



**Muta v Safaricom Limited; Liberty Africa Technologies Limited (Third party) (Civil Suit 193 of 2016) [2023] KEHC 19792 (KLR) (Commercial and Tax) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19792 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 193 OF 2016  
EC MWITA, J  
JUNE 23, 2023**

**BETWEEN**

**RUTH WAMUYU MUTA ..... PLAINTIFF**

**AND**

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

**AND**

**LIBERTY AFRICA TECHNOLOGIES LIMITED ..... THIRD PARTY**

**JUDGMENT**

**Plaintiff's case**

1. The plaintiff, a music artist and member of the Music Copyright Society of Kenya (MSCK), filed this suit against the defendant for copyright infringement on her musical songs (88 songs) between 2009 and 2014.
2. The plaintiff's case is that the defendant, offered her songs for sale and use to the public through the platforms namely, surf to win promotion, ring back tunes and skiza tunes. As a result, members of the public accessed, downloaded, stored and listened to the music at a fee without her consent or authority.
3. The plaintiff stated that the defendant reproduced, altered, modified, mutilated, distributed, offered for sale, stored and communicated her songs to the public, thereby pirated the music for self-enrichment. As a result of these acts, the plaintiff suffered loss of business because she could not sell her music, receive royalties or perform live shows.
4. The plaintiff filed a plaint dated 16<sup>th</sup> May 2016 and sought judgment for account of money the defendant had received for the use of her musical works; payment of the amount found to be due



upon the taking accounts; Special damages; general damages; exemplary damages and a permanent injunction restraining the defendant from infringing her copyright.

5. In the alternative, the plaintiff prayed for an award of such amount calculated on the basis of reasonable royalties which would have been payable by a license in respect of her musical works for copyright infringement, and costs of the suit.

### **Evidence**

6. The plaintiff testified and adopted her witness statement as her evidence in court. The plaintiff also produced her bundle of documents, comprising a list of her albums, schedule of skiza tunes logs and a notice to the defendant, as exhibits.
7. The plaintiff asserted that the logs showed that the defendant had offered her music to the public; that she did not authorize MCSK to pass her music to anyone and denied signing the mechanical deed of assignment (the deed) with the third party. She maintained that the defendant and third party infringed on her copyright and she never received payment from either the defendant or the third party for the use of her songs.
8. In cross examination, the plaintiff admitted that she did not know the dates when the defendant offered her songs to the public; that the deed bore her name and national Identity card number; that she received payment from the third party for the use of her songs on the defendant's skiza platform from 2012 to date, (the latest payment being in May 2022); and that she released two songs in 2018 (not in the list) which she also offered to the third party to be played on skiza platforms.
9. The plaintiff denied giving copy of her identity card to the third party. She stated that although the initials at the bottom of the deed were similar to hers, the signature was not hers. The plaintiff again admitted that she did not have accounts to show that she was making money before the skiza tunes platform was introduced.

### **Submissions**

10. The plaintiff filed written submissions and maintained that the defendant and third party infringed on her music copyright; did not sign the deed and that the deed lacked the basic ingredients of a legal contract such as the year and the person who drew it.
11. The plaintiff also argued that ringtones are not mechanical rights and, therefore, the deed could not pass rights to the third party to upload the songs as ringtones since the deed was only for mechanical rights.
12. The plaintiff took the view, that the schedule contained in the deed as an addendum, was not mentioned in the deed; was not signed and was handwritten while the deed was typed. It was the plaintiff's position that the deed is vague, opaque and void in that it did not show the revenue share between the parties.
13. Relying on section 35 of the [Copyright Act](#), the plaintiff submitted that as long as there was no direct consent from her, the defendant infringed her copyright even if the defendant received consent from the third party. The plaintiff also relied on Article 35(b) of [the Constitution](#) to support her claim for account for the money the defendant received from the use of her musical works.
14. The plaintiff urged the court to consider the fact that between 2009 and 2014, the defendants illegally used the songs thus infringed on her copyright. The plaintiff urged for an award of general damages



of Kshs. 200,000 per song because the defendant and the third party earned unknown amounts for every second a song was played.

15. The plaintiff relied on *John Katana Harrison v Royal Media Services Ltd*, (CMCC No. 6161 of 2009) and *John Bonface Maina v Safaricom Ltd* [2013] eKLR to support her case.

### **Defendant's case**

16. The defendant filed a statement of defence denying the plaintiff's claim. The defendant averred that use of the songs was permitted by the third party. The defendant sought and was granted leave to join the third party into these proceedings.
17. The defendant's case is that the upload of the songs on the skiza tune platform was authorised by the third party who had authority from the plaintiff to use the songs through the deed.
18. According to the defendant, the plaintiff assigned to the third party rights to play, modify, edit and/or offer the music to the public by way of ringtones, ring-back tones, true tones, online music sales and internet based sales. The plaintiff further granted the third party the right to engage other parties and in consideration of the assignment, the third party was to pay the plaintiff consideration for the use of the music.
19. The defendant asserted that it was contracted by the third party to offer the songs to subscribers of skiza tunes platform which would allow subscribers to download the songs and use them as ringtones or call-back tunes on mobile phones. The defendant paid the third party money received and the third party was in turn to pay the plaintiff according to the terms of the deed.
20. The defendant stated that the surf to win promotion was aimed at rewarding customers for using internet data to access any site regardless of the content. The defendant denied providing any content to the public for downloading and/ or use.

### **Evidence**

21. The defendant called Angela Karamba, its legal officer as a witness. Ms. Karamba adopted her witness statement and produced the defendant's bundle of documents containing the deed as defence exhibit 1.
22. Ms. Karamba testified that the defendant had authority from the third party to use the plaintiff's music on the strength of the deed.
23. In cross-examination, Ms. Karamba admitted that the defendant did not pay money directly to the plaintiff; that the defendant did not give a breakdown of the amount money paid on behalf of the plaintiff for the music; that she did not know whether the third party paid the plaintiff; that the plaintiff's MCSK membership number was missing in the deed; and that she did not know that it was only MCSK that could collect royalties for its members.
24. Ms. Karamba again admitted that the defendant relied on the deed to upload the plaintiff's music onto the skiza tunes platform but stated that she was not sure of the deed's authenticity.

### **Submissions**

25. The defendant filed written submissions and argued that use of the songs was authorized by the third party. According to the defendant, the deed constituted a valid and legally binding contract that the plaintiff could not turn away from. The defendant relied on *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR for the argument that parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved.



26. The defendant again submitted that the plaintiff did not join the third party as a defendant in the suit and no claim had been raised against the third party regarding use of the songs. The defendant pointed out that despite challenging the deed, the plaintiff still admitted that she had authorized the third party to upload the songs on the defendant's skiza tune platform.
27. The defendant asserted that the plaintiff had admitted that she received and was still receiving payments from the third party for the use of her songs on the skiza tune platform. The defendant argued, therefore, that the plaintiff was approbating and reprobating by disowning the deed while at the same time receiving payment and preferring to continue receiving benefits that accrue from the same deed.
28. According to the defendant, this was also demonstrated by the plaintiff's decision to abandon her prayer for injunction barring the defendant from continued use of the songs on the skiza tune platform.
29. The defendant relied on *Royal Bank of Canada v Hirsche Herefords*, 2012 ABQB 32 (CanLII) as cited in *Royal Ngao Holdings Limited v N K Brothers Limited & another* (Civil Case No. 156 of 2019) [2021] KEHC 275 (KLR) on the doctrine of estoppel of approbation and reprobation.
30. The defendant argued that the plaintiff did not adduce evidence to support the claim of copyright infringement and did not also plead the period of infringement, thus she is not entitled to the reliefs sought.
31. The defendant maintained that although the plaintiff admitted receiving payment from the third party, she did not indicate how much she received and the songs she had not been paid for.
32. The defendant urged the court to dismiss the suit with costs. The defendant further urged that if the court was to find that the plaintiff's copyright had been infringed, judgment should be entered against the third party, for holding itself out as having rights over the plaintiff's music.

### **Third party's case**

33. The third party filed a defence and denied allegations of copyright infringement. The third party averred that it had entered into the deed with the plaintiff which authorized the use all works and songs. The third party later entered into an agreement with the defendant allowing the defendant to use the plaintiff's songs. It is the third party's case that the plaintiff's claim for copyright infringement has no merit in so far as it related to works the plaintiff had authorised the third party to use.

### **Evidence**

34. Olive Githongo testified on behalf of the third party and adopted her witness statement as her evidence in court. Ms. Githongo also produced the third party's bundle of documents as exhibits. Ms. Githongo confirmed that she signed the deed on behalf of the third party in 2011. The document was thereafter taken to the plaintiff's offices for the plaintiff's signature. The document was then collected from the plaintiff's office dully signed together with the plaintiff's copy of identification card and the songs.
35. In the deed, the plaintiff authorised the third party to upload the music onto the skiza tunes platform. The plaintiff had been receiving payments from Xpedia Management since September 2011 on behalf of the third party for the use of the songs.
36. Ms. Githongo admitted that the deed does not show who drew it and that she could not confirm that it was the plaintiff who signed the deed and initialled it on every page. The deed was, however, received from the plaintiff's office dully signed.



## Submissions

37. The third party also submitted through written submissions that the deed met the minimum legal requirements of obligations and consideration. The third party took the position, that the mere fact that the deed did not contain the year or who drew it, and that some parts were inserted by pen cannot be a basis for vitiating the contract.
38. The third party relied on *Mamta Peesh Mahajan [Suing on behalf of the estate of the late Peesh Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR* and *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14*, [para 45] to support its case.
39. The third party pointed out that the plaintiff admitted that she was benefiting from the arrangements in the deed and had been receiving payments since 2011/2012. Furthermore, the plaintiff produced the same deed as an exhibit and told the court that she was not pursuing the prayer for injunction to prevent the defendant from using her song. The third party pointed out that the plaintiff was still providing more songs for a similar use.
40. The third party took the view, that the plaintiff had the burden to prove that she did not sign the deed but she failed to discharge that burden. The third party relied on sections 107 and 109 of the [Evidence Act](#) and the decision in *Robert Ouma Njoga v Benjamin Osano Ondoro [2016] eKLR* on that point.
41. The third party maintained that the plaintiff's claim of infringement prior to 2011/2012 cannot hold because she did not plead that her works were being used prior to that period. No evidence was also adduced to prove that claim. The third party urged that the suit is dismissed with costs.

## Determination

42. I have considered the evidence, exhibits and submissions by parties. The plaintiff's claim is for damages for copyright infringement of her songs. The plaintiff also sought an injunction restraining the defendant from using her songs. This claim was however later abandoned.
43. The defendant denied infringing the plaintiff's copyright and argued that it had authority from the third party on the strength of the deed executed between the plaintiff and the third party. The third party took the same position as the defendant, arguing that pursuant to the deed, it had allowed the defendant to use the songs, hence there was no copyright infringement.
44. From the pleadings, evidence and exhibits, I have distilled two issues for termination namely; whether the plaintiff executed the deed and whether the defendant infringed the plaintiff's copyright.

## Whether the plaintiff executed the deed

45. The plaintiff argued that the defendant used her songs without consent or authority which was an infringement of her copyright. The plaintiff further argued that she did not execute the deed and that the deed did not contain finer details such as the year, the person who drew it and the amount, thus it was not valid.
46. The defendant on its part, argued that the third party authorized use of the songs by virtue of the deed signed between the plaintiff and the third party. The third party supported the defendant's position that it allowed use of the songs by virtue of the deed executed between the plaintiff and itself.



47. I have perused the deed which shows that it was signed on 3<sup>rd</sup> of February. The year the deed was signed was not indicated. The third party maintained that the deed was executed between 2011 and 2012 and that the plaintiff had been paid since then to date.
48. It is true that the deed does not contain the year it was signed. That notwithstanding, the plaintiff admitted that she had been receiving payment and that the last payment received was in May 2022, during the pendency of this suit. The plaintiff did not explain on what basis she was receiving payment and when that arrangement was arrived at, if not after execution of the deed.
49. The third party further stated that the plaintiff was still providing new songs for uploading on the sikiza platform, a fact the plaintiff did not deny.
50. The deed may not have the year it was executed or who drew it. The deed may also not have other details including how the money was to be shared. However, the fact that the plaintiff received and continues to receive payments from the third party for the use of songs without question, and continues to give the third party new songs for use in the sikiza platform, it is difficult to agree with the plaintiff that she did not execute the deed or that details such as the year the deed was signed and who drew it, would render the deed invalid.
51. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, the court stated that:
- [45]. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.
52. The plaintiff did not say on what basis the third party has been paying for the songs and why she continued to give new songs to the third party. The plaintiff was not candid to the court in this regard. She could not continue giving songs, receive payments for use of the songs but still maintain that she did not sign the deed or authorise use of the songs.
53. The conduct of the parties and, in particular, continued co-operation between the plaintiff and the third party whereby the plaintiff continued giving song to the third party for use while receiving payment from the third party, such conduct could only lead to the conclusion that parties did not intend that terms such as the year, who drew the deed or the amount would be a pre-condition to a concluded and legally binding agreement.
54. The plaintiff did not also say who gave the songs and copy of her identity card or number to the third party and why she had been receiving payments from the third party and for what, if not for the use of her songs. In the circumstances, I am inclined to agree with the third party that the plaintiff executed the deed and was bound by the terms therein.

## **Infringement**

55. The next issue is whether the defendant infringed the plaintiff's copyright. The plaintiff argued that the defendant had been using her songs without her consent or authority thereby infringing her copyright.



- The defendant maintained that it had authority from the third party by virtue of the deed to use the songs. The third party supported the defendant's position, stating that it authorised the defendant to use the songs and was paying the plaintiff for the use.
56. Under section 22 of the *Copyright Act*, (the Act), musical works qualify for copyright. Section 35 (1) (a) of the Act states that copyright will be infringed if a person who has no licence of the owner of the copyright does, or causes to be done, an act the doing of which is controlled by the copyright.
  57. Further, section 30 provides for the rights of performers while section 33 provides for assignment. Copyright is transmissible by assignment, licence, testamentary disposition, or by operation of law as movable property. Section 33(3) states that no assignment of copyright and no exclusive licence to do an act which is controlled by copyright "shall have effect unless it is in writing signed by or on behalf of the assignor, or by or on behalf of the licensor, as the case may be..."
  58. The import of this provision is that an assignment of copyright must be reduced into writing and should be signed by the owner of the copyright or on his behalf.
  59. Section 34 provides for rights and remedies of the licensees and sub licensees. Offences and penalties for infringement of copyright are provided for under section 38.
  60. As already adverted to, the defendant's case is that the third party authorized use the songs on the sikiza platform on the basis on the consent and authority from the plaintiff in the deed. It was on the basis of the deed that the third party allowed the defendant to use the songs in the sikiza platform. The third party stated that the plaintiff had been receiving payment for use of the songs and continues to do so to date.
  61. This court has already held that the plaintiff signed the deed with the third party. The third party indeed admitted that it had permitted the defendant to use the songs on the authority of the deed.
  62. Under clause 2 of the deed, the plaintiff assigned to the third party mechanical rights in all her musical works which belonged to the plaintiff at the time or which the plaintiff would acquire or create in the future. Under clause 3, the third party would, upon signing the deed, commence using the rights so assigned and the plaintiff would be deemed to have "accepted all decisions, acts deeds or other arrangements at any time made concluded or executed..." by the plaintiff.
  63. The plaintiff allowed the third party to use the songs. In the same vein, the third party allowed the defendant to use the songs which was allowed by clause 3 of the deed. The defendant having received authority from the third party who had permission from the plaintiff to use the songs, could not be accused of infringing the plaintiff's copyright.
  64. The plaintiff' argument that the deed talked about mechanical rights and not songs would, if accepted, be a defeatist argument. This is so because the plaintiff had been giving out songs and receiving payments for it and, therefore, understood what the arrangements were between the parties.
  65. I further note that the plaintiff did not amend its pleadings to include the third party even after the defendant disclosed that permission had been received from the third party for use of the songs. The plaintiff having received and continued to receive payments for the legitimate use of the songs, I find no blame on the part of the defendant as it had permission from the third party to use the songs.
  66. The plaintiff had sought an injunction to restrain the defendant from continued use of her songs but this quest was abandoned. This meant the defendant would continue using the songs unhindered. This reinforced the defendant's position that the use of the songs was legitimate having been authorized by the third party who had permission from the plaintiff.



67. The defendant also argued that the plaintiff was approbating and reprobating in this case and I agree. In *Royal Bank of Canada v Hirsche Herefords*, 2012 ABQB 32 (CanLII), the court stated that a person having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and he will not be regarded, in general at any rate, as having so elected unless he has taken the benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.
68. In the present case, the plaintiff's case was that she did not execute the deed with the third party and that the defendant was infringing her copyright. The plaintiff elected to abandon the prayer for an injunction to restrain the defendant from using her song and continued to receive payment from the third party as a benefit for the use of the songs.
69. This conduct is inconsistent with the plaintiff's position that her copyright had been infringed. The plaintiff is deemed to have admitted that the defendant's use of the songs was legitimate.
70. The plaintiff did not prove that the defendant used her songs prior to 2011 or the period when the defendant started using her songs without paying for them. The claim for damages would therefore not arise.

### **Conclusion**

71. Having considered the evidence and arguments by parties, the conclusion I come to is that the plaintiff's suit has no merit. It fails and is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2023**

**E C MWITA**

**JUDGE**

