



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL SUIT NO. 94 OF 2010.**

**ANN NANG'UNDA KUKALI.....PLAINTIFF**

**VERSUS**

**MARY A. OGOLLA.....1<sup>ST</sup> DEFENDANT**

**UNIVERSITY OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

Ann Nang'unda Kukali the Plaintiff was at the material time pursuing a Post-graduate degree of Masters of Education Administration at Maseno University. The 1<sup>st</sup> defendant Mary A. Ogolla was pursuing a Masters of Arts in Project Planning and Management at the University of Nairobi at its Extra Mural Centre in Kakamega. It is a requirement for students undertaking Masters degree course to conduct research in their area of study as a condition for the award of the degree. Before conducting such research the student is supposed to submit a research proposal to the supervisor indicating the area of study, the objective of the study, conceptual framework, study design, population, methodology of research and benefits or importance of the research.

The plaintiff as part of her research undertook a project research titled “*An Evaluation of Implementation of Safety Policy in Girls Boarding Secondary Schools in Bungoma Est District Kenya.*” The plaintiff submitted the proposal to Maseno University. The Plaintiff’s Proposal was approved and her research work accepted being in partial fulfilment of the award of the masters degree. The plaintiff then graduated from Maseno University.

Upon graduation she shared the thesis with a friend who passed it to the 1<sup>st</sup> defendant without the plaintiff’s knowledge and consent. The 1<sup>st</sup> defendant who was pursuing her Masters degree at University of Nairobi in Project Planning and Management then presented a topic for research to the University. The research proposal was “*Factors influencing the Implementation of Health and Safety Policy in Public Boarding Secondary Schools in Kenya. A case for Bungoma South District.*” The Plaintiff contends that the work presented was not the 1<sup>st</sup> defendant’s original work and that the 1<sup>st</sup> defendant had infringed her copyright by plagiarizing her work. She now prays for genuine damages and exemplary damages and injunction restraining the 2<sup>nd</sup> defendant from awarding the 1<sup>st</sup> defendant any degree premised on the complained research work.

The plaintiff upon filing the suit simultaneously filed application dated 21.9.2010 and by order dated 21.9.2010 Muchemi J granted temporary orders of injunction restraining the 2<sup>nd</sup> defendant University of Nairobi from including the 1<sup>st</sup> defendant from the graduation list for award of Masters of Arts in Project Planning scheduled for 24.9.2010.

The defendant in paragraph 4 of her defence;

Both the Plaintiff the plaintiff and 1<sup>st</sup> defendant gave evidence. Their evidence is basically as contained in their respective pleadings and witness statement filed. From the evidence it is not in dispute that the plaintiff authorized the proposal titled “*An evaluation of implementation of safety policy in girls Boarding Secondary Schools in Bungoma East District Kenya*” and submitted the same to her supervisor who having been satisfied as to its genuineness and authorship, accepted it in partial fulfilment of the plaintiff’s award of the Masters degree of the Maseno University.

The document had a certificate that it was original work of the plaintiff. The plaintiff further testified that through a mutual friend Naomi, she gave the copy of document to the 1<sup>st</sup> defendant to guide her in making her proposal. This defendant admits. The 1<sup>st</sup> defendant admitted that she drafted a 1<sup>st</sup> proposal which was materially similar to the plaintiff’s work and submitted it to her supervisors but the plaintiff complained to her supervisor and same was withdrawn. She then made another proposal.

Counsel for both parties filed written submission. Gitobu Imanyara for plaintiff submitted the Constitution affords every person to the right of privacy which includes the right not to have their communication infringed. He submitted that plagiarism occurs when a party present another person's work as their own, and it is for this reason that there is a requirement for the author to make a declaration to the effect that accompanies all submissions and works. He submitted that plagiarism is a fault based tort condition upon conditioned upon strict liability. He submitted that where it has been established, damages are awarded as a way to compensate the plaintiff for the loss incurred due to the wrongful action of the defendant as intellectual property is a right to protected under the law.

Mr. Khakula for 1<sup>st</sup> defendant submitted that the 1<sup>st</sup> defendant admits seeking the plaintiff's proposal and that her attempt to use the same to enrich her proposal was defeated by the plaintiff's action of complaining to 1<sup>st</sup> defendant's supervisor who thereupon rejected her proposal. She thereafter abandoned the proposal. Counsel submits that this did not amount to plagiarism. He submits that since the University rejected the proposal, which was an administrative action that was sufficient sanction. He submits that since the plaintiff's work was a proposal not published, it is not protected under the copyright Act and the Plaintiff did not suffer any loss as no evidence of such was tendered. Finally Counsel submits that the 1<sup>st</sup> defendant as a result of the plaintiff's action of complaining to the University was locked out of her graduation on 24.9.2010, received adverse publicity which caused her anxiety and anguish and shattered her ambition of getting a doctorate degree. He urges the court to award her Kshs.4,140,000/= as general damages on the Counter - Claim. Counsel urged this court to be guided by the Supreme Court of Kenya decision in **Martin Wanderi & 106 Others -Vs- Engineering Registrar Board & 10 Others [2018] eKLR**.

From the pleadings, evidence and submission the distilled issues for determination are;

- a). *Did the 1<sup>st</sup> defendant copy the plaintiff's proposal and submitted the same to University of Nairobi as her own work.*
- b). *Did the 1<sup>st</sup> defendant commit an act of plagiarism?*
- c). *If (b) is in the positive is the plaintiff entitled to damages.*
- d). *Is the 1<sup>st</sup> defendant entitled to general damages on the Counter-claim.*

On the 1<sup>st</sup> issue the Plaintiff produced her work as Exh.1 and the 1<sup>st</sup> defendant proposal as Exh.2. Muchemi J analysed these two publications. The Judge stated;

***“The Applicant referred to the court to the annexures, the first of which is her original work and the second one is that of the 1<sup>st</sup> Respondent. On perusal of the two documents, I find that the Applicant who was pursuing a degree of Masters of Education in Educational Administration in Maseno University under registration number PG/MED/062/2006 for her research proposal in partial fulfillment of the degree, the Applicant's topic was “An Evaluation of the implementation of Safety Policy in Girls Boarding Secondary Schools in Bungoma East District.”***

***“ The declaration that the work which was submitted was her original work and had not been presented in any other University for a degree was signed by the Applicant and her first supervisor on 04/08/2008. The Applicant graduated at Maseno University after her research work was approved in partial fulfilment of the Master's degree court. Therefore, the Applicant gave a copy of her work to a friend who is believed to have passed it to the 1<sup>st</sup> Respondent.***

***The second annexure is the work of the 1<sup>st</sup> Respondent which has been complained of herein. The Respondent is currently pursuing a Masters of Art Degree in Project Planning and Management in the University of Nairobi. The topic of research is “Factors Influencing the Implementation of Health and Safety Policy in Public Boarding Secondary Schools in Kenya: A case for Bungoma South District.” A declaration that the work is the 2<sup>nd</sup> Respondent's original work was signed by her on 12/06/2009 and also endorsed by her two supervisors on the same date.***

***The Literature Review appears on pages 8-18 of the Applicant's work (Annexure ANK 1) while that of the 1<sup>st</sup> Respondent appears on pages 7-21 of her work (annexure ANK 2). On perusal of the said pages, I note that the 1<sup>st</sup> Respondent has reproduced almost word by word the original work of the Applicant save a few words, phrases and references.***

***Under the sub-hearing “Abstract” on page ix of the Applicant's work, the same material content has been reproduced in the 1<sup>st</sup> Respondent's work under the same sub-heading with only a few changes in some words and rephrasing of sentences. The introductory paragraphs and the objectives of the study are similar focusing on the role of the Ministry of Education in tackling the problems at hand. The research is based on boarding schools with the Applicant giving their names as fourteen (14) and the 1<sup>st</sup> Respondents as ten (10). The method of data collection is the same being through questionnaires, interviews, observations and documents analysis.***

***The research methodology for both the Applicant's work and that of the 1<sup>st</sup> Respondent is contained in Chapter III of the research proposal. The sub-headings and contents under the sub-headings are the same.”***

The main issue in this suit revolves around the concept of plagiarism: Section 23 of the Copyright Act provides: -

***“24. Copyright by reference to country of origin***

***(1) Copyright shall be conferred by this section on every work, other than a broadcast which is eligible for copyright and***

which—

(a) being a literary, musical or artistic work or any audio-visual work, is first published in Kenya; or

(b) being a sound recording, is made or first published in Kenya; or

(c) being a broadcast, is transmitted from transmitters situated in Kenya.

**(2) Copyright conferred on a work by this section shall have the same duration as is provided for in section 23 in relation to a similar work.”**

Muchemi J in analysis the two work by plaintiff and the 1<sup>st</sup> defendant proposal submitted, stated in her ruling: -

**“The Applicant referred to the court to the annexures, the first of which is her original work and the second one is that of the 1<sup>st</sup> Respondent. On perusal of the two documents, I find that the Applicant who was pursuing a degree of Masters of Education in Educational Administration in Maseno University under registration number PG/MED/062/2006 for her research proposal in partial fulfillment of the degree, the Applicant’s topic was “An Evaluation of the implementation of Safety Policy in Girls Boarding Secondary Schools in Bungoma East District.”**

**“ The declaration that the work which was submitted was her original work and had not been presented in any other University for a degree was signed by the Applicant and her first supervisor on 04/08/2008. The Applicant graduated at Maseno University after her research work was approved in partial fulfilment of the Master’s degree court. Therefore, the Applicant gave a copy of her work to a friend who is believed to have passed it to the 1<sup>st</sup> Respondent.**

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**The Literature Review appears on pages 8-18 of the Applicant’s work (Annexure ANK 1) while that of the 1<sup>st</sup> Respondent appears on pages 7-21 of her work (annexure ANK 2). On perusal of the said pages, I note that the 1<sup>st</sup> Respondent has reproduced almost word by word the original work of the Applicant save a few words, phrases and references.**

**Under the sub-hearing “Abstract” on page ix of the Applicant’s work, the same material content has been reproduced in the 1<sup>st</sup> Respondent’s work under the same sub-heading with only a few changes in some words and rephrasing of sentences. The introductory paragraphs and the objectives of the study are similar focusing on the role of the Ministry of Education in tackling the problems at hand. The research is based on boarding schools with the Applicant giving their names as fourteen (14) and the 1<sup>st</sup> Respondents as ten (10). The method of data collection is the same being through questionnaires, interviews, observations and documents analysis.**

**The research methodology for both the Applicant’s work and that of the 1<sup>st</sup> Respondent is contained in Chapter III of the research proposal. The sub-headings and contents under the sub-headings are the same.”**

The defendant admits both in her defence and evidence that she heavily borrowed from the work of the plaintiff in her proposal to the University of Nairobi. Indeed except for very minor changes, a perusal of the two works are almost similar in substance, language and construction. An objective analysis cannot differentiate the two. It is therefore clear that the 1<sup>st</sup> defendant plagiarized the plaintiff’s work and passed it off as the product of her own. This in my view was plagiarism properly defined.

Plagiarism is a violation of intellectual property right of another. It is a tort against the owner of the intellectual work. Once the plaintiff proves the claim of plagiarism he is entitled to recover damages. He need not prove the actual loss suffered. This is so because copyright infringement is a strict liability tort and all the plaintiff needs to establish is that the defendant copied her protected work.

Having found that the 1<sup>st</sup> defendant plagiarized the plaintiffs work, I am satisfied that the plaintiff is entitled to damages. As a general principle damages are awarded as a way to compensate the plaintiff for the loss he incurred due to the wrongful action of the defendant. These damages are intended to return to the plaintiff back to the position he was before the wrongful act. The assessment of quantum of damages is at the discretion of the trial court. However in exercising the discretion of assessment the courts will take into account such factors as the extent of injury sustained; whether injury was committed deliberately and whether the defendant took any action to mitigate the injury. In this case the subject of the complaint was a research paper presented to the Maseno University, the plagiarized paper was submitted to the University of Nairobi and therefore publication was limited to the supervisors. I also note that when plaintiff, complained this subject publication was withdrawn.

It is important however to note that plagiarism is a threat to academic integrity in Kenyan Universities and courts should assist academic institution to maintain academic integrity. I therefore find that the award of Kshs.300,000/= (Three Hundred Thousand) would be adequate compensation by the 1<sup>st</sup> defendant to the plaintiff. The 1<sup>st</sup> defendant filed a counter-claim for damages on the grounds that she was restrained by this court from graduating on 24<sup>th</sup> September 2010. From the University of Nairobi. This Judgment has demonstrated that the 1<sup>st</sup> defendant had submitted a plagiarized work in partial fulfilment of her Masters degree Course. That being so the order to stop her

graduation by Ruling delivered by Muchemi J was proper. In my finding she did not suffer any loss for this court to award damages. I therefore dismiss the counter-claim with costs.

In the result I enter Judgment for the Plaintiff against the 1<sup>st</sup> defendant for Kshs.300,000/= (three hundred thousand) and cost of this suit.

**Dated, signed and Delivered at Bungoma this 5th day of June, 2020.**

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**S.N. RIECHI**

**JUDGE**