



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.192 OF 2018

INCOGNITO PRODUCTIONS LIMITED.....1ST PLAINTIFF

AFRICAN ARTIST DEVELOPMENT

INITIATIVE LIMITED.....2ND PLAINTIFF

VERSUS

NATIONAL MEDIA GROUP.....DEFENDANT

RULING

1. The Plaintiffs brought this Copyright Action against the Defendant in respect to a Show dubbed Lit360 and have through the Notice of Motion dated 16th May, 2018 sought the following interim reliefs:

(i) spent

(ii) spent

(iii) spent

(iv) spent

(v) THAT pending the hearing and determination of this Suit, the Honourable Court be pleased to grant an injunction restraining the Defendants either by themselves, servants, beneficiaries, or any person claiming through the Defendant and/or agents from advertising and airing the TV and Radio show dubbed Lit360 and all corresponding promotional material related thereto until further orders of this Court.

(vii) THAT the Honourable Court be pleased to make such other Orders and/or issued such other directions as may be necessary to bring into effect any Orders granted and/or as the justice of the case may dictate.

(viii) THAT the costs of this Application be costs in the cause.

2. The 1st Plaintiff and the Defendant have an ongoing relationship in respect to a Television programme

known as “The Beat”. Pursuant to that relationship the Defendant and the 1st Plaintiff have entered into various Television Presenter’s Agreements (TPAs) which have been renewed from time to time since the year 2005 to date.

3. The Plaintiffs’ case is that in July 2016, it was approached by the Defendant to discuss and propose ways in which the Defendant could contribute and help advance the Local Music Industry. Subsequently, on 19th August 2016, the Representative of the Plaintiffs met with Representative of the Defendant to expand on some ideas that the 1st Plaintiff had conceptualized. At this meeting, it was agreed that the Plaintiffs would arrange a meeting between the Defendant and the person to implement the project. That it was on this basis that one of the 2nd Plaintiff’s Director (Brenda Muriithi) attended a meeting of 5th September 2016.

4. It is said to be in this latter meeting that there was focus on the creation of a Label that would sign new and upcoming artists together with established local talent. That at this meeting, the Plaintiffs highlighted the nuances of the Label which included the time it took to identify an Artist, cultivating the Artist to the point of Album release, marketing the release and the viability of making money through the Project. The Defendant was more interested in a faster turnaround and asked the Plaintiff to propose an idea with this in mind.

5. Five days later, on 9th September 2016, there was another meeting between the parties in which the Plaintiffs introduced the idea of a TV and Radio Station Show that would be simulcast. A simulcast is a simultaneous transmission of the same programme on Radio and Television or on two or more channels. At this point, the Defendant asked the Plaintiffs for a written proposal of the concept. A presentation of the concept was done on October 10, 2016 under the Project name The Fix96.

6. Pleased with the presentation, the Defendant agreed to facilitate the shooting of the concept in a Pilot project. This, again, was done but a reshoot was necessitated because the Defendant was not pleased with the Cameras used for the initial shoot. Thereafter, discussions began on the costs of running an episode. There were back and forth discussions on some budget proposals put forward by the Plaintiffs.

7. The Plaintiffs say that on 8th March 2017, the Defendant asked them to shut down the Project and close the discussions. So the Plaintiffs took this to be the end of the project. The Plaintiffs are aggrieved that on 3rd May 2018, the Defendant released a media statement announcing the launch of a media Label under the name Lit 360. The Plaintiffs were neither involved nor aware of the launch. The first episode of the Show was ran on Nation TV on 3rd May 2018 at 10.00pm. The Plaintiffs are unhappy that this was done without their authorization. Further that they were neither credited nor compensated by the Defendant. The Plaintiffs see an infringement and seek the following orders:-

a) An injunction restraining the Defendant either by themselves, servants, beneficiaries, or any person claiming through the Defendants and/or agents from advertising and airing the TV and radio show dubbed Lit360 and all corresponding promotional material related thereto pending the determination of the dispute between the Plaintiffs and the Defendant.

b) A Declaration that the Defendant has infringed the Plaintiff’s constitutional right to protection of property.

c) A Declaration that the Plaintiffs are entitled to control the commercial use and exploitation of their concept for the development of a music label with a TV and radio show dubbed Fix96 and later Lit360 that is simulcast unless such right be specifically assigned or licensed.

d) A Declaration that the Plaintiffs are entitled to be accredited as creators of the Lit360 TV and radio show.

e) That the Defendants admit liability and Rashmi Chugh issue an unequivocal apology for stealing from the Plaintiffs.

f) That this Honorable Court assess and award monetary compensation to the Plaintiffs for infringement by the Defendant of the Plaintiffs' right to control the commercial use of the concept dubbed Fix96 and later Lilt360 or other unequivocal aspects of TV and radio show.

g) That this Honorable Court award exemplary damages for the use of the Plaintiffs' concept without their consent.

h) The Honourable Court award special damages of Kes 143,900 spent (Kes 46,900 being cost of shooting a pilot for the Lit360 as proof of concept and Kes 97,000 cost of ticket refund for Brenda Muriithi).

i) Cost of this suit.

j) Interest on f, g and h above.

k) Any other relief this Honourable Court may deem just and fit to grant.

8. On its part the Defendant alleges that as the Beat Show was not performing as expected in terms of viewership and sponsorship, it commenced discussions with the 1st Plaintiff on how to improve it. Following the discussions, the 1st Plaintiff, on 18th August 2016, shared with the Respondent a proposal named 'Dreams2Beats' but this did not accord with the needs of the Defendant and so the 1st Plaintiff forwarded a second proposal which entailed revamping the Beats show by having a two hour Music/Entertainment Show with simultaneous broadcasting of the Beat on Radio and Television.

9. The 1st Plaintiff subsequently sent out a budget proposal for revamping the Beat but the Defendant found it to be unfeasible. It is a Defence that Lit360 concept was created by the Defendant's Digital team which started the Project in late 2015 and the same was launched in May 2018. The Defendant states that it has used approximately Khs.100,000,000 in launching the programme and has obtained Sponsors and Advertisers who have injected sum funds into the Show. It is the Defendant's case that the use of the words Lit360 borrows from a combination of a slang word LIT and the letters 360 borrowed from its offering of print, Radio, Television and Digital Platforms with an overall and all round perspectives in both information and entertainment. The Defendant state that the combined words Lit360 are not new and are in fact common. It cites an example of a brand of Tyre known as "Lit360 Ultra Reflective".

10. The Defendant contends that the Plaintiffs have never broadcasted in Kenya any Show from its concept or any Show known as 'Lit360' and as such the Plaintiffs have not built any goodwill or reputation in the concept nor can there be a likelihood of confusion as to enable the Plaintiffs claim for protection under the Law of passing off. The Defendant deny the Claim for infringement.

11. This is but a synopsis of the dispute which forms a basis for the court to determine whether the Application meets the threshold for grant of Temporary Injunction. **Giella Vs Cassman Brown** sets out the principles applicable to be;

First, an Applicant must show a Prima Facie case with a probability of success. Second, 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. Third, if the Court is in doubt, it will decide an Application on the Balance of Convenience.

12. In examining whether the Plaintiffs makes out a Prima Facie case, the duty of this court is neither to carry out a mini trial nor to make any firm findings on untested evidence that may embarrass the Trial Court. Another observation to be made is that as the Plaintiffs' cause of action is on an alleged Breach of a Copyright, the proposition that Copyright law is concerned not with protecting ideas, techniques or processes but an original expression of an idea is a theme that must be kept in mind.

13. There is evidence that the 1st Plaintiff and the Defendant have had an interaction at a professional, call it business, level since 2005. Through a collaboration the two have rolled out a Television Programme christened "The Beat". Their relationship in respect to The Beat is comprised in a Television Presenter's Agreement which has been renewed from time to time. Clause 6 of the Agreement reads as follows;

6 Confidentiality of Protected Information

6.1 At all times during and term of the Company's engagement by NMG, the Company shall hold NMG'S confidential and business information and trade secrets in the strictest confidence and will not disclose such information to any third party without written consent of NMG.

6.2 NMG shall be the sole owner of all income revenues and proprietary information as well as any Copyrights and Intellectual Property rights emanating from the show and the services rendered by the Company under this Agreement and the Company hereby assigns and or licenses to NMG any rights (whether of Intellectual Property, Performer's or moral rights) he may have or subsequently acquire in any broadcasts or programmes produced during the term of this Agreement.

It is an important provision in regards to the ownership of the Copyright and Intellectual property rights of The Beat. It vests the ownership of those Rights on the Defendant in no uncertain terms.

14. For starters, the Defendant takes the position that LIT360 is really just an improvement of The Beat and was formulated on the basis of its proprietary information and is therefore owns it. Shown to the Court is an email dated 13th March 2017 from the 1st Plaintiff which reads;

Hi,

When we met I was very excited because I knew I had finally found someone who understood my vision and was willing to work together for us to achieve those goals.

We have started this partnership from a while back from discussing the record label to talking Tv shows. I came up with the Radio/Tv idea in the first place because I was looking for a way to revamp The Beat show. I had been giving ideas to management on the 6th floor but no one would listen till I met you.

Along the way things started changing from THE BEAT 96 to THE FIX 96 and finally to LIT360, the idea became bigger, the budget became larger hence why we are here.

After our last meeting, I carefully assessed and made the decision to no longer be involved in LIT360. There are various things other than the budget that I don't agree with. I don't agree with putting LIT360 on THE BEAT's timeline. Am well aware it doesn't have ratings which is why I came up with the Tv/Radio idea in the first place and which is also why I have other plans and ideas to relaunch it.

This, among other reasons, have prompted me to make the decision not to be involved in LIT360 but rather Thank you so much for giving me your time to express my ideas.

PS.

All I want is to change the Local Music and Entertainment Industry....it's never about the money with me and that's the one part I don't think you understand.

Peter.

The words used can be construed to mean that LIT360 was a revamped and improved version of The Beat

which undoubtedly is owned by the Defendant. Secondly, there is an argument by the Defendant that by making it clear that it was no longer to be involved in LIT360, The Plaintiffs cannot insist on the ownership thereof.

15. On the other hand the Plaintiffs take the position that the two projects are separate and distinct. There is common evidence that after a discussion of some proposal (which the Plaintiffs insist were new concepts while the Defendant says were a revamp of The Beat), it was rejected by the Defendant on the basis that it was not feasible from a financial viewpoint. The plaintiffs maintain;

(i) That their proposal was to come up with a show concept complete with segment titles and breakdown and a name for the show.

(ii) That what began as a discussion to revamp the Beat ended up in discussions around a new show and this was after the second concept was shared with the Defendant on 5th October 2016.

(iii) That the rejected budget proposal was for LIT 360 and at the time of rejecting the Budget the Defendant indicated that it was unwilling to go on with the project.

The above positions are supported by the evidence of the former employee of the Defendant (one Oliver Waringo).

16. An issue for determination by the Trial Court is whether or not the dispute falls within or outside the scope of the “The Beat” and therefore the already existing Television Presenter Agreement (TPA). On the face of it, both sides take up plausible positions but a full trial in which evidence is tested will reveal the truth.

17. The other issue to be determined is whether what the Plaintiffs seek to protect is simply an idea and not an expression of an idea. The evidence that so far emerges is that there were various discussions on the proposals made by the Plaintiffs which at some point were merely ideas. However, it is common ground that at one time the ideas were expressed in a pilot show which was shot twice at the Defendant’s request and a USB Drive Comprising a Reshoot delivered to the Defendant. Counsel for the Plaintiffs makes the point that the show now run by the Defendant consists of actual segments from the Plaintiff’s proposal. It seems to the Court that the proposal given by the Plaintiffs evolved from an idea to an expression of an idea.

18. Was the expression original? The Defendant presses that the proposal is similar with 2 Nationally syndicated shows in the United States of America. The Plaintiff’s counter this by stating that the two American shows are on Youtube while their idea was to be, and is, simulcast. That is, simultaneously transmitted on Radio and Television. Whether the mode of transmission is a sufficiently distinguishing factor that sets out one idea from another is an issue to be determined by the Trial Court.

19. But it has to be said that the Plaintiff’s case is not a trifle. The case is in fact arguable and I am willing to find that they have made out a Prima Facie case with a probability of success. But that alone, cannot be reason for the Court to grant an Interlocutory Injunction.

20. Clearly demonstrated by the Television Presenter Agreements (TPAs) is that a contemplated outcome of the engagement between the Plaintiff and the Defendant was monetary in nature. If the discussions of the parties had ended amicably, then, just as provided in the TPAs, a fee would have been paid by the Defendant to the Plaintiffs. I did not hear the Plaintiffs’ Counsel argue too much about this. However, the Plaintiffs think that monetary compensation is not sufficient because the Plaintiffs are not being credited for their involvement in the making of LIT 360 and therefore losing out on goodwill.

21. As I turn to examine this argument, I acknowledge the merit in the proposition that the capability of compensating a Claimant in monetary terms cannot be an outright bar to a prayer for injunction [**Epcu Builders Limited Vs County Government of Kilifi (2017) Eklr**]. If the breach by the Defendant is flagrant, oppressive, blatant, arrogant and a glaring violation of the law, then it will not do for the

Defendant to say I am on the wrong but I can pay for it anyway! A Court of law would frown upon such arrogance and tame it by a restraining order. Yet in the matter before court, I have found that the Defence set up by the Defendant is a plausible one that deserves further interrogation through a full trial. I am unable, on the evidence, to find a blatant breach on the part of the Defendant and for that reason I still have to consider whether monetary compensation suffices.

22. It has to be common ground that some aspects of the Plaintiffs claim is monetary in nature. These are in prayers (f), (g) and (h) of the plaint which are;

(f) That this Honourable Court assess and award Monetary Compensation to the Plaintiff for infringement by the Defendant of the Plaintiff's right to control the commercial use of the concept dubbed FIX96 and later LIT360 or other unequivocal aspects of TV and radio show.

(g) That this Honourable Court award exemplary damages for the use of the Plaintiff's concept without their consent.

(h) The Honourable Court award special damages of Kes 143,900 spent (Kes 46,900 being the cost of shooting a pilot for the LIT360 as proof of concept and Kes 97,000 cost of ticket refund for Brenda Muriithi).

But the Plaintiff also seek to be accredited as creators of LIT 360 TV and Radio show. This, it is argued is beyond compensation in money. The argument by the Plaintiff is that; "the lack of credit to the Application is harm that cannot be quantified in monetary terms nor adequately cured by award of damages only as the episodes have already aired". There is strength in the argument yet on the other hand if the Plaintiffs were to succeed in the action, the apology to be made by the Defendants must necessarily include an acknowledgment that the plaintiffs are the creators of the Show. Any further loss that the Plaintiffs may have suffered resulting from failure of attribution may to, some extent, be compensatable by way of damages. That said, it may be a near impossible task to accurately work out the loss in goodwill that the Plaintiffs will have suffered.

23. What this Court is saying is that it is not certain that the Plaintiffs will not suffer irreparable loss but again its loss may be repairable by an award of damages. It is for that reason that the outcome of this matter must turn on the test of Balance of Convenience.

24. The test requires that I weigh the interests of both parties which invariably will be competing. I am asked by the Plaintiffs to find that if the injunction is not granted then it stands to suffer greater loss than the Defendant. That to grant an injunction would encourage creativity and bolster the need for the law to be upheld and will set a precedent on how the Defendant should in future engage on intellectual property.

25. These must be put on a scale against the argument by the Defendant that it has spent approximately Ksh.100,000,000 in launching the programme and has obtained sponsors and advertisers who have met part of the expenses for the show. The Defendant has set out that estimate in an Internal Office Memo dated 20th January 2018.

26. As I see it, the arguments put forward by the Plaintiffs proceed, by large, on the assumption that the Defendant is definitely on the wrong. If this Court were to grant the injunction only as a way of striking a blow for the need to respect Copyright Law then it will have to be premised on Strong Evidence that there has in fact been infringement, a matter that I have been unable to find at this stage. On the other hand, the Defendant has given evidence that it has spent a substantial amount of money in rolling out the show and has engaged third parties through sponsorship and advertisement. The grant of injunction may not only cause a direct monetary loss but a disruption of relationships with sponsors and clients which may, in themselves, have monetary ramifications. Yet I must say this would not have caused this court any anxiety if on, the two other limbs, an injunction was clearly deserved. But for now, where there is some degree of hesitation, the scales tip in favour of the Defendant.

27. And perhaps I need to add that the Plaintiffs may have themselves to blame for these state of affairs. In paragraph 8 of the Supporting Affidavit it is deponed:-

THAT the Defendant then asked the Plaintiffs for a written proposal of the concept. The 2nd Plaintiff suggested that the Parties should sign a Non-Disclosure Agreement, to which Defendant's reply was "Why would I want to steal your idea? I don't steal ideas. Just send the proposal and we will work together. We don't need NDAs." The Plaintiffs left the meeting with the understanding that we would come up with and develop the concept, and the Defendant would support and get it to air ASAP.

If the Plaintiffs thought that their proposal needed some protection through a non-disclosure agreement then they should have insisted on it. It now seems that the failure to do so was imprudent and they may have to suffer some inconvenience until the truth in this matter is unraveled at the hearing. Intellectual Property is an asset and when its owner possesses information which he/she is willing to share with a recipient then it is only sensible that the owner safeguards the information against misuse, infringement or breach of confidence by entering a Non-Disclosure Agreement with the Recipient. This may be one way of avoiding an "oh my God I was cheated" moment.

28. The upshot is that I decline to grant the prayers sought in the Notice of Motion of 16th May 2018 which is hereby dismissed with costs.

Dated, Signed and Delivered in Open Court this 6th day of June 2018

F. TUIYOTT

JUDGE

In the presence of:

Ogutu for Applicants

Nyaburi for the Defendant

Nixon- Court Assistant