

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

COMMERCIAL CASE NO. 81 OF 2010

MACMILLAN AIDAN (T) LTD PLAINTIFF

VERSUS

NYAMBARI NYANGWINE

J. A. MASEBO

NYAMBARI NYANGWINE PUBLISHERS

} **DEFENDANTS**

14th December 2015 & 14th March, 2016

JUDGEMENT

MWAMBEGELE, J.:

This is probably one of the oldest cases in the Commercial Registry. The record shows that it was presented for filing on 28.09.2010. The first scheduling conference was held, and the concomitant orders thereof given, on 14.04.2011 by my Brother at the Bench Mruma, J. Since then its history is rather chequered. Suffice it to note that it has gone through ups and downs at the instance of both the parties and this court up and until it finally landed onto my desk officially in February, 2015. I will attempt an epilogue to this case before getting into its analysis and my conclusion thereof.

The plaintiff's claim against the defendants jointly and severally is for infringement of her publication rights, whose copyrights are allegedly solely vested upon her. It is claimed that the plaintiff's copyrights are vested upon her by virtue of a Memorandum of Understanding (MoU) between one Hussein Tuwa PW2 (the Author,) and herself and that the said infringement was through publication, selling and or distribution of the book known and titled as **Tahakiki: Vitabu Teule vya Fasihi, Kidato cha 5 na 6, Uhakiki na Maswali - Riwaya, Tamthilia, Ushairi**. For such infringement it is claimed that the plaintiff suffered loss of revenue to the tune of Tshs. 87,500,000/= as well as general damages, reasons whereof she seeks judgment and decree against the defendants jointly and severally for:

- i) Declaratory orders that the defendants are in infringement of the plaintiff's Copyrights;
- ii) Permanent injunctions prohibiting the defendants, their agents, servants and or any other person/entity working upon their instructions from publishing, distributing and selling the said publication;
- iii) payment for loss of revenue on the part of the plaintiff, to the tune of Tshs. 87,500,000/=;
- iv) General, exemplary and punitive damages;
- v) Costs of the suit; and
- vi) Any other and further relief as the Court shall deem just and fit.

The defendants through their joint written statement of defence deny all the allegations putting, in the main, that they never infringed the rights. They categorically state that what has been done in the material book is to make reviews, critiques, analysis and evaluations of the themes of various books

and therefore the said **Tahakiki** book is original to the authors-cum-defendants after independently and creatively selecting, assembling, organizing and arranging points and materials of several books (including the plaintiff's) to give it a copyright infringement-free status.

The issues that were framed by the court on 18.07.2014 by consent of counsel representing the parties are four. These are:

- i) Whether there was a memorandum of agreement duly executed?
- ii) If issue No. 1 is answered in the affirmative, then what were the rights and obligations of the parties?
- iii) Whether there was breach of the rights and obligations of Memorandum of Agreement by either party; and
- iv) To what reliefs, if any, are the parties entitled.

The parties procured two categories of evidence; namely, documentary and oral testimonies through their respective witnesses. On the part of the plaintiff, he procured three witnesses and tendered a total of four documentary exhibits. These were Leila Magret Abdalah PW1, Hussein Issa Tuwa PW2 and Charles Adolf PW3 as well as a Memorandum of Agreement (Exh. PE1), a Book titled **Tahakiki: Vitabu Teule Vya Fasihi Kidato Cha 5 na 6, Uhakiki na Maswali – Riwaya, Tamthiliya, Ushairi** authored by J. A. Masebo and Nyambari Nyangwine (Exh. PE2), a Book titled **Mfadhili** (Exh. PE3) by Hussein Tuwa and the Auditor's Report (Exh. PE4).

For the defendants, a total of two witnesses namely Jubeck Alinine Masebo DW1 and James Eginu Kinunda DW2 were fielded. No documentary evidence was tendered in proof of their (defendants') case.

The first issue, as framed, is whether there was a memorandum of agreement duly executed. This was not in dispute, and I find it as affirmatively answered. However, the simplicity of this answer makes my mental faculties uncomfortable as far as the real matter in controversy is concerned. I maintain the discomfort due to the reason that the central issue here is infringement of copyright which, allegedly, is solely vested in the plaintiff. The rights, allegedly, emanate from or are conferred onto the plaintiff by the MoU between the plaintiff and the Author of the work subject of infringement who unfortunately is not a party to this suit. That is a point where the discomfort culls from this issue and the answer thereto. Thus, first, existence or otherwise of the MoU is not at issue between the parties to this suit, and therefore, secondly, investigation of its existence and the breach of the terms therein or otherwise as between the parties to this suit cannot settle the real issue in controversy. That is the reason why I have out rightly answered the first issue in the affirmative.

The second issue is what were the rights and obligations of the parties in the MoU as I have found above that the said MoU was between the Author (PW2) and the plaintiff. In my considered view, the investigation of the rights and obligations as between them is uncalled for in this matter. This is so because, none of them claims against either, save for the claims against the third parties to the MoU (the defendants), who are not said to be agents or clients of either of the parties (to the MoU).

The third issue is whether there was breach of the rights and obligations of Memorandum of Agreement by either party. To me the answer is also simple. There was no breach of any terms by either party. Thus, as against the defendants, there was no breach of the terms simply because they were, and are still, not a party to the said MoU and were therefore not bound by the same. As against the plaintiff, there cannot be said to be any breach in respect of the complaint, which is infringement of the rights. The defendants' counsel through his final submissions puts that it was the plaintiff that breached the terms therein by taking the case in its own name contrary to the agreement. With greatest respect, that line of argument resolves nothing in so far as the real issue is concerned in this case. The Author has not and did not complain about such decision by the plaintiff and therefore, the plaintiff cannot be said to have breached the term of the condition in the MoU by proceeding against 3rd parties in the way she did.

The totality of the above leaves the only relevant and helpful question to be answered to be whether, by virtue of the said MoU, the plaintiff acquired the copyright over the work of **Mfadhili**, and if that is answered in the affirmative, whether there was infringement of such rights by the defendants. I thus invoke the provisions of order XIV rule 5 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 and add the foregoing two issues so as to enable this court to determine the real matters in controversy between the parties to this suit.

It is vividly discernible from the pleadings that whereas the plaintiff maintains that by virtue of the MoU it acquired sole rights over the copyrights which

were ultimately infringed upon by the defendants' acts. The defendants deny the same by claiming that there was no infringement whatsoever.

I am certain in my mind, as day follows night, that this question will not detain me. This is because the answer to the first part thereof is readily discernible from the Exh. PE1, particularly clause 17. The clause is couched as follows:

"The Copyright in the WORK shall remain vested in the AUTHOR (unless otherwise agreed) but the PUBLISHER shall during the legal term of copyright have the sole and exclusive right to produce, print and publish the WORK in all forms throughout the world."

Clause 17 is clear on this take. It stipulates that the copyright shall remain vested in the author save that the publisher has sole and exclusive right to produce, print and publish the work in all forms and throughout the world during the legal term of the copyright. The immediate question which comes to the fore at this juncture is whether, by virtue of such a qualification to the copyright ownership, some of the rights incidental thereto were transferred/vested to the plaintiff. In other words, whether the rights to produce, print, and publish amounts to copyright.

In Tanzania, the law of copyright is embodied in the Copyright and Neighbouring Rights Act, Cap 218, of the Revised Edition, 2002 (henceforth

"the Act"). Under section 4 of the Act, the term "copyright" is defined to mean:

"... the sole legal right to print, publish, perform, film or record a literary or artistic or musical work".

Perhaps a more clear definition can be available elsewhere. According to the World Intellectual Property Organization (WIPO), in its Creative Industries Booklet No. 1 titled Managing Intellectual Property in the Book Publishing industry; (sourced with the help of internet and available at www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub.868.pdf), copyright entail a bundle of exclusive rights that enable the creator to control the economic use of such works whereby he or she through such exclusive right may authorize or restrict *inter alia*, reproduction of a work in copies, distribution of the copies to the public, translation, or adaptation of the work.;

Therefore, from the above definition on what copyright entails, the author may, through an agreement like the one at hand (Exh. PE1), authorize or grant rights to another person - a publisher most often - to exercise any or all of the above rights in consideration of monetary benefit called royalties.

It is clear from the foregoing, in the light of clause 17 in the MoU, that the plaintiff had a right to reproduce the work and distribute the same which is part and parcel of the author's copyright. It follows therefore that the first limb of the question, as to whether by virtue of clause 17 the plaintiff was granted copyright in the **Mfadhili** work is answered in the affirmative.

My conclusion is, *inter alia*, drawn from the testimony of PW1 to the effect that the plaintiff as a publisher had agreed with the Author of the said work to produce copies of the work and in turn pay royalties to him. This arrangement was further confirmed by PW2 who introduced himself as the said author of **Mfadhili**.

This stance takes me to the final lap of the above framed additional issue, that is, whether there was infringement of such rights by the defendants.

Black's Law Dictionary (Abridged 7th Edition) by Bryan A. Garner, Editor in Chief, at page 626 defines the term "infringement" in intellectual Property as:

"An act that interferes with one of the exclusive rights of a patent, copyright or trademark owner".

Black's Law Dictionary (supra) defines the term "copyright infringement" at the same page of the legal work as:

"The act of violating any of a copyright owner's exclusive rights granted by the federal Copyright Act, 17 USCA [in our case the Copyright and Neighbouring Rights Act, Cap 218, of the Revised Edition, 2002]..."

The dictionary provides an illustration that:

"A Copyright owner has several exclusive rights in copyrighted works, including the rights (1) to reproduce the work, (2) to prepare derivative works based on the work, (3) to distribute copies of the work ..."

In simple terms, infringement of copyright is a violation of the author's rights. Perhaps a simpler way of defining the term was provided by Lord Slessern in ***Hawkes & Sons (London) Vs Paramount Film Service Ltd*** [1934] 1 Ch. 593, at 606, where His Lordship observed that infringement of copyright occurs when "a substantial, a vital and an essential part" of a work is reproduced.

In the light of the foregoing discussion therefore, evidence to establish infringement of a copyright must show substantial similarity between the work subject of infringement and the infringing material or work [see also the **WIPO Booklet** (supra)]. In the United States of America case of ***Rogers Vs Koons***, 960 F.2d 301, 22 U.S.P.Q.2d 1492 (2d Cir. 1992) their Lordships referring to the case of ***Ideal Toy Corp. Vs Fab-Lu Ltd.***, 360 F.2d 1021, 1022 (2d Cir.1966) observed that such similarity is determined by the ordinary observer test of "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Again, referring to another case of ***Durham Industries, Inc. Vs Tomy Corp.***, 630 F.2d 905, 912 (2d Cir.1980) they went on to observe thus:

"We recognize that ideas, concepts, and the like found in the common domain are the inheritance

of everyone. What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes. Hence, in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the expression of an idea or fact, not on the similarity of the facts, ideas or concepts themselves”.

Armed with the foregoing persuasive authorities on infringement copyright, I now turn to the events and scenarios obtaining in the case at hand relating to infringement of copyright.

In the plaint, it is alleged at paragraphs 6 and 7 thus

“6. That, on diverse date, that is between the year 2007, 2008, 2009 and 2010, the defendants had facilitated the publication, selling and /or distribution of the Book, known and titled as TAHAKIKI-VITABU TEULE VYA FASIHI, KIDATO CHA 5 NA 6, UHAKIKI NA MWASWALI, RIWAYA, TAMTHILIA, USHAURI”, which publication had included among others various books(sic!) including the book Titled “MFADHILI” whose publication rights are solely vested upon the Plaintiff...”

7. That, by virtue of the memorandum of Agreement between the plaintiff and the Copyright holder, one HUSSEIN ISSA TUWA, who is also the author of the book titled as MFADHILI” The plaintiff was the sole and exclusively licensed to publish and distribute the said title ...”

Further to the above, the testimonies of both PW1 and PW2 are to the effect that the defendants infringed the rights vested unto the plaintiff through publication and distribution of the said **Tahakiki** book which among others contained the **Mfadhili** book. PW2 particularly testified that upon noticing the said **Tahakiki** book with the watchmen at his office, he contacted the plaintiff who denied having any arrangement with the defendants. Further to this, PW1 explained that there was infringement because the defendants incorporated **Mfadhili** book into their work which substantially affected even the sales for such **Mfadhili** work to the extent that the plaintiff decided to stop its publication.

The defendants on the other hand deny the claim putting that they only produced critiques which incorporated such works of the plaintiff. To be precise, it is said at para 3 (i), (ii), and (iii) of their joint written statement of defence that:

“(i) what has been done in the material book is to make reviews, critiques, analysis and evaluations of the themes of various books. It is also averred that the book was first

taken to the print house in 2002 and has undergone several editions namely in 2004, 2005 and 2008.

- (ii) Review, critique, analysis and evaluation of the Book "Mfadhili" only features in the last edition with compilation of ideas, contexts and themes from eleven(11) other works and which independent book entered the market at the end of 2008;
- (iii) the "Tahakiki" is original to the author thereof and /or defendants after having been independently created with adequate degree of creativity particularly in selecting, assembling, coordinating, arranging and organizing points and materials of several works to give the book a whole copyright infringement-free status ..."

To expound on the above, DW1 went further in his testimony to state that the two works of **Tahakiki** and **Mfadhili** are different in that the **Mfadhili** work (Exh. PE3) is targeted for forms 3 and 4 students whereas the **Tahakiki** (Exh. PE2) is For Forms 5 and 6 Students and hence, he argued, the latter does not infringe the former.

Further to this, DW2 who had introduced himself as the Managing Editor of the 3rd defendant, testified that the said **Tahakiki** is a combination of selected literature books for Forms 5 and 6 including Novels, Plays and

Poetry. His answer when led by the advocate for the defendants in examination in chief to explain **Tahakiki** in English was that it is a criticism or expression of one's ideas and evaluation of the relevance of a book written by another to the society. He explained also that the work of **Tahakiki** or "Criticism" contains only quotations for references but mostly it is the original ideas of criticism and comments on such works and that it is a fair use for educational purpose. According to him, it was first published in 2004 and the **Mfadhili** work was included therein in the 2008 edition.

Having heard the rival testimonies, as well as pleadings and the exhibits, I pause to ponder, on the exact meaning of the term "Tahakiki", and whether the same amounts to infringement of a copyrighted work.

In the first edition of the Swahili-English Dictionary by the Institute of Kiswahili Research of the University of Dar es Salaam, commonly known under the acronym as **TUKI**, the term "Tahakiki" is translated as "review, critique". These two words carry almost synonymous definitions in the 7th new edition of **Oxford Advanced Learners' Dictionary**. Therein, at page 1253, the term "review" has several meanings ascribed to it, but for purpose of the present discourse, it is:

" a report in a newspaper, or magazine, or on the internet, television or radio in which somebody gives their opinion of a book, play, film/movie etc; or an act of writing that kind of a report".

An example given in that dictionary is that of a book review.

In the same dictionary, the term "critique" as a noun, is defined as:

"a piece of written criticism of a set of ideas, work of art, etc".

And as a verb, it is defined at page 349 as:

"To write or give your opinion of, or reaction to, a set of ideas, a work of art, etc".

From the totality of the foregoing, I can confidently deduce a cumulative literal translation of the term "Tahakiki" as expression of one's views, comments and critique on a literary work particularly on form and content aiming at showing weaknesses and strengths therein and how or to what extent the author has succeeded in his literary work. *Stricto sensu*, the arrangement, organization, coordination of such expression as well as the expressions or comments, views, critiques are original ideas of that person or commentator/critic or writer though reference may be to the particular work of another. Thus, one literary work or book, can receive comments and criticism or more often, reviews from different persons who might not be the same or may differ in certain aspects in their view towards such literary work, without infringing any copyright.

Accordingly, it is my well thought opinion that it would be chaos and a confusion which may open up floodgates of litigation, if original holders of copyrights and or their assignees were allowed to seek redress claiming

infringement in courts of law because of criticism and/or reviews of their literary works. That could certainly be a halt to knowledge creation and dissemination as well as a blatant curtailment of right to freedom of expression.

To this, I render credence in DW2's testimony to the effect that the reviews of a book and the book itself are different and the reader of the review alone cannot claim to have read the book itself. To satisfy myself on the veracity of this statement, I have gone through the two works of **Tahakiki** (Exh. PE2) and **Mfadhili** (Exh. PE3), and found that indeed the two pieces of work are different in form/style and content. Thus, the author of **Tahakiki** (Exh. PE2) first mentions the author and publisher of the Book **Mfadhili** in the introduction part. Then he goes on to make a focused review whereas he comes up with comments and expression of his views in reaction to structure, style, theme, characters as well as success and criticism or failures of the author. These are organized and compiled in a style different from that in **Mfadhili** and contains quotations which are fully referenced by indicating the exact pages of the books from whence they are taken.

The above analysis brings to the second part of the sub question above which is whether "Tahakiki" or "Critique/Review" amounts to infringement of copyrighted work.

Going by the ordinary observer test as referred in the **Rogers** case (supra), as well as the persuasive observations made in the **Durham** case (supra), and flowing from the foregoing analysis, it needs no further interpolation that

an answer thereto must be in the negative. That is to say, "Tahakiki" or "Critique/Review" does not amount to infringement of copyrighted work.

Ordinarily and literally, the **Tahakiki** work cannot be said by all intent and purpose to be a copy of the **Mfadhili** book. That apart, infringement is further waded off by the fact that even the author and Publisher of the **Mfadhili** are fully and expressly acknowledged in the said **Tahakiki** work. I am further convinced to hold such view going by section 107 of the 1976 United States Copyrights Act to the effect that even an original work which is copied for purposes such as criticism or comment may not constitute infringement but rather fair use. It is unfortunate that we do not have such provision in our Copyright and Neighbouring Rights Act, Cap 218, of the Revised Edition, 2002. The presence of such provisions boosts learning.

At this juncture, I am certain in my mind that the plaintiff has not succeeded in establishing the claim of infringement of copyright against the defendants. As I have already alluded to above, there is no substantial similarity of the two works of **Tahakiki** and **Mfadhili** as to warrant the grant of the orders sought by the plaintiff. That is to say, no evidence or testimonies adduced has ably and on the preponderance of probabilities established infringement of her copyright to sustain the claim.

For purpose of clarity, I am in agreement with the defendants' statements at paragraph 3 (iii) of their joint written statement of defence that indeed the **Tahakiki** work is original to the author thereof and/or defendants after having been independently created with adequate degree of creativity particularly in selecting, assembling, coordinating, arranging and organizing

points and materials of several works which makes the same copyrightable material.

For the avoidance of doubt, as for the last issue, none of the relief sought by the plaintiff can be grantable since, under the adversarial system, no relief can be granted to an unsuccessful litigant. On the basis of the legal adage which goes thus, "costs must follow event"; perhaps sieved from the provisions of section 30 of the CPC, I hereby award costs of the suit to the defendants.

On account of all what has been stated above, the suit cannot stand. It fails miserably and I proceed to dismiss it in its entirety with costs.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of March, 2016.

J. C. M. MWAMBEGELE
JUDGE