

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 842 - 2003

UGANDA PERFORMING RIGHT'S SOCIETY LIMITED PLAINTIFF

VERSUS

FRED MUKUBIRA DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The brief facts of this case are that the plaintiff company, which is said to be an umbrella organization, incorporated to promote and protect the copyrights and intellectual property of local artists and music publishers brought this case against Mr. Fred Mukubira a music dealer for alleged infringement of copyright. The plaintiff brings this suit as an assignee of copyrights in various musical works from the authors of the said work. The assignor's include Rachel Magoola, Joseph Mayanja aka Jose Chameleon, Fred Sebatta, Godfrey Lutaaya, Ssozi John aka Emperor Oplendo, David S. Sematimba, Afrigo Band, Kasiwukira Studios and others. The plaintiff claims that by the said assignments they have the exclusive rights to control the following;

- i) Distribution of copies of the Musical works
- ii) Public performances for payment

iii) Broadcasting

Of either the whole or part of the works.

It is further alleged that the defendant has infringed and converted these copyrights.

The defendant denies the claim. The following issues were agreed to for trial;

1. Whether the plaintiff is an assignee of the copyrights of the various works.
2. Whether the defendant is an assignee of copyrights in the various musical works.
3. Whether the defendant infringed the plaintiff's copyrights.
4. Whether the plaintiff lost any revenue by reason of the defendant's copyrights infringement.
5. Remedies available.

Issues No. 1: Whether the plaintiff is an assignee of the copyrights of the various works.

PW1 Mr. James Wasula provided a host of exhibits P1 – P7 which depict the assignment of copyrights from various artists. PW2 Steven Sserumunye and Music Publisher in the employment of M/S Kasiwukira Limited confirmed one of the assignments he signed on the 10th September 2002 (Exh P.1) of the right to protect all its copyright interests to the plaintiff. PW4 Sawula Baker a businessman

also engaged in the production and distribution of the musical works under the name Dynamic Studios also confirmed a similar assignment on the 16th September 2002 (Exh P.3), which he signed.

For the defendant it is largely denied that Exh. P.1 – 7 are evidence assignments. Counsel for the defendant says that Exh. P.1 only refers to an assignment of musical works and compositions of singer Kazibwe Daniel aka Ragge Dee on his composition called "Nuggu" because it is specifically listed.

Counsel for the defendant also refers to Exh. 12 September 2003. The deed of assignment enjoins the assignor to submit to the assignee a list of works, in which copyrights subsists for protection.

Attached to Exh. P5 is a list of Albums submitted for protection i.e.

1. "Tukwegomba" by Mesach Ssemakula
2. "Byansobera" by Chance Nalubega
3. Geoffrey Lutaaya and Ronald Mayinja
4. "Eki Love" by Betty Mpologoma
5. "Sitoma" by Mariam Mulinde
6. "Njakulondola" by Ronald Mayinja

Counsel for the defendants argues that there are not other lists of specific assignments of musical works attached to the other instruments/deed of assignment exhibited to court by the plaintiff.

The copyright Act (Cap 215) under Section 3(1) and the 1st Schedule lists musical works as eligible for copyright. Section 12(1) the same Act allows a copyright interest to be transmissible by assignment. Section 12(3) provides that any such assignment shall be in writing.

On the basis of the law I agree that plaintiff is an assignee of various musical works. However since these are to be in writing one must read them to establish the legal extent of the assignment. I agree with the observations of counsel for the defendant that the plaintiff has only provided court with two complete instruments of assignment namely exhibit P1 and P5 which have an assignment of the musical works that have been properly and legally assigned with an attached schedule. The other instruments provided to court namely;

- Exh. P.2 executed by Tubro Music Sounds Limited
- Exh. P.3 executed by Dynamic Stereo Sound
- Exh.P.4 executed by Afrigo Band
- Exh.P.6 executed by Rachel Magolola
- Exh. P.7 Executed by Charles Kaggwa

Do not have the schedule of the Musical Works.

Exhibits P8, P11, P12 ,P13 P14 are all agreements of sale and publication between various artists and M/S Kasiwukira Limited who though were not parties to this case gave evidence for the plaintiff through PW2 Steven Sserumunye and PW6 John Ggayi.

Exhibit P15 is an agreement between Silver Lumansi Ndawala and Ronald Mayinja and exhibit P16 is an agreement between Fiona Mukasa and Lisyn Enterprises and who are not parties to this case (actually they are not even mentioned in the evidence to be under the umbrella of the Plaintiff company).

In answer therefore to issue No. 11 do find the Plaintiff to be an assignee of the copyright in various Musical Works but specifically those in Exhibit P1 an P5.

Issue No.2 wheher the Defendant is an assignee of copyrights in various Musical Works.

The Defendant also made available to court a host of document, which showed artists who had sold and assigned their copyrights to him i.e.Exh. D1-29. Most of the agreements are written in Luganda and are for Musical and sold to him by Music composers. However some of the documents in reality in ordinary business are "payment voucher" (i.e Exh. D23,D27 and 28) with the name of the person being paid, the amount of the Music Album. Exh.27 is a bit interesting. It contains a series of payment vouchers (8) made out to Mathias Walukagga with the same particulars of payment namely

"for the new album following school fees (sic).

That is Tuyita Nagazibu"

This is clearly a most unique way to assign copyright because such terms are not clear at all. Be that as it may, the other agreements (though basically written without legal assistance) at least name the composer, the Musical Work in question and consideration for sale.

Where there could be a problem is where the agreement when written in Luganda does not mention the grant of exclusive rights. Exh. P5 for example reads.

"Endaggano y'okutunda olutambi

Nze Mathias Walukagga nguzizza F.M Fred Mukubira Tape yange Ekomero ntana. Ampade Shillings emitwaloetaano 500,000/= cash Ngitundda bwayo. Teri abanja munne.

The translation by Mr. Mulumba Mathias Bwanika (M.E.D) of the Department of Language Education, School of Education Makerere University reads

"I Mathia(s) Walukagga have sold my old recorded tape "Eekomera Ntanna" to Mr. Fred Mukubira. He has given me 500,000/= (Five hundred thousand shillings only) in cash. I have sold it to him in its present form (second hand) no one owes the other.

Seller: Mathias Walukagga

Buyer: Fred Mukubira

Other in this category are Exh. PP7, P10, P15, P22, P25, and P26

In answer therefore to the second issue I must give again qualified answer that the Defendant is a purchaser (I think that given the documentation available this is clearly more appropriate than the term of assignee) of copyrights in various Musical Works but not relating to this dispute.

Issue No. whether the Defendant infringed the Plaintiff's copyright.

To address this issue one will need to look at the various Musical tapes that were taken into custody when this court issued the Anton pillar order and when the police also seized some other tapes.

Counsel for the Plaintiff submits that according to section 13(1) of the copyright Act *"A copyright is fringed by ant person who does, or causes any other person to do an act falling within the license of the person in whom is vested either the whole of the copyright....."* This counsel for the Plaintiff relying on section 7 (1) of the same Act includes doing any of the following acts.

- Distribution of copies
- Public performance
- Broadcasting of the whole or a substantial part of the work either in its original form or any form recognizably derived from the original

The Plaintiff argues that items P1D "1-5" obtained as a result of the Anton pillar order and P1D"6,7-11" following a complaint to the police and found at the Plaintiff's brother's (Herbert Sande Ssensuku) house all show evidence of the infringement.

Counsel for the Plaintiff states that the Defendant admits that Mr. Sensuku is his brother, which creates a nexus with the Defendant. Secondly the Defendant chose not to cross-examine the Police Officer PW3 Asuman Kungu thus making his evidence unchallenged on court record.

On specific items, counsel for the Plaintiff submits that P.1D 7-P.1D 11 were items relating to Musical Works owned by Kasiwukira Limited, Lusyn Enterprises, Dynamic Studio and Turbo Music Sounds all assigned in writing to the Plaintiff.

For the Defendant it is submitted that the Plaintiff had failed to prove a cause of action against the Defendant. Counsel for the Defendant argued that based on the evidence before court the only clear assignments for which a cause of action could derive would be Exh. P1 and 5.

Counsel for the Defendant argued that to prove an act of infringement, the Plaintiff should have brought to court the originals of the Music Works purported to have been infringed for comparison with the alleged "imitations". This counsel for the Defendant argues the Plaintiff failed to do.

He further argues that much of the evidence of alleged infringement is hearsay, as the Plaintiff did not witness any alleged act of infringement.

Counsel for the Defendant states that the Plaintiff did not lead any evidence to prove that though Mr.Ssensuku was the Defendant's brother, he was also his employee.

The Defendant argues that he too buys music copyright to the Plaintiff to listen to, hence of P.1D4 (tape reserved by Kasiwukila Limited) at one of the defendant's business premises.

Counsel for the defendant also argues that the suit was brought in bad faith, was fuelled by cut throat competition and the refusal by the defendant to join the plaintiff's umbrella organization.

I have reviewed the evidence on record on this matter. From the onset I must observe that the plaintiff could have more to specifically lead the court through the hundreds of items that had been impounded so as to prove its case. This is especially so regarding the 5 big bundles that were impounded by the police. Be that as it may court had to catalogue the items itself.

Counsel for the defendant has persistently argued that based on evidence on record the plaintiff can only clearly derive a cause of action could be based on Exh. P.1 and P.5. Counsel for the defendant argues that since the rest of the plaintiff's Deeds of assignment and sale are silent on the actual musical works covered and protected by

them no cause of action can be based on them. I in general terms agree with the submission of counsel for the defendant on this point. However when court went through the impounded items got from the plaintiffs brother's house some interesting facts emerge which court cannot ignore.

First Exh. P5 is an assignment by M/S Lusyn Enterprises to the plaintiff of various musical works that are listed in the attached annex. Counsel for the defendant also recognizes that Exh. P5 is an effective assignment of a copyright. Item No. 2 on the annex to Exh. P5 is an album by Chance Nalubega entitled "Byansobera".

In the impounded items is P.ID got from the home of the plaintiffs which brother contains 833 printed cassette labels for the said album "Byansobera" though no actual cassette and cassette covers were found. The said cassette labels have the face of singer Chance Nalubega and the words "copyright reserved by Luysn Enterprises" on the left hand side corner. It is intriguing that 833 printed cassette labels without cassettes were found. In fact many more labels of other artists were also found without cassettes.

Counsel for the defendant states that since the plaintiff did not provide court with copies of the original works produced by the plaintiff it cannot be said that the items recovered from Sande Sensuku's home were pirated imitations.

Furthermore the fact that the items were got at the defendant's brother's home does not make the defendant liable. Counsel for the defendant states that the plaintiff who caused the impounding of the items should have called the said Sande Sensuku to

explain himself, which he did not do. In any event the defendant testified that he had not seen his brother in 3 months following a family misunderstanding.

Counsel for the plaintiff submitted that the residences of the defendant and his brother Sensuku are both in Kafeero Zone Mulago. He further submits that Mr. Sensuku is an employee of the defendant. Counsel for the plaintiff argues that this is sufficient nexus to link the copyright infringement to the defendant.

When I issued an Anton Pillar order to the defendant to allow a search of his home in Kafeero Zone Mulago, the defendant did not allow entry into his home. Now an Anton Pillar order by court is not an order for forcible inspection but an order to permit inspection.

In the case of **Anton Pillar K.G Vs Manufacturing Processes Limited and Ors** [1976] 1 ch P55

Lord Denning M.R. (as he then was) at P61 outlined the consequences of non-compliance by the defendant of the order.

"...they refuse at their peril. It puts them in peril not only of proceedings for contempt, but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply..."

I am personally persuaded by the finding of Lord Denning as those who have nothing to hide are normally vindicated and so apply this reasoning to this case. If a court is

of the opinion that an inspection should occur that should not be taken lightly by the defendants.

When one applies the arguments by the defence to the labels for Chance Nalubega's album "Byansobera" I find them weak and very technical. I agree with counsel for the plaintiff that PW1, PW2 and PW4 all consistently testified on oath and stated that Mr. Sensuku is the defendant's employee and not just brother. The defendant Mr. Mukubira has not at all denied this in this testimony, but only said he had not seen his brother for 3 months following a family disagreement. I am afraid this family dispute response does not answer the claim/allegation of employment, which infers a nexus with the defendant. Neither is the argument that the plaintiffs should have called the defendant's brother as a witness credible as incriminating material was found at his house. The onus is on the brother Mr. Sensuku and the defendant himself to rebut the clear inferences that could be drawn from the impounding done by the Police.

There is also the matter of P.ID4 a tape reserved by Kasiwukira Limited entitled "Bei Kali" by Jose Chameleon which when enforcing the Anton Piller order was found at the defendant's business premises. This cassette by the way did not have a cover label. The defendant says that he had bought it for his listening needs.

Counsel for the defendant further submitted that there was no evidence that the music thereon was reproduced.

Whereas this may be so in the bundle marked P.ID8 court found cassette 2,312 labels for "Bei Kali". The said labels have a picture of the singer Jose Chameleon and the words "copyright reserved by Kasiwukila Limited" in bottom left hand corner. This indeed is curious considering that P.ID4 as stated above did not have a cover label. Could this be a coincidence? Now even though "Bei Kali" by Jose Chameleon is not one of the clear assignments to the plaintiff company court cannot fail to take judicial notice of the quality of testimony given around this Exh. P.ID4. The inference here is that Kasiwukira's copyright was also being infringed.

All in all based on the evidence in court and the legitimate inferences that can be made there from the defendant did infringe or was in the process of infringing the plaintiff's assigned copyright to Chance Nalubega's album "Byansobera". It can also be inferred that the rest of the items that were impounded though not clearly copyrights of the plaintiff are materials used in the infringement of copyrights of other third parties.

Issues No. 4 Whether the plaintiff lost any revenue by reason of the defendants copyright infringement.

I am at a loss as to how the plaintiff chose to tackle this issue. OW1 Mr. Wasula clearly testified that the plaintiff company does not sell its assigned copyrights but merely monitors the use of the assigned rights and intervenes in matters of law. Loss of revenue is a special damage, which has to be proved specifically by the plaintiff.

The calculations given by PW6 John Ggayi being those of a third party to the suit are therefore of no vale to plaintiff with regard to this issue.

I therefore agree with counsel for the defendant that the plaintiff's have failed to prove this issue.

Isse No. 5 Remedies

The plaintiff prayed for various remedies under S.13(2) of the copyright Act as follows:-

(a) **Prayer for damages**

Counsel for the plaintiff has submitted on the authority of **Copinger & Shame James on copyright** 13 ed. P. 343.

“that the measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action. This if the defendant has dealt with the plaintiff's copyright as if he had a licence, the defendant ought to pay as damages an amount equivalent to the fair fee or royalty which he would have to pay for licence to do the acts, which he had done and damages may be said to be at large”.

This very well may be true but no evidence along the lines of this authority was led with respect to the album “Byansobera” so I cannot award general damages here.

Counsel for the plaintiff has also asked court to take judicial notice of the prevalence of privacy of Musical Works in Uganda and the notorious disregard for intellectual property rights in the entertainment industry and because of this award Shs.65,520,000/= as exemplary damages, Counsel for the defendant argues that there is no basis for this award in exemplary damages and if any should be awarded Shs. 300,000/= would suffice.

I find that indeed that intellectual property rights in Uganda are not well observed. An award in exemplary damages would send a clear signal for this practice to end. The defendant in this case though himself a person involved in the Music Industry with copyrights of his own to protect went ahead through his employee and brother to obtain materials for violating the copyrights of the plaintiff. This is not acceptable. He appears also not to be interested in working with the plaintiff company, which is an umbrella organization to protect the copyrights that he deals in. Whereas he is within his rights to refuse to join the organization, the inference there from cannot be positive.

For possessing infringing materials for the album "Byansobera" I award Shs.10,000,000/= as exemplary damages against the defendant.

(b) **Injunction**

Counsel for the plaintiff submits that once there is evidence of infringement of a copyright the plaintiff would be entitled to a permanent injunction to restrain future infringements.

Further more the injunction is a normal remedy and is granted even though the plaintiff has not proved actual damage provided that damage is likely to be caused to the claimant – see

Borthwich Vs Evening Post (1888) 37 CH. Defendant 499 (quoted in **Bullen & Leake & Jacob's Precedents of Pleadings** Vol. 2 Sweet & Maxwell 2001 at P. 1004).

Based on my earlier findings on the balance of probabilities the plaintiff through his business F.M. Studios and his brother employee were infringing the copyright of the plaintiff in the album "Byansobra". This in my view is enough for me to grant an injunction against the defendant from continuing to infringe the copyright of the plaintiff.

(c) **Delivery up**

The plaintiff prayed for all copies of the unauthorized Musical Works that are in the defendant's possession to be delivered up. Section 13 (2)(c) better states this remedy as follows:-

“an injunction requiring the delivery up to court and the destruction or other disposal, as the court may direct, of copies of the work in question, or other articles which may have been or may otherwise be, used for purposes of infringement”.

Based on my findings in this matter I order that the cassette labels for the Album “Byansobera” by Chance Nalubega and clearly assigned to the plaintiff be separated from the rest of items in exhibit P ID9 and be destroyed by fire under the supervision of a court bailiff. Only one copy may be left for the court record and the court bailiff should file a certificate of destruction with the Registrar on carrying out this order.

The rest of the items in P. ID7 – P. ID 11 which were impounded by the police should be returned to the police to carry on their investigations into other possible violations of copyright.

Exhibits P. ID 1, P. ID 2, P. ID 3, P. ID 4 and P. ID 5 seized with the Anton Piller order of this court from the business premises of the defendant and yet do not have his copyright shall remain seized by order of this court and be handed over to the Police with a view to investigate a possible infringement of copyrights of the various artists mentioned there on. Exhibits P. ID 6 a ledger book, which in my view contains little useful information and was not generally referred to at the trial may be returned to the plaintiff.

(D) **Costs**

The plaintiff has prayed for costs. However since the plaintiff was unable to prove that all the impounded items were assigned to it except one I would award ½ the costs claimed.

In conclusion judgment is entered in favour of the plaintiff against the defendant for:-

1. Shs.10,000,000/= be paid by the defendant to the plaintiff as exemplary damages for breach of the copyright of the Album "*Byansobera*" by Chance Nalubega which is assigned to the plaintiff.
2. A permanent injunction restraining the defendant by himself or by his agents or servants from reproducing labels, recording, compiling and distributing the Musical Works assigned to the plaintiff.
3. The delivery up and destruction by fire of the 832 cassette labels (one of the 833 counted to be left on court record) for the Album "*Byansobera*" by Chance Nalubega.
4. The delivery up to the Police for investigation into the possible violation of copyright for the items in Exhibits P.ID. 1,2,3,4,5,6,7,8,10 and 11.
5. One half of the plaintiffs cost of this suit to be paid by the defendant.

Sgd: Geoffrey Kiryabwire

JUDGE

Date: 23/02/05