



**Njongoro v Kenya Bankers Association & 2 others (Commercial Case E438 of 2019)  
[2023] KEHC 21124 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E438 OF 2019  
DO CHEPKWONY, J  
JULY 21, 2023**

**BETWEEN**

**STEPHEN MUIKIA NJONGORO ..... PLAINTIFF**

**AND**

**KENYA BANKERS ASSOCIATION ..... 1<sup>ST</sup> DEFENDANT**

**INTEGRATED PAYMENTS SERVICE LTD (IPSL) ..... 2<sup>ND</sup> DEFENDANT**

**CENTRAL BANK OF KENYA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit against the Defendants vide a Plaint dated November 29, 2019 seeking judgment to be entered against them jointly and severally in the following manner:-
  - a. That a permanent injunction do and is hereby issued restraining the Defendants, whether by themselves, their directors, officials, servants, representatives and/or agents from infringing or further infringing on the Plaintiff's copyrights and/or intellectual property rights of the concept of inter-banking transactions/services copyrighted as " All In One Banking Innovation" and "Air Money Virtual Banking Transfer Solution Innovation" by illegally operating Pesalink service and/or product.
  - b. An award of general damages amounting to One Billion Kenyan shillings (Kshs 1,000,000,000/=) for copyright infringement.
  - c. An award of exemplary damages for infringement.
  - d. Any other relief that this court may deem fit



- e. Costs of this suit.
2. The basis in seeking those prayers as pleaded in the Plaint is that the while in his employment with Co-operative Bank of Kenya between the year 2010 and 2014 when he resigned, the Plaintiff identified a gap in the banking industry where at the time it was impossible to conduct inter-bank transactions between two different banks. He explained that where someone needed to make payments/transactions through another bank where he/she is a customer, the practice was for that person to withdraw his/her funds from his bank and proceed to manually pay to the other bank. That his idea thus sought to bridge this gap by not only creating a platform where banking transactions could be conducted at the comfort and convenience of one's phone but also enabling a customer to do any banking transactions from any commercial bank without necessarily being a customer in both banks.
  3. The Plaintiff pleaded that he christened the idea as "All In One Banking Innovation" and registered the same as a copyright literary work with Kenya Copyrights Board which issued him with a certificate of registration on February 2, 2015. In addition to that, the Plaintiff pleaded that he also registered a concept of using software to conduct services at the comfort on one's phone as "Air Money Virtual Bank Transfer Solutions Innovation" and was issued with a certificate of registration thereto on July 14, 2015.
  4. It is the Plaintiff's case that he forwarded written works of his original concept of inter-bank transactions and the use of software platform to Central Bank of Kenya, (the 3<sup>rd</sup> Defendant herein) vide a letter dated May 19, 2015 seeking guidance on how he could introduce his concept to the Commercial Banks of Kenya. According to the Plaintiff, he expressed the fear in sharing his innovation directly with the banks in that letter since there was a possibility that it would be stolen without any compensation at all.
  5. The third Defendant the responded vide a letter dated May 28, 2015 wherein it expressed that the Commercial Banks were better placed to scrutinize the concept and if convinced with it, they would submit the same to it for consideration. The 3<sup>rd</sup> Defendant also suggested to the Plaintiff that it would be easier to channel his ideas to the Commercial Banks through the 1<sup>st</sup> Defendant, who represents all banks.
  6. Accordingly, on the June 2, 2015, the Plaintiff forwarded the concept and made a follow up vide emails send on June 6, 2015 and June 12, 2015. However, on July 13, 2015, the 1<sup>st</sup> Defendant turned down the Plaintiff's proposal and enlisted the reasons for refusal in a letter of even date.
  7. In view of the said responses, the Plaintiff denoted that neither the 1<sup>st</sup> nor the 3<sup>rd</sup> Defendant had a similar idea before his.
  8. The Plaintiff claims that on the August 13, 2018, he learnt that the 1<sup>st</sup> Defendant through its subsidiary Company, the 2<sup>nd</sup> Defendant had launched a similar innovation termed as Pesalink in February, 2018 and as at August, 2018 had transacted upto Kshs 81 Billion. According to the Plaintiff, Pesalink is a development of his innovative ideas (inter-bank transactions) which has been launched without his sanctions or license. He adds that the logo adopted for Pesalink is similar to the one he had submitted for registration but could not complete the registration owing to lack of funds. He seeks the Defendants to be permanently barred from infringing on his innovative works through Pesalink App.
  9. The Plaintiff's claim is denied by the Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint defence dated February 5, 2020 wherein it is pleaded that under its Constitution, one of the 1<sup>st</sup> Defendants core objective is to develop and implement new ideas and innovations in banking services. That, way back in the year 2005, under that mandate, it developed a national payments strategy way back in which the



Commercial Banks were integrated through a national payments switch. The same was implemented in a strategy known as Kenya Electronic Payment and Settlement System (KEPSS) which facilitated, large value payments, time critical transactions and automated interbank clearance. That it duly developed Pesalink under the same initiative and registered it as a trademark effective from the December 18, 2015. It is averred that the innovation by the 1<sup>st</sup> Defendant is different from the Plaintiff's. And in any event, the idea of interlinking banks is not unique to Kenya as it had previously been established in other countries globally.

10. The 3<sup>rd</sup> Defendant on the other hand filed a statement of Defence dated the February 26, 2020, wherein it avers that it is a constitutional body created pursuant to Article 231(1) of the [Constitution of Kenya, 2010](#). Its case in relation to the Plaintiff's claim, that it was not within its power to gauge and determine whether the innovations by the Plaintiff were original. However, it scrutinized the 1<sup>st</sup> Defendant's Pesa Link platform as required of it under the [National Payment System Act](#) No 39 of 2011 and it is not privy to the allegation that the Pesa link platform bear similar features with the Plaintiff's concept since the Plaintiff never submitted the final concept for scrutiny. Lastly, the 3<sup>rd</sup> Defendant sought the court to find that no cause of action was established against it and that the Plaintiff has not laid any basis for his claim of Kshs 1 Billion against the 3<sup>rd</sup> Defendant for an alleged breach of copyright.
11. After pre-trial and Case Management Conference, the case was certified ready for hearing and the Plaintiff testified on his own behalf on July 13, 2021 whereas the Defendants called two witnesses; Mr. Fidelis Muia who testified as DW1 on July 22, 2021 and Mr. Matu Mugo who testified as DW2 on September 13, 2021.
12. In his evidence in-chief, the Plaintiff adopted the witness statement dated November 29, 2019 which reiterates his averments in the Plaint with addition that literary works are one of the works eligible for copyright under Section 22 (1)(a) of the Copyrights Act and his concept was eligible. He then sought the court to award him damages and compensation for his transformative innovation.
13. On cross-examination, the Plaintiff admitted that he was dismissed from employment by the Cooperative Bank for failing to attend work for a full week and he had conceptualized the innovative idea during his employment. That, although he had realized the gap in the banking industry, he is not familiar with the legal regulations undertaken with respect to payments therein. He admitted that the 3<sup>rd</sup> Defendant is a public body mandated to prevent the public from banks and is therefore merely a regulator. He confirmed that when he conceptualized and crystalized the idea, he was working closely with some other two friends (Andrew Raiti & Ken Mugeru) who were still in employment with the bank. When asked whether he had considered his concept in line with other interline banking systems in existence on other platforms such as paypal which has more characteristics likened to Pesa-link, he stated that his research was confined to the Kenyan market.
14. DW1, Fidelis Muia informed the court that he was the 1<sup>st</sup> Defendant's Director of Technical Services, and he steers the initiatives geared towards enhancing technology and operations for the banking industry. That, upon the 1<sup>st</sup> Defendant developing the electronic payments and settlement system way back in 2005, and following the enactment of the [National Payments Systems Act](#), a study was commissioned with an aim of interconnecting the switches already developed by the 1<sup>st</sup> Defendant and then being used by various banks. The Bankable Frontier Associates was procured to carry out the study while taking into consideration the already existing interlink banking systems then in existence in the UK, Nigeria and India. Eventually, after three months of consultation, three options were arrived at namely; a single payment, multiple payment and default option. The banks involved in the consultation then opted for single payment switch as the preferable option. A task force was then commissioned to evaluate on its implementation and sometimes in 21<sup>st</sup> December, 2012, the



consultants delivered their final report on the Integrated Payment System (IPS). That, it is the said report which informed the establishment of the Kenya Interbank Transaction Switch. A sum of Kshs 849 Million was invested to operationalize the switch and sometimes in January 2013, meetings were held to discuss the modalities of governing the operation. The project was then launched on 1<sup>st</sup> June, 2015 with a pre-study phase being undertaken in Nairobi. By October of the same year (2015), the project was 36% complete the name Pesalink was agreed on. Pesalink was thereafter registered as a trademark effective from December, 2015 and the 2<sup>nd</sup> Defendant was thereafter incorporated to run Pesalink as a utility service.

15. According to DW1, the project was implemented in phases with more than 20 banks being involved and participating in the User Acceptance Testing Trials since the year 2013 which was long ago before the Plaintiff's idea was born in 2015. In any event, it is DW1's view that the Plaintiff's concept is different as it was meant to serve customer even those not registered with the subject banks whereas under the 1<sup>st</sup> Defendant's project, a customer ought to have an active bank account to utilize the services.
16. DW2, Mr. Matu Mugo on the other testified that he was then the 3<sup>rd</sup> Defendant's Assistant Director, Bank Supervision and was all aware of the Plaintiff's proposal letter and the response sent by the bank. However, he stated that there was no further response or communication from the Plaintiff since 28<sup>th</sup> May, 2015 until sometimes on 31<sup>st</sup> July, 2019 when the 3<sup>rd</sup> Defendant received a complaint letter by the Plaintiff with regard to an alleged copyright infringement. In response to the complaint, the 3<sup>rd</sup> Defendant advised the Plaintiff that issues relating to intellectual property rights are outside its regulatory purview. Further to that, the 3<sup>rd</sup> Defendant reviewed, scrutinized and approved the 1<sup>st</sup> Defendant's "Pesa Link" platform after it was convinced that it had met the statutory threshold required under the [National Payment System Act](#). However, to-date, the Plaintiff has never submitted a final copy of his concept to the 3<sup>rd</sup> Defendant for review and at no particular time did the 3<sup>rd</sup> Defendant confirm to the Plaintiff that there has never been in existence such related concept. As regards the allegations on conversion of the Plaintiff's logo by the 1<sup>st</sup> Defendant, the deponent averred that the alleged Plaintiff's logo is not registered and cannot be a basis for awarding the damages sought.
17. Further to the averments and testimonials summarized above, the parties filed written submissions in support of their respective cases. For the Plaintiff, extensive submissions dated October 13, 2021 were filed on his behalf by the Firm of Prof. Tom Ojienda & Associates, Advocates, for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, submissions dated March 12, 2022 were filed whilst the 3<sup>rd</sup> Defendant's submissions are dated March 14, 2022. Those submissions were extensively highlighted before court on the January 30, 2023 and to the assurance of the parties, I have read the submissions and considered the highlights made before court. This Court does not wish to reproduce the submissions here but the same will be highlighted along the analysis and determination below.

### **Analysis and Determination**

18. Having considered the respective Pleadings by parties and submissions made in support thereof, a common ground between the parties is that the Plaintiff's claim revolves around an infringement of the Plaintiff's copyright work registered on February 2, 2015 and July 14, 2015 and christened as "All In One Banking Innovation" and "Air Money Virtual Bank Transfer Solutions Innovation". According to the Plaintiff, while in the course of his employment with Co-operative Bank of Kenya Ltd in the period between 2010 and 2014, he identified a gap in the banking industry especially the inability to undertake interbank transfers which motivated his innovation. In his own words, he eventually came up with a proposal and a novel idea which would inter-link all bank transactions. It is the said proposal which was forwarded to the 3<sup>rd</sup> Defendant and with advice of the 3<sup>rd</sup> Defendant further forwarded to



the 1<sup>st</sup> Defendant. He told court that the 1<sup>st</sup> Defendant turned down the proposal and thereafter the Plaintiff seems to have paused the implementation of his proposal until sometimes in the year 2018, when he learnt that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had launched a platform in the name “Pesalink” which sought to inter-link all bank transactions.

19. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Pesalink platform which was developed at the watchful eye of the 3<sup>rd</sup> Defendant, has stark and glaring similarities with his innovative idea. He asserts that the launching of the Pesalink platform without his permission has infringed on his copyright and deprived him of the lawful compensation. The underlying question arising and which this Court consider to be issues for determination are therefore as follows:-

- a. Whether the Plaintiff’s proposal registered under the literary work category was copyrightable and hence infringed by the Defendants.
- b. Whether the Plaintiff deserves the reliefs sought.
- c. Who bears the costs of the suit.

20. On the first issue, it is important to glean through Section 2 of the of the Copyright Act which defines literary works as follows:-

“Literary work” means, irrespective of literary quality, any of the following, or works similar thereto—

- (a) novels, stories and poetic works;
- (b) plays, stage directions, film sceneries and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles.
- (d) encyclopedias and dictionaries;

21. Further to that, Section 22(3) of the same Act guides in the understanding when a literary work can be eligible for copyright. In that sense, it provides that a literary work cannot be eligible for copyright unless sufficient effort has been expended in making the work to give it an original character or the work has been written down, recorded or otherwise reduced to material form.

22. In the instant case, since the Plaintiff’s work was considered eligible and registered as copyright work way back in 2015 by the Executive Director of the Kenya Copyright Board, this Court will contrast the Plaintiff’s works against the requirement of having an original character to establish if it is eligible for Copyrights protection

23. It is undisputed that the Plaintiff first forwarded his copyrighted works to the 3<sup>rd</sup> Defendant through a letter dated May 19, 2015 seeking guidance on how he would introduce the innovation to Commercial Banks in Kenya. I have read through the Plaintiff’s works as compiled and intended for the Central Bank of Kenya and the Kenya Bankers Association and find the introductory paragraph reads as follows: -

“This is a well thought out idea which if carefully explored and brilliantly executed will not only bring a lot of revenues to the banks and the government through taxation but will bring ease and convenience to millions of customers in conducting bank business...”



24. Throughout the entire document, the Plaintiff discussed how magnificent and profitable he thinks the idea is. He even states that it can possibly be implemented via transactions over the phone just like 'Mpesa' works. He however leaves it at "it (the idea) will work perfectly if executed" without expressing how it can be implemented. Although in his view, he expected the same to be funded by the Central Bank and implemented by the Kenya Bankers Association.
25. With the foregoing, this Court is persuaded by the expression under Section 102 of the US [Copyright Act](#) which states that in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. That provision points out the old principle that an idea cannot be copyrighted but only the express in it can. An idea in this sense is the formulation of thoughts and expression of the idea constitutes the implementation of the said idea. Copyright law seeks to protect the expression and not the idea itself. This is so because an idea can be expressed and implemented in a number of different ways. In the resultant, a number of different copyrights may co-exist without infringement.
26. In the instant suit, it would be outside the purview of copyright law to seek to protect the Plaintiff's idea at the expense of the 1<sup>st</sup> Defendant's expression and resources expended to implement a closely related idea. The Plaintiff cannot purport to reserve the monopoly in the idea or illustration of effecting translink bank transfer in the country without having an expression on how to implement the same.
27. To the contrary, the 1<sup>st</sup> Defendant led evidence including minutes supporting that its Pesalink platform predates back in the year 2005 when a taskforce was sanctioned to work towards its implementation. That was long ago before the Plaintiff had his works registered in the year 2015. In the circumstances, it cannot be said that Pesalink is an assimilation of the Plaintiff's idea or illustration in the All In One Banking Innovation Concept.
28. In the premises, this Court finds that, the Plaintiff has not proved his case on the balance of probabilities and proceeds to dismiss it with costs to the Defendants.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Makokha counsel for Plaintiff

M/S Leila Ahmed counsel for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Kivindyó counsel for 3<sup>rd</sup> Defendant

Court Assistant - Martin

