

IN THE DISTRICT COURT OF ILALA  
AT SAMORA AVENUE

CIVIL CASE NO. 17 OF 2012

HAMISI MWINJUMA-----1<sup>ST</sup> PLAINTIFF

AMBWENE YESSAYAH-----2<sup>ND</sup> PLAINTIFF

Versus

MIC (T) LIMITED-----DEFENDANT

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JUDGMENT

BEFORE HASSANI - SRM:

The plaintiffs herein namely Hamisi Mwinjuma and Ambwene Yessayah they have instituted the present suit against MIC Tanzania Limited, according to the pleadings though it appears initially or previous the defendant was also addressed Tigo Company Limited.

The plaintiffs are claiming against the defendant for the following reliefs;

- (a) Declaration that the defendant infringement the rights of the plaintiffs over their registered joint authorship musical work is illegal and it infringe the copyright and or

neighbouring rights to which civil remedies are applicable.

- (b) An injunction restraining the defendants, its agents, workmen to prevent the further infringements except upon permission obtained from the plaintiffs.
- (c) Payments of General damages at the sum of Tshs. 50,000,000/=.
- (d) Payments of special damages at the total of as pleaded on paragraph b (a) (b) and (c) and b (a) and (b) Tshs. 4,320,000,000/=.
- (e) Interest at 20% Commercial rates on Tanzania shillings.
- (f) Any other relief this court deem fit and just. According to paragraph 5 of the plaint the plaintiffs avered that on October, 2010 up to now on different occasion during day and night hours the defendant have been using and setting the caller tones of sons called *usije mjini* and DAKIKA MOJA to various Tigo subscribers without consent. Or permission or authority of the plaintiffs and infringe the rights of the plaintiffs over their registered joint authorship Musical work.

The defendant they have filed their written statement of defence disputing the claim leveled against them as envisaged in paragraph 4 of the written statement of defence and consequently asked this court to dismiss the suit with costs.

The defendant also they did file an application in order to present third party notice against the Cellulant Tanzania Ltd. Third party notice it was issued to Cellulant Tanzania Limited, after they have been served with the third party notice through the services of kings law chambers, they have filed their written statement of defence disputing the defendants rights of indemnity against them.

On ground that they procured the tunes and songs from another party, Sony music entertainment Africans (Ptn) Ltd. whom they have a legal contract for supply of the tunes and songs. The third party further overed in the event is found liable in the respondents claims including the costs, then the indemnity claimed by the applicant to be borne by Sony.

Finally, the third party prayed the dismissal of the third party notice in its entirety with costs. Before hearing Commerce two issues was framed which are;

- (1) Whether the defendant's infringed the plaintiffs' rights over their joint music work.
- (2) To what reliefs the parties are entitled PW1 Hamisi Mwinjuma, in his evidence he told the court that he is an Artist, he is recording and performing Data.

He began his duty as artist in 2002, when his Sony began to be heard. Every year he was issuing three songs save year, 2009 and 2010. He was performing with Ambwene Yessayah (....) PW1 said the songs produced is "DAKIKI MOJA and USIJE MJINI" they registered the song to "COSOTA" The letter dated 24/9/2010 admitted as exhibit P1. Both plaintiffs they are author of the work.

They have not entered into an agreement with anybody to distribute the job. He had no agreement with 1<sup>st</sup> defendants in respect to that job. He did no agreement with cellullants their complaints against the defendants to use their job without their consents PW1 said their song was used as ring backs tone.



The demand notice admitted as exhibit P2. He had not received my payment from COSOTA in respect to that job. They suffered loss because the songs were not used in the promotion and there was no offer to sell those songs again.

PW1 prayers are to be compensated by the defendants and the defendant be restrained to use the works. PW1 doesn't know agreements between the defendant and the third party. PW1 when cross examined by Herman Lupogo Advocate in the year 2009 - 2010 he was standings. The witness when shown exhibit. P1 he said the exhibit shows the job it was received. He did business of ring tone back PW1 said the demand note it was addressed to Tigo they commended from Tigo who replied then bought the song from the in supplier cellulant. They have no agreements with cellulants PW1 when reexamined by Albert Msando Advocate, he said, he claim his rights, because the two songs known by them. PW2 Ambwene Yessayah, he know kPW1, they worked together in preparing sons USIJE MJINI and DAKIKA MOJA. They performed in 2011. They registered their works to COSOTAS. They registered their works in order to safe guard their rights. The defendants they used their works without involving them. They heard songs by the call tone they inquired

but the defendants did not bother thus they instituted the present's suit. PW2 he asked the defendant to pay them 4.32 billion as compensation. Also prays to be paid 50 million as general damages and costs of the suit.

PW2 when cross examined by Herman Lupogo Advocate said he did the job on 2010 and the work it was registered at COSATA. His work it was used by the defendant at that time ring tone back it was sold for 24/=. He claims 4.3 billion because the defendant company earned a lot of money they ever worked with East African Television, and they were paid 20 million.

PW2 when cross - examined by Ntemi Massanja Advocate he did the work in 2010, it was the end of the plaintiff case in their defence DW1 David Zakaria. He is an employee of MIC (T) ltd as head of data and devices. He was employed in 2009.

He was assigned as a head of entertainment as well as head of projects. As head of entertainment he was also head of value added services. Those services are entrepreneur SMS ring back tone, promotion, and wireless access protocol (WAP). DW1 said they have a supplier who they bring tone to them. The agreement

between MIC (T) Ltd and Cellulant admitted as exhibit D1. He know the plaintiffs, they have no agreement with them, their Song brought to them by Cellullants. The witness said the responsibility of MIC (T) Ltd, is to facilitate the supplier to do business to supply monthly they paid the supplier for songs they received.

The witness showed the invoice from the supplier to MIC (T) Ltd, which showed the counts of songs down loaded by customers and a particulars month. The invoice it was from Cellulant to MIC (T) Ltd (Tigo).

Tax invoice dated 2<sup>nd</sup> March, 2011 admitted as exhibit D2. According to DW1, they used to pay their supplier. The witness continued to tell the court that payments made to supplier is for all songs which they made deductions to as particular period DW1 said supplier is the one paying the Artist, DW1 is suprised with such claim, because there is no relation between Artist and MIC (T) Ltd, also the artist knows they have contractual relation with suppliers of MIC (T) eg. Cellullants, push mobile who actually pays the artist. Also no period supplier ever paid 4 Billion DW1 said the two songs brought did not earn 4 billion for

all the days. He prayed the court to dismiss the suit DW1 when cross examined by Albert Msando Advocate he said there was no agreements between plaintiffs and MIC (T) Ltd. He is surprised the plaintiffs to sue. He further said since he was employed no supplier ever paid 4 billion. He agreed the songs to be received by the defendant. He was not shown USIJE MJINI and DAKIKA MOJA songs how much earned. The money was paid to cellulant who is party in this case. He knows it is wrong to use song of another without his/her consent. The plaintiffs are not entitled to be given information in respect to the payments made to supplier by MIC (T) Ltd. Thus it was the end defence case. Both counsels they have filed their respective final submission. I have read their submission. I have read their submission I have evaluated the evidence of both sides. The question now is whether on the basis of the evidence it can be concluded that the plaintiffs they have discharged their burden of proof of proving their case on the balance of probability. The defendant they are not denying to use the songs of the plaintiffs but they said those songs was brought to them by the supplier, and they had contract with the supplier, but the plaintiffs had no contract with the defendants, and they were not paid for their work, in the evidence the plaintiffs they have failed to market their joint



author ship musical work, and they did not get any offer to sell. Under section 4 of the copy right and neighbouring Rights, court, means, the District court established under the magistrates courts Act, 1984, thus this court is vested with powers to grants the reliefs sought by the plaintiffs.

Under section 36 (1) (5) and (b) of the copy right and neighbouring act no. 7 of 1999 provides remedies to a party which rights it has been infringed under the Act. On the basis of the evidence of PW1 and PW2, their joint authorship musical work it was used by the defendant without their consents, thus the defendant on the basis of the evidence they have infringed the plaintiffs rights over their joints musical work, thus the defendants are restrained from interfering with the plaintiffs copy rights. On the basis of the evidence the plaintiffs they told the court they suffered general damages.

I am of the view the amount they have claimed is very high but, I am of the view shs. 25,000,000/= will meet the ends of justice, thus the plaintiffs should be paid 25,000,000/= as general damages. The plaintiffs also they testified that the suffered special damages, because each down load of the tone was procured at shs. 24/= hence for 90 days, for one million subscribers the defendant earned an income of Tshs.

2,160,000,000/= for two songs it was Shs. 4,320,000.000/=, though plaintiffs submitted this court to rely on DW1 arguments that the price for ring back tone is 300/= to make total of shs. 6,000,000,000/= I decline, because this court did not receive the documentary evidence to substantiate earning but, it is undisputed the songs it earned an income for the interest of justice if the plaintiff are paid half of the amount will meet the ends of justice. Thus the plaintiffs to be paid 2,160,000,000/= as specials damages. From the fore going the suit patly succeeds to the extent that the defendant to pay Tshs. 25,000,000,/= as General damages to the plaintiffs and Shs. 2,160,000,000/= as special damages also they should be paid costs of the suit, other reliefs sought are declined.

Sgd: Hassan - SRM.

11/4/2016

Right of Appeal Explained to any of the aggrieved party.

Sgd: Hassan - SRM.

11/4/2016

Judgement delivered today this 11<sup>th</sup> April, 2016 in the presence  
Ivone Sionda for the plaintiffs and Herman Lupogo - Advocate  
for the defendant.

Sgd: Hassan - SRM.

11/4/2016

~~XXXXXXXXXX~~ SRM  
21/4/2016  
RECEIVED  
PROSECUTOR GENERAL  
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KINSHASA

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AMBWENE YESSAYAH-----2<sup>ND</sup> PLAINTIFF

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DECREE

**WHEREFORE:-** The plaintiff prays for Judgement and decree as follows:-

- (a) Declaration that the defendant's infringement the rights of the plaintiffs over their registered joint authorship musical work is illegal and it infringe the copyright and or Neighboring rights to which civil remedies are applicable.
- (b) An injunction restraining the defendant, its agents, workmen to prevent the further infringement except upon permission obtained from the plaintiff.
- (c) Payment of General damages at the sum of Tanzania Shillings 50,000,000/=.



- (d) Payment of special damages at the total of as pleaded on paragraph 6 (a), (b) and (c) and 6 (a) and (b) Tshs. 4,320,000,000/=.
- (e) Interest at 20% commercial rate on Tanzania Shillings.
- (f) Costs of the suit.
- (g) Any other or further relief this court deems fit and just.

This coming for judgement on 11<sup>th</sup> day of April, 2016. Before Hon. J.S.K. Hassan – Senior Resident Magistrate in the presence of Ivone Sianda for the Plaintiffs and Herman Lupogo Advocate for the Defendant.

**IT IS HEREBY ORDERED THAT:**

The Defendant to pay Tshs. 25,000,000/= as general damages to the Plaintiff and Tshs. 2,160,000,000/= as special damages also should pay costs of the suit and other reliefs sought are declined.

**"BY THE COURT"**

Given under my hand and seal of the Court this 11<sup>th</sup> Day of April, 2016.



*[Signature]*  
**SENIOR RESIDENT MAGISTRATE  
ILALA DISTRICT COURT  
DAR ES SALAAM**

**SENIOR RESIDENT MAGISTRATE  
DISTRICT COURT ILALA  
DAR ES SALAAM**