

Title: Nonny Gathoni Njenga & Another V Catherine Masitsa & Another [2014] Eklr

Venue: High Court Of Kenya At Nairobi, Milimani Commercial & Admiralty Division

Case Id: Civil Case No. 490 Of 2013

Authoring Judge: E O K Ogola J.

Date Of Decision: 12 March 2014

Plaintiff: 1. Nonny Gathoni Njenga

2. Jane Wambui Odewale

Defendants: 1. Catherine Masitsa

2. Standard Group Kenya

Keywords: ICT, Telecommunication

#### RULING:

1. The Plaintiffs herein filed the Notice of Motion dated 19<sup>th</sup> November 2013 and amended on 17<sup>th</sup> January 2014 seeking for orders, inter alia, that the Defendants be committed to prison for contempt of Court.
2. The Application came up for hearing on 23<sup>rd</sup> January 2014 when Counsel for the 1<sup>st</sup> Defendant/Respondent raised an issue with regard to the admissibility of the DVDs annexed by the Plaintiffs to demonstrate the contemptuous conduct of the Defendants.
3. Briefly, on 8<sup>th</sup> November 2013 pursuant to the Plaintiffs' Notice of Motion filed on even date, this Court made orders, among others, restraining the Respondents either from infringing in any way on the Applicants' Copyright in the Literary work "WEDDINGS WITH NONI GATHONI" and dubbed "THE BAILEYS WEDDING SHOW WITH NONI GATHONI". It is the Applicant's case that the aforesaid orders notwithstanding, the Defendants/Respondents went ahead to infringe on the Applicants' said copyrighted literary work in violation of the Court's Orders.
4. During the hearing aforesaid, Counsel for the Plaintiffs submitted that the 1<sup>st</sup> breach of the orders occurred on 9<sup>th</sup> November 2013 when the Standard Media Group through KTN proceeded to broadcast in the Samantha's Bridal Show, the contents and substance which were substantially copied and reproduced from the works against which injunctive orders had been issued.
5. He further submitted that the 2<sup>nd</sup> instance of breach occurred on 17<sup>th</sup> November 2013 when the 2<sup>nd</sup> Defendant acting on the instructions of the 1<sup>st</sup> Defendant proceeded to broadcast, in the Samantha's Bridal Show, works which infringed on the copyrights of the 1<sup>st</sup> Plaintiff and the injunctive orders. To this end, it was Counsel's submissions that the Plaintiffs had annexed three (3) DVDs that demonstrated the contemptuous conduct of the respondents.
6. It is with regard to the aforesaid DVDs that Counsel for the 1<sup>st</sup> Defendant raised the issue of their admissibility as evidence before this Court. It was Counsel's submission that the said DVD evidence was inadmissible as it was secured illegally from Bauhaus Limited and the same constituted an infringement of property rights. He further submitted that the said DVDs were

taken not from one show but a series of shows over a period of time which was a contravention of the property rights of Bauhaus Limited.

7. In reply, counsel for the Plaintiffs submitted that under section 106 A and B of the Evidence Act the only lawful obligation impressed on a party tendering evidence on ICT was to tender a Certificate of the Person responsible for rendering that evidence on ICT form. I however note that there is no such certificate attached to the DVDs the Plaintiffs seek to rely on or at least none has been brought to the Court's attention.
8. The admissibility of electronic records is provided for under Section 106 B of the Evidence Act (Cap 80) Laws of Kenya in the following terms:

"106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

9. Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

"a) identify the electronic record containing the statement and describing the manner in which it was produced; and

b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer."

10. The certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).

11. In the case of REPUBLIC .V. BARISA WAYU MATUGUDA [2011] eKLR the court observed that:

". . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."

The court went on that:

"This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B

(4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence."

12. In light of the above analysis and having already stated above that the DVDs attached by the Plaintiffs are not accompanied by a Certificate as required under the evidence Act, it therefore follows that the said DVDs are inadmissible as evidence.
13. However, in the interest of justice, it is my view that the Plaintiffs are at liberty to produce such certificate for the admissibility of the said evidence. When that is done, the Court will be able to examine the evidence and evaluate the probative value of the said DVDs as well as the authenticity. The Respondent has alleged that the DVDs were obtained illegally, however that cannot be ascertained at this stage until the Certificate is filed and the Court is able to determine the source of the DVDs.
14. Costs shall be in the cause.