



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 499 OF 2011

SIMON OTIENO OMONDI PLAINTIFF

VERSUS

SAFARICOM (K) LIMITED..... DEFENDANT

JUDGEMENT

1. By a plaint dated 11th November 2011, the plaintiff is seeking for judgement against the defendant for: -

(a) A declaration that the defendant's actions violate the plaintiff's rights under the Copyright Act (Act No. 12 of 2001) and that, the plaintiff is the copyright owner of the literary work, 'maliza story service' and the literary work 'credit advance of all value for mobile phone users' as more particularly embodied in the business proposals submitted to the defendant;

(b) An order immediately and permanently enjoining and/or restraining the defendant, its officers, directors, agents, servants, employees, representatives, related companies, successors, assigns and all others in active concert or participation with them from copying and republishing the plaintiff's copyrighted literary work titled 'maliza story service' and 'credit advance of all value for mobile phone users' or attendant copyrighted material without consent, license or otherwise infringing plaintiff's copyrights or other rights in any manner including but not limited to advertising, marketing and publicity in pursuit of profit and/or deriving benefits;

(c) An order requiring the defendant to account to the plaintiff for all gains, profits and advantages derived by the defendant in their infringement of plaintiff's copyright;

(d) General and punitive damages for copyright infringement of the plaintiff's literary works;

(e) An inquiry as to damages for infringement of copyright;

(f) An order for delivering up and forfeiture to the plaintiff of all infringing copies of the plaintiff's copyright work or in the alternative destruction upon oath of all such infringing copies and/or materials;

(g) Costs of the suit; and

(h) Interests on (d) and (g) above.

2. The plaintiff avers that, at all material times, he has been the owner of the copyright rights in and author of the original literary works entitled; "maliza story service" and "credit advance of all value for mobile phone users". On 5th June 2009, he forwarded to the defendant the aforesaid literary works in the form of a business proposal, under the title, "maliza story", detailing out the descriptions of services, regarding improved telecommunication services to the defendant's customers and more particularly, provision of a quality credit advances services.

3. He requested the defendant to consider his idea and/or concept. The defendant responded through its agent and/or employee; Mary Murage Mwithia, through an e-mail, acknowledging receipt of the proposal. That, Ms Mwithia indirectly intimated the defendant's lack of interest in the business proposal and/or literary work.

4. He then sent the defendant another business proposal on improvement of its credit advance, through incorporation of; credit advances for

different values. The defendant did not respond thereto.

5. However, on 8th May 2011, he was shocked to discover that, the defendant had infringed on his copyright and was running a promotion dubbed “maliza stori” with the “improved okoa jahazi” on one of the local dailies circulating within the country. He therefore avers that; the defendant has infringed on his copyright works by: -

- (a) *Using his legend of “maliza story” and unlawfully altering and/or changing the same to read “maliza stori”*
- (b) *Virtually embodying its credit advance services in similar and identical words as contained in his copyrighted literary works as expressed in the business proposals dated 5th June 2009 and 21st June 2009;*
- (c) *Adopting and using for benefit his literary work as embodied in the business proposals presented to the defendant;*
- (d) *Failing to identify him as the author or copyright owner of the legend “maliza story” thereby infringing on his moral rights;*
- (e) *Using or exploiting for gain and profit his copyrighted literary works without license and/or consent of the plaintiff; and*
- (f) *Publishing or reproducing without license his copyrighted literary works in the print and electronic media including but not limited to local dailies newspapers.*

6. The plaintiff further avers that, as a result of these acts of infringement, he has been deprived of; substantial benefit of his copyright works. Further, the defendant has in its possession copies of the infringing works and the infringement subsists to date. That, he expended labour and skill in coming up with the aforesaid literary work, in addition to the uniquely business concept or legend titled “maliza story”.

7. The certificates issued by the Kenya Copyright Board, are evidence of ownership of the copyrights. However, despite demand and notice of intention to sue having been issued, the defendant has refused and/or neglected to make good his claim or to desist from further infringement.

8. However, the defendant responded to the claims by filing a statement of defence dated 19th December 2011 and denied that the plaintiff is the author of the purported literary works entitled; “maliza story service” and/or “credit advance of all value for mobile phone users” as alleged.

9. The defendant averred that, the plaintiff procured the registration of the alleged works with effect from 10th August 2011, notwithstanding the fact that, the same do not meet the threshold set out at; section 22 of the Copyright Act No. 12 of 2001, as the concept of; “credit advance for mobile phone users” which has been used by the defendant’s related companies, Vodafone, in other jurisdictions as follows: -

- (a) In India where it is known as ‘*Chhota Credit*’;
- (b) In Egypt where it is known as ‘*Sallefny Shokran*’; and
- (c) In Spain where it is known as ‘*Anticipo de Saldo*’.

10. Further, even if the proposal was forwarded to the defendant as alleged, the defendant already had possession and knowledge of the concept by virtue of; the learning from other Vodafone operators, referred to above and was in the process of rolling out the same as a new product. Therefore, the proposal forwarded to the defendant, was of no value or interest to it and the plaintiff was expressly informed of rejection thereof by the defendant’s employee as the Defendant’s “okoa jahazi” services already captured the essence of his proposal.

11. However, the Defendant acknowledged, running a promotion dubbed “maliza stori” with “improved okoa jahazi” but denied infringing on the plaintiff’s copyright as alleged or at all; and/or as per the particulars stated. It averred that, the tag-line “maliza stori” was a marketing campaign headline that, was coined by the defendant’s public relations and marketing agents, RedSky Limited.

12. The defendant further denied basing its credit advance services in similar and/or identical words as contained in any copyrighted works of the plaintiff nor as expressed in any business proposals received from the Plaintiff. The defendant further denied depriving the plaintiff of the benefit of the copyright works as alleged. Finally, it was averred that, the certificates of ownership relied on by the plaintiff were issued on 12th August 2011, well after ‘okoa jahazi’ had been launched and the promotion ‘maliza stori’ concluded.

13. On 22nd December 2011, the plaintiff filed a reply to the defence and denied the allegation that, his alleged copyright works were in use in other jurisdictions and/or the defendant’s had possession and/or knowledge of the literary works from those other jurisdictions. He averred that, even if the tag-line, “maliza stori” was coined by the defendant’s marketing agents, RedSky Limited, the defendant is vicariously liable for the actions of its authorised agent.

14. At the close of the pleadings, the case proceeded to full hearing. The plaintiff testified in support of his case, and relied on the witness statement he filed dated 11th November 2011, alongside documents of the even date. He adopted the statement as his evidence in chief, literally reiterating the averments in the plaint. In a nutshell; he testified that, he came to court because, the defendant used his idea unlawfully, however, his claim is limited to “maliza story” tagline.

15. In cross-examination, he stated that, at the time he sent the proposal to the plaintiff he was aware that, “Okoa Jahazi” existed, but the

difference between his proposal and the defendant's was that, whereas the defendant's entailed disconnection of the call upon expiry of airtime, his idea would enable the customer to continue talking without disconnection.

16. He acknowledged that, the defendant did not respond positively to his proposals. However, when he sent another proposal on the interim value of credit to the defendant, he was not aware that, there were other credit advance systems in other countries. He conceded that, the defendant did not respond to the proposal but used his idea. That, he proposed credit advance up to Kshs. 200 but the defendant's newspaper advertisement capped it at Kshs. 100.

17. In re-examination, he maintained that, the defendant used his ideas without reference to him and it is suspicious that, three (3) years down the line, they used his idea, using the same words.

18. The defendant's case was supported by the evidence of; Mr. Daniel Ndaba, who relied on his witness statement dated 31st October 2016; together with a bundle of documents, filed therewith. He adopted the same and relied on it wholly. The contents thereof, are similar to the defence pleadings, save for the emphasis that, Okoa Jahazi enables customers to receive airtime on credit and Maliza Stori was a marketing concept.

19. In cross-examination, he stated that, he was not aware of the plaintiff's proposal of "maliza story" and/or "improved okoa jahazi services" sent to the defendant. However, he conceded that, he has stated in his statement that, the proposals were not acknowledged by the defendant. He maintained that, the products were developed by the defendant's marketing team, RedSky Limited.

20. In re-examination, he maintained that, at the time the plaintiff offered the proposal, the defendant was already using the products, "Okoa Jahazi" is owned by the defendant.

21. The parties filed a list of agreed issues for determination dated 8th March 2012; as follows: -

- a) *Whether the plaintiff is the author of the purportedly literary works entitled "maliza story services"*
- b) *Whether the plaintiff is the author of the purportedly literary works entitled "credit advance of all value for mobile phone user"*
- c) *Whether credit advance is a new concept in telecommunication industry;*
- d) *Whether the concept of credit advance for mobile phone users has been used by the defendant's company Vodafone in India, Egypt and Spain;*
- e) *Whether the defendant received any proposal from the plaintiff before Okoa jahazi had been developed by the defendant;*
- f) *Whether the plaintiff's proposal differed with okoa jahazi service already offered by the defendant;*
- g) *Whether the plaintiff's registration of the alleged works with effect from 10th August 2011, meets the threshold of section 22 of the Copyright Act, No. 12 of 2001,*
- h) *Whether the defendant has the plaintiff's unsolicited proposal in its possession;*
- i) *Who came up with the artistic works represented in the tagline "maliza stori";*
- j) *Is there a similarity between the plaintiff's tagline "maliza story" and the defendant's tagline "maliza stori";*
- k) *Is the plaintiff entitled to the orders sought in the plaint;*
- l) *Who should bear costs of the suit?*

22. At the close of the hearing, the parties filed their final submissions, whereby the plaintiff reiterated that, he is the author and/or originator of the innovations, inventions and/or the literary works, with the tagline "maliza story" and "proposed improvements of okoa Jahazi". That, he holds a valid copyright certificate number CR000916, which protects his concept "the maliza story service" and certificate number KCB0920 which relates to "credit advance of all value for mobile phone users".

23. That, the defendant's successful manipulation of his aforesaid works has rendered the entire concept unusable by any other company providing mobile services similar to the defendant and cannot be sold to any other telecommunication company within Kenya.

24. That the defendant has not adduced any evidence to prove that it is the originator of the two literary works nor demonstrated how it come into the possession thereof nor produced ownership documents, that demonstrates that, it has converted his literary works. He submitted that, Article 40 of the Constitution of Kenya, 2010, gives every person a right to acquire and own property of any description.

25. That the infringement of a copyright is not necessarily infringement of the exact or verbatim copy of the original but the resemblance with the original in a large measure is sufficient to indicate that, it is a copy, as held in the case of; Mount Kenya Sundries Limited v Macmillan Kenya (Publishers) Limited (2016) eKLR quoting the case of R.G Anand v M/S Delux Films & Ors (1978) A 1 R 1613, (1979) SCR (1) 218 (1978) SCC (4) 118.

26. He rebutted the defendant's averment that the word "stori" is a swahili word but argued that, it is a slang of the word "story". He submitted that Redsky Limited proposed the improvement of; Okoa Jahazi services, after being advised by the defendant upon receipt of his proposal.

27. However, the defendant submitted that, the alleged literary works are not original. That, for a copyright to be original, the author must have exercised the requisite intellectual qualities, labour, skill or effort in producing the work, as held in the case of; Labroke v William Hill (1964) 1 All ER 465. The relevant skill employed in creation of the works will be determined on the facts of a particular case.

28. That the plaintiff did not expend or exercise sufficient effort in proposing to the defendant to increase the denomination to be advanced to its subscribers. Thus, his proposal does not qualify as new works but derivative or copied works. For derivative works to be treated as original, it must satisfy three conditions: First, the labour expended must be of the right kind, that is, labour, skill and judgement must not be mechanical or automatic but must exhibit some individuality as held in the case of; Macmillan v Cooper (1924) 40 TLR 186.

29. Secondly, the effort must bring a material change in the work. Thus the labour, skill and judgement must have been applied to the existing material so as to, bring about change to the raw material and/or must have imparted to the product "some quality or character which the raw material did not possess and which differentiates the product from the raw material" as held by Lord Oliver in the case of; Interlego v Tyco (1989)AC 217 .

30. Thirdly for there to be material change in any literary works, there must, in addition be some element of material alteration or embellishment, which suffices to make the totality of the work an original work.

31. The defendant thus submitted that; the plaintiff did not exhibit individuality in proposing inclusion of more denominations to be advanced in Okoa Jahazi. His proposal only reiterated the defendant's model of access to the Okoa Jahazi service, as well as service charge.

32. Further, as the plaintiff's proposal for the improvement of; Okoa Jahazi service was not eligible for copyright protection; as per section 22 (3) of the Copyright Act, it was incapable of infringement. The defendant relied on the Court of Appeal case of; Mount Kenya Sundries Limited (supra), quoting the decision of; R.G Anand v M/S Delux Films & Ors (supra).

33. The defendant further submitted that; the plaintiff never registered a tag-line known as "maliza stori" and the word "maliza stori" is incapable of being copyrighted. It is a common word used by the public, of which the plaintiff cannot be the originator. The defendant relied on the case of; Mathews Ashers Ochieng v Kenya Oil Company Limited & Another (2007) eKLR where it was held that the words; "proudly Kenyan" are common words in public usage and no one in the public can claim monopoly by virtue of having acquired the registration.

34. That, more importantly the words "maliza story" fall in the regime of; trademarks as opposed to copyrights. The plaintiff did not register the tag-line "maliza story" with the Registrar of trademarks and no action can be brought on the infringement of unregistered trademarks. Reference was made to, the definition of a trademark under section 2 of the Trade Marks Act (cap), 506 of the Laws of Kenya.

35. I have considered the evidence adduced in total, including the submissions and issues raised for determination and I crystallize them as follows: -

- (a) *Whether, the plaintiff is the owner of the two literary works referred to herein;*
- (b) *Whether the defendant infringed on the plaintiff's copyright;*
- (c) *Whether the plaintiff should be granted the orders sought; and*
- (d) *Who should bear the costs of the suit?*

36. As regards the first issue I find note, the defendant argues that the plaintiff work is a trademark and not a copyright but the plaintiff argues it is literary works and/or a copyright Therefore, it is imperative to define terms; literary works and trademark. Section 2 of the Copyright Act (cap 130) laws of Kenya, defines literary works as;

"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) *encyclopaedias and dictionaries;*
- (e) *letters, reports and memoranda;*
- (f) *lectures, addresses and sermons;*
- (g) *charts and tables;*

(h) computer programs; and

(i) tables and compilations of data including tables and compilations of data stored and embodied in a computer or a medium used in conjunction with a computer,

but does not include a written law or a judicial decision”

37. Whereas section 2 of the trade mark Act cap 506, laws of Kenya states that: -

“trade mark” means, (except in relation to a certification trade mark) a mark used or proposed to be used—

(a) in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person or distinguishing goods in relation to which the mark is used or proposed to be used from the same kind of goods connected in the course of trade with any person;

(b) in relation to services for the purpose of indicating that a particular person is connected, in the course of business, with the provision of those services, whether with or without any indication of the identity of that person or distinguishing services in relation to which the mark is used or proposed to be used from the same kind of services connected in the course of business with any other person;

38. The same Act defines a mark as: -

“mark” includes a distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof whether rendered in two-dimensional or three-dimensional form;

39. However, before I deal with the subject issue, it is noteworthy the issue was raised by the defendant for the first time in the submissions, as such the plaintiff was not accorded an opportunity to address the court on it at the hearing. In that case, it is not available for consideration. Even then having considered the terms above, the idea fronted by the plaintiff can be classified under; “letters, reports and memoranda”; as defined under literary works.

40. Be that as it were, I shall now deal with the issue raised above for determination. In that regard, it is not in dispute that, at the time the plaintiff wrote to the defendant forwarding his first proposal, the defendant was already using the tagline “Okoa jahazi services”. The plaintiff acknowledged the same in the letter dated 5th June 2009, addressed to the CEO, Safaricom (K) Limited P.O. Box 46350-00200, Nairobi -Kenya, entitled “proposing a new “maliza story services.”

41. The plaintiff states in the letter inter alia;

“I’m also very happy for the lately implemented service “OKOA JAHAZI”. Now here is an idea/proposal of service known as “MALIZA STORY” a service that will enable the subscribers to enjoy communication without disappointment of being disconnected due to air time cut down”

42. The plaintiff the He concludes by stating”: -

“I hope that, this service will make the networks subscribers to enjoy their communication and also it will make the better option to be better. Thank you”.

43. Therefore the plaintiff’s proposal was to expound on the delivery of existence service in that his proposal under the tagline “maliza story” would enable the customer enjoy advance credit of up to; Kshs. 20, after the expiry of the customer’s positive credit balance, with advance warning to the customer that, the positive balance had expired. The advantage being to enable the customer continue communication without disconnection after the available credit expired. Therefore, it is undisputable that, “Okoa jahazi” was the defendant’s product and the plaintiff was as much aware of the same.

44. The question that arises is whether the plaintiff’s idea of “maliza story” was a new idea altogether or whether it was supplementary to; Okoa Jahazi or an improvement thereto. To answer the same, it suffices to note that, the defendant responded to the plaintiffs proposal through an undated email from Mary Murage Mwithia, informing him that, the defendant had a billing structure, with the ability to implement the concept of allowing subscribers to continue with calls despite exhausting current credit and allowing negative balances. It appears the defendant did not find any additional value in the plaintiff’s proposal and did not accept it.

45. By a letter dated 21st June 2009, the plaintiff acknowledges the response to his proposal and states that, though not accepted, “maliza story services” is completely different from “Okoa jahazi services”. He then offers a different proposal for improvement of “Okoa jahazi services” He suggests that, the defendant should give its “customers credit according to their classes, with an option of choosing a credit in advance of either; Kshs. 20, Kshs. 50, Kshs. 100 or even Kshs. 200, according to how they normally top up their phones so long as the company deducts the 10% of the service fee”.

46. The plaintiff pens of by stating, “I would request you to think about this suggestion hoping that, this will improve the Okoa jahazi services and make it better.” However, the defendant similarly did not buy into the plaintiff’s idea in the second proposal.

47. The question arises again as to whether the second proposal was an original idea or supplementary or an improvement to; Okoa Jahazi services. As already stated, the defendant argue that it was already utilising the credit advance services and produced several documents in proof thereof. Among these document is; “an emergency top up concept paper dated 21st July, 2008, product evaluation of; Okoa jahazi” undertaken by TNS Research International on behalf of the defendant. A copy of the defendant’s “Okoa Jahazi” Supplementary Business Rules Sigh Off dated 22nd June, 2009. I have considered these documents reveals and note that, they relate to the defendant’s final product “Okoa Jahazi”.

48. The defendant has also produced a copy of a brief it gave RedSky Limited on various dates, between April and May 2011 on improved Okoa Jahazi concept. That it was informed by the fact that, sometime in February 2011, the defendant noted that it had come under extreme pressure from its competitors leading to massive price reduction on its voice tariff and also acknowledged that from 1st April of the same year, Mobile Number Portability (MNP) would go live and this would further deepen its revenues in the event the subscribers ported to its competitors and as such, the defendants designed a tactical campaign to tackle MNP on three pillars; acquisition, retention and reward. Regarding okoa jahazi, the defendant revamped the same to enable the subscribers top up with various denominations of Kshs. 20, 30, 50 and 100. In addition, the credit advance could be used to browse the internet.

49. Accordingly, the defendant engaged Redsky Limited (‘Redsky’) to market its many existing, improved and new products including the revamped okoa jahazi to attract and retain subscribers.

50. Redsky came up with a marketing tag line ‘maliza stori’ to market the defendant’s revamped or improved product okoa jahazi.

51. The Defendant thus attributes its product “maliza stori” to RedSky Limited. However, RedSky Limited, did not testify to explain how they came up with the words “maliza stori”. There is no doubt that, by the year 2011, when RedSky Limited, came up with the words “maliza stori” the plaintiff had sent his proposal to the defendant on 5th June 2009, with the words “maliza story”.

52. In fact, the plaintiff wrote to Kenya Copyright Board complaining that, the defendant had infringed on his copyright works, He stated that, on 10th August 2010, he “decided to test the defendant” by “signing for them the first proposal concerning the Automobile Network Tracking Services dated 21st April 2009”.

53. He further states that, he received a letter written by Mrs Justine Njonjo on 23rd September 2010, to the effect that, the defendant had stopped receiving unsolicited proposals from the public and would not be in a position to consider the terms of his letter and wished him well. He lost hope and stopped sending proposals to the company.

54. He further states that; -

“I requested them to give me something small like appreciation for the work I’ve done and also I acknowledge them that I had sent other previous proposes like: -

a) Automobile Network Solutions Part I and II;

b) Maliza Story Services;

c) Improvement of Okoa Jahazi; and

d) Send and win with M-pesa”

55. It is clear that the plaintiff kept on sending proposals to the defendant, the defendant termed them as unsolicited and/or unwelcome. It is also clear that, the plaintiff wanted to be appreciated with whatever “something little”. It is evident again, the defendant was not ready to entertain him, leave alone consider an appreciation however, however small.

56. To revert back to the issue herein, the certificates of ownership of the concept and/or works claimed by the plaintiff were issued in the year, 2011, in particular on 12th August, 2011 for “the maliza story services” and 10th August 2011 for “credit advance of all value for mobile phone users”. It is therefore clear that the time the plaintiff sent the two proposal to the defendant, he had not registered any proprietary interest therein.

57. However, the provisions of section 22 (5) of the copyright Act provides that;

“(5) Rights protected by copyright shall accrue to the author automatically on affixation of a work subject to copyright in a material form, and non-registration of any copyright work or absence of either formality shall not bar any claim from the author.

58. Therefore, late registration of the plaintiffs alleged literary works do not bar his claim. However, the same section 22(1) to (4) states that:

“(1) Subject to this section, the following works shall be eligible for copyright—

(a) literary works;

(b) musical works;

(c) artistic works;

(d) audio-visual works;

e) sound recordings; and

(f) broadcasts.

(2) A broadcast shall not be eligible for copyright until it has been broadcast.

(3) A literary, musical or artistic work shall not be eligible for copyright unless—

(a) sufficient effort has been expended on making the work to give it an original character; and

(b) the work has been written down, recorded or otherwise reduced to material form.

(4) 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”.

57. The defendant relied on sub section (3) to argue that, the plaintiff did expend sufficient effort in the alleged works to give it original character. The plaintiff did not deal with this submission. However, it suffices to note that; copyright is legal protection for an author/creator which restricts the copying of an original work they have created. The key word is “original”. In the same vein, literary, dramatic, musical and artistic works will only be original, if they are the result of independent creative effort. They will not be original if they have been copied. The key to protection is independent creation.

58. The plaintiff states in his statement that, on 20th April, 2009, he proposed to the defendant, “the idea” of Automobile Network Tracking Solution, then followed with other proposals. It noteworthy that, ideas cannot be protected by copyright, although the form in which they are expressed can be. This is referred to in copyright circles as the “idea-expression dichotomy” or the “idea-expression divide.” Indeed, it is not always easy, however, to distinguish between an idea and the expression of an idea and the reproduction of a detailed pattern of incidents or ideas could constitute copyright infringement.

59. One of the earliest idea-expression cases dates back to 1879 when the Supreme Court considered the case of; Charles Selden, the author of Selden’s Condensed Ledger, a book that described and facilitated a unique way of bookkeeping. W.C.M. Baker, the auditor of Greene County, Ohio, published his own book on accounting that drew significantly on Selden’s method. Selden sued Baker for copyright infringement, and initially prevailed, but the Supreme Court reversed the lower court, holding that although Selden had a copyright interest in his book, “[t]he copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.” (see; *Baker v. Selden*, 101 U.S. 99, 104 (1879).

60. Whatever, the case may be, whether an idea or invention as stated in the plaintiff’s submissions, the evidence reveals that, the plaintiff in his proposals to the defendant, was to improve on the defendant’s product “Okoa jahazi” by allowing continuous communication even after expiry of available credit and the grant of credit in different denomination. Therefore, the plaintiff was riding on already existing defendant’s infrastructure.

61. He actually admits in his second proposal he was improving of the “Okoa Jahazi” therefore my finding is that the plaintiff did not originate the idea or technology communication and/or communication credit systems. In fact, the defendant had Kshs 50, denomination running.

62. However, there is no doubt that, the defendant’s use of “maliza stori” is similar to the plaintiff’s “maliza story” and the subsequent use of varying credit denomination, was initially the plaintiff’s decision. In that case the defendant is being less than candid to aver that, it did not take into account the plaintiff’s suggestion for improvement of their respective product.

63. Be that as it were, the use of that information does not pass the test of originality and sufficient expended effort to amount to original work that would be subject to infringement thereof. Originality for the purposes of establishing copyright requires the author’s own intellectual creation (*Infopaq International A/S v Danske Dagblades Forening* (2010) FSR 20).

64. The courts have traced the element of originality back to the Constitution, as is illustrated in; *Chamberlain v. Uris Sales Corp.*:

"Our starting point must be the Constitution. For, as the constitutional power to enact the Copyright Act... derives from Article I, § 8, that Act would be void if it went beyond granting monopolies (or exclusive franchises) to authors whose works 'promote the progress of science and the useful arts.' Obviously, the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional"

65. All in all, I find that, the plaintiff has not proved his case on the balance of probabilities, and I dismiss it with no orders to costs. I have declined to award costs on the finding that the defendant’s tag line ‘maliza stori’ is in close resemblance with the plaintiff’s ‘maliza story’

66. I also hold the view that it would have been in the interest of morality and institutional reputation of the defendant to have appreciated the plaintiff.

67. Those then are the orders of the court.

Dated, delivered and signed on this 22nd day May 2020

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Onyango for the Plaintiff

Mr. Kiche for the Defendant

Robert -----Court Assistant