



REPUBLIC OF KENYA



**Omare v Safaricom Limited & another; Music Copyright Society Kenya (Third party)
(Civil Case 181 of 2016) [2024] KEHC 875 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 181 OF 2016**

**CW MEOLI, J
JANUARY 31, 2024**

BETWEEN

MOFFAT ACHOKI OMARE PLAINTIFF

AND

SAFARICOM LIMITED 1ST DEFENDANT

LIBERTY AFRIKA TECHNOLOGIES LIMITED 2ND DEFENDANT

AND

MUSIC COPYRIGHT SOCIETY KENYA THIRD PARTY

JUDGMENT

1. By a plaint dated 13th July, 2016 Moffat Achoki Omare (hereafter the Plaintiff) sought against Safaricom Limited and Liberty Afrika Technologies Limited (hereafter the 1st and 2nd Defendants, respectively) the reliefs set out hereunder, namely:
 - a. “Production of all documents and records relating to the use, distribution and sale of the Plaintiff’s works for the period running from the year 2009 to the year 2014.
 - b. A permanent injunction restraining the defendants, their servants and/or agents from infringing upon the copyrights of the Plaintiff by offering for sale, selling or storing of any data relating to the Plaintiff’s musical work.
 - c. Account of all the proceeds of sale realized from the online sale of the Plaintiff’s music on the 1st Defendant’s online portal aforementioned.
 - d. General damages for infringement of Copyright.



- e. Costs of the suit plus interest thereon.
 - f. Any other reliefs this Honourable Court deems fit to grant.” sic.
2. The Plaintiff pleaded that sometime in the year 2018 the 1st Defendant introduced a caller ring tune service referred to as skiza to enable its subscribers customize their ringtones, and subsequently entered into a Content Provision Agreement (CPA) with the 2nd Defendant, by which the latter allegedly assigned to the former various copyrights, licenses and sub-licenses in respect of music and other content featured on the skiza service.
 3. The Plaintiff further pleaded that between the years 2009 and 2014 respectively, the Defendants, without obtaining his consent or authority, used, distributed and/or sold his musical works on their Skiza Top Tunes service hosted on the 1st Defendant’s website www.skiza.safaricom.com. Thereby infringing on the Plaintiff’s intellectual property rights. That subsequently and upon issuance of a demand, the 1st Defendant expunged the following musical productions by the Plaintiff from its online portal:
 - a. 703030-His Love
 - b. 7013023-She is Gone
 - c. 7013022-Preach it
 - d. 7013021-Praise
 - e. 7013018-4th Man
 - f. 7013019-Gospel Celebrity
 4. Upon entering appearance, the 1st and 2nd Defendants filed their statements of defence separately, denying the key averments in the plaint and liability.
 5. On its part, the 1st Defendant by way of the statement of defence dated 12th August 2016 admitted to operating the skiza service and further admitted the existence of the CPA cited in the plaint. However, the 1st Defendant averred that the CPA between itself and the 2nd Defendant was made on the premise that the latter had obtained the requisite licenses and approvals in respect of the related copyright. The 1st Defendant further denied the allegations of its use and/or distribution of the Plaintiff’s musical works, adding that any subsequent expungement of the Plaintiff’s said works from the skiza website was done in the exercise of due caution.
 6. The 2nd Defendant filed its statement of defence dated 31st August 2016 similarly denying the allegations of use, distribution and/or sale of the Plaintiff’s works amounting to infringement. The 2nd Defendant averred that any such use of the Plaintiff’s musical works was done pursuant to a license issued to it by Music Copyright Society of Kenya (hereafter the 3rd Party) of which the Plaintiff was a member at all material times.
 7. Subsequently, the 2nd Defendant took out third party proceedings against the 3rd Party, who then entered appearance and filed the statement of defence dated 18th May, 2022 equally denying the key averments in the plaint and disputing the Plaintiff’s claims. It is the 3rd Party’s assertion that while the musical works belonging to the Plaintiff were utilized by the 2nd Defendant during the timelines stipulated in the plaint, this was done pursuant to a deed of assignment of rights.
 8. The hearing of the suit commenced on 22nd March, 2023 with the Plaintiff testifying on oath as PW1, therein stating that he is a musician by profession, more specifically a gospel artiste. The Plaintiff then



proceeded to adopt his signed witness statement dated 13th July, 2016 as part of his evidence-in-chief and his bundle of documents of like date as P. Exh. 1-3.

9. The Plaintiff stated that he had neither contracted with the Defendants for the purpose of authorizing them to exploit his music, nor assigned his copyrights thereto to any person. The Plaintiff further stated that in the year 2007 he joined the 3rd Party as a member, he never assigned to them any rights for the sale or distribution of his music. That he learned of the use of his music works by the Defendants, through an acquaintance. That he had never received any remuneration from the said Defendants, arising out of such use.
10. In cross-examination, the Plaintiff testified that the songs particularized in the plaint are his own composition, adding that he was still a member of the 3rd Party at the time of instituting the present suit. That the 3rd Party was responsible for collecting royalties on his behalf for the use of his music in events or in public service vehicles. The Plaintiff restated his earlier testimony that he had not assigned his music rights to the 3rd Party, and was unaware, of any existing agreement between the Defendants and/or the 3rd Party, pertaining to his music works. That as far as he was concerned, he had never contracted with either of the Defendants to upload, distribute, sell, or otherwise use his music.
11. In re-examination, it was his evidence that under the agreement entered into between himself and the 3rd Party, all performing rights and film synchronization had been assigned solely to the latter.
12. For the 1st Defendant, Enock Wabwoba, the Principal Legal Officer-Financial Services testified as DW1. He began by adopting his signed witness statement dated 24th May, 2023 as his evidence-in-chief and produced the 1st Defendant's bundle of documents of even date, as D. 1 Exh. 1 and 2. In cross-examination, the witness stated that although no evidence was tendered to show all the payments made to the 2nd Defendant by the 1st Defendant, for use of the Plaintiff's music works, payments were made following receipt of invoices listing the songs played.
13. It was his further evidence that no contract subsisted between the Plaintiff and the 1st Defendant, but instead, any rights to the Plaintiff's music were obtained from the 2nd Defendant. It was also his evidence that the Plaintiff's music was made available on the skiza platform and that payments arising therefrom were made to the 2nd Defendant pursuant to the CPA between the Defendants herein. That the Plaintiff initially assigned his rights to the 3rd Party, who then reassigned them to the 2nd Defendant. That resultantly, the 1st Defendant does not owe the Plaintiff any monies. He stated that the 1st Defendant had in its possession the license agreements entered into between the 2nd Defendant and the 3rd Party.
14. DW1 reiterated the above evidence during re-examination, adding that pursuant to the CPA, the 1st Defendant was indemnified against any infringement claims arising from use of the various music works on the skiza platform.
15. The 2nd Defendant on its part relied on the testimony of its content manager, Olive Githongo (DW2). Adopting her executed witness statement dated 28th October, 2021 as her evidence-in-chief, she further produced the 2nd Defendant's bundle of documents dated 22nd May, 2023 as D2. Exh. 1-13. During cross-examination, the witness testified that the Defendants herein entered into the CPA dated 27th April, 2009 the contents of which included a clause indicating the assignment of rights to the 2nd Defendant by the 3rd Party. That this assignment coupled with the copyright license issued by the 3rd Party, formed the basis of the CPA between the Defendants.
16. That by virtue of the assignment to the 3rd Party, the Plaintiff had essentially authorized the 3rd Party to grant license and collect royalties on his behalf in respect of his music works. That the 1st Defendant would make payments to the 2nd Defendant upon invoicing, and subsequently, the relevant royalties



- would in turn be paid to the 3rd Party. The witness stated that the 1st Defendant does not owe any outstanding payment to the 2nd Defendant. The witness stated that the 3rd Party ought to have made any requisite payments to the Plaintiff as artists ordinarily contracted with the 3rd Party. That the 2nd Defendant had no personal relationship with the Plaintiff and utilized the Plaintiff's music works by virtue of its contract with the 3rd Party.
17. In re-examination, she stated that payments were made to the 3rd Party upon issuance of invoices and that no demand was made by the said Party for any outstanding royalty payments. Reiterating that the 3rd Party was responsible for remitting payments received from the 2nd Defendant to artistes, there being no obligation on the 2nd Defendant to make direct payments to the Plaintiff.
 18. Richard Sereti (DW3) testifying on behalf of the 3rd Party identified himself as the Operations Manager of the 3rd Party. Adopting his signed witness statement dated 18th May, 2023 as his evidence-in-chief, the witness stated that the Plaintiff was a registered member of the 3rd Party as well as a renowned artiste. It was his evidence that the said Plaintiff signed a deed of assignment with the 3rd Party, thereby assigning his performing and mechanical reproduction rights to the 3rd Party. That the performing rights assignment was exclusive. That subsequently, the 3rd Party and the 2nd Defendant entered into a copyright agreement, in respect of which the former received payments. He stated that payment of royalties to artists was governed by rules which he produced as D3. Exh. 1.
 19. During cross-examination, the witness stated that mechanical rights entail the reproduction of rights such as the skiza tune which exploits both mechanical and performing rights. That the agreement entered into between the 3rd Party and the 2nd Defendant did not authorize the latter to assign its rights to a third party. That however, the former licensed the latter to exploit the rights of artistes. He asserted that all royalties were promptly paid, and no outstanding sums were owed by the 2nd Defendant.
 20. It was DW3's further testimony that until the year 2015 the 3rd Party had received bulk payments from the 2nd Defendant but that the 3rd Party did not know how to distribute the payments among artists who comprised a pool adding that no specific monies were remitted to the 3rd Party in respect of the Plaintiff. It was equally his testimony that it was plausible that the Plaintiff received monies out of the said bulk payments, but that he did not have the particulars thereof. The witness averred that no authorization was ever given for the 1st Defendant to utilize the Plaintiff's music works and hence such use amounted to an infringement of copyright. This marked the end of the trial.
 21. At the submissions stage, the Plaintiff's counsel anchored his submissions on Section 35 of the Copyright Act Cap. 130 Laws of Kenya (the Act) regarding what constitutes an infringement of copyright, and Section 26 of the Act on copyright to musical works. Counsel submitted that by utilizing his works without his consent or authority, the Defendants infringed on the Plaintiff's copyright and should therefore be held liable.
 22. Concerning damages, counsel urged the court to consider the decisions in Gitobu Imanyara & 2 Others V Attorney General [2013] eKLR and Park Towers Ltd v John Mithamo Njika & 7 others (2014) eKLR, and award the sum of Kshs 5,000,000/- as general damages for every song whose use amounted to an infringement of copyright. In total a sum of Kshs 30,000,000/-. Counsel also prayed for exemplary damages at the court's discretion, while citing the decision in Mikidadi v Khaigan and Another [2004] eKLR 496 on instances when such damages can be awarded. In the same manner, counsel pressed for the injunctive order as sought in the plaint, costs of the suit and interest thereon.
 23. The 1st Defendant's counsel in his written submissions cited the decisions in Muneer Mohamed Omar & another v Emmanuel Charo Tinga & another [2015] eKLR and National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR. In arguing that a court of law cannot rewrite



- a contract entered into between parties, as was the case here, where it is not disputed that contracts were entered into between the 3rd Party and the Plaintiff, as well as between the 3rd Party and the 2nd Defendant.
24. Counsel further reiterated that on its part, the 1st Defendant remitted all requisite payments to the 2nd Defendant, who also claimed to have remitted the same to the 3rd Party. That consequently, the 1st Defendant cannot be held liable for the omissions of the 3rd Party, who failed to pay the relevant royalties owed to the Plaintiff. As for damages, it was counsel's submission that in the absence of any proof of copyright infringement by the 1st Defendant, the Plaintiff is not entitled to claim any reliefs against it. It was also counsel's submission that should the court find it liable, then any reliefs sought ought to be against the 2nd Defendant, pursuant to the indemnity clause in the CPA. The court was urged to dismiss the Plaintiff's case against the 1st Defendant.
 25. On its part, the 2nd Defendant through its counsel argued that, no evidence was tendered to prove the Plaintiff's copyright to the musical works particularized in the plaint. Counsel citing Sections 33 and 35 of the Act, as well as Halsbury's Laws of England Vol 8, page 425 paragraph 77 to contend that an infringement of a copyright cannot arise where a license to use such copyright has been given by its owner. That in the present instance, the Plaintiff had assigned his rights to the 3rd Party, who then licensed the 2nd Defendant to utilize his musical works, and which was done through the skiza platform belonging to the 1st Defendant.
 26. To buttress the foregoing point, counsel relied on the decision in *Michael Branham Katana t/a Harsutak Bar & 4 others v Kenya Association of Music Producers (Kamp) & 3 others* [2016] eKLR concerning the difference between an assignment and a license. Counsel maintained that the 2nd Defendant was entitled to license the 1st Defendant for the exploitation of the Plaintiff's works and that all the while, no complaint was ever raised by the 3rd Party. That the 3rd Party received royalty payments remitted by the 2nd Defendant for the exploitation of music works.
 27. Counsel asserted that the Plaintiff is not entitled to any of the reliefs sought in the plaint, in the absence of any evidence of alleged infringement of his copyright. Whilst citing the case of *Mathew Peevers v Leo Slingerland & Another* [2000] eKLR and the case of *Alternative Media Limited v Safaricom Limited* [2005] eKLR counsel advanced the argument that the award proposed by the Plaintiff is inordinately high and disproportionate to the purported loss suffered. Counsel further argued that the Plaintiff is not entitled to the permanent injunction order sought. Resultantly, counsel echoed his counterpart's submission that the Plaintiff's case against the 2nd Defendant ought to be dismissed with costs.
 28. The 3rd Party's counsel while relying on the definition of infringement of a copyright in *Black's Law Dictionary* 8th edition, submitted that the 3rd Party in no way infringed on the Plaintiff's copyright. In light of the fact that the latter had completely assigned his rights to the former, by way of the deed of assignment dated 27th August, 2008 produced as an exhibit at the trial. Further that, pursuant to Section 33 of *the Act*, a copyright is transmissible by inter alia, assignment or a license, and that under Section 46 of the Act, the 3rd Party is licensed to collect royalties on behalf of artistes, as was the case here. The 3rd Party's counsel however asserted that by re-assigning its rights to the 1st Defendant, the 2nd Defendant breached the agreement between itself and the 3rd Party.
 29. The court has considered the parties' respective pleadings, evidence tendered at the trial, as well as rival submissions. There was no dispute that in the material period, the 1st and 2nd Defendants had entered into a CPA pursuant to which the former was licensed to exploit the musical works which are the subject of this suit, on its skiza tunes platform. Equally, there was no dispute that the 2nd Defendant had obtained licence to the works pursuant to an agreement with the 3rd Party, to whom the Plaintiff had



pursuant to an agreement assigned rights in respect of his music. Three key issues fall for determination, namely:

- a. Whether, the Plaintiff has established ownership of the musical works referenced in the plaint;
- b. Whether the Plaintiff has made a case for infringement of his copyright, as against the 1st and 2nd Defendants;
- c. If a) is answered in the affirmative, whether the 3rd Party ought to be held liable for any such infringement particularly with respect to the 2nd Defendant; and
- d. Whether the Plaintiff is entitled to the reliefs sought.

30. As concerns the first issue, Section 2 of the Act contains the following pertinent definitions, *inter alia*:

“artiste” means a singer, declaimer, musician or other person whose work constitutes a ring back tune;

...

“musical work” means a work consisting of music, irrespective of musical quality, and includes a graphical notation of such work and works composed for musical accompaniment;

...

“owner of the copyright” means the first owner, an assignee or an exclusive licensee, as the case may be, of the relevant portion of the copyright”

31. It was the 2nd Defendant’s submission that the Plaintiff did not own the copyright to the songs particularized in the plaint. However, the Plaintiff’s asserted ownership of the material musical works was not disputed by the parties in their pleadings or during the trial. On the contrary, in their pleadings and evidence, the parties attributed the works cited to the Plaintiff. In any event, it is trite law that submissions do not constitute evidence and a party cannot be heard to raise new issues or arguments by way of submissions, and contrary to its pleadings. The court is therefore satisfied that the Plaintiff was at all material times the owner of the copyright to the musical works stated in the plaint.

32. Regarding the second issue touching on whether the Plaintiff has made a case of infringement of copyright against the 1st and 2nd Defendants, Section 2 of the Act defines an infringement as:

“Any act which violates a right protected by this Act”.

33. Section 35 (1) & (3) of the Act spells out the acts that constitute infringement as follows:

“(1) Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights—

- (a) Does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or
- (b) Imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.

(2) ...



- (3) Copyright and related rights shall be infringed by a person who—
- (a) Circumvents any effective technological protection measure designed to protect works; or
 - (b) Manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technological protection measures designed to protect works protected under this Act; or
 - (c) Removes or alters any electronic rights management information; or
 - (d) Distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.”

34. On the matter of assignment and licensing of a copyright by its owner, Section 33 of *the Act* stipulates as follows:

1. Subject to this section, copyright shall be transmissible by assignment, by licence, testamentary disposition, or by operation of law as movable property.
 2. An assignment, license or testamentary disposition of copyright may be limited so as to apply only to some of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.
 3. No assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing signed by or on behalf of the assignor, or by or on behalf of the licensor, as the case may be.
- (3A) An assignment under subsection (3) shall not be valid unless it is lodged at the Board and a certificate of record issued to the applicant and entry made in the Assignment Register.
4. A non-exclusive licence to do an act the doing of which is controlled by copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time, but a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.”

35. In the case of *Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 others* [2019] eKLR the Court of Appeal stated concerning infringement that:

“In the Indian case of *S.K. Dutt vs. Law Book Co. & ors A.I.R. 1954 All. 570*, cited with approval in *R.G Anand vs. M/S Delux Films & others 1978 AIR 1613*, it was held that to sustain a claim for infringement of a man’s copyright, there must be a substantial infringement of the work and a mere fair dealing with any work falls outside the mischief of the *Copyright Act*.”

36. This dispute arose from the 1st Defendant’s admitted use of the Plaintiff’s music on its skiza tunes platform, between the years 2009 and 2014. According to the testimony of DW1, the 1st Defendant gained such authorization from the 2nd Defendant, by way of the CPA dated 27th April, 2009 entered into between itself and the 2nd Defendant and tendered as D 1. Exh. 2. This position was confirmed



- through the testimony of DW2. Clause 4.2 of the CPA states that the 2nd Defendant had rights and/or the requisite licenses to the content, including rights to assign and/or distribute such content. Clause 6.8 sets out the payment terms under the CPA, whereas Clause 7 sets out the general obligations of the 2nd Defendant, including the obligation to obtain the requisite licenses and authorizations from the first owners of copyright. Clause 11 constituted the indemnity clause in favour of the 1st Defendant.
37. It was not disputed that prior to entering into the CPA with the 1st Defendant, the 2nd Defendant had entered into a license agreement dated 22nd August, 2008 with the 3rd Party (D2. Exh. 2), pursuant to which the latter granted the former a non-exclusive license over the musical works within the 3rd Party's purview, under Clause 2. Clause 12.2 further stipulated that the license granted to the 2nd Defendant and that any rights therein could not be assigned without the consent of the 3rd Party. A further agreement dated 22nd October, 2010 bearing fairly similar terms was subsequently entered into between the 2nd Defendant and the 3rd Party (D2. Exh. 3).
38. According to DW3, the decision by the 2nd Defendant to enter into a license agreement with the 1st Defendant was in contravention of the above stated agreements, as the rights accruing from the licence agreement could not be reassigned to a third party. The 2nd Defendant tendered copies of receipts and cheques bearing various dates, to support the assertions by DW1 and DW2, that a portion of the payments received from the skiza platform was remitted by the 1st Defendant to the 2nd Defendant. Whereupon the latter remitted payments accompanied by a detailed report on usage of the works on the platform, to the 3rd Party, for forwarding to the relevant artistes, the Plaintiff included.
39. DW3 was evidently aware that the bulk payments received from the 2nd Defendants were on account of the skiza tunes. There is no evidence that the 3rd Party raised any objection in this regard. This conduct suggests that the 3rd Party had waived the requirement for prior consent by the 3rd Party before assignment of rights, despite clause 12.2. Or in other words, that the 3rd Party through its admitted conduct consented to the 2nd Defendant's assignment of its rights to the 1st Defendant.
40. This conclusion appears even more credible given the 3rd Party's evidently prevaricating positions on the question, as found in its defence statement, witness statement and oral testimony. While evidently disputing the Plaintiff's claim, the 3rd Party proceeded at paragraph 5 and 7 of the Defence statement, to admit, without any qualification, the authority of the 2nd Defendant to exploit the works of the Plaintiff between 2009 and 2014, a matter replicated at paragraph 5 of the witness statement of DW3. In paragraph 6 thereof however, the witness disputes such authority between 2012 and 2014. Notably, the defence and witness statement were filed in May 2022, which means that the 3rd Party had notice of the substance of various pleadings hitherto filed.
41. Despite the foregoing, DW3 in his oral testimony sought to qualify the purport of the licence and authority to the 2nd Defendant under the agreement, while admitting invoicing and receiving payments from the 2nd Defendant in respect of the Plaintiff's work in 2009-2014. He also unsuccessfully sought to deny the second licence agreement with the 2nd Defendant, all but abandoning the related assertion at paragraph 6 of the witness statement under cross-examination. He also admitted regular settlement of invoices raised by the 3rd Party to the 2nd Defendant. He did not produce any correspondence with the 2nd Defendant or other concrete evidence regarding the alleged contravention of Clause 12.2 by the said Defendants.
42. It appeared to the court, upon reviewing the stance adopted by the 3rd Party, and in particular, DW3 that their position oscillated from unqualified affirmation of the authority to the 2nd Defendant (in the defence and witness statement) to denial or qualification thereof in oral testimony. If indeed, the truth was always that the 2nd Defendant had acted in violation of Clause 12.2 in assigning a licence to



the 1st Defendant without consent, the 3rd Party ought to have raised such breach in its defence, or at worst qualified its averments therein. To my mind, the oral evidence of DW3 in this regard appears no more than an afterthought, and his shifty demeanor in court spoke volumes. In the circumstances, subsequent qualifications or denials by the 3rd Party can only be taken as self-serving statements, aimed at avoiding any likely consequences.

43. In the court's view therefore, from the conduct of these parties it seems more plausible than not that the 3rd Party consented to the 2nd Defendant's assignment of its rights to the 1st Defendant for the exploitation of the Plaintiff's musical works on the skiza platform, despite Clause 12.2. Section 33(4) of the Act appears to contemplate a scenario where inference regarding an agreement can be made from the conduct of parties, and in the circumstances, the 3rd Party is estopped from asserting otherwise.
44. Concerning estoppel arising from consent or waiver, an illuminating passage found in the judgment of the Court of Appeal in 748 *Air Services Limited v Theuri Munyi* (2017) eKLR deserves quoting in extenso :-

“Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of *McIlkenny vs Chief Constable of West Midlands*, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:

“..we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying 'estoppel is only a rule of evidence. If you go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others.”

The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of *Banning vs Wright* (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.



Closer home in the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (*supra*) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury’s Laws of England, 4th Edition, Volume 16. At page 992* waiver has been defined as follows: -

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.” (Emphasis added)

45. On the core question whether a case of infringement of copyright has been made out by the Plaintiff, DW3 produced the deed of assignment dated 27th August, 2007 (D3. Exhibit 3) executed between the 3rd Party and the Plaintiff. The purport of Clause 2 therein is that the Plaintiff had assigned all his performing and film synchronization rights to the 3rd Party, to be held by the latter for its exclusive benefit. Moreover, under Clause 3, the 3rd Party had agreed to pay to the Plaintiff all royalties collected by itself from the Plaintiff’s musical works, upon exploitation by and on behalf of the 3rd Party. Apparently, payments were remitted to the 3rd Party in respect of works by various artists including the Plaintiff. It is unclear whether the Plaintiff ultimately received all the royalty sums thus received, but no claim or complaint in that regard was made by the Plaintiff against the 3rd Party before this court.



46. Further to the foregoing, the mechanical rights deed of assignment executed on 27th August, 2007 between the Plaintiff and the 3rd Party is to the effect inter alia, that the copyright was being held and exercised by the 3rd Party. This means that the Plaintiff had assigned copyrights to his music works to the 3rd Party at all material times, and the 3rd Party subsequently granted licence to the 2nd Defendants, who in turn granted licence to the 1st Defendant for the exploitation of the Plaintiff's works.
47. That being the case, the court finds that the Plaintiff has not proved infringement of his copyright to the required standard, against the 1st and 2nd Defendants. Consequently, the remaining issues for determination are rendered moot and no useful purpose will be achieved in considering them. In the result, the Plaintiff's suit has failed and is for dismissal. The suit is hereby dismissed, with costs to the 1st and 2nd Defendants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Gikunda

For the 1st Defendant: Mr. Opole h/b for Mr. K. Wilson

For the 2nd Defendant: Mr. Gode h/b for Mr. Kiingati

For the 3rd Party: N/A

C/A: Carol

