



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC.COMM NO.231 OF 2011**

**1) JACK J. KHANJIRA**

**2) JOASH N. MORARU.....PLAINTIFFS**

**VERSUS**

**SAFARICOM LTD.....DEFENDANT**

**RULING**

1. On 18/10/2011 the plaintiff filed the chamber summons dated 17/10/2011 and expressed to be brought under Order 20 Rule 1(3) Civil Procedure Rules 2010. In it the plaintiff invoked the provisions of section 35(4) of the Copy Rights Acts for order of account and inquiry into the profits made from an alleged innovation by the plaintiff out of the defendants operations. The plaintiff further sought orders that an inquiry be made as what was the market for value of the technology employed in MKESHO as a service exported out of Kenya since 2010, payment of a sum equal to 1/3 of the net earnings by the defendant from operating Mikesho and the appointment of a referee under Order 28 Rule 9 for purposes of taking of proper accounts.

2. That application was filed simultaneously with the plaint whose main and only prayers is for an inquiry as to damage for the infringement of moral and economic right of works allegedly authored by the plaintiff and the payment of sums found due.

3. The jurisdiction of the court to order accounts is governed by the provisions of order 20 Rule 1 which provides:

Order 20 Rule 1 (1) & (3)

***“Order for accounts [Order 20, rule 1.]***

***Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.***

***Procedure [Order 20, rule 3.]***

***An application for such order as is mentioned in rule 1 and 2 shall be made by chamber summons and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account; and such application may be made at any time after the time for entering an appearance has expired.”***

4. To this court the prerequisites before a court grants orders for accounts are two fold:

**a) The plaintiff must seek an order for accounts.**

**b) The defendant fails to enter an appearance or satisfies the court by an affidavit or otherwise that there is a preliminary question to be tried.**

5. In the matter before court the Plaintiff indeed seeks accounts but the defendant did enter appearance and filed a statement of defence dated 5.9.2011 in which it challenges the connection between the plaintiffs and the said works described by the plaintiff as innovation. The defense at paragraphs 9,10,11 & 12 is expressed as follows:-

**i. The Defendant denies the contents of paragraph 7 and the particulars set out in paragraphs 7(a) -(d) of the Plaint to the extent that the Defendant has infringed on any of the Plaintiffs' moral rights and puts the Plaintiffs to strict proof thereof. The Defendant avers that the Plaintiffs do not have any moral rights to the purported literary works as the same are not of an original character neither are they peculiar to the Plaintiffs as to offer protection under the Copyright Act, No. 121 of 2001.**

**ii. The Defendant further avers that the concept of money transfer through the mobile phone platform is not original to the Plaintiffs as to be amenable to protection as an intellectual property over which they may assert the moral right of authorship.**

**iii. In specific reply to paragraph 8 of the Plaint, the Defendant avers that there was no contractual or any relationship between the Plaintiffs and the Defendant as to occasion any breach of trust and or trade confidences as alleged neither is there anything confidential about the effectuation of financial transactions under the mobile telephony platform.**

**iv. The Defendant replies to paragraph 9 of the Plaint and denies that it made any adaptation of the Plaintiffs' work or that it altered the whole or any part of it or at all. The Defendant reiterates that the alleged “*Chemi Chemi na Safaricom*” concept which primarily embodies the use of mobile telephony to effect financial transactions is in any case not original to the Plaintiffs. The particulars or loss detailed under paragraphs 9(a) and 9(b) are denied.**

6. To this courts' mind, the question whether the plaintiff were the originators of the works as original works is a preliminary matter that the court need to determine before the questions of accounts can be delved into.

7. The Plaintiff contend that the works entitled '*chemi chemi na safaricom*' was their original innovation while the defendant contests that position. There exists, by the defence filed, a preliminary issue to be determined being whether or not the plaintiff were the original creators of the works. That being the case, to order accounts prior to that determination would be premature and in contravention of order 20 Rule 1 which is the foundation of the plaintiffs application.

8. The application therefore fails for now. To enable the court proceed, the following directions are deemed desirable.

9. The suit does proceed for case conference for the purposes of identifying the contested issues and exploring ways of resolving such the contested issues.

**Dated, signed and delivered at Mombasa this 15th day of July 2016.**

In the presence of:-

No appearance for the Plaintiffs.

No appearance for the Respondent.

**P.J.O.OTIENO**

**JUDGE**