



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E253 OF 2019

RADIO AFRICA LIMITED..... PLAINTIFF

VERSUS

THE STANDARD GROUP PLC.....1ST DEFENDANT

KENYA BROADCASTING CORPORATION.....2ND DEFENDANT

RULING

1. **Radio Africa Limited** is the plaintiff in this action. The two defendants are **The Standard Group PLC** (the 1st defendant) and **Kenya Broadcasting Corporation** (the 2nd defendant).
2. The plaintiff has brought this action against both the defendants in respect to its allegation that the defendants have infringed its exclusive license which entitles the plaintiff to exclusively broadcast and transmit, inter alia, the live audio programmes in the English language, including live commentary of 5 English Premier league Matches in each week; and live audio programmes in the Swahili language and live commentary of 5 English premier league matches per week. The exclusive license to broadcast and transmit live audio programmes is for the season of 2019/2020. The plaintiff pleaded in its plaint that it has suffered loss and damage as a result of the infringement by the defendants.
3. The plaintiff by an interlocutory application dated 16th August 2019 seeks an injunction to restrain the defendants from making live audio transmission with commentary on the 2019/2020 English Premier League.
5. The 1st defendant filed a preliminary objections dated 4th September 2019 in the following terms:

“NOTICE OF PRELIMINARY OBJECTION

The 1st Defendant will at the first hearing of the Notice of Motion dated 16th August 2019 argue the following preliminary points:

1. ***The alleged exclusive agreement upon which the Plaintiff's cause of action is premised offends Section 21 of the Competition Act, No. 12 of 2010;***
2. ***No exemption has been granted to the Plaintiff to enter into the alleged exclusive agreement as required under Section 25 of the Competition Act, No. 12 of 2010;***
3. ***The alleged exclusive agreement upon which the plaintiff's cause of action is premised offends Section 84Q of the Kenya Information and Communications Act, Chapter 411 A;***
4. ***To the extent that the plaintiff seeks an injunction to restrain inter alia, the 1st defendant...from making live audio transmissions of with commentary on the 2019/2020 English Premier league... it acknowledges that there can be no copyright infringement having regard to section 22 (2) of the Copyright Act, Chapter 130;***
5. ***In any event, the Plaintiff can have no claim to copyright in the live audio transmissions in light of the express provisions of section 29 of the copyright Act, Chapter 130;”***

5. Both the plaintiff and the defendant are in agreement that preliminary objection is only raised on a pure point of law and is raised from clear implication out of the pleadings. This was restated by the Supreme Court in the case **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** thus:

“The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

[15] The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

6. The 1st defendant’s learned advocate in advancing submission in support of the objection began by stating that the 1st defendant accepts the factual basis in the plaint. That means that the 1st defendant accepted that the plaintiff has entered into an exclusive agreement with another entity for the broadcasting of the English premier league in Kenya.

7. The 1st defendant’s advocate began by posing the question whether the plaintiff was entitled to the claim of copyright. The learned advocate submitted that the premier league, which is played in England, is a foreign work which does not enjoy protection in Kenya. In this regard the learned advocate cited section 23(1) of the Copyright Act (the Act) which provides:

“Copyright shall be conferred by this section on every work eligible for copyright of which the author, or, in the case of a work of joint authorship, any of the authors is, at the time when the work is made, a citizen of, or is domiciled or ordinarily resident in, Kenya or is a body corporate which is incorporated under or in accordance with the laws of Kenya.”

8. The advocate also referred to section 22 of the Act which he stated it does not protect broadcast until the same has been broadcast. This is what section 22 (1) and (2) provides:

Works eligible for copyright

Subject to this section, the following works shall be eligible for copyright—

(a).....

(b).....

(c).....

(d).....

(e).....

(f)broadcast

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

9. The learned advocate re-emphasized those submissions by stating that since what the plaintiff alleges the 1st defendant is doing is simultaneously broadcasting the premier league at the same time as the plaintiff that there therefore cannot be infringement of copyright until the premier league was re-broadcast. On the ground on provisions of sections 22 and 23 the 1st defendant submitted that the plaintiff’s claim is unsustainable.

10. The 1st defendant’s advocate submitted that the plaintiff’s claim was further defeated by the plaintiff’s failure to obtain sanction, of its agreement, from Competition Authority. Looking at the preamble of the Competition Act the learned advocate stated that the said Act is

intended to promote and safeguard competition. In this case 1st defendant argued that it is the two entities entering into an agreement which provides for exclusive right to provide a service, in Kenya. That the said agreement prevents any other party from participating in the endeavour which in the end restricts competition. That the plaintiff needed to have obtained exemption from the competition authority as provided under section 25 of the Competition Act.

11. The 1st defendant, citing section 84Q of the Kenya Information and Communication Act (herein after Information and Communication Act) stated that the said section prohibits anticompetitive conduct. That the plaintiff is caught by the said section which prohibits the conduct which plaintiff has engaged in.

12. The plaintiff opposed the preliminary objection. That opposition was based on submissions that the 1st defendant had not raised a proper preliminary objection. That the 1st defendant should have argued its objections on the assumption that all, not some, of the facts are correct.

13. The plaintiff's learned advocate further submitted that the 1st defendant failed to produce evidence, but rather relied on bare statement, that the competition authority had not exempted the agreement on the broadcast of premier league. The plaintiff submitted that the 1st defendant in arguing that the plaintiff had not obtained exemption was raising a factual issue which would need consideration whether the conduct is actually anti-competitive. That accordingly the 1st defendant had failed to prove the alleged violation of competition law.

14. The plaintiff relying on the case **Governor of Kericho County vs Kenya Tea Development Agency & 30 others Ex parte KTDA Management Services Limited [2016] eKLR**, argued that the information and communication Act having provided a procedure for determining whether there was anti-competitive behaviour of an entity licensed under that Act, the court cannot overlook that procedure. The plaintiff relied on the decision in **Governor of Kericho case** (*supra*) as follows:

*“We agree with the respondent that the allegations raised about price fixing and manipulation falls within the province of investigation by the Competition Authority established under the **Competition Act (Chapter 504 of the Laws of Kenya)**. Under **section 4** of the Act, the Authority is empowered to receive complaints from legal or natural persons or consumer bodies and has the power to investigate restrictive trade practices which include price fixing manipulation.*

*We are of the view that the **Competition Act** provides an efficacious remedy for resolution of matters concerning price-fixing and manipulation.*

*We agree with and adopt the well-established principle established in **Speaker of National Assembly v Njenga Karume (Supra)** where the Court of Appeal that;*

In our view there is considerable merit.... that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

ANALYSIS

15. Bearing in mind that what I am considering is a preliminary objection, it is important to consider what the plaintiff's has pleaded in this case. The plaintiff pleaded that it has a license which entitles it to have in Kenya live audio programmes in English and in Swahili language of the live commentary of the English premier league for the season 2019/2020. The plaintiff further pleaded that by virtue of having paid the License fee it is entitled to beneficial use of the rights it acquired there under. It is that right/license/copyright that the plaintiff alleges the defendants have breached. The plaintiff has made the following prayers in its plaint:

a. A declaration that the plaintiff is the only local broadcaster that has the exclusive right to broadcast live audio transmissions with commentary on the 2019/2020 English Premier League within Kenya.

b. A permanent injunction restraining the Defendants (whether acting by their servants or agents or any of them or otherwise howsoever)from making live audio transmissions with commentary on the 2019/2020 English Premier League and thus infringing on the plaintiff's exclusive right.

c. An inquiry as to damages for infringement of copyright or, at the option of the plaintiff, and account of the profits made by the defendants by virtue of their infringement of copyright.

d. An order for the payment of all sums found to be due to the plaintiff upon the taking of such inquiry together with interest.

e. Aggravated damages for flagrant infringement.

f. Costs of this suit.

16. Having the above pleadings in mind I do find that the 1st defendant's objection is misplaced. This is because as the 1st defendant's learned advocate, quite rightly stated in his submissions; the facts as pleaded by the plaintiff must be deemed as agreed. It is clear even from the affidavit in support of the interlocutory application that the plaintiff's case is that it has an exclusive license of broadcast and transmission in Kenya of live audio programmes of the English premier league 2019/2020 season. It is that license, that the deponent of the affidavit, stated the defendants were infringing.

17. There is nothing before court which shows that the plaintiff wishes, by this action, to enforce protection of foreign works, as argued by

the 1st defendant. The 1st defendant's argument of whether or not such foreign works can be protected in Kenya, in as far as this case is concerned, is lost to me and in my view the 1st defendant erred in so submitting. It follows submissions on the provisions of section 22 and 23 of the Act have no basis.

18. Similarly, and as correctly argued by the plaintiff's learned advocate, there is no evidence/fact before me which shows that the plaintiff's exclusive license/agreement is anti-competitive. It follows that the court cannot, without evidence being adduced, conclude that the plaintiff's agreement breached the provisions of the Competition Act or the Information and Communication Act.

19. The 1st defendant in my view, was out on a limb, in submitting that the plaintiff's interlocutory application must fail for seeking to enforce a foreign copyright in broadcast. It is clear from the pleadings that the plaintiff, which is a Kenyan entity, is seeking to protect what it considers its right to carry out live broadcast of English premier league. The 1st defendant, therefore, in arguing its preliminary objection ran foul of the holding of the case **Mukisa Biscuit** (*supra*). The 1st defendant invited the court not only to engage in inquiry of whether the plaintiff was in breach of the Competition Act but also was imposing facts that had not pleaded by the plaintiff. The 1st defendant did not raise a proper preliminary objection.

CONCLUSION

20.. It is because of the above finding that I make the following orders:

a. The 1st defendant's preliminary objection dated 4th September 2019 is dismissed with costs to the plaintiff

b. At the reading of this Ruling a date will be fixed for the hearing of the plaintiffs Notice of Motion application dated 16th August 2019.

DATED and SIGNED at NAIROBI this 5TH day of November 2019

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT