

HIGH COURT

ARUSHA

PATRICK BALISIDYA PLAINTIFF

versus

THE EXECUTIVE DIRECTOR AUDIO)
MASTER & SIX OTHERS)..... DEFENDANTS

Copyright
Locus
Stendi

R U L I N G.

KYANDO, J.

This is a suit for damages for breach of copyright in a musical production. In paragraph 8 of the plaint the plaintiff, Patric Balisidya, avers that "in divorce dates in 1988, the six defendants, jointly and severally, did produce sell and/or distribute cassettee which are copies of BAHATI ALBUM, a set of musical productions by the plaintiff, which the plaintiff has copyright of, without licence, permission and or assignment from the plaintiff or A.I. Records (Kenya) Limited the sole producer and seller of the said BAHATI ALBUM." In para 9, he avers that the defendants, actions in paragraph 8 were a breach of the copyrights of the plaintiff protected by the Copyrights Act, 1966, the constitution of the United Republic of Tanzania of 1977, as amended, and other laws of the country.

At the commencement of the trial of the suit, Mr. Raihatha for the first and second defendants took two points of preliminary objection to the suit or plaint. The first one was that as the plaintiff relies on a breach of a statutory right he should, in his plaint, have cited the provision (section and Act) which gives him such right. He said failure to do so, as it is in this case, makes the plaint rejectable for not disclosing a cause of action. He referred the Court to CHARLES COMBAR v. THE HON. ATTORNEY GENERAL OF THE COLONY OF KENYA, (1938) 5 EACA 13 in support of his submissions on this point.

Alternatively, and this is his second point, Mr. Raihatha submitted that as in para 8 the plaintiff says A.I. Records (Kenya) Ltd are the sole producers and sellers of Bahati Album, they (A.I. Records) are the ones who own the copyright and not the plaintiff. He submitted that the plaintiff therefore has no cause of action against the defendants on this ground too.

In reply, Mr. Kwakusa for the plaintiff maintained that the suit has been well pleaded in the plaint and he submitted that the plaint discloses a cause of action against the defendants. With regard to the first point made by Mr. Raihatha he submitted that in so far as the plaint pleads the copyright act, the Constitution and "other laws", it perfectly meets the demands made by Mr. Raihatha that it should have specified the provisions of the law upon which the claim is based. He argued that the claim in this suit is based on more than one law. He said the copyright Act does not create copyrights but merely protects them. He said by "other laws of the country" it is meant, for instance, the common law.

In relation to the second point raised by Mr. Raihatha, Mr. Kwakusa had the following to say:-

WE wonder why my learned friend says the plaintiff has no right in the production because para 8 of the plaint says A.I. Records (Kenya)Ltd is the sole producer and seller of the album. I thought it was common sense in all literary or artistic productions that by the time you get it, it will have gone through several persons, each putting in his part until finally you get a whole. All those persons in the line have each their interests in the final product. In this instant case the plaintiff is the author and composer of the musical production, whereas A.I. Records (Kenya)Ltd are the ones who put the composition into permanent form. They are in this sense called sole producers and sellers. The fact that a composer of a musical product hands over his work to the producers, it does not mean that he does not have rights as a composer and author.

We have the album here. Copyrights are to A.I. Records (Kenya)Ltd. The fact that A.I. Records have the copyright does not extinguish the rights of an author and composer. See (i) British Actors Film Co. v Glover (1918) 1KB 299:
(ii) Jude v Ray Brothers (1907) 1 Ch. 651.

Having examined both the points raised by Mr. Raihatha closely, I am of the view that this matter can be decided on the clear and less controversial point of whether or not the plaintiff is the proper person to sue in this case. Section 13 (2) of the copyright Act, 1966, provides:-

"13 - (2) subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of

the copyright; and in any action for such an infringement all such relief, by way of damages, in action, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights."

Then in section 13 (6) it is provided, "13-(6) In this

section

.....

.....

"owner of the copyright means the first owner, an assignor or an exclusive licensee, as the case may be, of the relevant portion of the copyright."

Under the Copyright Act, 1966, copyright "shall be transmissible by assignment, by testamentary disposition or by operation of law, as movable property," (section 12(1)). In para 8 of the plaint, as already noted, the plaintiff says A.I. Records (Kenya) Ltd are "the sole producer and seller of the album" the subject matter of this suit. Over and above this, on the cover of the album it is indicated that copyright in it (the album) is to A.I. Records (K) Ltd. On the face of the record itself there appear the following words: "All rights of the Producer and of the owner of the record work reserved. Unauthorised copying, hiring, renting of this record prohibited." The producer is indicated to be one Felix G.M. Njaka, and "the owner of the record work" are obviously the A.I. Records (K) Ltd. By these indications then on the album, the "owner of the copyright in terms of S.13 (2) and (6) Copyright Act, 1966, is obviously A.I. Records (K) Ltd. This is possible because, as already noted, under the copyright act copyright can be assigned or disposed of and there is more than ample evidence here establishing that the plaintiff assigned or disposed of the copyright in his composition to A.I. Records (K) Ltd. Otherwise they would not have been being referred to by him as "the sole producers and sellers" of the record. Nor would they have printed (on the record) to indicate that copyright belongs to them. I hold therefore that A.I. Records (K) Ltd are the assignees or exclusive licensees of the copyright in B.HANI ALBUM. Under S.13 (6) Copyright Act copyright belongs to either the first owner, an assignee or an exclusive licensee. It cannot belong to both the first owner, such as the plaintiff in this case, and the assignee or exclusive licensee, such as A.I. Records (K) Ltd here, jointly as Mr. Mvuka wanted this court to hold. The joining word in the definition of the phrase "owner of the copyright" in s.13 (6)

is "or" not "and". It means there that "owner of the copyright" can either be the first owner, or an assignee or an exclusive licensee. The words "as the case maybe" in the definition reinforce this interpretation and this means then that once a first owner assigns or licenses his work to an assignee or exclusive licensee he ceases to be the owner of the copyright and the assignee or licensee becomes the owner exclusively. This being the law then, A.I. Records (K) Ltd are owners of the copyright in the DARANI ALBUM to the exclusion of the plaintiff.

Finally, the Copyright Act, 1966, requires the owner of the copyright to sue in case of an infringement of copyright. (It says, "infringements of copyright shall be actionable at the suit of the owner of the copyright" (s.13 (2), supra). The plaintiff in this case is not, as already held, the owner of the copyright in the album the subject matter of this suit. It is A.I. Records (K) Ltd, as amply demonstrated above, who are the owners. The plaintiff therefore cannot maintain any action against anyone in relation to the copyright in the album. He certainly is not the one who should have sued the defendants. For these reasons I have to agree with Mr. Raithatha in so far as his second point of objection to the suit is concerned. I hold that the suit the plaintiff has filed against the defendants is unmaintainable by him and I order that it be struck out, with costs to the defendants.

(L.A.A. KYAIDO)

JUDGE

DAR ES SALAAM

19TH MAY, 1990

Raithatha - for 1st & 2nd defendants

Mwakasa, for plaintiff, absent, notified.

Ruling delivered.

I certify that this is a true and correct copy of the original.

Ag. DEPUTY REGISTRAR