



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO.512 OF 2016

J.W. SEAGON & COMPANY INSURANCE

BROKERS (KENYA) LIMITED.....PLAINTIFF

- VERSUS -

LIAISON GROUP (I.B) LIMITED.....1ST DEFENDANT

JUBILEE INSURANCE COMPANY LIMITED.....2ND DEFENDANT

SATIB INSURANCE BROKERS (PTY) LIMITED.....3RD DEFENDANT

RULING

1. The application dated 16th December 2016 is for interlocutory injunctions to restrain the defendants from dealing with, using, copying, selling, offering for sale, publishing, distributing or making available to the public, the defendants’ **SAFARI SHIELD INSURANCE POLICY** and **ANY INSURANCE PRODUCTS ANCHORED** on the said Safari Shield Insurance Policy, in their current forms.
2. Secondly, the plaintiff seeks an interlocutory injunction to restrain the defendants from infringing the plaintiff’s copyright in the **SAFARI PLAN POLICY** and **ANY INSURANCE PRODUCTS** anchored on the Safari Plan Policy, in their current forms.
3. The plaintiff claims ownership of an original literary work known as the **SAFARI PLAN POLICY**, which was authored by its employee, **JEREMY CLAYTON** in the year 2014.
4. Being the owner of the copyright, the plaintiff contends that it has the exclusive right to authorize its reproduction, its translation or adaptation, as well as its distribution to the public.
5. The plaintiff further contends that its right to the exclusive use of the copyright constituted a bar to other persons who might want to use either the original form or any form which was re- cognizably derived from the original.
6. It was the plaintiff’s case that notwithstanding the right to exclusive use which the law bestowed upon it, the defendants had infringed the copyright by reproducing the contents of the Safari Plan Policy.
7. The defendants are said to have replicated the plaintiff’s copyright, albeit with a slightly different name.

8. But the defendants deny ever having infringed the plaintiff's copyright.
9. Indeed, the defendants submitted that the plaintiff did not have any copyright which could be infringed.
10. The defendants pointed out that the plaintiff had not registered its alleged copyright.
11. But it is not just because the alleged copyright had not been registered that led the defendants to deny the plaintiff's claim, they also said that there was absolutely no novelty in the work which the plaintiff had produced.
12. It was asserted that in the Insurance Industry, most of the words and phrases have been and continue to be in use by players in the industry in such a manner that no single person can lay claim to the originality.
13. According to the defendants, the words, terms and expressions which are used in insurance policies are of such universal use that it was not possible to express any idea of insurance in a completely unique way.
14. Implicit in that argument is an acknowledgement that it was possible to have some elements of insurance which were unique.
15. I believe that the insurance industry is not static. It keeps on growing and evolving. It is in that context that I hear the plaintiff to be saying that Jeremy Clayton expended a lot time, skill and energy to create and develop the plaintiff's Policy which is in issue.
16. The defendants do not deny the contention that Jeremy Clayton undertook considerable work to come up with the ideas now being claimed by the plaintiff. The defendants position is that the said work did not give rise to something which was either so new or so unique that it could qualify for protection as a copyright.
17. If anything, the work which the plaintiff undertook was indicated to have involved;

“...a lot of copying and posting....and lots of backwards and forwards...?”
18. But whether or not Jeremy Clayton had not created a whole new product or a product which was unique, I hold the view that the defendants cannot be lawfully permitted to reproduce the said work so blatantly that the formatting and the errors contained in Clayton's work was replicated.
19. In Kenya, there is no legal requirement that each and every copyright must be registered before the same can be protected.
20. Of course, the registration of a copyright has huge advantages to its owner, as there can be no ambiguity about the exact thing which he owns. Registration provides a clear and defined reference point, against which the court can assess other products, to ascertain whether or not they did infringe the copyright.
21. When the owner of a copyright has not registered his product, he remains exposed to the risk that any other person may come up with similar products. If that were to happen, the onus of proof becomes heavier because the owner of the un-registered copyright may be faced with claims that the other product was an original idea too.
22. In this case, the defendants have submitted that Insurance Policies are not capable of registration as copyrights. They are said not to be copyrightable.
23. But the plaintiff insists that an insurance policy falls within the definition of “*Literary Work?*” under section 2 (1) of the Copyright Act, which provides as follows;

“...means, irrespective of literary quality; any of the following, or works similar thereto –

- a) Novels, stories and poetic works;**
- b) Plays, stage directions, film sceneries and broadcasting scripts;**
- c) Textbooks, treatises, histories, biographies, essays and articles;**
- d) Encyclopedias and dictionaries;**
- e) Letters, reports and memoranda...?**

24. The works particularized above do not constitute an exhaustive list of literary works.

25. Whilst the plaintiff submitted that the definition was not exhaustive and that therefore Insurance Policies are literary works, the defendants reasoned that the lawmakers had excluded Insurance Policies from the definition.

26. As I have also said, the phrase used in Section 2 (1) of the Copyright Act, which is;

“...any of the following, or works similar thereto...?” means that the list provided is not exhaustive. The statute made it clear that other works which were similar to those listed, also fall within the definition of literary works.

The 2nd defendant contends that Parliament had deliberately excluded Insurance Policies from eligibility under the Copyright Act. With all due respect to the 2nd defendant, Parliament did not exclude Insurance Policies from eligibility under the Copyright Act.

27. The failure to include an item on a non-exhaustive list does not mean it was excluded. Exclusion connotes an express statement, which keeps out the specified item. In this case, the statute did not expressly specify that Insurance Policies are not eligible under the Copyright Act.

The statute left it open to the person who was asserting that Insurance Policies were literary works, to prove their assertion. If the person satisfied the court that Insurance Policies were literary works, the same would be copyrightable.

29. At this interlocutory stage, I decline to make a final determination on the question as to whether or not Insurance Policies were copyrightable, because that issue must remain alive for determination after the court will have given a substantive hearing to all the parties.

30. In the meantime, however, I reiterate that the defendants cannot just copy the plaintiff’s works without any care in the world.

31. The defendants have shown that there are in existence, other insurance policies which bear the same phrases and terms as the plaintiff lays claim to having created. Examples are;

- a) The ICEA Fire Insurance Policy;**
- b) The JAVA Fire Policy.**

32. That illustrates the point that the product of the plaintiff was not unique to the hospitality industry.

33. Therefore, when the defendants or any of them use such phrases and terms, they cannot be said to be copying only the work of the plaintiff.

34. But when the copying extends to such lengths as to incorporate items such as errors which have not

been shown to exist in any other policies, I find, on a *prima facie* basis, that the defendants cannot be heard to say that they did not copy the plaintiff's work.

35. In principle therefore, the plaintiff has made out a *prima facie* case.

36. It now asks the court to order the defendants to be restrained from a range of actions, as specified earlier in this Ruling.

37. The question is;

“Are the defendants offering to the public the plaintiff's product known as SAFARI SHIELD INSURANCE POLICY or SAFARI PLAN INSURANCE POLICY??

38. In a literal sense, the defendants are not doing so. At most, they are offering products which may be deemed as adaptations from the plaintiff's product.

39. But the defendants have also shown that there existed similar products in the Kenyan market before the plaintiff came up with its product.

40. Whilst the blatant copying should not be countenanced by the court, I also hold the view that it would be punitive to completely stop the defendants, at this interlocutory stage, from continuing to offer services to the clientele to whom policies have already been issued.

41. I also find that an order which would stop the defendants from using insurance policies would result in the termination of insurance contracts which are in force; and that has the potential of exposing the insured persons to risks.

42. There is no legal justification in giving orders which would expose persons who were already holding policies of insurance, to the very risks which they had sought to be covered in respect of. None of them has done anything wrong.

43. However, justice demands that the defendants be restrained from offering the contentious policies to new potential policy-holders.

44. Nonetheless, the policies which the 2nd defendant had in the market earlier may continue to be offered. The said product was called the “*Tour Operators Policy?*”.

45. If the “*Tour Operators Policy?*” goes on being offered in the market, it shall be in the same format, style and content as originally created.

46. I emphasize that the defendants are restrained by an interlocutory injunction issued forthwith, from selling, offering for sale, distributing or making available to the public, the product known as “**SAFARI SHIELD INSURANCE POLICY?**”.

47. I wish to make it clear that this order does not extend to “*Any insurance products anchored on the Safari Shield Insurancy Policy?*”; because that would imprecise and thus incapable of enforcement.

48. The interlocutory order issued herein shall take effect upon the filing in court, and service on the defendants, of an Undertaking by the plaintiff, that it will compensate the defendants if the plaintiff's case is ultimately unsuccessful, and if the interlocutory injunction would have, in the interim, caused the defendants or any of them to suffer losses and damages attributable to the interlocutory injunction.

49. The costs of the application dated 16th December 2016 are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mwango for the Plaintiff

Miss Kidunduhu for the 1st Defendant

Miss Kidunduhu for Mbaluto for the 2nd Defendant

Miss Kidunduhu for the 3rd Defendant

Otieno – Court clerk.