to the Applicant's claim.

40. In the upshot, I am satisfied that the Applicant has failed to satisfy the court that he is entitled to any of the prayers sought in this application. The application is dismissed for lack of merit. Bearing the nature of this application, it is fair and just that each party bears its own costs.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 23RD DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Murgor for Applicant

N/A for Respondent

Isindu, Court Assistant