REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.196 OF 2018

EVANS GIKUNDA.....PLAINTIFF/APPL.

VERSUS

PATRICK QUARCOO .....1ST DEFENDANT/RESP.

RADIO AFRICA LIMITED.....2ND DEFENDANT/RESP.

SAFARICOM PLC.....3RD DEFENDANT/RESP.

R U L I N G

This is a ruling on the Plaintiff's application dated 21st May 2018 it seeking the following orders:-

1. Spent

2. Spent

3. Temporary injunction to restrain the Defendant from using passing off, selling, offering for sale, broadcasting, advertising or making available to the public, or in any way from further infringing upon the Plaintiff's/Applicant's copyright and/or intellectual property over the software platform referred to as *'Songa by Safaricom'* in any manner whatsoever pending the hearing and determination of this suit.

4. Mandatory injunction to direct and/or compel the Defendants to deliver up to Court any article in their possession which appears to the Court to be used for making infringing copies of the Plaintiff's protected and/or copyrighted works currently known as *"Songa na Safaricom"* and records of such data, copies of all purchases and sale records, server credentials and any item which constitutes or could constitute evidence necessary to prove his claim and for purposes of preserving such evidence.

5. In the alternative to prayer 4 above the Inspector of Kenya Copyright Board be authorized to enter the Defendants' premises to inspect machines, gadgets and take such data, make copies of all purchases and sale records, access servers and server credentials and any item which constitute or could constitute evidence necessary to prove his claim and for purposes of preserving evidence.

6. That the Plaintiff in company of Inspector of Copyright Board to enter the Defendants premises to seize and keep such record, data, documents and materials relating to the platform for safe custody and preserve the to safeguard vital evidence for trial.

7. That this Court grant Anton Pillar orders to enter the premises of Defendants and 3rd party to seize, collect and keep machines, data, documents or storage materials relating to his copyright in the platform.

Grounds on the face of the application are that the Plaintiff initially worked for the 2nd Defendant's subsidiary TrNC Digital Limited. In August 2013, Plaintiff was employed by the 2nd Defendant as a Web and Digital Manager upon takeover of the subsidiary.

The Plaintiff contends that he conceptualized, designed and developed an original music streaming platform known as the Platform which was later renamed RAMP and subsequently changed to NakedGroove in the year 2014.

That the Platform was to enable users to stream music, listen to FM Radio stations, watch videos, view lyrics from various sources and connect with other users through web application referred to as Platform.

That while working for the 2nd Defendant, he mentioned, demonstrated and shared the link to the platform with the 1st Defendant in his capacity as the 2nd Defendants Chief Executive Officer (CEO). He shared it as one of the innovative ides he has been developing for some time since this was of his requirement in the employment contract.

That the 1st Defendant was very excited with the idea and having been satisfied that it was an innovation out of employment, he persuaded Plaintiff to partner with him in his personal capacity to ensure that the product which was in advanced stage went into the market.

The Plaintiff avers that on 31st May 2016, he was forced to resign and thereafter, the 1st Defendant took advantage of his absence and sold The Platform to Safaricom PLC. The Applicant learnt the 2nd Defendant had commercialized The Platform without his consent when he saw adverts by Safaricom in the name '*Songa by Safaricom'* in January 2018.

That as a result of the Defendant's violation of the Plaintiff's copyright, he has been deprived of the use, utilization and benefit of The Platform a right guaranteed to the Plaintiff by law.

The Applicant filed Supporting Affidavit restating grounds of opposition. He further averred that the 1st Defendant proposed that they enter into a partnership which included the 2nd Defendant and one William Chesire where they were to have shares as follows:

Radio Africa (2nd Defendant)	40%
Evans Gikunda (Plaintiff)	30%
Patrick Quarcoo (1st Defendant)	20%
William Chesire	10%

He averred that the 1st Defendants proposal was to register a company but later changed his mind and decided to use a disused company but change ownership to reflect the above shareholding.

Plaintiff averred that he later realized that the 1st Defendant did not give his offer in good faith but was focused on appropriating The Platform from him for his personal benefit.

Plaintiff averred that the 1st Defendant acknowledged through various communications that the idea was originally for the Plaintiff and that he just came in to improve it.

In response, the 1st and 2nd Respondents filed grounds of opposition dated 22nd May 2018.

The 1st and 2nd Respondents accused the Plaintiff of material non-disclosure; that the Plaintiff failed to disclose that there is an existing suit between the same parties currently pending before Milimani High Court Civil Suit No.164 of 2018 and the application contravene the doctrine of subjudice which ousts the jurisdiction of this Court; that the application offend the equitable maxim that "he who comes to equity must come with clean hands."

The 3rd Respondent filed Replying Affidavit dated 29th May 2018 sworn by its Senior Manager. He averred that he is aware of an agreement between the 2nd, 3rd and Convergence Africa Media Limited (CAML) where they partnered to commercialize CAML's music streaming application named Songa. He attached the Agreement.

3rd Defendant averred that under Clause 13 of the Agreement, CAML owns the intellectual property rights to the Songa streaming application, its code, software and underlying methods.

He averred that the application was launched on 12th February 2018 and that the *Songa By Safaricom* is a music streaming app downloadable from all android users by dialing *812# to get a download link; that it has created alternative/additional revenue stream for local and international music artists.

That the application currently has a catalogue of over 2.5 million songs from 400,000 and the list is growing; that payment is as per airtime billing.

3rd Defendant averred that the 1st Defendant has signed agreements with international and local labels and music aggregators including Sony Music Entertainment, Africoric, Ngoma and Xpedia.

The 3rd Defendant contends that grant of orders sought would adversely affect the artists and aggravators who are not parties to this suit.

The 3rd Defendant contend that copyright in any original works vests upon the material or fixed expression of an original idea rather the idea itself.

That even if one was to assume that the Plaintiff came up with the idea, he has not demonstrated that he went on to express the idea in

material/copyrightable form capable of being infringed upon.

The 3rd Defendant further contends that the Plaintiff has expressly admitted that at the time he claims to have come up with the idea of music streaming up, he was employed by the 2nd Defendant and for that reason any copyright work belong to his employer.

That Plaintiff cannot claim ownership of copyright of works developed in the course of his employment for which he must have been paid agreed salary.

The 3rd Defendant confirmed that there exists Suit No.164 of 2016 where the 1st and 2nd Defendants are Plaintiffs while the Plaintiff herein is the Defendant. He attached a copy of the Plaint and application for injunction; that nondisclosure of the other suit was intended to obtain exparte orders and by conduct of this suit, the Plaintiff has failed to come to Court with clean hands.

Counsels for the parties herein did oral submissions.

Counsel for Plaintiff refuted the claim that there is a dispute between the parties herein concerning the subject matter. He submitted that in Case No.164 of 2018, the Applicant is sued for breaching terms of employment and issue of infringement of trademark has been raised. He argued that what should be disclosed is material and that this suit was not intended to steal a match.

He further submitted that the principle of subjudice is not applicable in this case as issues are fundamentally different.

Counsel further submitted that the Applicant has shown that he created the application and shared with the 1st Defendant as Chief Executive Officer .He argued that the Defendants have admitted that the Plaintiff created The Platform and at the same time saying it is owned by a 3rd party. He submitted that the balance of convenience lie in favour of the Plaintiff.

Counsel for the 1st and 2nd Defendant urged Court to take judicial notice of the fact that the subject matter is copyright infringement and that the Plaintiff has substantially relied on evidence in File No.164 of 2018 to support his case; that the issue of who own the copyright is also an issue before HCC No.164 of 2018; that the two Courts will make a determination on the same evidence thus this matter is subjudice.

Counsel further submitted that the Applicant has not tendered any document to show that he has expended effort in developing the software or that he actually own the said software; that the application does not meet the test set in the case of Giella Vs Cassman Brown.

He further submitted that damages are ascertainable as prayer *e* is an account for income.

On Anton Pillar order, he submitted that the threshold is higher than that of Giella Vs Cassman Brown. That the Applicant is required to demonstrate that the subject matter can be destroyed; on balance of convenience, he submitted that the business is currently running and there is no supporting document that the Defendants will not be able to compensate the Plaintiff.

Counsel for the 3rd Defendant associated himself with submissions by Counsel for the 1st and 2nd Defendants.

Counsel submitted that there are 3 substantive issues:

1. Whether the Plaintiff had developed a software, which is similar to *Songa* platform,

2. If he developed, whether he was in the 2nd Defendants employment & if he employment, by dint of Section 23 & 24 of the Copyright Act, the copyright belongs to the employer,

3. Whether the Plaintiff has *loci standi* to bring the case for copyright infringement.

Counsel submitted that the answer to the 3 questions is no. He submitted that there is a tripartite agreement between 2nd, 3rd Defendants and a company called Convergence Africa which has not been made a party to this suit and orders issued may affect a party who has not been heard.

On primafacie case, Counsel submitted that the Applicant has not demonstrated that he reduced the idea he claimed to have developed to literary format and therefore is not capable of being copyrighted; that copyright infringement do not extend to ideas. He said there is nothing to show what the Plaintiff developed and there is therefore no primafacie case.

On general damages, he submitted that the Plaintiff has pleaded general damages and accounts in paragraph (b) and (e) and he cannot therefore say that damages is not adequate.

On balance of convenience, he submitted that it lies on denying injunction. He added that the Plaintiff did not come to Court immediately as the application was in February and he came to Court in June.

I have considered rival submissions herein. I have also perused documents attached to affidavits file and authorities cited and wish to consider the following issues:-

1. *Whether the Applicant is guilty of material nondisclosure;*

2. *Whether the threshold for grant of injunction and Anton Pillar orders have been met.*

On issue of non-disclosure, I have perused the Plaint and application attached to responses herein and do confirm that the subject matter in File No 164 of 2018 is ownership of copyright. The Plaintiffs were seeking to restrain the Applicant herein from laying claim on the copyright. It is clearly the same issue in the instant suit. The Applicant should have disclosed pendency of that suit. I find that the Applicant is guilty of material non-disclosure. Ordinarily a party found guilty of non-disclosure does not deserve grant of orders sought but in the interest of justice I will consider the prayers sought on merit.

I wish to consider whether prerequisites for grant of injunction have been met. The Plaintiff claims that he developed the application and shared its link with the 1st Defendant who later shared with the 2nd Defendant without his consent.

On the other hand, the 2nd Defendant is claiming ownership of the copyright and goes further to argue that even if one was to assume the Plaintiff developed it, he did so while in the 2nd Defendants employment; that it was part of his job requirement to develop the app thus belonging to the 2nd Defendant. The 3rd Defendant has also argued that if the idea was the Plaintiff's he never reduced it to literary work and is not therefore capable of copyright infringement.

On perusal of annexures to the affidavits filed, I am of the view that the issue ownership of copyright can only be established after evidence has been adduced in this matter. The 2nd Defendant indicated that it rejected an application developed by Plaintiff for lack of originality. It is not also disputed that the Plaintiff was in the 2nd Defendants employment.

The Court will be called upon to make a determination as to whether the app was developed in the course of employment; if so whether employer is entitled to ownership. A determination can only be arrived after a full hearing. At this stage, it is difficult to establish whether the Plaintiff has high chances of success in respect of his claim.

I wish to proceed to consider whether damages would be sufficient to compensate the Plaintiff in the event that he succeeds in proving his claim.

3rd Defendant contends that it has expended Kshs. 100,000,000 towards development, promotion/advertisement of the app through billboards, fliers, print and electronic media.

On perusal of the Plaint I note that the Plaintiff has, sought general damages and full account to be rendered from performance income and profit earned from use of the platform among other prayers; it is therefore evident that income and profits earned from use of the platform are ascertainable.

I also note from averments that other parties are benefiting from use of the platform and orders of injunction may adversely affect them. In view of the fact that there is need to establish ownership of the copyright and the likelihood of adverse effect on other parties who have not been enjoined in this suit, I find that the balance of convenience tilts in favour of the Defendants.

I am however of the view that there is need to preserve evidence for purposes of trial as sought in prayer 5 of this application. This will assist the Court in arriving at a fair and just determination on the issues between parties herein.

FINAL ORDERS

1. Prayers 3, 4, 6 and 7 disallowed.

2. Prayer 5 is allowed; I do direct the inspection of Kenya Copyright Board machines, gadgets and take such data, make copies of all purchases and sale records, access servers and server credentials and any item, which constitute or could constitute evidence necessary to prove parties' claim for purposes of preserving evidence.

3. The parties set down this matter for hearing on priority basis after compliance with pretrial directions.

4. Costs in the cause.

Dated and **Delivered** at **Nairobi** this **17th** day of **October, 2018**

……

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: **COURT ASSISTANT**

OMITI: **COUNSEL FOR PLAINTIFF/APPLICANT**

KAHORO H/B FOR NJERU: **FOR 1ST & 2ND DEFENDANTS/RESP.**

MS. ROTICH H/B FOR MR. MUSYOKA **FOR 3RD DEFENDANT/RESP.**