



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 220 OF 2011
SCHOOL EQUIPMENT PRODUCTION UNIT.....PLAINTIFF
VERSUS
JAMES MUHORO t/a MAMUR SERVICES.....DEFENDANT

JUDGMENT

1. The Plaintiff is a state corporation under the Ministry of Education. Its Mandate is to design, manufacture, supply and distribute science materials and apparatus for Educational institutions and act as agent, consultant, stockist of chemicals and drugs as well as publisher of Education materials for purposes of promoting high standards and quality science education.
2. By a Plaint dated 8/06/2011, the Plaintiff alleged that in or about 2009, it empanelled people including the Defendant, to develop for it a primary science kit which included a catalogue entitled “**Primary Science Charts**” consisting of “**Weather and the Sky, HIV/Aids and Drugs and drug abuse.**” The said primary science kit was presented to the Kenya Institute of Education who awarded the same an approved status. The Plaintiff therefore claimed that it had acquired copyright in the artistic work comprised in the catalogue entitled “**Primary Science Charts (1) Weather and the Sky (2) HIV/Aids and (3) Drugs and Drug Abuse**”.
3. The Plaintiff further contended that on 15th September, 2010 the Defendant infringed upon its copyright in the said works by causing to be registered in his name a copyright work under certificate No.000063 of the artistic work similar to the said works. The Plaintiff alleged that it had suffered loss and damage which it particularized in the Plaint. The Plaintiff therefore prayed for various reliefs including an injunction to restrain the Defendant from further reproduction and publication of the said works, cancellation of the registration of copyright No. CR 000063, general and exemplary damages.
4. The Defendant denied the Plaintiff’s claim and in his defence claimed that those who were empanelled in 2009 by the Plaintiff, of which he was one of them, were tasked to only update the primary science kit and not to design and develop the primary science charts. That he, the Defendant, had already designed and developed the Primary Science Charts and had even sold them to the Plaintiff in 2008. The Defendant further claimed that the Plaintiff purchased the said charts from the Defendant and he permitted the Plaintiff to remove the name Mamur Services from the said Charts and replace the same with its own. He defended his registration as the copyright owner of the said works and counter claimed for damages against the Plaintiff for infringement.

5. At the trial, three (3) witnesses testified one for the Plaintiff and two for the Defendant. The parties agreed on a total of 11 issues which can be summarized into four (4) as follows:-

- a. Who is the owner of the copyright in the “Primary Science Charts” named “Weather and the Sky, HIV/Aids and Drugs and Drug Abuse”?
- b. Who has infringed the copyright in the said works?
- c. Should the copyright registered under Certificate No. 000063 be cancelled?
- d. What reliefs should be given in the circumstances?

6. The evidence of the witnesses and submission of learned counsel is on record. I will consider the same as I determine the above four (4) issues in the following paragraphs.

7. PW1 Perpetua S. Wanaswa told the court that in 2009, a panel of teachers were appointed by the Plaintiff to upgrade the Plaintiff’s Primary Science kit. That one of the items that the panel came up with and was added to the said kit was three charts i.e. Weather and Sky chart, HIV/Aids chart and the Drug and drug abuse chart (hereinafter “**the said works**”). That although the Defendant was part of the said panel, the said works was a product of the entire panel and not any particular individual member. The Panelists were paid their sitting allowances for the work they did and a firm known as Apex Consultants was tasked to print the charts for which it was fully paid. It is then that the Primary Science Kit was awarded “**the Approved Status**” by the Kenya Institute of Education (KIE). According to her, upon such award by the KIE, the copyright in the works vested in the Plaintiff. PW1 explained that the invoice by Apex Consultants in October, 2008 was in respect of the work the panel was working on. She contended that if the Defendant was a supplier of the material to the Plaintiff as he had contended, he would not have sat as one of the panelists.

8. On his part, the Defendant told the court that representatives of the Plaintiff approached him in August, 2008 and sought for three types of Charts. He gave them and they later came and told him that the same had been accepted. They asked him to remove his name and replace it with that of the Plaintiff so that it would fit in the Kit. Later in January, 2009, the Plaintiff asked the Defendant to assist in updating the kit which took 9 days. He was paid for that work and he went on with his business. That the Defendant and the Plaintiff had agreed in 2008 that the Plaintiff would be buying the charts from the Defendant. That there was no business transaction between the parties between 2009 and 2010.

9. PW3 Charles Rurigi Waweru told the court that he had worked for the Plaintiff since 1998 to 2011 when he left to start his own business. That he and one Jane Mwai approached the Defendant who supplied them with charts the subject of the suit; that the Plaintiff requested the Defendant who agreed to replace the name of Mamur Services with that of the Plaintiff in those charts; that the charts belonged to the Defendant and not the Plaintiff. That the panel that was appointed in 2009 was only looking at the spelling mistakes in the Primary Science Kit and not to develop anything.

10. From DExh1 pages 3 to 21, it is clear that the original Primary Science kit was developed by the Plaintiff in 2002. When it was developed, it did not have the charts that are the subject of the present dispute. From the testimony of the witnesses, the said charts were included in the Plaintiff’s Science Kit in 2009 where upon the KIE gave the kit an approved status. The Defendant’s testimony is that he is the one who developed those charts before 2009. He never stated when he developed them. He only stated that he sold them to the Plaintiff in 2008 when DW2 and one Jane Mwai came calling looking for them after the Plaintiff’s kit had been rejected by KIE. DW2 sought to support the Defendant’s version as to the origin and source of the Charts.

11. I observed DW2 testify. I did not believe his testimony for two reasons. Firstly, every time he was testifying in court, both during his evidence in chief as well as cross examination, he kept on looking towards the Defendant who was in court seeking his approval on his testimony. He would change the moment the Defendant shook his head. The court had to warn him at one time and direct him to face the

court and stop consulting the Defendant by signs. Secondly, he admitted that after he left the employment of the Plaintiff, he joined the Defendant in his Mamur Services business. Accordingly, he was not an independent witness as it were. He had an interest in the outcome of the case.

12. The Defendant's contention was that he was the author of the said works; that vide the job card No. 1035 and invoice No. 1057 dated 21/10/2008, respectively, he had sold the said works to the Plaintiff and that the Plaintiff asked him to rebrand them in its name instead of his name Mamur Services which he accepted. The question that arises is, why was the Defendant agreeing to rebrand works he alleges to be his in the name of the Plaintiff? I have looked at pages 41, 42, 43, 44 and 83 of DExh1. These are; an invoice dated 21/10/08, a job card dated 21/10/08, a deposit slip for Kshs.101,958/80 of which Kshs.98,913/80 was paid by the Plaintiff, a withholding certificate dated 5/11/08 and another job card dated 6/02/09. According to the Defendant, this was evidence of delivery and sale of the subject charts to the Plaintiff.

13. On her part PW1 insisted that the Defendant never developed the charts, the charts were developed by the plaintiff's panel and passed on to the Defendant to print and produce them for the Plaintiff. To her, this was both in 2008 and 2009. She was however unable to explain why there was such delivery of the charts to Apex Educational Consultants in 2008 yet those who developed the same are said to have been empanelled in 2009.

14. I have looked at DExh1 pages 41, 42, 43, 44 and 83. They are documents relating to a firm known as Apex Educational Consultants. PW1 stated that this was the firm that was introduced by the Defendant to the Plaintiff to print and produce the charts for the Plaintiff. Invoice No.1057 shows that it related to:-

“Graphic Design 300 A4 Size full colour print out at Sh.100, 180 A2 size full colour print out at Sh.400, Binding 30 pieces A4 Size at Sh.15 Binding 18 pieces A2 Size at Sh.30”

That invoice was for 114,740/=

15. Job card Nos. 1035 and 1110 dated 21/10/08 and 6/02/09, respectively are addressed to the Managing Director of the Plaintiff. They are for various charts. The Defendant admitted that, they are not delivery notes. He further admitted that delivery notes could have been used instead of the job cards.

16. In my understanding, a delivery note is a document that accompany a shipment of goods and it lists the description and quantity of the goods delivered. On the other hand a job card is a document that sets out procedures of how a particular task is to be undertaken.

17. In my opinion looking at the invoice and the job cards produced in evidence, it is more likely that what Apex Educational Consultants did was to print and bind the charts than to sell the charts to the Plaintiff as alleged by the Defendant. If it was an outright sale as alleged, why didn't the invoice make that fact in the description? To the contrary, the invoice gave detailed explanation as to the size of the print and bindings carried on the items charged.

18. Further, the Defendant here is sued as trading in the name and style of Mamur Services. Why is it that, if the charts belonged to him in that business name, it is Apex Educational Consultants raising an invoice in respect of those Charts? There was no acceptable evidence that was produced to connect Mamur Services and Apex Educational Consultants. I accept the evidence of PW1 that the invoice and job cards produced by the Defendant in this case were in respect of the printing and binding services offered by the firm Apex Educational Consultants.

19. The other issue is, if the Defendant had actually developed the charts way before they found their way to the Plaintiff's Science kit, there was no evidence that the Defendant had sold to any other entity before 2009. There was no explanation why the Defendant would allegedly change the branding of the charts from Mamur Services to the Plaintiff's name, sell the same to the Plaintiff before registering his alleged copyright. There was further no explanation why the Defendant would wait until the Plaintiff's kit is approved with ***“his alleged charts therein,”*** let the Plaintiff make mass production and start supplying

educational institutions and then rush in 2010 to register the copyright.

20. I am of the view and I so hold that, the Defendant was, as were other teachers, included in the panel that was updating the Science kit in 2009, after the charts were developed and formed part of the approved kit, the Defendant had a chance of making copies of the same when he was contracted to print and make copies for the Plaintiff through Apex Educational Consultants. He then decided to steal a march against the Plaintiff by registering the said charts as his copyright in September, 2010.

21. Accordingly, I answer the first question in favour of the Plaintiff, that after the charts had been developed, approved by the KIE and became part of the Science Kit for use in Primary Schools, the Plaintiff became the owner of the copyright therefor.

22. I have examined the charts appearing at pages 22 to 32 of DExh1. They are the ones bearing the name of Mamur Services. I have compared them with the charts appearing at pages 26 to 54 of PExh1. They bear the names of the Plaintiff. They are the same in every respect save for the names and address of the designers. Since I have made a finding that the Plaintiff is the owner of the copyright in those charts, by printing the charts in the name of Mamur Services, the Defendant had infringed in that copyright. As a copyright is not conferred by mere registration, the subsequent purported registration by the Defendant of the said works under Certificate No. CR 000063 did not defeat the Plaintiff's claim to copyright on the said works. Accordingly, that Certificate of Registration of a copyright work is of no consequence and is liable to be cancelled.

23. As regards the claim for damages, the Plaintiff did not lead evidence to show that although the Defendant had produced the said works, he had sold or distributed the same to third parties. In this regard, I am not satisfied that a case has been made for an award of damages.

24. Accordingly, I hold that the Plaintiff has proved its case to the required standard. I allow the suit in terms of prayer Nos. (a), (b) and (e) of the Plaint. Costs follow the event and the same is accordingly awarded to the Plaintiff. The Defendant's counterclaim is accordingly dismissed with costs.

DATED and **DELIVERED** at Nairobi this 8th day of May, 2015.

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A. MABEYA

JUDGE