

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 106 OF 2020**

**TANZANIA-CHINA FRIENDSHIP**

**TEXTILE COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**NIDA TEXTILE MILLS (T) LTD (NIDA) ..... DEFENDANT**

**JUDGMENT**

1<sup>st</sup> & 28<sup>th</sup> September, 2022

**ISMAIL, J.**

This is a claim founded on an allegation of infringement of the provisions of the Copyright and Neighbouring Rights Act, Cap. 218 R.E. 2002. It is a battle that pits one rival against the other, both of whom are players and household names in the apparel industry. What has sparked off the dispute is the allegation, by the plaintiff, that the defendant has stolen the plaintiff's artistic works - otherwise known as pattern designs - of its printed fabrics, popularly known as "khanga" and "vitenge".

It was alleged that in August, 2018, the plaintiff received complaints from her customers that the products that the plaintiff had taken to the

market were of an inferior quality. The notable shortfall was said to be on the colours of the apparels which faded within a single wash, while the cotton fibre was also said to be of low quality. This revelation prompted an investigation, taken at the plaintiff's instance. The investigation took the plaintiff's personnel to a retail outlet in Manzese and whole sale shops in Mnazi Mmoja, Dar es Salaam. They registered complaints which touched on the quality of the products which were later found to be those of the defendants. The plaintiff allegedly found that that the products had design numbers and pattern design numbers owned by the plaintiff and are protected by the laws governing copyrights in Tanzania.

The contention by the plaintiff is that the copying of the plaintiff's rights, considered to be an infringement, was massive to the extent of flooding the entire market with products made and supplied by the defendant. This was done in the guise that the same had been produced by the plaintiff. As a result of the alleged infringement, the plaintiff contends that its market share plummeted and her fortunes dwindled profoundly. The plaintiff projected the loss incurred to be in the sum of TZS. 3,369,728,553/- . This is what constitutes the plaintiff's substantive claim, along with a claim of general damages amounting to TZS. 300,000,000/-.

Subsequent to these revelations, the plaintiff took the matter to relevant regulatory authorities for intervention but to no avail, hence the decision to institute the instant proceedings. Besides the money claims, there are a few other reliefs sought by the plaintiff against the defendant. These are:

- (i) An injunction to prevent the infringement and prohibit continuation of the infringement of the copyright and neighbouring rights of the protected artistic works (pattern designs) of the plaintiff, by the defendant;
- (ii) Provision of a detailed accounting reflecting profits received and attributed to the infringement i.e. sale of Khanga and Vitenge embodying the plaintiff's artistic works; and
- (iii) Provision of a detailed accounting showing the amount of money received in relation to the plaintiff's artistic works that the defendant has aggregated without the plaintiff's authority.

The defendant's has valiantly denied any wrong doing. While admitting being summoned to a meeting convened by COSOTA, at which an order for production of proof was issued, the defendant maintained that her operations and production conformed to the laws and practices that govern their industry. With respect to artistic designs, works and patterns, the

avermment by the defendant is that hers were designed and drawn by local artists, while others were acquired along with the acquisition of Sungura Textile Mills in 2003. The defendant averred that proof to that effect was destroyed by floods that swept her factory and office premises in the year 2011.

She took the view that the allegations by the plaintiff were baseless, deserving nothing but a dismissal with costs.

The parties' efforts to have the matter resolved through mediation fell through, necessitating conducting trial proceedings which saw the plaintiff procure attendance of one witness against three for the defendant. For the plaintiff was Ms. Selina Julius Otacho, who featured as PW1, while the defendant had Mohamed Rajab Seif Honello (DW1); Muhammad Amin Godil (DW2); and Muhammad Imran (DW3). 12 exhibits were tendered by the plaintiff and admitted by the Court, while 9 exhibits were admitted as part of the defence testimony.

At the Final Pre-trial Conference, on the parties' consensual basis three issues were drawn by the Court. These were:

- (i) *Who is the owner of the disputed artistic work?;*
- (ii) *Whether the defendant is infringing the copyright of the plaintiff's artistic work; and*

*(iii) To what reliefs are the parties entitled?*

Hearing of the evidence in chief took the form of witness statements, filed ahead of the hearing of the parties' cases. Representing the plaintiff was Mr. Elisa Mndeme, learned counsel, while the defendant was ably represented by Ms. Shamima Hizza, learned advocate.

With respect to the first issue, the Court is called upon to pronounce itself on the ownership of the artistic works that constitute the contention between the parties. On this, the testimony of PW1 is what the plaintiff has relied on to contend that she is the owner the artistic works around which the claim of infringement revolves. Through PW1, the plaintiff tendered Exhibits P1, P2, P3 and P4. They were certificates for artistic works that are alleged to evidence registration of the said works. These are known as Copyright Clearance Certificates with reference Nos. CST/DOC/CL/CERT/Vol. III/011, dated 14<sup>th</sup> June, 2018; CST/DOC/CL/CERT/Vol. III/012, dated 14<sup>th</sup> June, 2018, CST/DOC/CL/CERT/Vol. IV/335, dated 18<sup>th</sup> July, 2019; and CST/DOC/CL/CERT/Vol. III/013, dated 14<sup>th</sup> June, 2018. The contention by the plaintiff, as discerned from the plaintiff's final submission is that the certificates conveyed ownership of the works exclusively produced by the plaintiff. Further, the plaintiff contended that exclusive ownership of the

copyrights included the use of the name URAFIKI or RAFIKI which is a trade name.

The plaintiff's submission and testimony have been ferociously contradicted by the defence evidence and submission. Ms. Hizza's submission addressed the matter by relying on the provisions of sections 5 (1) (2) and 15 (1) of Cap. 18 and rule 6 of the Copyright and Neighbouring (Registration of Members and their Works) Regulations, 2005. These provisions offer protection of literary or artistic work upon registration. The defence's contention is that these rights were not infringed. In fact, the defendant contended, these rights were registered subsequent to the defendant's production of the garments that hit the shop shelves.

Successful settlement of the first issue requires a common understanding of what an artistic work, which a copyright, encompasses. Artistic work has been widely defined by legislation across jurisdictions. The United Kingdom's Copyright Designs and Patents Act of 1988, from which our Cap. 218 is modelled, defines artistic work to mean:

*"graphic works such as paintings, drawings, diagrams, maps, charts and plans, engravings, lithographs, etchings or woodcuts, sculpture, collage; this includes the surface design or manufactured products such as pottery and textiles."*

This definition mirrors the long form description enshrined in section 4 of Cap 218 which defines a term copyright to mean:

*"... **the sole legal right to print, publish, perform, film or record a literary or artistic or musical work.**"* [Emphasis supplied].

Section 5 (1), (2) and (3) of Cap. 218 gives a detailed and extensive range of such rights. They cover:

- "5 (1) Authors of original Works in which literary and artistic works shall lie copyright may Subsist entitled to copyright protection for their works under this Act, by the sole fact of, the creation of such works.*
- (2) In this section literary and artistic works shall include in particular-*
- (a) books, pamphlets and other writings, including Computer programs; addresses,*
- (b) lectures, other 11 Sermons and works of the same nature;*
- (c) dramatic and dramatic - musical works-.I 28 No. 7 Copyright and Neighbouring Rights 1999 (d) musical works (vocal and instrumental), whether or not they include accompanying words;*

- (e) choreographic works and pantomimes; cinematographer works, other and audio-visual works (g) works of drawing, painting, architecture, sculpture, engraving, lithography and tapestry;*
- (h) photographic works including works expressed by processes analogous to photography; Copyright and Neighbouring Rights 1999 30 No. 7 works of applied art,*
- (i) whether handicraft or produced on an industrial scale-31 0) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.*
- (3) Works shall be protected irrespective of their form of expression, their quality and the purpose for which they were created."*

Simply stated, therefore, a copyright is a head of intellectual property right that protects the original works of authorship the moment the author fixes the work in a tangible form of expression. This position draws its concurrence and plausibility from the decision of the Court in ***Macmillan Aidan (T) Ltd v. Nyambari Nyangwine & 2 Others***, HC-Comm. Case No. 210 of 2010 (unreported), in which it was held:



*"Copyright entails 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."*

It is worth of a note, that even where the author or creator of the artistic or literary work is an employee, the employer is still considered to be the owner of the rights. It is what is commonly known, in the United States and United Kingdom, as "*works for hire*." Thus, in ***Community for Creative Non-Violence v. Reed***, 490 U.S. 730 (1989), the U.S. Supreme Court made the following scintillating remarks:

*"If a work is made for hire, an employer is considered the author even if an employee actually created the work. It must be ascertained whether a work was prepared by (a) an employee or (b) an independent contractor. If an employee created the work in the course of his or her employment, it will generally be considered a work made for hire."*

This position has been legislatively acknowledged in our legal regime through the provisions of section 15 (3) of Cap. 218 that stipulate as follows:

"15.-(1) N/A

(2) N/A

- (3) N/A
- (4) *In the case of a work created by an author for any person or body corporate in the course of fulfillment of his or her duties under a contract of service or employment, the rights of the work referred to in section 9 shall, in the absence of contractual provisions to the contrary, be deemed to be assigned to the employer of the author to such extent as may be necessary to its customary activities at the time of the conclusion of the relevant contract of service or employment."*

From the testimony adduced by the plaintiff, both oral and documentary, there is no denying that the rights that are the subject of the alleged infringement were duly created or designed by her employee, a Mr. Furaha Kuzila, and registered as the plaintiff's property in terms of Exhibits P1 to P4. The defendant has not put any robust defence that would be said to have blurred this factual account. The only contention by the defendant is that registration of these copyrights was done subsequent to the receipt of complaints of the alleged infringement. In my considered view, the timing of the registration is a subject for another time. It is enough that the

defendant acknowledged that the said rights were duly registered by the plaintiff and were hers.

In my considered view, the plaintiff has done enough to prove that artistic works registered by the plaintiff and are the subject of the instant disputation, are an original work of the plaintiff, created through the plaintiff's employee. This requirement is consistent with the position, as it currently obtains in our jurisdiction and underscored by the Court in ***RSA Ltd v. Hanspaul Automech Ltd & Another***, HC-Comm. Case No. 160 of 2014 (unreported), wherein it was held:

*"For a work to be protected by copyright, under section 5 of the Copyright and the Neighbouring Rights Act, [Cap. 218 RE 2002] plaintiff has to prove that the work is original and belongs to him. That means, it has to be original in the real sense and the plaintiff has to be creator of the real sense."*

This disposes the first issue in the affirmative.

The next issue for determination is whether there was any infringement of the plaintiff's artistic work by the defendant. As I address this issue, it is fitting that I should begin by reproducing the splendid quotation by Sir Philip Pullman, a luminary and decorated English writer who stated in one of literary works as follows:

*"It is outrageous that anyone can steal an artist's work and get away with it. It is theft, as surely as reaching into someone's pocket and taking their wallet is theft."*

Infringement of copyrights arises or occurs where a party, not the owner thereof, exploits one of the rights without permission. It entails improperly copying or creating a new work based on the original version. In terms of an Article authored and published by the British Academy and the Publishers Association at p. 15, infringement must involve exploiting a substantial part of the copyright without prior authorization of the copyright owner. In the words of Lord Reid in ***Ladbroke (Football) Ltd v. William Hill (Football) Ltd*** [1964] 1 WLR 273, "Infringement "substantially" depends more on the quality than the quantity of what has been taken", and that it is when the copyrighted work is reproduced, distributed, performed, publicly displayed, or made into derivative work without the permission of the copyright owner, that an infringement may be alleged.

See also: ***Mitchell v. BBC*** [2011] EWPC 42; and ***Hawkes & Sons (London) v. Paramount Film Service Ltd*** [1934] 1 Ch. 593, at 606.

The clear message distilled from the cited authorities is that a plaintiff, in an action for infringement, must establish that the defendant has copied the plaintiff's form of expression and not his ideas. This recognizes the fact

that a copyright does not monopolize the idea or information. Rather, it deals with the form in which the work is expressed.

While the plaintiff has fervently contended that the defendant charted into her artistic work's territory and made the most of it to the plaintiff's detriment, the argument by the defendant is that the plaintiff's folder khanga with designs No. 234 and 453, and even Designs No. GIGA 9098 and Design No. 8044, bear different colour and different trademark from the plaintiff's own artistic work. Ms. Hizza, the defence counsel, contended, as well, that failure to produce handmade drawings or computerized drawings for Designs Nos. 234 and 453 means that none existed, and that the same were not among the works registered under Exhibits P1 to P4. She argued that PW1 admitted so during cross-examination.

On the failure to bring evidence that would counter that of her adversary, the defendant's contention is that COSOTA failed to offer a fair and just hearing as no sufficient time was given to prove existence of such documents. Learned defence counsel took the view that, on the basis of the testimony adduced by DW2 and DW3, the plaintiff's testimony was weak and falling short of proving ownership of the artistic works. She contended that registration of the works in 2018 and 2019 was done after complaints had

been submitted to various institutions, and that the plaintiff was not a creator of the works.

As I delve into the analysis of the testimony adduced by the parties, it is incumbent upon me to borrow the priceless and fabulous observation and guidance of Lord Millet, ushered in the case of ***Designers Guild v. Russel Williams*** [2000] WLR 2416. He held:

*"The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are common place, unoriginal, or consist of general ideas."*

Applying the principle set out in the foregoing excerpt and, scoping through the testimony - as adduced by the disputants in this case - what is clear, as stated earlier on, is that the rights under dispute officially became the plaintiff's intellectual property or artistic work the moment they were registered with COSOTA. It is also a certainty, that the overall appearance

of the defendant's designs is similar to that which was registered by the plaintiff. This is clearly gathered from Exhibit P12. The similarity is, as sufficiently pointed out by the plaintiff, a result of copying. It is not that of coincidence. This means that any imitation or substantial use in the products manufactured by the defendant was an act of violation or infringement of the plaintiff's rights.

The defendant has not disputed that these rights were duly registered as the plaintiff's artistic works. She has not denied, either, that the same were used in some of the garments that the defendant pumped into the market. In fact, DW2 has admitted that in one of their productions, the word "RAFIKI" was used. The defendant has not produced any shred of evidence that would vindicate the use of the artistic rights and names that strike resemblance to "URAFIKI", the name that the plaintiff's factory and products are known for, and was registered as one of the literary works vide Exhibit P2. It is an unauthorized use that was censured by Fair Competition Commission (FCC) vide Exhibit P9.

Whilst I take cognizance of PW1's concession, during cross-examination that Exhibit 12 was not part of the artistic works which were registered, it should not escape anybody's mind that Mr. Mohamed Rajab Seif Honello, DW1 and the defendant's General Manager, admitted that none

of the drawings the defendant used was registered with COSOTA as the defendant's artistic or literary work, to justify her use in the products. He also admitted that there was an order to cease and desist from using the plaintiff's works and that the order was legitimate, and it was never appealed against.

The net effect of the parties' contending positions is that, whereas the plaintiff has put some material that discharged her burden as imposed by section 110 (1) of the Evidence Act, Cap. 6 R.E. 2022, the defendant's assertion does not bring the impression that it got anywhere close to disproving the allegation of infringement. This implies that the legal and evidential burden cast upon the defendant was not discharged, leaving the scale to tilt in the plaintiff's favour. This justifies the application of the principle enunciated in ***Hemed Saidi v. Mohamed Mbilu*** [1984] TLR 113. The reasoning in the said case is in sync with the decision made in an English case of ***Re B L*** [2008] UKHL 35 in which it was held:

*"if a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not."*



It is my fortified position that the defendant is culpable of infringement of the plaintiff's copyrights, and the second issue is answered in the affirmative.

Moving on to the third issue, the task of the Court is to declare reliefs that the parties may be entitled to. This is a consequential task that follows the findings made with respect to the substantive issues. In the instant matter, the prayers sought are myriad. They are a mix of money claims which are essentially compensatory; declaratory orders; injunctive orders; provision of details of the proceeds that may have been received by the defendant as a result of the alleged infringement of artistic works.

As held earlier on, the evidence tabled by the plaintiff has done enough to convince this Court that acts of infringement were perpetrated by the defendant, and that the plaintiff's artistic works were irregularly and illegally used by and for the benefit of the defendant. The Court has pronounced itself on that. This, therefore, calls for a swift and decisive action that will put to a halt, the defendant's improprieties. This can be done through issuance a permanent injunctive order that will restrain the defendant, or anybody acting in her behalf, from continued infringement of the plaintiff's protected copyrights and other neighbouring rights.

Relating to provision of details of proceeds and profits posted by the defendant from the use of the infringed rights, my settled view is that this prayer is lacking in any material sense sufficient to move the Court to order what the plaintiff has not proved. It was expected that the plaintiff would stitch her case in a manner that would show that, while losses were posted by her, as a result of the defendant's unscrupulous acts which amount to infringement, the defendant posted some quantifiable and known gains which translate into profits. It is neither comprehensible nor plausible for the plaintiff to pass on the baton of proving her case to a party who does not bear the legal and evidential burden of doing so. To demand the Court to issue an order that violates the canon of evidence with respect to burden of proof is, to say the least, ludicrous, and I am not convinced that such is an allowable practice. I choose to resist this urge and dismiss these prayers.

I now turn to the claim of TZS. 3,369,728,553/-. This is the quantum that allegedly constitutes damages for the damage suffered as a result of the infringement. By its very own description, this is a claim for specific damages. As I get to the heart of the discussion on this item, it is apt that the philosophy behind claim and grant of damages be restated. Halsbury's Laws of England 3<sup>rd</sup> Edition Volume 11 (page 216) defines damages in the following words:

*"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort or to put more shortly damages are the compensation given by process of law to a person for the wrong that another has done to him."*

In the old English case of ***Livingstone v. Rawyards Coal Co.*** (1880) 5 App. Cas. 25, Lord Blackburn came up with a simpler definition of what damages are. He stated as follows:

*"... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

In the words of Asquith, J., held in ***Victoria Laundry v. Newman*** [1949] 2 KB 528 at page 539, damages are aimed at putting the plaintiff *"... in the same position, so far as money can do so, as if his rights had been observed."*

Putting matters in the right perspective, the Court of Appeal of Tanzania borrowed a leaf from Lord Wilberforce that he pronounced in ***Johnson and Another v. Agnew*** [1980] AC 367. This was in the case of

***Hotel Travertine Limited v. M/S Gailey & Roberts Limited*** [2009] TLR

158. The following position was given with respect to damages.

*"The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach ...."*

See also: ***Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T)*** Limited, CAT-Civil Appeal No. 21 of 2001 (unreported).

While the quoted excerpts expounded the position with respect to damages in their broad sense, the settled position with respect to specific damages is that the same must be specifically pleaded and specifically proved. This has been stated in a litany of court decisions. They include the decision of ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 137, wherein it was held:

*"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved."*

In the instant case, the claim of these damages is stated in a liner, without any specifics and absolutes which would be said to be anywhere

closer to being specifically pleaded. No particulars were given on how the damages were arrived at. Regarding proof of the said damages, reliance placed by the plaintiff was on Exhibit P11. This is known as an Annual Total Sales Report which highlights gross sales of their products for the period covering between 2013 and 2019. It paints a picture that exhibits the dwindling of the plaintiff's fortunes. The contention in the report is that, owing to the infringement, the sales volumes plummeted substantially, and that the cumulative loss registered as a result is TZS. 3,369,728,553/-. This is what constitutes the claim by the plaintiff.

I have given a thoughtful consideration to the contention by the plaintiff. While I take note of the sad and painful reality of what the plaintiff has become i.e. a pale shadow of its vibrant old self, I am not convinced, one bit, that the workings that depict a shrinking trend can serve as the basis for awarding damages to the plaintiff or at all. My position is predicated on the following reasons:

- (i) That the report is a mere statement that has no verifiable or quantifiable basis for the downward spiral movement. It was expected that a more professional analysis that apportions the attributions in a more scientific way would be tendered;

- (ii) The report has considered that infringement is the only bottleneck that would impede access to the market, without demonstrating that other market dynamics were in the plaintiff's favour. The plaintiff chose to be economical with facts relating to other aspects. These include issues relating to volume, quality and promotion, all of which were not factored in the plaintiff's simulations;
- (iii) That the explanation given is quite sketchy as it only highlights the marketing side, without demonstrating the volume of production and if the market was fed with adequate and qualitative supply from which the lost sales volumes would be realized. It not clear, either, that the sum allegedly lost was in respect of khanga production alone, which would be affected by the defendant's production of RAFIKI KHANGA. Nothing was stated with respect to Vitenge which are known to be, the plaintiff's other line of business, or similar other productions;
- (iv) Overall, Exhibit P11 lacked any specifics which would form the basis for allowing the claim, as no indication has been given as to when exactly the infringement occurred and whether

production by the adversaries was at a constant level for the entirety of the period under review. Presence of the facts would bring a conclusion that the sum suffered is directly and wholly attributed to the defendant's infringement.

It is my conclusion that a claim of specific damages is not demonstrable and the same fails.

Regarding general damages, my task on this has been made easier. This is in view of the earlier finding that placed the defendant on a culpable role of having flouted the copyright law and the rights of the plaintiff. Noting that damages are what they are, and are intended to serve as a reparatory tool to an injured party, their grant becomes an inescapable eventuality, unless reasons exist for not doing so. In the instant case, the claim of damages has been pleaded based on the infringement of the plaintiff's copyrights, a contention which has since been established, and the defendant's culpability is now a matter of certainty. Needless to say, this infringement, an abhorrent practice, has had an adverse impact on the plaintiff. It constitutes a sufficient material upon which the award of general damages may be awarded and, invariably, determine the quantum of damages to be awarded.

It is my conviction that the claim of damages is plausible and legitimate. While the claim is justified, I hold the view that the sum of TZS. 150,000,000/- is an adequate recompense that can sufficiently address and restore the plaintiff to the position where she would be, had the infringement not been perpetrated by the defendant. The same is hereby awarded. Further to that, the said quantum will attract interest at the current commercial rate from the date of filing of the suit to the date of judgment; and further interest at the court's rate, from the date of judgment to the date of full satisfaction of the decretal sum. I also award costs of the matter to the plaintiff.

Order accordingly.

DATED at **DAR ES SALAAM** this 28<sup>th</sup> day of September, 2022.



**M.K. ISMAIL**

**JUDGE**

**28/09/2022**

