

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E761 OF 2021

BETWEEN

EVANS WAMWOYO

WAFULA.....PLAINTIFF

AND

THE STANDARD GROUP PLC

.....DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff filed this suit through his Complaint dated 19th August 2021, where he claims that he is the registered owner of an audio-visual copyright titled "*Diplomatic Front*" under Registration No. AV-00300 and that in September 2019, he proposed a show to the Defendant designed to allow diplomats to promote investment opportunities from their countries that they represent in Kenya.
2. That the Defendant accepted the proposal, agreed on thematic areas, and requested a "pilot show" which the Plaintiff filmed on 2nd December 2019 and that despite initial plans for revenue sharing

and formal rollout, the Defendant stopped communication without signing a formal agreement. In May 2021, the Defendant began airing a segment called "*The Diplomat*" within its "*Bottomline Africa*" show, which the Plaintiff claims is a modified version of his work. The Plaintiff asserts he is the legal author and owner of this work under the **Copyright Act(Chapter 130 of the Laws of Kenya)**, with exclusive rights to reproduce, adapt, and broadcast the material until the year 2070.

3. The Plaintiff further claims that the Defendant modified and aired the show without a license or authority and that by renaming it "*The Diplomat*" it allegedly passed off the work as its own, leading the public to believe the property belonged to the media station and preventing the Plaintiff from selling it elsewhere. The Plaintiff contends the Defendant acted in bad faith by encouraging him to divulge confidential information and then using that information for profit without compensation. As such, the Plaintiff is seeking *inter alia* a declaration from the court that "*The Diplomat*" infringes on the "*Diplomatic Front*" copyright, a permanent injunction restraining the Defendant from broadcasting the infringing show, an accounting of all profits earned from the show and payment of

those amounts to the Plaintiff, General, Exemplary, and Aggravated Damages, plus interest and costs.

4. The Defendant opposes the suit through its Statement of Defence dated 18th February 2022. It argues that copyright law only protects the expression of ideas, not the ideas themselves and asserts that the Plaintiff is trying to claim exclusive ownership over "diplomatic relations" as a subject and the "talk show" format, both of which are commonplace themes in the public domain. The Defendant relies on the "doctrine of merger" and "*scènes-à-faire*," arguing that when an idea can only be expressed in limited ways or contains indispensable elements for a topic, those elements receive no protection. Using comparative jurisprudence from the UK and New Zealand, the Defendant argues that for a TV format to be protected, it must have a coherent framework and specific, repeatable features. The Plaintiff's synopses are described as unclear, lacking specifics on program length, setting, or a distinctive structure and that even if the synopses were protectable, the Defendant points out that the actual segments in "*The Diplomat*" do not include the specific elements proposed by the Plaintiff, such as audience call-ins or specific "top five" travel tips.

5. The Defendant maintains that it never broadcast, reproduced, or translated the Plaintiff's actual pilot video, that is, "*Diplomatic Front*" and that the Plaintiff's pilot had significant sound quality issues and when the Plaintiff failed to submit an improved version, the Defendant proceeded with its own independent production. The Defendant states that the Plaintiff has no proof that the Defendant used his specific audio-visual recording and he did not own the general topics covered. The Defendant argues that the Plaintiff fails to demonstrate that the public was misled into believing "*The Diplomat*" was the Plaintiff's work and that there was no breach of trust, as the interactions were exploratory and centered on a subject the Defendant had previously explored in a show called "*Diplomatic Perspectives*".
6. The Defendant invites the Court to focus on whether the work consists of unprotectable commonplace elements and whether "*The Diplomat*" is substantially similar to the Plaintiff's protected expression rather than just his idea. In sum, the Defendant urges that the Plaintiff's claim of copyright infringement is without merit and should be dismissed.
7. When the matter was set down for hearing, the Plaintiff testified on his own behalf(PW 1) relying on his witness statement dated 19th

August 2021 and produced the Bundle of Documents dated 19th August 2021(PExhibit 1-6B) which includes a copy of the Certificate of Registration of Copyright work dated 16th June 2020, a copy of the Plaintiff's proposal for Diplomatic Front show which includes a Flash Drive, a bundle of copies of email correspondence between the Plaintiff and the Defendant, a copy of the Plaintiff's demand and notice of intention to sue, a copy of the Defendant's response letter dated 12th July 2021 and the Plaintiff's Certificate under **section 106B** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.

8. The Plaintiff also called Harlen Kaur Jabbal, a producer, researcher and YouTuber (PW 2) who relied on his witness statement dated 30th May 2022; Ann Wanjiru Mahihu, the Plaintiff's wife (PW 3) who relied on her witness statement dated 4th October 2022 and; Leon Karani Mwambi, a producer (PW 4), who relied on his witness statement dated 30th May 2022. On its part, the Defendant presented Denise Laila, its Chief Strategy Officer (DW 1) who relied on her witness statement dated 29th September 2022 and produced the Bundle of Documents dated 29th September 2022 (DExhibit 1-6) which included the synopsis of "*The Diplomat*" a copy of the Plaintiff's answer to Request for Particulars and annexure "004", a copy of the presentation made by the Plaintiff,

copies of YouTube Page Printouts, the Certificate of Authenticity of electronic records and a Flash Drive containing videos of: *The Diplomat, Diplomatic Perspectives* and other shows.

9. After the hearing, the parties filed written submissions which together with the pleadings and evidence I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

10. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in **Miller v Minister of Pensions [1947]2 All ER 372** discussed the burden of proof and he stated as follows:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing

the burden of proof will lose, because the requisite standard will not have been attained.”

11. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in **sections 107 and 108** of the **Evidence Act** which provide as follows:

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(Also see **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)**)

12. From the parties' submissions, I find that the following are the abridged issues falling for the court's determination:

a) Whether the Plaintiff holds a valid copyright work and rights to the copyright work?

b) What is the work subject of these proceedings?

- c) *Whether the Defendant infringed on the copyright work and passed off “Diplomatic Front as “The Diplomat”?*
- d) *Whether the Defendant breached trust and confidence?*
- e) *Whether the Plaintiff is entitled to the reliefs sought?*

Copyright ownership

13. The Plaintiff has asserted he is the legal author and owner of the *Diplomatic Front* work under the **Copyright Act**, with exclusive rights to reproduce, adapt, and broadcast the material until the year 2070. Indeed, the Plaintiff’s ownership of “*Diplomatic Front*” registered in the audio-visual category under the **Act**, is undisputed and the Plaintiff produced a certificate of registration of this work in his evidence. This court, in **Simon Otieno Omondi v Safaricom (K) Limited [2020] KEHC 10062 (KLR)** held that copyright is legal protection for an author/creator which restricts the copying of an original work they have created, the key word being “original”. Therefore, I have little difficulty finding that the Plaintiff is the owner of the audio-visual work of “*Diplomatic Front*” and I am in agreement with the Defendant’s submission that only this audio-visual work should be regarded by the Court when

determining whether or not there was copyright infringement in that Copyright law is only intended to protect the expression of ideas, not the ideas themselves. An idea can be expressed and implemented in various ways, resulting in different copyrights coexisting on the same idea without any infringement (see **Jack J. Khanjira & Another V Safaricom Limited [2012] KEHC 5508 (KLR)**)

Alleged Infringement and Passing off

14. As stated, the Plaintiff claims that in May 2021, the Defendant began airing a segment called "*The Diplomat*" within its "*Bottomline Africa*" show, which the Plaintiff claims is a modified version of his work, "*The Diplomatic Front*" and that the Defendant modified and aired the show without a license or authority and by renaming it "*The Diplomat*," the Defendant allegedly passed off the work as its own, leading the public to believe the property belonged to the media station and preventing the Plaintiff from selling it elsewhere. In his testimony, the Plaintiff admitted that he had no proof that the Defendant has broadcast the video that he was copyrighting and that he had no proof that the Defendant has copied any component of the copyrighted video. He further had no

proof that the Defendant had translated any part of his video or that the video was communicated to the public.

15. The Plaintiff also stated that he was not aware that in 2009, the Defendant already had a show known as “*Diplomatic Perspectives*” and that in his research, he came across various shows that discussed diplomatic foreign policies of various countries, trade and investment opportunities, education opportunities in different countries and topics on agriculture and culture. He stated that he was not the owner of these topics and when questioned about the format in his synopsis he admitted that his video did not have a curtain raiser as envisaged in the synopsis and that from the videos aired by the Defendant, he was not able to point out a segment on questions/comments as set out in the synopsis. On the passing off, the Plaintiff stated that he never presented his synopsis to the public even though he owns the copyright to it.

16. From the evidence highlighted above, I find that the same does not support the Plaintiff's claims of copyright infringement or passing off or breach of confidence and trust. The Plaintiff admitted he had no proof that the Defendant broadcast the video he copyrighted, that the Defendant copied any component of his copyrighted work or that the Defendant translated or

communicated his video to the public. Without evidence of actual copying, broadcast, or communication to the public, his copyright infringement claim cannot stand. Copyright is defined in **Black's Law dictionary 8th Ed.**, as an act of violating any of a copyright owner's exclusive rights. It seeks to protect the expression and recorded content of someone's intellectual labours. It refers to the dealing with copyrighted material in a manner inconsistent with the copyright owner's interests.

17. The Plaintiff also admitted he was not aware of the Defendant's pre-existing show "*Diplomatic Perspectives*" from 2009), which covered similar diplomatic topics. He also acknowledged that in his research, he found many other shows discussing diplomatic relations, trade, education, and culture, topics that are not original or owned by him. The format described in his synopsis, that is, the curtain raiser, Q&A segment was not actually used in his own video, nor could he identify it in the Defendant's show. This suggests that the concept of a diplomatic talk show is generic and not unique to the Plaintiff.

18. On passing off, the Court of Appeal, **Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 others [2019] KECA 701 (KLR)** accepted its definition in **Black's Law**

Dictionary, 8th Ed., that it is *the act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers. It is actionable in tort under the law of unfair competition. It may also be actionable as a trademark infringement.* The appellate court cited the case of **Reckitt and Colman Products Ltd vs. Borden Inc and others [1990] 1 All ER 873**, where the House of Lords summarized the ingredients of an action in passing off, namely: *that the plaintiff must establish a goodwill or reputation attached to the goods or services; secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff; and thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.* In essence, passing off requires misrepresentation to the public leading to confusion.

19. The Plaintiff admitted he never presented his synopsis to the public, so there was no established public goodwill or recognition of

his “brand” that could be misappropriated. Merely renaming a segment “*The Diplomat*”, which I find to be a common, descriptive title, does not, in itself, constitute passing off without evidence of public confusion or damage to his reputation.

20. In contrast, the Defendant provided examples of other similar shows including **WION’s “The Diplomacy Show,” Arirang TV’s “The Diplomat,”** which is proof of pre-existing diplomatic programming and demonstrates the generic nature of diplomatic talk shows globally. This undermines the Plaintiff’s claim that his concept was original or that the Defendant copied it. As such, given the generic nature of the show’s theme and format, the lack of proof of copying or broadcast, the absence of public presentation of the Plaintiff’s work, and the existence of similar pre-existing shows, there is no evidence of copyright infringement or passing off. The Plaintiff’s claim is based on the idea of a diplomatic talk show, which is not protected by copyright, rather than on the expression of a unique creative work that was copied, which as I have found, is not unique and that any similarities stemmed from common diplomatic show tropes.

Reliefs sought by the Plaintiff

21. Based on my findings above, it is my conclusion that the Plaintiff has not proven his case to the required standard and that the reliefs he seeks cannot be granted and his entire claim therefore fails at this point. Further, as he has been unsuccessful in his suit and the Defendant has expended effort and resources defending the same, it is only fair that the Plaintiff, as the losing party should bear the financial burden of this litigation.

Conclusion and Disposition

22. In the upshot, the Plaintiff's suit is dismissed with costs being awarded to the Defendant. it is so ordered.

**DATED SIGNED and DELIVERED virtually this 12TH DAY OF
FEBRUARY 2026**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF:-

1. Ms. Rotich holding brief for Mr. Kiplagat for the Plaintiff.
2. Mr. Pamba for the Defendant.
3. Amos - Court Assistant

ORIGINAL