REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 430 OF 2015

CORETEC SYSTEMS AND SOLUTIONS LIMITED.....PLAINTIFF

VERSUS

JACKSON MUTUKU KIIO.....1ST DEFENDANT

SURESTEP SYSTEMS AND SOLUTIONS LIMITED.....2ND DEFENDANT

VICTOR WANYONYI SIMIYU.....3RD DEFENDANT

RULING

[1] The Plaintiff, **Coretec Systems and Solutions Limited**, filed this suit on **9 September 2015** seeking a Permanent Injunction to restrain the three Defendants, **Jackson Mutuku Kiio, Surester Systems and Solutions Limited,** and **Victor Wanyonyi Simiyu**, and each of them by themselves, their servants or agents or otherwise howsoever from using the confidential information or any information of the Plaintiffs for the purpose of enhancing their trade or business for a period of two years as per their agreements. The Plaintiff also prayed for General Damages for breach of contract, interest and costs. Contemporaneously, the Plaintiff filed the Notice of Motion dated **9 September 2015** for interim relief by way of **temporary injunction** pending the hearing and determination of the application.

[2] On the **3 May 2016**, the Plaintiff filed an Amended Plaint which widened the nature and scope of the relief sought to include a Permanent Injunction to restrain the Defendants from infringing its registered copyright in the literary works set out in paragraph 5A of the Amended Plaint; as well as an order for the payment of all sums found to be due to the Plaintiff upon the taking of accounts and inquiry pursuant to **Section 35(4) of the Copyright Act**, or under the equitable jurisdiction of the Court. The Plaintiff filed an Amended Notice of Motion dated **28 April 2016** on even date to attune the same to the prayers sought in the Amended Plaint.

[3] The Defendants filed a Statement of Defence to the Amended Plaint together with a Replying Affidavit to the Amended Notice of Motion on **27 June 2016**; and while the Plaintiff's application was pending hearing and determination, the Defendants filed an application dated **6 October 2016** on **7 October 2016** seeking stay of Chief Magistrate's Civil Case **No. 6615** of **2016** which had been filed on **27 September 2016** in connection with the same subject matter, which order, it was averred, had the effect of stalling the business of the 2nd Defendant and causing its clients to terminate contracts that had already been entered into. Three days following the filing of the Defendant's application dated **6 October 2016,**

the Plaintiff filed its second application dated **10 October 2016** seeking further restraining orders, including an Anton Piller order authorizing it to enter into the premises of the 2nd Defendant, among others, for the purpose of collecting, seizing and keeping machines, data, documents or materials relating to the Plaintiff's registered copyrighted software. Accordingly, this Ruling is in respect of the three applications, in support of which Learned Counsel filed written submissions and Lists of Authorities in addition to their oral submissions.

The Plaintiff's 1st Application dated 9 September 2015 as Amended on 28 April 2016

[4] The first application is the Plaintiff's Amended Notice of Motion, amended on **28 April 2016** and filed on **3 May 2016**. It was made pursuant to **Sections 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Section 35 of the Copyright Act, Chapter 130 of the Laws of Kenya** and **Order 40 Rules 1 and 2 of the Civil Procedure Rules**, **2010.** The prayers sought by the Plaintiff by means of that application are:

> [a] That pending the hearing and determination of the **application**, a temporary injunction be issued restraining the Defendants/Respondents and each of them by themselves, their servants or agents or otherwise howsoever from using/divulging the confidential information or any information relating to the Plaintiff's/Applicant's business, trade practices within their knowledge for any purposes including but not limited to enhancing their trade or business.
>
> [b] That pending the hearing and determination of this **suit**, a temporary injunction be issued restraining the Defendants/Respondents and each of them by themselves, their servants or agents or otherwise howsoever fromusing/divulging the confidential information or any information relating to the Plaintiff's/Applicant's business, trade practices within their knowledge for any purposes including but not limited to enhancing their trade or business.
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> [c] That pending the hearing and determination of the application, an injunction be issued restraining the 1st and 3rd Respondents from seeking employment with the Plaintiff's competitors in the country for a period of two years from the date of termination of their employment with the Plaintiff or setting up business of any nature that will compete with the Plaintiff's business.
>
> [d] That pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendants, whether by themselves, servants or agents, or any of them or otherwise howsoever from infringing on the Plaintiffs registered copyright in the literary works categories entitled:
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> > [i] SACCO Banking numbered LT-12559
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> > [ii] Human Resource Management numbered LT-12555
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> > [iii] Depot Management numbered LT-12560
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> > [iv] Grants and Retail Management numbered LT-12553
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> > [v] Funds Management numbered LT-12551
> >
> > [vi] Mobile Messaging numbered LT-12557
> >
> > [vii] Academic Management System numbered LT-12561
> >
> > [viii] Procurement and Work Plan numbered LT-12552
> >
> > [ix] E-Procurement numbered LT-12562
> >
> > [x] Hospital Management numbered LT-12554

[xi] Fleet Management numbered LT-12550

[xii] Property Management numbered LT-12558

[xiii] Mobile Banking numbered LT-12556

[xiv] Investment Banking Software numbered LT-LT-12927

[xv] Higher Education Loans Management numbered LT- 12648; and any other literary works copyrighted by the Plaintiff.

[e] That pending the hearing and determination of this suit, an order for delivery up and forfeiture to the Plaintiff of all infringing copies of the Plaintiff's above copyright works or in the alternative destruction upon oath of all such infringing copies in the Defendant's possession.

[f] That the costs of the application be provided for.

[5] The brief background to the application is that he Plaintiff is an indigenous IT solutions service provider. It prides itself with over 15 years experience in offering total end to end solutions entitled Enterprise Resource Planning Systems (ERPs), Core Banking Solution (CBS), Content Management systems (CMS), Web Portals and Document Management & Mobile Solutions. It was averred that it had partnered with leading interactive solution providers around the world, such as Microsoft, to enable it provide its clients with high quality, reliable and affordable solutions. It was further the Plaintiff's case that it is the registered proprietor of the aforementioned literary works, which it registered with the Kenya Copyright Board.

[6] It was averred by the Plaintiff that by an agreement dated **5 March 2008**, by which it engaged the services of the 1st Defendant as a Financial Analyst, the 1st Defendant undertook not to make public or disclose to any person any information as to the practice, business dealings or affairs of the Plaintiff or any of its customers or any other matters which may come to his knowledge by reason of his employment. That the 1st Defendant further undertook not to, during his employment or at any time thereafter, make available to any competitor of the Plaintiff, information, formulae, trade secrets or other knowledge or any document containing any confidential information belonging to the Plaintiff or acquired during the course of his employment.

[7] The non-disclosure and trade restraint agreement between the Plaintiff and the 1st Defendant was signed on **4 January 2011**, whose terms included a covenant that upon the termination of his employment from the Plaintiff, the Plaintiff would return all documents and property of the Company, including drawings, blueprints, reports, manuals, correspondence, customer lists, computer programs and all other material obtained in the course of employment, and not retain any copies thereof. It was also a term of the latter agreement that upon termination of employment with the Plaintiff, for a period of 2 years from the date of termination of his contract, the 1st Defendant would not join a competitor of the Plaintiff dealing with the Microsoft NAVISION products. The Plaintiff averred that by a letter dated **12 November 2014**, the 1st Defendant issued it with a 3 months' resignation notice which was duly accepted by the Plaintiff, whereupon the resignation took effect from **12 February 2015.**

[8] With regard to the 3rd Defendant, the Plaintiff averred that he was employed by as a NAVISION Support Systems Developer by the Plaintiff, and that he also signed a similar agreement as did the 1st Defendant. The agreement was signed on **18 March 2011**; and that the 1st and 3rd Defendant proceeded to incorporate the 2nd Defendant and proceeded to apply the information and networks obtained by them during their employment with the Plaintiff to compete with the Plaintiff by operating similar business dealing with Microsoft NAVISION products prior to the lapse of the 2 year period agreed upon. In particular, the Plaintiff alleged that:

[a] the Defendants deliberately opened an office in the same building as the Plaintiff's offices purporting to offer the same services as the Plaintiff's, particularly Microsoft NAVISION;

[b] the Defendants began to poach clients belonging to the Plaintiff and the 1st Defendant took clients lists and started calling the Plaintiff's clients;

[c] the Defendants used confidential information and trade secrets obtained in the course of its employment with the Plaintiff in order to discredit the Plaintiff to the Plaintiff's clients;

[d] in breach of the Plaintiff's copyright, the Defendants have materially plagiarized and downloaded the Plaintiff's copyrighted literary works which they now sell to unsuspecting clients as their own works;

[e] the Defendants are illegally using the Plaintiffs tools of trade and trade secrets acquired during their employment with the Plaintiff to compete with the Plaintiff and destroy the Plaintiff's business.

[9] It was consequently the Plaintiff's contention that as a result of the aforementioned breaches, it has suffered and continues to suffer substantial loss and damage, and that unless restrained, the Defendants threaten and intend to continue and repeat the acts of infringement complained of, thereby causing the Plaintiff further loss and damage, hence the application.

[10] In support of the application, the Plaintiff relied on the affidavit annexed thereto, sworn by **Eng. Tobias Otieno**, the Plaintiff's Managing Director, in which the aforementioned grounds were amplified. It was further deposed by **Eng. Otieno** that he received several telephone calls from clients, including **Maseno University** and **Wanandege Sacco Ltd**, among others, informing him that the 1st Defendant had visited their premises with a view of discrediting the Plaintiff's products, discouraging them from doing business with the Plaintiff and inviting them to instead work with the 2nd Defendant. He added that he also established that the Defendants were selling the Plaintiff's products in breach of the Plaintiff's rights, and that the products had been sold to **Utabibu Sacco Ltd, Acumen Sacco Ltd, Acumen Properties Ltd** and **KMA Investments Ltd**, among others; and on the basis thereof the Plaintiff urged the Court to grant the prayers sought in the Amended Notice of Motion.

[11] To augment the averments in the Supporting Affidavit, the Plaintiff exhibited, as attachments thereto, copies of the Certificates of Registration of Copyright Work in the Literary Works aforementioned; Letters of Appointment and Terms and Conditions of Service for the 1st and 3rd Defendants; Employee Non-Disclosure Agreement, among other documents.

[12] The application was opposed by the Defendants on the basis of the Replying Affidavit sworn by the 1st Defendant on **27 June 2016**. The 1st Defendant conceded that he used to work for the Plaintiff along with the 3rd Defendant and that he resigned and proceeded to incorporate the 2nd Defendant, whereafter, the 3rd Defendant also resigned and was employed by the 2nd Defendant as was stated by the Plaintiff. It was however the 1st Defendant's averment that the 2nd Defendant sells Microsoft Dynamics Solutions as a Microsoft partner, and that the solution does not belong to the Plaintiff.

[13] It was further contended by the 1st Defendant that the purported literary works aforementioned were just names and system shells of products offered in the Microsoft NAVISION product package, and that the Plaintiff does not sell any local in house solutions at all. It was further deponed that there are more than 100 partners of Microsoft Company in Kenya that are authorized to sell, implement and maintain Microsoft Dynamics in Kenya, and that it was therefore wrong for the Plaintiff to assume that Microsoft Dynamics is its product. He added that the 2nd Defendant does not sell any local in-house solutions either; but is merely partnering with multinational ICT companies.

[14] In the premises, the 1st Defendant denied that the Terms and Conditions of his service with the Plaintiff prohibited him from forming his own IT company; or that the 2nd Defendant opened an office in the same building as the Plaintiff's offices, contending that their offices are on the 3rd Floor of Vision Plaza along Mombasa Road. It was thus the Defendants' case that it would be a breach of their constitutional rights for the orders sought to be granted, particularly because the Plaintiff had not made out a prima facie case to warrant the issuance of a temporary injunction.

[15] I have given due consideration to the Amended Notice of Motion, the grounds set out in support thereof as backed by the Supporting Affidavit of **Eng. Tobias Otieno.** I have also considered those aspects of the submissions made and the Lists of Authorities filed by Learned Counsel that are relative to the First Application. The requirements to look out for were set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** thus:

> **"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 be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

[16] As to whether the Plaintiff has established a prima facie case, there is no disputation that it is an IT Solutions service provider offering **Enterprise Resource Planning Systems (ERPs), Core Banking Solutions (CBS), Content Management Systems (CMS), Web Portals** and **Document Management & Mobile Solutions**. It is also not in dispute that it had its literary works registered under the **Copyright Act** as set out in paragraph 4(d) herein above; indeed the Plaintiff exhibited copies of the Certificates of Registration at pages 1 to 15 of the documents attached to its Amended Notice of Motion. That the 1st and 3rd Defendants are former employees of the Plaintiff is also not in contention. The Plaintiff demonstrated this by annexing copies of the employment agreements at pages 17 to 21 of the documents attached to the Amended Notice of Motion; and in any event, these averments were conceded to by the Defendants in the 1st Defendant's Replying Affidavit at paragraphs 3 and 22 thereof.

[17] The Plaintiff further showed that both the 1st and 3rd Defendants, in their contracts of employment, undertook not to make public, or disclose to any person any information as to the practice, business dealings or affairs of the Plaintiff or any of its customers, any information which came to their knowledge by reason of their employment; and further that upon the termination of their employment, they would not join the employ of any competitor of the Plaintiff for a period of 2 years. In the case of the 1st Defendant, these covenants are to be found in Clause 6 of his Employment Contract and Clauses 2 and 3 of the Employee Non-Disclosure Agreement. Clause 6 reads:

> **"You shall not (except so far as is necessary and proper in the ordinary course of your employment) make public or disclose to any person any information as to the practice, business dealings or affairs of the Company or any of its customers or as to any other matters which may come to your knowledge by reason of your employment as aforesaid. You will not during your employment or at any time thereafter make available to any competitor the Company information, formulae, trade secrets or other knowledge or any document containing any confidential information belonging to the Company or acquired during or in the course of your employment with it."**

The aforestated Clause was reiterated in the Employee Non-Disclosure Agreement at Clause 2 thereof; and in Clause 3(e) of the Non-Disclosure Agreement, it was agreed thus:

> **"That on Termination of my employment with Coretec, for a period of (2) two years from the date of termination of my contract I will not be allowed to join a Coretec Competitor who deals with Microsoft NAVISION products, Mobile banking or Micro-finance systems; I shall also not be allowed to join one of Coretec's Current clients during this period."**

[18] There is no dispute that the 1st Defendants did resign from the Plaintiff's employment and proceeded to incorporate the 2nd Defendant where he was later joined by the 3rd Defendant. That the 1st Defendant is a Director and Shareholder of the 2nd Defendant is evident in the Form CR12 annexed at **page 33** of the Amended Notice of Motion and is admitted at paragraph 5 of the 1st Defendant's Replying Affidavit filed on **27 June 2016**. That the 2nd Defendant is a competitor of the Plaintiff is not in dispute and is evident upon a perusal of the two proposals exhibited by the Plaintiff at pages 40 to 57 of the documents attached to its Amended Notice of Motion. Accordingly, the contention by the 1st Defendant that the employment and non-disclosure agreements did not **"...stipulate a specified period precluding me or any other person employed by the same company from opening a company of the same**

nature..." is untenable; granted the specific terms of agreement aforementioned. The 2nd Defendant is, undoubtedly a competitor of the Plaintiff, and it is immaterial that it was incorporated by the 1st Defendant; or that the 1st Defendant's employment contract did not preclude the formation of the company by him.

[19] The foregoing notwithstanding, what is sought in paragraphs 2 and 2A of the Amended Notice of Motion filed on **3 May 2016**, was an order restraining the Defendants from using/divulging the confidential information or any information relating to the Plaintiff's business, trade practices within their knowledge for any purposes including enhancing their trade or business. A perusal of the Supporting and Further Affidavits filed on behalf of the Plaintiff does not explicitly show that nature of the disclosure, or the confidential information by way of trade secrets, formulae or confidential information envisaged by the Plaintiff, and which the 1st and 3rd Defendants had divulged to the 2nd Defendant. Thus, it is to be surmised that the complaint is by implication, premised on the fact that the two Defendants resigned from the Plaintiff's employ and are now working for the 2nd Defendant. To this end, the Plaintiff exhibited at pages 39 to 44 of the documents annexed to the Amended Notice of Motion, a proposal that it says was made by the 2nd Defendant to one of its clients, namely, **Maseno University.** The Plaintiff took offence with paragraph 6 of the introduction at page 42, in which the 2nd Defendant stated thus:

> **"Your rather not so good experience with Microsoft Dynamic Navision was brought to my attention by a friend of mine who attended a conference for ICT directors for all universities/university colleges and I must admit that from what he heard from your representative, you seem to be having serious challenges with the system."**

[20] First and foremost, there is no indication that the solution in question had been provided by the Plaintiff. There was no demonstration that **Maseno University** had an ongoing contract with the Plaintiff at the time. More importantly, in the proposal complained of, the 2nd Defendant encouraged **Maseno University** to continue using the solution stating that **"...you don't need to dispose the solution that you have just because you are not getting the support that you deserve..."** It was therefore imperative for the Plaintiff to demonstrate that the proposal was accepted by **Maseno University** and that the Defendants thereupon divulged any of the trade secrets or formulae of the Plaintiff to **Maseno University**. There is thus no indication whatsoever that **Maseno University** was enticed to abandon the Plaintiff for the 2nd Defendant.

[21] In a bid to proof its case, the Plaintiff relied on the list of products or solutions exhibited at **page 36** of the documents annexed to the Amended Notice of Motion appearing on the 2nd Defendant's website as being offered by the 2nd Defendant, and posited that they are similar to its products. It is however instructive to note that the list was based on suspicion, for it is headed:

> **"PRODUCTS or Solutions which we suspect are in their custody, listed on their website and may also be found in the computers confiscated from their premises by the Police per the OB. no 25/17/6/2015 at industrial area CID police station"**

[22] In the Replying Affidavit sworn by the 1st Defendant on **13 October 2016,** the search and confiscation aforementioned was adverted to. The 1st Defendant confirmed that, at the instance of the Plaintiff, one **PC Daniel Kieny,** obtained a search warrant on **18 June 2015** and proceeded to search the 2nd Defendant's premises and collected various computers to facilitate their investigations. No indication was given by the Plaintiff of the result thereof.

[23] It is further noted that it was the contention of the Defendants that the 2nd Defendant sells Microsoft solutions as a Microsoft partner; and that the same are not in-house innovations belonging to it or any other vendor. The Defendants exhibited a copy of the Microsoft Dynamics Solution Provider Agreement that was been between the 2nd Defendant and Microsoft and Exhibit A annexed thereto confirms the some of the solutions that the 2nd Defendant contracted to provide were Property Investment Management, Sacco Management and University Management Solutions, based on the Microsoft NAVISION platform. In the circumstances, it can hardly be said that the Plaintiff has demonstrated, on a prima facie basis, that the Defendants are using/divulging confidential information or trade secrets

relating to its business to warrant the issuance of the orders sought. The foregoing findings are relevant to and apply equally to Prayer 3A of the Plaintiff's Amended Notice of Motion, in which the Court was asked to issue a temporary injunction to restrain the Defendants from infringing the Plaintiff's registered copyright in the literary works whose particulars are set out in Paragraph 4 hereof; and for delivery up and forfeiture to the Plaintiff for of all infringing copies and/or their destruction.

[24] In prayer 3 of the Amended Notice of Motion, the Plaintiff sought to have the 1st and 3rd Defendants restrained from seeking employment with its competitors for a period of 2 years from the date of termination of their employment or setting up business in any nature that would compete with the Plaintiff's business. It is noted however, that the 2nd Defendant was incorporated in 2014 and the Microsoft Dynamics Solution Service Provider Agreement entered into on **8 October 2014**. The 1st Defendant's resignation notice was issued on **12 November 2014** and was accepted by the Plaintiff, whereupon he proceeded to offer his services to the 2nd Defendant as its Managing Director and has been working as such to date. Thus, what is sought to be restrained is an act that has already taken place. Accordingly, whereas the Plaintiff may have a genuine grievance in this respect, it would be in vain to grant injunctive orders after the alleged breach had occurred; a point well explicated by the Court of Appeal in the case of **Eric V.J. Makokha & Others vs Lawrence Sagini & Others [1994] eKLR** thus:

> **"There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction... is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."**

[25] Thus, upon a careful consideration of the Plaintiff's Amended Notice of Motion filed on 3 May 2016, the Court is not satisfied that a prima facie case was made out to warrant the issuance of the injunctive orders sough therein. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 it** was observed thus:

> **"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter...the evidence must show an infringement of a right, and the probability of success of the applicants case upon trial..."**

[26] The Plaintiff has not demonstrated, prima facie, that the Defendants have indeed divulged its trade secrets or infringed on its copyright. If anything, what has been shown is that the Plaintiff is suspicious that this has been the case, based on the ground that the 1st and 3rd Defendants' resigned to work for its competitor, the 2nd Defendant. In the premises, there would be no basis for the issuance of a temporary injunction. Having so found, it would serve no purpose giving consideration the second and third principles of irreparable harm and balance of convenience. In the case of **Nguruman Limited vs Jan Bonde Nielsen & Others [2014] eKLR,** the Court of Appeal expressed this position thus:

> **"It is established that the ... three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially ... if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration..."**

[27] While it is appreciated that the Plaintiff may have a genuine grievance with regard to the 2 year restraint clause in the employment contracts it made with 1st and 3rd Defendants, it has not been shown that it stands to suffer irreparable harm as a consequence, for which damages would not be adequate remedy. In **Halsbury's Laws of England, 3rd Edition, Volume 21, Paragraph 766, page 366**, irreparable injury is defined as follows:

"...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired.."

[28] And in the **Nguruman Case,** the Court of Appeal expressed itself thus on this issue:

"On the second factor, that the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie,* the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

[29] It is noteworthy too that in the Amended Plaint, the Plaintiff asked for an inquiry as to damages, and order for the payment of all sums found to be due to it upon taking such inquiry on account as well as general damages. It is now trite that where a party prays for damages, it is an indication that the loss is compensable by a monetary award, and therefore that an order of temporary injunction may not be warranted. I would thus be of the same viewpoint as was taken by **Havelock, J** in the case of **Patstifico Lugi Garofalo S.P.A. vs Debenham & Fear Limited [2011] eKLR**) thus:

"The claim for general damages in Paragraph (g) herein above adequately demonstrates that the applicant itself is contented that it can be compensated by an award of damages. In that event, it is not necessary to grant an injunction as damages would suffice to compensate the applicant."

For all the reasons aforestated, my finding is that the Plaintiff has not satisfied the conditions for the grant of a temporary injunction as prayed in the Amended Notice of Motion filed on **3 May 2016**.

The Plaintiff's 2nd Application dated 10 October 2016

[30] The Plaintiff's second application is the Notice of Motion dated **10 October 2016** and filed on **11 October 2016** pursuant to **Sections 3A** and **63 of the Civil Procedure Act**, **Sections 35** and **37 of the Copyright Act**, **Chapter 130 Laws of Kenya**, **Order 39 Rule 5** and **Order 40 Rules 1, 2** and **10 of the Civil Procedure Rules** for orders that:

[a] spent

[b] A temporary injunction be issued restraining the Defendants, by themselves, servants, agents, employees or otherwise howsoever from selling, installing and/or utilizing any of the Plaintiff's developed and copyrighted software Solution and/or in any manner pirating and infringing the Plaintiff's registered copyright in the literary works whose particulars are set out in paragraph 4 herein above pending the hearing and determination of this application;

[c] An *Anton Piller* order do issue allowing the Plaintiff to enter into the premises of the 2nd Defendant, AMREF SACCO LTD and OLLIN SACCO LTD to seize, collect and keep machines, data, documents or storage materials relating to the Plaintiff's registered copyright.

[d] A temporary injunction be issued restraining the Defendants, by themselves, servants, agents, employees or otherwise howsoever from selling, installing and/or utilizing any of the Plaintiff's developed and copyrighted software Solution and/or in any manner pirating and infringing the Plaintiff's registered copyright in the literary works whose particulars are set out in paragraph 4

herein above pending the hearing and determination of this application;

[e] That the Court be pleased to add AMREF SACCO LTD and OLLIN SACCO LTD as Defendants in this suit;

[f] That the costs of the application be provided for.

[31] Having considered the grounds upon which the second application has been brought, including the Supporting Affidavit and the annexures thereto, I entertain no doubt that prayers [b] and [c] are repetitive of the prayers sought in the first application and my views and conclusions thereon would be similar. As for the prayer for *Anton Piller* order, **section 37(1) of the Copyright Act** provides that:

> **"If a person has prima facie evidence that his right has been infringed by another party and he satisfies the court or competent authority that prima facie--**
>
> **(a) he has a cause of action against another person which he intends to pursue;**
>
> **(b) the other person has, in his possession, documents infringing copies or other things of whatsoever nature which constitute evidence of great importance in substantiation of that cause of action; and**
>
> **(c) there is the real and well-founded apprehension that the documents, infringing copies or other things may be hidden, destroyed or rendered inaccessible before discovery can be made in the usual way, the court or competent authority as the case may be, may make such order as it considers necessary or appropriate to secure the preservation of the documents, copies or things in evidence."**

[32] Thus, an *Anton Piller* order can only issue where an applicant demonstrates that it is not only necessary but also appropriate for the purpose of securing the preservation of documents or things for purposes of evidence. Indeed in the case of **Anton Piller KG vs Manufacturing Processes Ltd & Others [1976] 1 All ER 779**, it was held that:

> **"The court had an inherent jurisdiction to make such an order ex parte, but should exercise it only in an extreme case where there was a grave danger of property being smuggled away or of vital evidence being destroyed. The Plaintiff had to show that it was essential so that justice could be done between the parties and when it would do no real harm to the defendant or his case."**

[33] The Plaintiff urged the Court to find that the contractual foundation upon which the Defendants are trading has been brought to question, and that the only solutions that are registered so far are those belonging to the Plaintiff which the Defendants have always had access to. It therefore urged the court to conclude that, in the circumstances, the Defendants are utilizing the Plaintiff's registered solutions in order to be able to do business with Microsoft; and that without *Anton Piller* order, the Plaintiff cannot ascertain for a fact the exact extent of the use of its works by the Defendants. On the basis of the foregoing, the Plaintiff submitted that it had established a prima facie case for grant of an *Anton Piller* order as sought in the second application.

[34] The Defendants opposed the application contending that the NAVISION software is solely owned by Microsoft and not the Plaintiff; and that there was no infringement as alleged. In respect of the first application, the court has come to the conclusion that no *prima facie* case was made out in this regard, but more importantly, is the established fact that the Plaintiff did cause a search to be carried out in the premises of the 2nd Defendant in which computers were seized, among other items. It has not been shown that the seizure did not yield the desired outcome so as to warrant another attempt via an *Anton Piller* order. I would therefore agree with the submissions of the Defendants that this belated attempt to obtain an *Anton Piller* order is neither necessary nor warranted.

[35] In the case of **Microsoft Corporation vs Mitsumi Computer Garage Ltd [2001] 1 EA 128,** it was observed that:

> **"...For an Anton Piller order to be granted there must be an extremely strong prima facie case, the actual or potential damage to the applicant must be very serious, there must be clear evidence that the respondents have in their possession incriminating matter and there must be real possibility that such material could be destroyed before an inter partes hearing."**

In this instance, the Anton Piller order application was not brought ex parte, but belatedly, following a search and seizure exercise that was undertaken by a police officer in 2015. There is no clear evidence that the Defendants have in their possession the literary works in question or that there is a real possibility that the material could be destroyed. In the premises, it is my considered finding that the Plaintiff, having failed to demonstrate a prima facie case as aforestated, cannot be said to have made out a strong case for the grant of an *Anton Piller* order. In similar vein, I find it unnecessary to have AMREF SACCO LTD and OLLIN SACCO LTD enjoined herein. I would thus be inclined to dismiss the Plaintiff's second application as lacking in merit.

The Defendant's Application dated 6 October 2016

[36] The Defendants on their part, moved the Court under **Section 3A and 6 of the Civil Procedure Act, Order 2 Rule 15, Order 40 Rule 2,** and **Order 51 Rule 15 of the Civil Procedure Rules**, for orders that:

[a] (spent)

[b] that this Court do stay the proceedings of **CMCC No. 6615 of 2016** and all consequential orders issued therein pending the hearing and determination of this application;

[c] that this Court do stay the proceedings of **CMCC No. 6615 of2016** and discharge/vacate all consequential orders issued therein pending the hearing and determination of this suit;

[d] that a temporary injunction be issued restraining the Plaintiffs by themselves, servants, agents, employees or otherwise howsoever from contacting, harassing, persecuting, interacting or communicating with any client of the 1st and 2nd Defendants to whom the 1st and 2nd Defendants sells Microsoft products and or interfering, impeding, hindering, constraining, meddling, maligning or in any way injuring the business of the Defendants pending the hearing and determination of this application;

[e] that a temporary injunction be issued restraining the Plaintiffs by themselves, servants, agents, employees or otherwise howsoever from contacting, harassing, persecuting, interacting or communicating with any client of the 1st and 2nd Defendants to whom the 1st and 2nd Defendants sells Microsoft products and or interfering, impeding, hindering, constraining, meddling, maligning or in any way injuring the business of the Defendants pending the hearing and determination of this suit;

[f] that the Court be pleased to call up the file of the Chief Magistrate, being **CMCC No. 6615 of 2016** so that all the issues can be determined before the High Court since the issues are substantially similar and to avoid duplicity of suits and to save judicial time. In the ALTERNATIVE, the same be struck out for being an abuse of the court process;

[g] that the Court do grant the Defendants leave to amend the Defence in the manner shown in the draft Amended Defence annexed to the Supporting Affidavit;

[h] that the costs of the application be provided for.

[37] In the grounds set out in the Defendants' Notice of Motion, it was stated, inter alia, that in blatant

disregard of the pendency of this suit, and upon being denied ex parte orders, the Plaintiff through its Advocates went ahead and filed a suit seeking similar orders in the Chief Magistrates Court on **27 September 2016**, without disclosing the existence of this suit. Accordingly, the lower court issued a temporary injunction restraining the Defendants from installing or utilizing any Sacco software solution or in any manner infringing on the Plaintiff's registered copyright in the literary works aforementioned.

[38] It was further contended by the Defendants that, on the basis of the order aforementioned, the Plaintiff contacted its clients and cautioned them to avoid any contact or dealings with the Defendants; and that some of the clients had issued notice to the Defendants giving their intention to terminate their services. It was further averred that the 1st and 2nd Defendants filed an application dated **3 October 2016** seeking the discharge of the ex parte injunction, but their request for ex parte orders were declined and the application listed for *inter partes* hearing. It was us the contention of the Defendants that unless **CMCC 6615 of 2016** is called to the High Court and the orders issued on **27 September 2016** is vacated or set aside, the 2nd Defendant will suffer grave and irreparable loss and damage. The Defendants also sought leave to amend the Defence to introduce a Counterclaim for libel, loss of business and Permanent Injunction against the Plaintiff.

[39] The application was supported by the affidavit sworn by the 1st Defendant, **Jackson Mutuku Kiio**, in which the aforestated grounds were explicated. It was, in particular, reiterated that **CMCC No. 6615 of 2016,** which was filed about one year after the institution of this suit, seeks an aspect of the very orders that were prayed for in the Plaintiff's Amended Notice of Motion that was filed on **3 May 2016**, namely a temporary injunction to restrain the Defendants from installing and utilizing their Sacco Software and from infringing the Plaintiff's copyright in the literary works aforementioned. The Defendants posited that the Plaintiff could still pursue the same orders in this matter; and that to allow the two cases to proceed concurrently, there may ensue an embarrassment should the courts handling reach different conclusions in respect of the same subject matter.

[40] The Plaintiff's response to the application is in the Replying Affidavit sworn by **Eng. Tobias Otieno** on **12 October 2016** and filed on **13 October 2016**. According to the Plaintiff the application is sub-judice and is therefore a gross abuse of the process of the Court, in that the Defendants filed a similar application on **4 October 2016** and the same is pending hearing and determination before the Chief Magistrate's Court in **CMCC No. 6615** of **2016**. The Plaintiff added that the instant application was only filed on **7 October 2016** following the Defendants' failure to procure similar orders before the Chief Magistrate's Court. It was further averred on behalf of the Plaintiff that its claim in **CMCC No. 6615** of **2015** is dissimilar from the claim herein, and pointed out that the **CMCC No. 6615** of **2015** is specific to one client, **Ukristo Na Ufanisi wa Anglicana Sacco Ltd,** which client is not a party to this suit, and that the order sought is a permanent injunction to restrain the Defendants from installing and utilizing its Sacco Software and infringing the Plaintiff's copyright.

[41] I have carefully considered the application, the grounds in support as well as the affidavits filed in respect thereof and the annexures exhibited. The Plaint in **CMCC No. 6615** of **2016** shows that indeed some of the prayers sought in the lower court are the very same orders sought herein, namely: a Permanent Injunction to restraining infringement of copyright, an order for the payment of all sums found to be due to the Plaintiff upon taking an inquiry into account and General Damages. The only difference is that the 3rd Defendant in **CMCC No. 6615 of 2016** is **Ukristo Na Ufanisis wa Anglicana Sacco Ltd** and not **Victor Wanyonyi Simiyu,** and that the registered literary works cited for purposes of the lower court case are 6 of the 15 set out in paragraph 4 of this Ruling. The same list is replicated in Paragraph 7 of the Plaint filed in **CMCC No. 6615** of **2016**. Nevertheless, in the cause of action is the same; such that the averments in the Replying Affidavit are almost word for word with the Plaintiff's Amended Plaint herein and the Amended Notice of Motion.

[42] In **Section 6 of the Civil Procedure Act**, it is the law that:

> **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the same parties under whom they or any of them claim,**

litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[43] It is noteworthy that although **CMCC No. 6615** of **2016** was filed one year after the filing of this suit, and although the 1st and 2nd Defendants herein are also the 1st and 2nd Defendants in **CMCC No. 6615** of **2016,** the Plaintiff averred thus in paragraph 22 of the Plaint filed before the Chief Magistrate:

"There is no suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendants over the subject of sale of the Plaintiff's Sacco Software by the 1st and 2nd Defendants to the 3rd Defendant."

[44] It is apparent that the averment is untrue, granted the contents of the Amended Plaint filed herein on **3 May 2016**, before the lower court case was instituted. The Sacco Software aforementioned is the subject of paragraph 5A of the Amended Plaint. In the particulars of breach set out in Paragraph 12(f) it was pleaded thus by the Plaintiff:

"In breach of the Plaintiff's copyrights, the Defendants have materially plagiarized and downloaded the Plaintiff's copyrighted literary works which they now sell to unsuspecting clients as their own literary works."

[45] That the literary works in question include the Sacco Software is not in doubt from a reading of the Plaint. I would thus take the same view that was taken by **Mabeya J in Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR** that:

"The mischief sought to be avoided by Section 6 of the Civil Procedure Act is a likelihood of two different courts adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions. That will be embarrassing to the judicial process."

Accordingly, whereas I find no justification for to calling up the file of the Chief Magistrate, being **CMCC No. 6615 of 2016** so that all the issues can be determined before the High Court, I would be inclined to grant an order staying the proceedings in **CMCC No. 6615 of 2016** pending the hearing and determination of this suit as prayed by the Defendants.

[46] As to whether a temporary injunction should issue restraining the Plaintiffs by themselves, servants, agents, employees or otherwise howsoever from contacting, harassing, persecuting, interacting or communicating with any client of the 1st and 2nd Defendants to whom the 1st and 2nd Defendants sells Microsoft products and or interfering, impeding, hindering, constraining, meddling, maligning or in any way injuring the business of the Defendants pending the hearing and determination of this suit, it is to be noted that this is the same relief that the Plaintiff asked for. Having analyzed the Defendant's case, I find nothing in the case presented in their application that is different from the Plaintiff's Amended Notice of Motion.

[47] Having considered the Plaintiff's case and found that there was no prima facie case established with regard to the copyright infringement alleged, I would for the same reasons as stated herein above find that the Defence case is similarly unproven, granted that they are competitors contending to hold licenses issued by Microsoft to deal in the software in issue. I would thus decline the prayers for temporary injunction for the same reasons that neither the Plaintiff nor the Defendants have established a prima facie case for the grant of an temporary injunction with regard to the Microsoft NAVISION software that is the foundation of this suit.

[48] The Defendants also asked for leave to amend the Defence to include a counterclaim for damages for defamation as proposed in the draft Amended Defence and Counterclaim at pages 63-67 of the Defendants' Notice of Motion filed on **7 October 2016.** In this regard, the Defendants intend to rely on the letters that were allegedly written by the Plaintiff to the clients of the 2nd Defendant on the basis of the interim orders issued in **CMCC No. 6615 of 2016** to prove defamation and loss of business. Copies of

the letters are exhibited at pages 61 and 62 of the Defendants' Notice of Motion.

[49] I have considered the application for amendment as well as the written submissions by Counsel in support and opposition thereto. The general rule is that the Court has a wide discretion to allow amendment of pleadings so long as the said amendments are necessary for the determination of the real issues in controversy in the suit and provided there is no prejudice occasioned to the other party. In ***Halsbury's Laws of England, 4th Ed. Vol. 36(1)*** at ***paragraph 76,*** this point is made thus:-

> ***"…The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side…".***

[50] In addition to the foregoing, I find instructive the decision of the Court of Appeal in the case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others [2000] eKLR, in which the Court rendered itself as follows:-**

> **"The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties..."**

Thus, the Defendants were under duty to demonstrate that:

[a] the amendments are necessary for determining the real question in controversy; and to avoid multiplicity of suits provided there has been no undue delay;

[b] no new or inconsistent cause of action is being introduced;

[c] that no vested interest or accrued legal rights is affected and no prejudice or injustice will be occasioned to the other side which cannot be properly compensated for in costs

[51] As indicated hereinabove, the application for amendment was prompted by the filing of **CMCC 6615 of 2016** and the interim orders made therein. The Court having found that the lower court case is a subset of this case and ordered a stay thereof, it would follow that any amendments of the nature sought can only be brought in the lower court case, upon conclusion of this case. Hence, I am not persuaded that the proposed amendments are necessary for the purpose of determining the issues in controversy in this matter; or that it will aid in avoiding multiplicity of suits, granted that **CMCC 6615 of 2016** from which the proposed counterclaim arises is already in existence.

[52] In the result, the three applications that are the subject of this Ruling are resolved and determined as hereunder:

[a] The Plaintiff's Amended Notice of Motion filed on **3 May 2016** is without merit and is hereby dismissed with costs;

[b] The Plaintiff's Second application dated **10 October 2016** is also unmeritorious and is hereby dismissed with costs;

[c] The Defendant's application dated **6 October 2016** succeeds in terms only of prayer 3 thereof, for stay of **CMCC No. 6615 of 2016** pending the hearing and determination of this suit. The rest of the prayers therein are unmeritorious and are accordingly dismissed, with an order that costs of the application be in the cause;

[d] The status quo order issued on **28 October 2016** to remain in force and to apply during the pendency of this suit.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE