



**Ivusa v Safaricom Limited (Civil Case E562 of 2021) [2025] KEHC 1137 (KLR)
(Commercial and Tax) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E562 OF 2021
FG MUGAMBI, J
FEBRUARY 27, 2025**

BETWEEN

DAVIDSON IVUSA PLAINTIFF

AND

SAFARICOM LIMITED DEFENDANT

JUDGMENT

Introduction and Background

1. The plaintiff, through a plaint dated 20th April 2021 instituted a suit against the defendant seeking judgment as follows;
 - i. An order restraining the defendant by itself, its servants, its agents, its workers, assigns and/or any person claiming through it, from using, causing to be advertised in the print and electronic media or any other form of media the product titled or bearing the name Saricom Reverse Call Feature
 - ii. Damages for breach of trust and passing off the Plaintiffs mark
 - iii. Damages for loss of business and income
 - iv. Costs of this suit.
2. The plaintiff's case is founded on a proposal christened 'Jichomoe' which he shared with the defendant on 10th May 2010. The proposal was designed to ensure that the defendant's customers, being a leading provider of converged communications solutions in Kenya, were not limited from making calls by their financial capabilities. The plaintiff claims that the proposal remained under consideration at the defendant's offices, with repeated assurances that it was being reviewed.



3. The plaintiff accuses the defendant of launching his idea on 18th June 2019 under the name Safaricom Reverse Call Feature without prior consultation. The plaintiff further accuses the defendant of breaching trust by failing to notify him of the concept's adoption, delaying its implementation, launching it without his involvement, and attempting to register the concept as its own without informing the plaintiff.
4. As a result, the plaintiff claims to have suffered loss of business opportunities with potential buyers, as well as a depreciation in the value of his intellectual property. The plaintiff argues that the defendant is guilty of passing off by launching a product identical to Jichomoe under the name Safaricom Reverse Call Feature while still retaining the plaintiff's original proposal.
5. In response to the plaintiff's suit, the defendant filed a statement of defence dated 17th January 2022, denying the plaintiff's claims and seeking the dismissal of the suit with costs. The defendant argues that, due to many of its subscribers being unable to complete their calls, it independently developed a proposal in June 2018 titled Reverse Call Service. This service, launched on 26th April 2019, allows subscribers to make reverse calls to complete their conversations.
6. The defendant asserts that it had expended sufficient and independent effort in developing the Reverse Call Service, giving it an original character. It further argues that reverse call technology was not unique to the plaintiff, as similar services had existed even before the advent of mobile telecommunications providers. Additionally, the defendant contends that the plaintiff had not provided evidence demonstrating that Jichomoe was independently developed to possess an original character.
7. The defendant highlighted key differences between the two services, stating that Reverse Call Service was limited to calls, whereas Jichomoe included calls, text messaging, and mobile internet. The defendant explained that its service requires the caller to dial a special prefix to initiate a reverse call, while Jichomoe functioned as a module or feature that needed to be installed on a customer's handset. Furthermore, the defendant notes that its service requires a minimum airtime balance of Kshs 5, whereas Jichomoe did not specify any minimum balance. Based on these distinctions, the defendant maintains that its Reverse Call Service was developed independently.
8. The plaintiff filed a response to the defence on 27th March 2022, asserting that Jichomoe was unique and original at the time it was shared with the defendant. The plaintiff further claims that no reverse call service existed before the proposal was presented to the defendant.
9. At the hearing, the plaintiff testified as PW1, while the defendant called Stephen Maina Muchiri as DW1. The witnesses' testimonies closely align with their respective witness statements and pleadings, as summarized in the brief facts. Therefore, I do not intend to restate their testimonies in full but will reference them where necessary.

Analysis and Determination

10. At the close of hearing parties filed their respective submissions which I have carefully considered alongside the pleadings, testimonies, evidence and cases relied on by the parties. I have distilled the following issues for determination;
 - i. Whether there was a breach of trust on the part of the defendant;
 - ii. Whether the defendant is guilty of passing off;
 - iii. Whether the plaintiff is entitled to the remedies sought.



11. On the first issue, the court in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, cited from the Halsbury's Laws of England as follows;

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as;

The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.

A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).”

12. Additionally, in *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

13. The plaintiff submits that the circumstances of the case warrants the imposition of a constructive trust. The Halsbury's Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where:



- i. there was a common intention that both parties should have a beneficial interest; and
 - ii. the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.
14. Based on the above judicial pronouncements and writings, the first question is whether independently of any inferences drawn from the parties' conduct in sharing the property, there was, at any time before acquisition (or, in exceptional cases, at a later date), an agreement, arrangement, or understanding that the property would be shared beneficially.
15. According to the passage from Halsbury's Laws of England, where there is no evidence that the matter was discussed, the court may infer a common intention for the property to be shared beneficially based on the parties' conduct. In such cases, direct contributions to the purchase price by the non-legal owner, whether at the time of acquisition or through mortgage installments, can readily justify the inference necessary to establish a constructive trust.
16. Once a common intention has been established, either through direct evidence of an agreement or inferred from the parties' conduct, the claimant must demonstrate that they acted to their detriment in reliance on that agreement.
17. In the matter before me, PW1 testified that the Jichomoe concept was sent to the defendant via email. He confirmed that the submission was unsolicited, and in fact, no communication from the plaintiff regarding the concept was presented as evidence. However, the plaintiff claims he shared his idea in good faith, expecting it to be considered fairly.
18. While it is undisputed that the defendant received the plaintiff's concept, the other issue is whether the defendant acted dishonestly by using the plaintiff's idea to develop its own service. The plaintiff alleges a breach of trust, arguing that the defendant improperly used his concept without consultation or acknowledgment. The defendant, on the other hand, contends that it independently developed its Reverse Call Service and that similar services existed prior to the plaintiff's proposal.
19. The plaintiff having confirmed that he voluntarily shared the Jichomoe concept without any documented agreement, means that the court cannot infer any express trust, or fiduciary relationship between the parties. The concept was sent unsolicited, and there was no evidence that the defendant undertook to hold it in trust for the plaintiff or to act in a fiduciary capacity. There was further no mutual understanding that the concept was to be held in confidence or used for the plaintiff's benefit.
20. Since this element has not been proved, the issue of dishonesty in my view is immaterial, but even then, the plaintiff has not substantiated the claim of dishonesty on the defendant's part. The defendant has equally not provided any evidence of conduct on the part of the defendant that would create an impression of a constructive trust.
21. The plaintiff's work would most likely be regarded as a software application which under Section 22 of the [Copyright Act](#) it is protected as a literary work.
22. It is a well-known principle of copyright law that copyright infringement revolves around the fundamental distinction between ideas and their expression. Copyright law protects the expression of



ideas, not the ideas themselves. The reason for this is that copyright aims to foster creativity by allowing others to build upon existing ideas. If ideas were protected under copyright, it would stifle creativity and innovation, as others would be prevented from using or expanding upon those ideas to create new works.

23. This fundamental principle of copyright law was affirmed in High Court Civil Case No. 231 of 2011 – Jack J. Khanjira & Another v Safaricom PLC, where the Court held:

“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.”

24. Likewise, in Samuel Otieno Omondi v Safaricom (K) Limited [2020] eKLR, the court also confirmed that: -

“...It is noteworthy that, ideas cannot be protected by copyright, although the form in which they are expressed can be. This is referred to copyright circles as the “idea-expression dichotomy” or the “idea-expression divide.” Indeed, it’s not always easy, however, to distinguish an idea and the expression of an idea and the reproduction of a detailed pattern of incidents or ideas could constitute copyright infringement.”

25. No evidence was presented to establish that the plaintiff’s work was protected under copyright. Additionally, it is undisputed that while both programs share a similar objective, there are technical differences between them. The plaintiff has also not provided any proof that the defendant was unaware of the reverse call feature before receiving the email.
26. The key issue is that, even if the plaintiff’s concept of allowing callers to make calls despite running out of airtime was original, copyright protection does not extend to the idea itself but rather to the specific manner in which the plaintiff expressed and implemented that idea.
27. Beyond the concept note being shared, no evidence has been presented detailing the proposal sent to the defendant. In the context of computer software, the expression of ideas is typically manifested through source code. Without evidence of the plaintiff’s unique implementation such as written code, diagrams, or a functional prototype, it is difficult to establish that the defendant appropriated the plaintiff’s specific expression rather than independently developing a similar idea.
28. Having made this determination, for the plaintiff to succeed in his claim that the defendant passed off the Jichomoe concept as its own by renaming it Safaricom Reverse Call Feature, he would need to establish three key elements.
29. First, the plaintiff needed to prove that Jichomoe had acquired goodwill and market recognition before the defendant launched its service. This would require demonstrating that the concept was known to a specific market, had been promoted or used in a way that created a distinct identity, and had developed a reputation among consumers or industry players. Second, the plaintiff ought to have proved that the defendant’s service misrepresented its origin by creating a false impression that it was associated with or derived from Jichomoe. This could be through similarities in branding, marketing, or functionality that would lead a reasonable person to believe that Safaricom Reverse Call Feature was based on or linked to Jichomoe.
30. Third, the plaintiff ought to have provided evidence of financial or reputational harm suffered as a result of this alleged misrepresentation. This could have included loss of business opportunities, reduced market value of his concept, customer confusion, or damage to his professional reputation.



31. The plaintiff did not present any evidence to support these claims. There was no proof that Jichomoe had gained market recognition before the defendant's service launch, nor was there evidence that consumers or industry stakeholders associated Safaricom Reverse Call Feature with Jichomoe. Additionally, the plaintiff failed to demonstrate any financial loss or reputational damage caused by the defendant's actions. In the absence of such evidence, the claim for passing off remains unproven.

Disposition

32. Accordingly, the plaintiff's suit as presented through the plaint dated 20th April 2021 is devoid of merit. It is dismissed with costs to the defendant.

SIGNED IN NAIROBI

F. MUGAMBI

JUDGE

DATED AND DELIVERED IN NAIROBI THIS 27th DAY OF FEBRUARY 2025.

A. VISRAM

JUDGE

