



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 166 OF 2019**

**AFRICHA ENTERTAINMENT LIMITED.....PLAINTIFF**

**VERSUS**

**GAME 1<sup>ST</sup> QUALITY LIMITED.....DEFENDANT**

**RULING**

1. **AFRICHA ENTERTAINMENT LIMITED** is the plaintiff in this case. The plaintiff has sued **GAME 1<sup>ST</sup> QUALITY TZ LIMITED**, the defendant, alleging that the defendant entered with it an exclusive contract for Licensing and distribution rights for agreed content in the defendant's catalogue for movies and albums both audio and video music. Further the plaintiff alleged that the defendant infringed its copyright by entering into a similar agreement over the same content with another entity called Step Entertainment Company. The plaintiff by this action seeks, permanent injunction to stop the defendant proceeding with any agreement that infringes its existing agreement; mandatory injunction to compel the defendant to terminate any and all such infringing agreement(s); and an order for general damages.

2. The plaintiff has moved this court by an interlocutory application by way of Notice of Motion dated 15<sup>th</sup> August, 2019. The plaintiff, by that application, seeks interlocutory injunction orders, to restrain the defendant from dealing with the "content catalogue (whether audio or video, music and movies) exclusively licensed to the plaintiff; and to bar the defendant from licensing any other third parties over the same content licensed to the plaintiff.

3. The plaintiff through the affidavit of its director **Charles Mwaura Chang'a** alleged that it had gotten strikes on its Youtube channels from the company known as Steps Entertainment Limited and subsequently the plaintiff's Youtube channel by the name Africha Movies, with more than 240,000 subscribers was taken down by Youtube on the allegations that the plaintiff was in breach of copyright of Steps Entertainment Limited. The plaintiff's director further stated that there were further threats to take down another of its Youtube channel known as Steven Kanumba. The plaintiff's director stated that the plaintiff had incurred losses and lost earning due to the defendant's breach.

4. In its replying affidavit by the defendant's director, Gabriel Jeremia Mtitu, the defendant denied that the plaintiff's movies that received strikes were those that were purchased by the plaintiff. The defendant alleged the plaintiff had not come to court with clean hands because the plaintiff had failed to pay the defendant 30% of the market from the content; the plaintiff had failed to furnish the defendant with the link for their site, to enable the defendant keep track; and that the plaintiff had failed to give the defendant a report concerning content given. Further that the plaintiff had run trailers of defendant's movies that the plaintiff did not have a right over. That the plaintiff had received strikes from Step Entertainment Limited, which company had rights over the subject content.

5. The plaintiff through its director's further affidavit denied the allegations made by the defendant.

**ANALYSIS**

6. The plaintiff has, by its application sought both restraining and mandatory injunction. In considering both those prayers it is necessary for the court to exercise caution as was stated by the court of appeal in the case **MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) eKLR** viz:

*"The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits."*

7. It is also necessary to consider the principles of granting an injunction which were discussed in the case **ROBERT MUGO WA KARANJA V ECOBANK (KENYA) LIMITED & ANOTHER [2019] eKLR** as follows:

*“The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction:-*

*“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”*

8. Has the plaintiff shown a prima facie case with probability of success?

9. On *prima facie* basis I would respond in the negative. The defendant stated that the content licensed to the entity Step Entertainment Limited was dissimilar to that which is in the agreement between the plaintiff and the defendant. The defendant proceeded to set out the content which was the subject of the copyright strikes on the plaintiff’s Youtube which content was different from that licensed to the plaintiff. The defendant also raised a very pertinent issue, that the copyright strikes was done by Step Entertainment Ltd and not the defendant.

10. In my humble view those two, very pertinent issues raised by the defendant were not adequately responded to by the plaintiff. It is for that reason that I find the plaintiff has failed to show a prima facie case with probability of success.

11. Further I am of the view that the loss the plaintiff will suffer, if any, is loss which can be adequately be compensated by an award of damages.

12. On the whole the plaintiff has failed to satisfy the principles of granting an injunction.

13. Further I do find the plaintiff has failed to show special circumstances that would justify the granting of mandatory injunction. This is a prerequisite to granting such an injunction. See the case of **Rabai Kadili Agufa & another vs Kenya Power & Lighting Co. Ltd (2015) eKLR**

The considerations for granting interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal said:-

*“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:-*

*‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’.....*

In the recent case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said:-

*“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temp*

14. It is on the whole not clear whether the copyright strikes were over the very content the subject of the agreement between the plaintiff and the defendant. It as a consequence of the above finding that the plaintiff’s application fails. The costs of that application will follow the event, in this case the event is the dismissal of the application.

15. The plaintiff’s application dated 15<sup>th</sup> August, 2019 is dismissed, for the reasons set above, with costs to the defendant.

16. At the reading of this Ruling this case will be referred for mediation.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of DECEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**