

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 160 OF 2014

BETWEEN

RSA LIMITED..... PLAINTIFF

VERSUS

HANSPAUL AUTOMECHS LIMITED.....1ST DEFENDANT
GOVINDERAJAN SENTHIL KUMAR2ND DEFENDANT

JUDGMENT

Date: 28/10/2015 & 12/4/2016

SONGORO, J

RSA Limited Company, the Plaintiff engineering company, have filed a suit and stated that, they are using their own original artistic engineering drawings, which have copy right to convert bodies of Toyota Land Cruisers and Nissans into RSA Model safari cruisers and selling them.

Further, they claim that Hans Paul Automechs Limited, and Govinderajan Senthil Kumar, the 1st and 2nd Defendants have wrongly infringed their copy right, copy it and use their engineering drawings to make, and sale similar " safari car and caused them to suffer loss and damages in their business.

The Plaintiff Company is therefore praying for several orders, which includes ;

1. perpetual injunction to restrain Defendants from manufacturing, fabrication, sale, and offering for sale similar Land Cruiser, and Nissan safari converted vehicles, made from Plaintiff`s Engineering drawings.
2. payment of specific damages to the sum of USD 1, 689,352.31 for the loss suffered, Payment of USD 1,000,000 for loss of goodwill occasioned by the Defendant's infringement, and Payment of USD 1,000,000 as general damages for the deliberate infringement of the Plaintiff`s copy right and
3. Costs of the suit and any other reliefs the court deem fit.

In response to the Plaintiff`s claim Hans Paul Automechs Limited, and Govinderajan Senthil Kumar, the first and second Defendant , filed a joint written statement of Defence and opposed all Plaintiff`s claims by stating that, Plaintiff is not original copy right owner of the said engineering drawings, and the filed claims have no merit. Next Defendant prayed for the dismissal of the suit.

In the light of the Plaintiff claims, and Defendant's Defence, and the court, after consulting the parties, framed up 11 issues for determinations which in view my may be summarized in five points of determination being;

1. Whether the Plaintiff is the owner of the Engineering drawings subject of this suit and constitutes original artistic works protected under the Copy Right.
2. whether the 1st Defendant car bodies is the reproduction of the Plaintiff Engineering drawings ;
3. Whether or not the Second Defendant has passover the know how of the said Plaintiff`s Engineering drawings to the 1st Defendant;
4. Whether the Plaintiff has suffered any loss or damages pleaded in the Plaint
5. What reliefs are parties entitled to.

So, the Plaintiff`s suit was heard, and concluded on the basis of the above mentioned issues.

In support of his claim, the Plaintiff called Manmohan Singh Bharma who testified as PW1, and he tendered several exhibits including a Certificate of Incorporation of RSA Company No 29555 which was admitted as Exhibit P1, RSA Specialized brochure was admitted as Exhibit P2, Brochure claimed to be of Hans Paul Automechs Ltd was admitted as Exhibit P3, A document with title "Bopper and Mark Best Friend of Nissan admitted as Exhibit P4, Agreement between RSA and 2nd Defendant who was Technical designer of 2006 admitted as Exhibit P5, the 2nd Defendant 2010 admitted as Exhibit P6, Letters from RSA to Senthil Kumar Govinderajan dated 26/6/2012 admitted as Exhibit P7 (a) and 7(b).

PW1 then explained to the Court that, the Plaintiff`s company has 5 models of car bodies which were launched in 2001, and have Patent Registration, and a Certificate from Business Registration and Licensing Authority

Then PW1 concluded his testimony by briefing the court that, their companies, have been, solely producing their models cars, and selling them in Tanzania and other countries. However, Defendants have wrongly infringed their copy rights, produced and sell similar bodies cars and caused them to suffer loss.

The Plaintiff's second witness was Sanjai Pandit who informed the court that, he bought a car, which its body was built by the Plaintiff's company in 2001. PW2 then tendered a Delivery Note of an Invoice No 1828 dated 15/6/2001, which was admitted as Exhibit P8.

He then concluded his testimony by saying that, the difference between the safari body's cars made by the Plaintiff, and other is that, Plaintiff safari cars were more spacious, and have a wide body.

Then Plaintiff called Nagesh Dinavan who testified as PW3, and informed the court that is finance director of the Plaintiff Company. Next PW3 briefly informed the court that, from year 2001 to 2006 Plaintiff's sales from conversion Vehicles, increased by 300% , but from 2007 there has been a decline of the gross profit attributed by Hans Paul Automechs Limited act of coping, and selling safari car similar to the one made by the Plaintiff's company.

After PW 3 testified, the Plaintiff called Enrico Ciceri who testified as PW4 and briefly told the court that, he is a freelance photographer who took photographs of cars in brochures which were admitted in court as Exhibits P2 and P3.

After that, PW4 closed his testimony, Wilfred Laurent was called by the Plaintiff and he testified as PW 5. In his testimony the witness informed the court that, he joined the RSA Company Limited in 2005

as a trainee in sheet metal work and bending and Senthil Kumar Govindarajan the 2nd Defendant was an engineer designer at the Plaintiff`s company working under the Varinder Singh Bharna who is the Technical director of the designing section.

He finally told the court that, the 2nd Defendant was fully involved in designing of safari vehicle bodies at the Plaintiff`s company

Another witness called by the Plaintiff was Saimon Ignace Marandu who testified as PW6, and told the court that is an engineer with a PhD Degree in Machine Designing from the University of New Castle, United Kingdom.

He then briefed the court that, he was assigned by Manmohan Bharna , the Managing Director of the Plaintiff`s Company, after he consulted the University of Dar es Salaam, to come and give expert evidence in court on "car body models" made by the Plaintiffs and those made by Defendants .

The witness then said he inspected, and examined "original engineering drawings of the Plaintiff" created through computer aided design software, used in the Plaintiff`s production unit on the computer Numerical Control Machine (CNC Machines) and found, the design in the machine is the same like engineering drawings, presented in Annexure 2 (a) -(e) of the Plaint.

PW6 then informed the court that, in his finding he realized that, Plaintiff`s models of RSA safari wagon including, RSA safari Wagon N7X , and N5X were made on the basis of the engineering's drawings annexed to the Plaint, as Annexure 2(a)-(e) of the Plaint. He then indicated that, the models were unique.

Next, PW6 said as part of his investigation, he has examined the car body models named as Hans Paul Land Cruiser 7SX, Hans Paul 5SRX Land Cruiser, Hans Paul 5SX, Hans Paul Nissan7SX and Hans Paul 5SRX NISSAN Y61 and was convinced that, their body models were reproduced from the engineering drawings annexed and marked as Annexure 2 (a) - (e) of the Plaint.

Further, the witness said that, he examined the features, configuration, and design of both Vehicles of RSA and Hans Paul and was convinced that, there is no difference in their aesthetic appearance. He then indicated that, in his investigation he realized that the Plaintiff`s and Defendant`s vehicles are similar with each other on configuration, and they resembles.

In concluding his testimony, PW6 stated that, his in-depth inspection, and comparison of the "two models of vehicles" he found they were similar to each other, their configuration is the same.

After PW6 testified, the Plaintiff then called Varinder Singh Bharna who testified as PW7, and he tendered "Engineering drawings which were admitted as Exhibits P9 to 13" Tanzania Bureau of Standard Licence No 0514 which was admitted as Exhibit P14, and a renewed Licence which was admitted as Exhibit P15 and Email correspondences from Senthil To Jagam which were admitted as Exhibit P16. Further, PW7 told the court that, he is in-charge of research and development department in the Plaintiff Company and between years 1997 to 2008 he created different engineering drawings which are annexed to his statement.

Furthermore, PW7 told the court that, his engineering drawings have been used to produce different converted car bodies including RSA Safari Cruiser 7X, RSA Safari Cruiser 5X, RSA Cruiser 5XE, RSA Safari Wagon, and RSA Safari Wagon N5X which have peculiar features, and appearance compared to other Toyota's, and Nissans. He also stated that, the 2nd Defendant, was part of their designing, and engineering team, he had access to the engineering drawings, and even when he left the company to India, he used to share information on electronic drawings with him until they realized that, he was working with the 1st Defendant company in Tanzania.

He then pointed out that, their "drawings" are tailor made and owned by the Plaintiff, and were submitted to the Tanzania Bureau of Standards in 2004 and licensed. Also he indicated that, their license has been renewed.

After PW 7 testified the Plaintiff's company closed his evidence, and Defendant's opened their Defences by first calling Wilbard George Chambulo who testified as DW1. In his testimony, DW1 informed the court that, he is the Managing Director of Kibo Guides (T) and Tanganyika Wilderness Camps, and in 1992/1993, he realized that, factories in Kenya were converting /modifying bodies of vehicles into safari tour cars by extending their chassis to accommodate more passengers. Then said, in 1996, he ordered 4 converted motor vehicles from Kenya, and he later bought converted motor vehicles from the 1st Defendant.

The witness then said there are workshops in Kenya and Tanzania, including of the 1st Defendant, Plaintiff, Sunny Auto works which are doing the same work of converting motor vehicles bodies preferably of Toyota, and Nissan into safari vehicles. To conclude his testimony, DW1 said the 1st Defendant's company has been making body conversion of motor vehicles into safari vehicles for years now.

After DW1 concluded his testimony, the 1st Defendant called Satbir Singh Hans Paul who testified as DW2, and he informed the court that, he is the managing director of the Defendant's Company which operate a business of designing, fabricating, customizing, and converting of motor vehicle bodies into safari vehicles since 2007.

He then pointed out that, all fabricated and converted safari Vehicles in the market, including the ones claimed by the Plaintiff are not

original, but is a result of copy work from other safari vehicles which existed in different Markets.

Next, DW2 faulted the Plaintiff claim that, he has registered Industrial Designs by saying that, there is no a certificate or proof of Licence designs which were presented in court as Exhibit. He then told the court the Plaintiff`s license and designs are subject of another litigation case at the High Court of Tanzania (Arusha Registry) in Civil Case No 20 of 2014 between the same parties.

DW2 then contested that, the 1st Defendant conversion of safari motor vehicle is not a reproduction of the 1st Plaintiff`s purported models, but has been following his own original design, pattern, mold, features, art, and structure of Toyota, and Nissan with some minor modifications. Further, he challenged the Plaintiff that, he did not produce in court as exhibits, license or copy right which allows converting motor vehicles into safari vehicles.

Regarding employment of the 2nd Defendant into the 1st Defendants Company, DW 2 briefed the court that, he joined their company while they were already in the business of conversion of safari vehicles for about 7 years. Then DW2 finished his evidence, and Senthikumar Govindarajan defended himself as DW3. In his testimony DW3 informed the court that, he is a Mechanical Engineer, and he previously worked with the Plaintiff`s company. He then stated that, the Plaintiff is not the original copy right owner of Engineering Drawings annexed as Annexure 2 (a) to (b) to the Plaintiff.

He then elaborated that, drawings in Annexure 2(a) -(e) to the Plaintiff were copied by the Plaintiff by means of process known as reverse engineering in which they copy the shape, dimension, structure, original , design, pattern , mold, features, and art of Toyota Land Cruiser , Nissan Patrol and Land Rover. Then he clarified further that, what the Plaintiff did in car body conversion, is to extend the length of the chassis, window sizes, and body to cater for more passengers; but shape, dimensions, structure, design, pattern, mold, features, and art of converted vehicles remain of Toyota or Nissan.

DW3 then admitted to have worked with the Plaintiff until when his contract ended, and went back to India in July, 2014 and then was employed with the 1st Defendant, in August, 2014. He then closed his testimony by denying that, the Plaintiff is not the original owner of engineering drawings, and he did not pass-over the know how. Finally both the 1st and 2nd Defendants closed their defence, and counsels made their submissions.

Mr. Malima, submitted for the Plaintiff and enlighten the court that, the suit is about copy right infringement of the Plaintiff`s engineering drawings used to make particular car bodies, which Defendants have copied the drawings and used them to reproduce the car bodies of similar make which has negatively affected the Plaintiff`s market, and caused his business and earnings to suffer.

Relying on Exhibits P9-P13, the Plaintiff's Counsel argued that, Plaintiff as the author of the drawings, his drawings are protected under Section 15(1) of the Copy right and Neighboring Rights Act Cap 218 [R.E 2002]. He then submitted that, in the absence of any one claiming to be the owner of the said engineering drawings, and then the court must find, and decide the Plaintiff is the owner of the drawings.

Further he submitted that, the Plaintiff's engineering drawings are entitled for legal protection under the Copy Right and Neighboring Rights Act Cap 218 [R.E 2002] because the evidence has proved that, the drawing constitute his original artistic works of the Plaintiff. Then relying on decisions in cases of M/S Babbar Wreckers Private Versus Ashok Leyland Ltd, and others I.A. 5916, 8163/2009 & 1396/2010 in CS (OS) 803/2009, and John Richard Versus Chemical Process Equipment Ltd AIR 1987 Del 372 and Equipment Ltd & Another Versus Action Construction Equipment (Pvt) Ltd which decided that, engineering drawings constitute artistic works, and are entitled to protection under Section 2(c) of the Indian Copy rights Act, it follows therefore even the Plaintiff drawings are entitled to such protection under the Copy right and Neighboring Rights Act Cap 218 [R.E 2002].

Submitting on a point whether the 1st Defendant car bodies are a reproduction of the Plaintiff engineering drawings, the Plaintiff's Counsel pointed out that, going by decision in the case of Escorts Construction Equipment Ltd Versus Action Construction Equipment

(PVT) Ltd 1999PTC 36 (Del) India the infringement of copy right is tested on "visual appearance of the drawings", and the object in question. Then relying on the testimony of PW6 who said "visual appearance" of the 1st Defendants cars and those of the Plaintiff is the same, the Counsel insisted that, the evidence proved the fact that, 1st Defendant car bodies were reproduced from the Plaintiff`s drawings. So he emphasized that, 1st Defendant car bodies, are reproduction of the Plaintiff`s engineering drawings.

Also, on the issue whether the Plaintiff`s brochure was used to market the 1st Defendant products, he insisted that, the testimony of PW 4 has established the 1st Defendant copied and used the Plaintiff`s brochure, and that was also improper.

Responding to issue of whether the 2nd Defendant was in possession of the Plaintiff`s Engineering Drawings, he submitted that, he was employed by the Plaintiff, was also the inner member of the engineering team, had full access to the drawings, was aware of the drawings. So he passed over the know how to the 1st Defendant.

Submitting on the issue of whether the 1st Defendant created safari car from the Plaintiff`s drawings, the Counsel insisted that, the testimony of PW6, established that, the bodies made by the Plaintiff and 1st Defendant car bodies were made on the same drawings which are subject matter of the present suit

In respect of the issue of whether, the Plaintiff suffered loss and damages, the Plaintiff`s Counsel relying on the testimony of PW3 the

Finance Director of the Plaintiff's Company submitted that, in 2008 one year after the first Defendant entered into the market, the Plaintiff sales in the market dropped by 39 % compared to previous year. So the evidence of PW3 established that, there was financial loss, loss of goodwill, and damages which the Plaintiff's suffered due to copy right infringement.

On reliefs which parties are entitled to, the Plaintiff submitted that, the Plaintiff is entitled to injunction reliefs prayed pursuant to paragraph 30(a) to (K) of the Plaint for reason that, the Plaintiff's claims have been proved on the balance of Probability.

On their part Mr. Salum Mushi, and Mr. Hussein Mlin ga, Learned Advocates for Defendants, in their submissions they first raised two Preliminary Objections on points of law that;

1. The life span of the suit has expired and therefore the court lack jurisdiction to entertain and hear the suit.
2. Secondly the Jurisdiction to hear cases in relation to copy right claims by virtue of Section 4 the Copy right and Neighboring Rights Act Cap 218 [R.E 2002]. lies with the District Court. In view of the above, they prayed for dismissal of the suit.

Next, the Counsel submitted on the issue of whether the Plaintiff is the owner of engineering drawing, and told the court that, Exhibits P9-13 do not have any measurements therefore are not engineering drawings.

To support their assertion that, are not engineering drawings, Counsels referred the court to a decision in a case Toyotomi Co and Another Versus Alfa Therm Ltd in Suit No 12 of 2005 annexed to their submission, which decided that, engineering drawings need to be self explanatory, must have dimension and specified parameters and feature. So, they insisted that, the drawings in Exhibits P9 to 13 do not meet that test of being Engineering drawings.

Secondly, they submitted that, going by the presented evidence form both sides there is no evidence which established that, by the moment PW7 was making the drawings, he was an employee of the Plaintiff`s Company, or the Plaintiff was assignee, or has a Copy right.

Further they submitted that, engineering drawings, presented to Business Registration and Licensing Authority (BRELA) by the Plaintiff, and Exhibits P9 and P13 which are subject of present litigation, differs, and that creates doubts on the Plaintiff`s claims if the drawings which are subject of litigation are artistic work of the Plaintiff.

Responding to the point of whether the 1st Defendant's car bodies are reproduction of the Plaintiff`s design, Counsel submitted that, there was no evidence which shows when the technical know how was passed over by the 2nd Defendant to the 1st Defendant.

The evidence established that, the 2nd Defendant joined the 1st Defendant in July, 2014 while the 1st Defendant was in business of conversion of car bodies for safari vehicles since 2007.

On the testimony of PW6 that, the 1st Defendant's cars bodies reproduced were from the Plaintiff's engineering drawings, Counsels submitted that, his testimony was one sided, of the one who hired him therefore is un-reliable. And that, the reasons, he did not visit the 1st Defendants workshop to investigate the truth.

On the issue of the Plaintiff's brochure alleged to have been used to the 1st Defendant to market his products, Counsels submitted that, the contention is irrelevant because the dispute is on the copy right of engineering drawings for manufacturing bodies of the 1st Defendant car and not brochures.

Presenting on the issue whether the Plaintiff suffered loss of good will, financial loss, or damages, Counsels submitted that, the allegations were not proved because PW3 who is the financial director in his testimony did not tender exhibits of company accounts which shows the company earnings and profits declined.

On reliefs which parties are entitled to, the Defendants Counsel, pointed out that, the Plaintiff has failed to establish his claim on the balance of probability, and prayed for the dismissal of the suit for lack of merit.

The court has considered the Plaintiff's claim, Defendant's defence and submission from both parties, and find the suit may be disposed off by determining five contentious points being; (1) whether the Plaintiff has copy right on engineering drawings in Exhibits P9 to 13, (2) whether the 2nd Defendant pass-over the engineering drawings to the 1st Defendant, (3) whether there was an infringement of copy right (4) whether there was losses and damages suffered by the Plaintiff arising from infringement of copy right, and (5) What reliefs are parties entitled.

Also other issues to be determined are Defendants two preliminary objection on point's of law, which were raised when the suit was reserved for Judgment. The two preliminary objections raised by Defendants are that, the life span of the suit has expired and the jurisdiction of copy right cases like the present one, lies with the District Court therefore the suit is not maintainable and ought to be dismissed for lack of jurisdiction.

Turning to the two objections, I have considered both of them and find that they were not raised at appropriate time. It is a rule of practice that, preliminary objections must be raised at the earliest possible time. Moving on the two objections that, the life span of the suit has expired and Jurisdiction of the case lies with the District Court I find since both parties closed their cases, it is improper to re-open the case and allow the Defendants to pursue their objections. On the foregoing reasons, I hereby dismiss the Defendants objections.

Turning to the merits of the case, I find it's the Plaintiff who is alleging that, he is the owner of the Engineering drawings, the drawings are protected by copy right, there is an infringement of copy right, and plaintiff suffered losses as a result of infringement . Therefore under Section 110 of the Evidence Act, Cap 6 [R.E 2002] the Plaintiff had obligation to prove his claim on the balance of probability. In deed Section 110 (1) of the Evidence Act Cap 6 [R.E.2002].

" Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that, those facts exist. When a person is bound to prove the existence of any fact, it is said that, the burden of proof lies on that, person"

Guided by Section 110 of the Evidence Act Cap 6, on burden of proof and evidence from both sides I consider the 1st and 2nd points of determination of whether the Plaintiff is the owner of the Engineering drawings which are subject of this suit, and if drawings constitutes original artistic works protected under the Copy Right.

In addressing the above, I revisited Section of 5 of the Copy right and Neighboring Rights Act Cap 218 [R.E 2002] and find it provides a statutory guide on Works which copyright may subsist. The Section provides as follows;

" Author of "original literary and "artistic works" shall be entitled to copyright protection for their works under this Act, by the sole fact of the "creation of such works".

Further I revisited Section 15 of Cap 218 and find it defines who is supposed to be the owner of copy right. Indeed the Section states as follows;

The right in a work protected under this Act shall be owned in the first instance by the author or authors who created the work. The authors of a work of joint authorship shall be co-owners of the said rights.

Guided by Sections 5 and 15 of Cap 218 it seems to me that since the Plaintiff`s claim on copy right on Exhibits P9 to 13 is being disputed, the court hurdles, is to consider whether the Plaintiff`s works in Exhibits P 9 to 13 is original works which is being protected under the Copy Right, and if the Plaintiff is the owner of the copy right in terms of Section 15 referred above,

Turning to the so called engineering drawings in Exhibits P9 to 13 , drawings which are subject of this litigation, I find for a work to be protected by copy right, under Section 5 of the Copy right and Neighboring Rights Act Cap 218 [R.E 2002] "Plaintiff`s has to prove that, the work is original and it belongs to him. That means, it has to be original in the real sense, and the Plaintiff has to be a creator in the real sense.

PW1 and PW6 maintained their orally testimonies that, the Plaintiff is the owner original of works, but they did not show the Court in Exhibits P9 to 13 where its stated that the Plaintiff is the original owner of the works and if the work is protected by a copy right.

The Court is aware that, the Copy right and Neighboring Rights Act Cap 218 [R.E 2002] is silent on a manner in which "the owner or creator of work may establish and prove that, the work is his original artistic works and he is creator , and the work is protected by a copy right .

However the court finds, a written notice or any other form of notice like a sign "on the works itself - Exhibits 9 to 13 , stating (1) "the name of the original owner,(2) stating that, the copy right exists on the work , and (3)stating restriction of the copy right on the works in my view is sufficient and proof and proves ingredients of Section 5 of the Copy right and Neighboring Rights Act Cap 218 [R.E 2002] that the works has the original owner and a copy right which subsists.

Also other forms of notice to establish that, the copy right subsist on the original works may be in form of sign of letter "C" which is fenced in the ring and that also is proof that copy right subsist on the works.

It seems to me a notice on the works or property is the one which assist in deciding competing claims or which stops others from using the works, or infringing the copy right.

The court is mindful that, such kind of notices of copy right are on books, films, music and broadcasting, and various property and products and they also states restriction of the copy right.

Guided by the Provisions of Section 5 of the Copy right and Neighboring Rights Act Cap 218 [R.E 2002] and what is stated above, I perused Exhibits P 9 to 13 and find they have a bare written statement of the name of a company which reads as follows;

RSA LIMITED
P.O.BOX 591, MOSHI TANZANIA

The writings on Exhibits 9 to 13 do not go a step further and state if the Plaintiff is the original owner of the works. Also Exhibits do not state if Exhibits P9 to 13 has a copy right which subsist. Also, there is no even a sign on Exhibits P9 to 13 which shows the copy right exists, or they have copy right protection.

I find since Exhibits P 9 and P 13, are silent on the points that, "Plaintiff is the original owner of the works, and do not state if copy right subsist, that the works has a copy right protection, it is my views that, Exhibits P9 and 13 did not meet a statutory requirement of Section 5 of the Copy Right Act, Cap 218 and requirements enables the court to make a finding that, copy right exists on Exhibits P9 to P13.

Mr. Malima, Learned Advocate for the Plaintiff argued that, since there is no one claiming to be the owner of the said engineering drawings, except the Plaintiff, and then the court should find and decide that the Plaintiff is the owner and holder of the Copy Right on Exhibit P9 to P13.

The court has carefully considered the Learned Advocate submission and prayer, that, since there is no one claiming to be the owner of the copy right, so the court should find and decide that the Plaintiff is the owner I find that, argument is not in line with Section 5 of the Copy Right Act, Cap 218 [R.E.2002] which requires a copyright subsist on the works itself.

In the absence of any notice on the works itself, or credible evidence from the works itself the Court has no legal basis of finding that, the Plaintiff is the original owner of Exhibits P9 and P13. Also it has basis of deciding that the drawings are protected by the copy right.

The Court has been wondering if the Plaintiff is the original owner and creator of Exhibit P9 to 13, and he inserted his details , why he did not put statements in his works, stating he is the original owner, the copy right subsist in the copy right and copy right restrictions on the said works.

It seems to me that the "commercial practice" which is being followed by authors, manufactures, engineer and others of inserting notices or signs of copy right on their works, ensures order and fairness in the copy right claim regime, and has been adopted by many, to the extent that, the practices of notices on works form part of unwritten rules.

So on the issues of whether the Plaintiff is the owner of the engineering drawings, in Exhibits P9 and 13 which are subject of this suit, the Court finds from the above mentioned Exhibits that, there are no precise words or sentence or paragraph which state in black and white that, the Plaintiff is original owner of works on Exhibit P9 to 13 or the copy right subsist in Exhibits 9 to 13 or the said Exhibits are protected under the Copy Right Act, Cap 218.

In respect of License of Tanzania Bureau of Standards (TBS) Exhibit P14, and Licenses from Business Registration and Licensing Authority, (BRELA) Exhibit P15, the court finds the two licenses do not support the Plaintiff`s claim of the copy right on Exhibit P9 to 13. Also the licenses do not support the Plaintiff`s assertion that he is the original owner of the drawings, and there is no evidence which established that, above the mentioned authority are not competent authority for the purposes of the Copy Right and Neighboring Rights Act Cap 218 [R.E 2002] or they deal with copy right matters. So as far as the Plaintiff`s claim of copy right is

concerned the TBS and BRELA Licenses has no assistance. On the Plaintiff's claim on the Patent, honestly the court was not furnished with any patent as Exhibit. So the argument of patent also is not of assistance to the court.

Turning to witness statements of PW1, PW2 and PW7 the court find the above mentioned witnesses argued that, the Plaintiff has a copy right on Exhibits P9 to P13 and is original owner of Exhibit P9 to P13. Honestly I find the Plaintiff witnesses statements and evidence on matters of copy right, and ownership was not supported by what is stated Exhibits P9 to P13.

Also I find that, mere statements of witnesses on the claim of copy right which is not supported by details contained in works itself is not sufficient enough to prove if the Plaintiff is original owner of Exhibit P9 to P13 or prove his copy right on works contained in Exhibits 9 to 13.

To conclude on the point of whether the Plaintiff has copy right on engineering drawings in Exhibits P9 to 13, I decide that, the Plaintiff evidence fall short of proof because in the works themselves there is no indication if the works are protected under the copy right and copy subsist.

On the Claim that, the 2nd Defendant passed over the engineering drawings to the 1st Defendant, I find Plaintiff's assertion is based

on the testimonies of PW4 and PW 7. In their testimonies the two witnesses said the 2nd Defendant was employed by the Plaintiff in the engineering section and was part of the inner circle of engineering design team and had access of the drawings.

They also the 2nd Defendant, he left and joined employment of the 1st Defendant Company, which was also designing, fabricating and making car bodies like the Plaintiff. Bearing in mind there was similarities of convertible safari cars of the Plaintiff and Defendants, the assumption and inference is that, the 2nd Defendant may be the one who passed over the engineering drawings.

I have analyzed the testimonies of Wilfred Laurent PW4 and of Varinder Singh PW7 that, the 2nd Defendant is the one who passed over the know how to the 1st Defendant and find their testimonies is contradicted by told the court that, the conversion of cars into safari cars was spread in Kenya and Tanzania for years. He even mentioned workshops of the Plaintiff, 1st Defendant and Sunny workshops of Arusha has been practicing modification of bodies conversion of safari vehicles.

Next, the court finds the testimony of DW1 that, the 1st Defendant was doing conversions of motor bodies was even supported by Manmohan Singh Bharma PW1 who in item 1.3 of his witness statement at page 4 stated that ;

In the year 2007, I saw a brochure advertising safari vehicle car made by the 1st Defendant I examined carefully that, brochure only to find out that, the products advertised therein were a replica of the Plaintiff products

So going by PW1 testimony since 2007 there was a brochure of the 1st Defendant way back 2007 advertising safari converted vehicles and this was even before the 2nd Defendant was employed by the 1st Defendant`s company. In view of such evidence then there is doubt if the 2nd Defendant pass over the know how, because the 1st Defendant was doing the work which is similar to that, of the Plaintiff, and the Plaintiff was doing the same work which was being done by the 1st Defendant.

On the email correspondence between the Plaintiff and the 2nd Defendant which was admitted as Exhibit P16, of 2013 the court finds that there is no proof, if the drawings which were being referred in emails were Exhibits P9 to 13 which are subject of the present suit. Bearing in mind that, there is no proof if it's Exhibits P16 refer to Exhibits P9 and 13, then I find email correspondence is not of assistance to the Plaintiff case.

Also, In view of the evidence that, the 1st Defendant was making safari cars before even the 2nd Defendant joined him, I find the claim of passing over the know how against both Defendants was short of proof and it fails.

Turning to the issue of whether the engineering's drawings were wrongly copied and used by the Defendants to make, and sell similar car bodies, the court finds that is what was testified by PW1, PW7 and other witnesses.

But substantive evidence on infringement, and similarities of drawings was advanced by Saimon Ignace Marandu PW6 who said he inspected the "original engineering drawings of the Plaintiff as appears in Annexure 2 (a) -(e) of the Plaintiff and compared them with Hans Paul Land Cruiser 7SX, Hans Paul 5SRX Land Cruiser , Hans Paul 5SX , Hans Paul Nissan7SX and Hans Paul 5SRX NISSAN Y61 and was convinced that, the 2nd Defendant car bodies were made and reproduced from engineering drawings attached to the Plaintiff, and marked as Annexure 2 (a) -(e) of the Plaintiff.

PW6 finding and conclusion were based on the fact that, the drawing had common features, configuration, and design, and has no difference in appearance.

I have weighed carefully the investigation, and examination conducted by PW 6, and find it has shortfalls and flaws which turns both his finding and conclusion to be incomplete and un reliable. The first shortfall is that, in his investigation and examination, he did not see or compare engineering drawings of the Plaintiff, and those of the 1st Defendant.

The second shortfall is that, in his investigation and before reaching to his findings and conclusion, he did not offer his investigation

report or findings to two Defendants to get opposite sides of the story or comment, or further input on his report before making his final findings and conclusions.

Courts like in cases of Stanton v Callaghan [1998] 4 All ER 961, [2000] 1 QB 75, and Whitehouse v Jordan [1981] 1 All ER 267 at 276, [1981] 1 WLR 246 at 256], have always insisted that, expert witness in their responsibilities of investigation, in civil cases, like PW6 they should not omit to consider material facts which would detract from his concluded opinion.

It seem to me none involvement of Defendants in his investigation, finding and conclusions, and failure to get Defendants input into his investigation works, from the opposite side, and that turned his investigation works to be incomplete, one sided, and unreliable.

Further the court considered the PW6 and Plaintiff argument that, infringement may be tested on the visual appearance of the drawings and the object itself, and finds primarily the object which was being investigated was the 1st Defendants alleged copied engineering drawings.

Reasonably, one would have expected that, PW6 as an expert, his investigation on technical design, and engineering's drawing would extend his investigation into the drawings and engineering process of the 1st Defendant, regardless of who assigned him the work. So

going, by the testimony of DW3, honestly I find the Plaintiff's argument and PW 6's argument on visual appearance of the 1st Defendant safari cars, and that of the Plaintiff, that are the same of is inconclusive and not sufficient enough to support the claim of infringement of copy right. The reason is that, his findings and conclusions on appearance, similarities of drawings and convertible safari cars are not credible, for lack of completeness.

After discarding the testimony of PW6 the court went a step further and explore the Plaintiff's contention of similarity and visual appearances of the Plaintiff and 1st Defendants safari cars, in line with testimony of Senthikumar Govindarajan, DW3.

In his testimony DW3 told the court that, body conversions of safari cars is done by a "reverse engineering" in which they "copy the shape, dimension, structure, original, design, pattern, mold, features, and art of Toyota Land Cruiser, Nissan Patrol and Land Rover. So what is extended is the length of the chassis, window sizes, and body to cater for more passengers.

DW3 insisted that features and appearance of all converted safari vehicles from the Plaintiff and Defendants workshops will remain, and look the same of Toyota or Nissan in appearance

With that evidence at hand the Court, is satisfied from the testimony of DW3 that even without using the same engineering drawings,

once body car conversion is done by different workshops visual appearance of Toyota or Nissan or Landover will look the same.

The above court finding based on the testimony of DW3 on body conversion and modifications, is reliable because he has worked in both the Plaintiff and Defendants workshop. His explanation that the Plaintiff and Defendant body will look similar and visual appearance will resemble not because of copy right infringement, but both parties are using the same Model of Toyota, and Nissan.

The Plaintiff's Counsel relying on decisions in cases of M/S Babbar Wreckers' Private Versus Ashok Leyland Ltd, and others I.A. 5916, 8163/2009 & 1396/2010 in CS (OS) 803/2009, John Richard Versus Chemical Process Equipment Ltd AIR 1987 Del 372 and Equipment Ltd & Another Versus Action Construction Equipment (Pvt) Ltd and Escorts Construction Equipment Ltd and & Versus Action Construction Equipment (PVT) Ltd 1999PTC 36 (Del) India tried to convince the court that, the infringement of copy right may be tested by looking at visual appearance of the drawing and the object as decided in the two cases.

But honestly I find as DW3 said if the models which are being tested are of the same make like Toyota or Nissan which contains thousands of similar and same parts from other suppliers cars will look the same. So visual appearance alone may not be conclusive proof of infringement of copy right the car themselves looks similar. So credible evidence on the analysis of parts, and drawings supplied

by both parties was required to ascertain a claim of copy right, as opposed to one sided investigations. So the court finds, and decides that the Plaintiff and Defendant models of convertible cars, even if their visual appearance looks the same, their appearance is not necessarily caused by using similar drawings but because the models of cars are the same.

Another legal point which the Court wants underscore score is on the protruded facts and legal wrangling on RSA Model Cars and Hans Paul model Cars. It seems to me even if the court assume that, Exhibits P9 to 13 are original drawings of the Plaintiff, are protected under copy right, but such copy right protection may not legally be extended to Toyota and Nissan Land Safari Cruiser model of RSA for reasons that, the degree and scope of works and parts of body conversions compared with original parts, and body of Toyota or Nissan manufactures, may not lead to the conclusion that, the Plaintiff is the original owner, or creator or author of RSA Land Cruiser Safari or RSA Nissan safari cruiser, and is entitled to copy right protection on modified vehicles as the owner.

In other words, court finds that the Plaintiff`s evidence is not sufficient enough to prove that, the Plaintiff is original owner and creator of RSA Safari Cruiser and Nissan Cruiser as a whole.

Reverting back to the Plaintiff`s claim of infringement the court finds there is no evidence no direct or indirect evidence which

proved the Plaintiff's claim of Defendants wrongly copied Exhibits P9 to 13, and improperly make and sell similar car bodies. So the claim of copy right infringement fails, for reasons which I have stated above.

Moving on the Plaintiff's claim of losses, the court finds Nagesh Dinavan PW3, is finance director of the Plaintiff's Company and he alleged that, from 2007 when the 1st Defendant started to make and sell conversion safari car, the Plaintiff's earning declined, and suffered loss.

I have considered the testimony of PW3 as far as loss of the Plaintiff Company is concerned and find DW 3 as finance director has access and is in possession of the Audited Account of his company of 2007. So the easiest way for him to prove company loss for year 2007 was to tender the Audited Accounts of the Plaintiff's Company as Exhibit and show that, loss.

Since PW3 did not tender the Audited Accounts, I find the Plaintiff claim that, his company suffered loss and damages have remained un substantiated and the claim fails.

Regarding relief claim the court finds since the Plaintiff's evidence has failed short of proof in all claims of ownership of copy right on Exhibits P9 to 13, of passing over of engineering drawings, of infringement of copy right and losses suffered. I find no compensation for loss or damages may be awarded.

In view of the above I decline to grant any of the orders and reliefs prayed in the Plaint. On foregoing reasons, I hereby dismiss the Plaintiff suit with costs in favour of the Defendants. The right of appeal is fully explained to the parties.

Dated at Dar es Salaam this 12th day of April, 2016


H.T.SONGORO
JUDGE



Delivered at Dar es Salaam this 20th day of April, 2016


H.T.SONGORO
JUDGE



The Judgment was delivered in the presence of Mr. Joseph Niwamanya, Advocate for the Plaintiff and Mr. Mlinga, Learned Advocate for the Defendants,