

**IN THE DISTRICT COURT OF KINONDONI  
AT KINONDONI**

**CIVIL CASE No. 195 OF 2019**

**MAIMUNA KIGANZA..... PLAINTIFF**

**VERSUS**

**MULTCHOICE TANZANIA ..... DEFENDANT**

**JUDGMENT OF THE COURT**

*3<sup>rd</sup> June, 2020*

**DONASIAN, RM:**

"PENZI BIASHARA" is the epicenter of present an apple of discord. According to the plaint, Maimuna Kiganza (elsewhere to be referred as Plaintiff) sued Multichoice Tanzania (hereinafter the Defendant) for the infringement of copyright and neighborhoods right of the artistic work named PENZI BIASHARA, the property of the plaintiff by airing her motion picture (movie) without prior permission from her. She thus, claims for:-

1. An injunction preventing the Defendant from airing the movie;
2. A total of Tanzanian Shilling of Four Billion and Two hundred million (Tshs. 4,200,000,000/=); two hundred million being specific damage and four billion being general damages;
3. The defendant to provide detailed account reflecting profit obtained from airing a movie;
4. The defendant to provide detailed account reflecting money received from airing a movie; and



5. The defendant to produce all programs broadcast by DSTV on 31<sup>st</sup> November, 2018; 31<sup>st</sup> January, 2019; 31<sup>st</sup> March, 2019; 30 June 2029 and 02<sup>nd</sup> August, 2019.

The Defendant through the written statement of defence, strenuously dispute the allegation and left for the Plaintiff to prove her claims. Further the Defendant averred in the WSD that:

1. Authorization and approval to air the film were obtained by responsible channel, Maisha Magic Bongo from the legal owner who is registered with COSOTA and holder of a Copyright Clearance Certificate with registration No. A086092 registering 'PENZI BIASHARA' under No. CO835831 dated 25 July. 2017
2. That before airing the film, the owner of the channel responsible, entered into license agreement dated 16<sup>th</sup> October, 2018 with the authorized distributor and was dully granted authorization to air the film.
3. That on November 2018 after having entered into license agreement the owner of the channel responsible received the letter from registered distributor granting Maisha Magic Bongo authority to air the film 'PENZI BIASHARA' as per term of agreement; so no particular infringement was so caused.



Before the matter was scheduled for hearing, the Defendant counsel prayed to the Court to file third party notice to join third party via Misc. Civil Application No 12 of 2019. The Court granted the prayer and one **Nsia Eliabu Ulomi the managing director of Changamka Media Ubungo Msewe DSM** was joined as third party but, the defendant prayed again to withdraw such prayer on 16<sup>th</sup> January, 2020. So the matter proceeded by Plaintiff and Defendant without intended third party.

Upon completion of pleadings, in line with **Order XIV Rule 5 of the Civil Procedure Code, Cap. 33 R.E. 2019** the court with assistance of the parties counsels, Mr. Sijaona Revocatus, Esq, for the plaintiff and Mr. Kagirwa Jovinson, Esq, for the defendant framed four issues to wit:

1. Whether the Plaintiff is real owner of the movie titled "PENZI BIASHARA" as against Nassoro Idd Bakari.  
In other words, who is a real owner between Plaintiff and Nassoro Idd Bakari.
2. Whether Claim against Plaintiff is maintainable,
3. Whether the Defendant has prerequisite permit to air the movie PENZI BIASHARA, and
4. What are remedies entitle to the parties.



To prove her case, the plaintiff called seven witnesses namely PHILLEMON AUGUSTINO KILAKA (PW1), MAIMUNA KIGANZA (PW2), MOHAMED MGAZIJA (PW3), PANTALEO PETER (PW4), SALOME MWALUSAKA (PW5), HUSSEIN SAID (PW6) and HUSSEIN MBINGA (PW7) while Defendant called one witness namely ASTRID MAPUNDA.

It is pertinent at this juncture to restate that, in term of **Section 143 of the Evidence Act, Cap. 6 R.E. 2019**(Cap. 6)there is no particular number of witnesses who are required to prove a case, what is important is for the Plaintiff to prove or Defendant to disprove at the balance of preponderance in term of **Section 3(2)(b)** read in tandem with **Section 110 of Cap. 6**.

PW1, who is Principal Copyright Officer at Copyright Society of Tanzania (COSOTA), testified that his duties, among others, are to register documents with right of copyright. When the document is registered, he assign No. as per requirement of WIPOC; the registration is only registered once, and there is no possibility of double registration.

PW1 proceeded to state that, the registration of the movie called PENZI BIASHARA was registered by the Plaintiff at COSOTA. The work was titled as No. C0840177 issued on 05<sup>th</sup> July, 2019; apart from her, PW1 added that, no one other than Plaintiff who registered the same



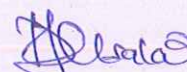
work. PW1 concluded to give his evidence by saying that, Nasoro Bakari Iddi registered other artistic work known as "MACHUNGU" titled as C0835831.

PW2, the Plaintiff under oath stated that, she is the owner of the work, PENZI BIASHARA as she possess certificate of title from COSOTA No. C08840177. Before acquiring title, she comes with an idea during the year 2016 and she prepared her movie for a year, from December, 2016 to December, 2017.

During preparation, she used to hire different places for shooting and rehearsal for movie. Some places where allowed to use for debt basis while others where to pay money in upfront. At Mama Mkubwa Hall, home ground, Plaintiff paid Three Million and Mgazija Social Hall she paid Ten Million for use of premises for the period of six months. PW2 continued to testify that in the preparation process, she was supplied food for herself and her actors/actress on debt basis; and paid three million for shooting, sound track and graphics for the movie.

Further, PW2 said that, after completion of the work she went to the film board where she was given stage permit. It was Permit No. 0006900 issued on February, 2018 and letter registered her work.

PW2 stated further that, she has never sold or entered agreement with any person about airing the movie, though, earlier on she was



communicated by Azam TV and Star Times TV to have airtime in their channel in form of seasons, but before concluded a deal, she learn that her movie was aired by DSTV in *Channel 160, Maisha Magic*.

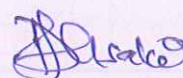
PW2 went on to say, she contacted the Defendant to settle the matter but her effort proved futile as the Defendant remained deaf ear. She thus repeats her claims averred in the plaint.

After PW2, Come PW3. He is owner of Mgazija Social Hall which was rented by the plaintiff. His testimony was to the effect that, he entered into agreement with the Plaintiff to use his hall for the consideration of Ten Million for six months.

Next witness was PW4, a lawyer employed by the Film Board of Tanzania. During hearing he testified that, the movie PENZI BIASHARA was brought to his office by the Plaintiff on 28 February, 2018 for inspection. Having examine the context of the movie, she was given Permit No. 006900 after paid requisite fee of Ninety three Thousands (Tshs. 93,000/=).

From that time, PW4 put that, no any other person went to his office for the same reason of examine a movie title PENZI BIASHARA.

The Court heard also the testimony of PW5 who is cosmetologist. She commenced by saying that, she own a Salon at Mbezi Makabe area. She contracted with the Plaintiff to makeup and beautify 27



actor/actress all the time they were supposed to make shootings. The consideration was Fifteen Million and One Hundred and Twenty Thousands (Tshs. 15,120,000/=). Out of total sum, the Plaintiff paid her Three Million (Tshs. 3,000,000/=) and remaining sum is still in area.

Following PW5 evidence, the Court heard PW6, a food supplier based at Mbezi Makabe area. PW6 stated to the court that, they agreed with the plaintiff to supply food and drinks (breakfast, lunch and dinner) for the whole period, in which 27 actors/actress were preparing a movie.

PW6 continued to state that, the Plaintiff paid him only Four Million and Five Hundred Thousands (Tshs. 4,500,000/=) and there is outstanding sum of Fifteen Million Nine Hundred and Ten Thousands (Tshs. 15,910,000/=).

The last witness for the Plaintiff was PW7, Videographer, testified before the court that, he took the entire picture in the movie titled PENZI BIASHARA and letter on he edited the same and put sound track. PW7 tendered a CD titled PENZI BIASHARA and concluded that, the movie is the original work of the Plaintiff.

After closer of Plaintiff evidences, a ball turned to the Defendant who called DW1, Head of Regulatory Affairs of Multichoice Company in

Tanzania. DW1 one testified in Court that he worked in the Company from 2016. His main obligation in the company is to manage relationship between the Company and other stakeholders.

DW1 further stated that Multichoice Tanzania is a company which issue support services by collecting subscription fees and installation of dishes. DW1 concluded by saying that, the company does not own television stations, so claim against plaintiff was made against the wrong party.

Having testified, the parties were ordered to file written submission within 14 days. They were duly complied with the order.

I have cautiously and objectively considered pleadings, evidence and submission by both counsels. From the very outset, I am obliged to express my profound appreciation in the manner the learned counsel on either side addressed the issues of contention in detail and painstakingly well. I wish to commend them all for the industry and brilliance that went into the preparation and presentation of their respective submissions. But, as I do so, I should hasten a confession that it will not be possible for me to go so far as to recite each and every detail comprised in counsel's submissions. Rather, I propose to be choosy and only relate, in a nutshell, so much of their respective contentions which are conveniently relevant to relevant issues.



With regard to the first issue, on *Whether the Plaintiff is real owner of the movie titled "PENZI BIASHARA" as against Nassoro Idd Bakari (who is a real owner.)*

Ownership of Copyright is provided by **Section 15 of the Copyright and Neighbouring Rights Act, Cap 218**(Cap 218) whereby the right in a work protected, must be owned in the first instance by the author or authors who created the work.

The works which are protected by the Act are those enumerated under **Section 5(2)(a) – (j) of Cap 218**; to include dramatic and dramatico-musical works and cinematographic works, and other audio-visual works if they fall within the ambit of **Section 3 of Cap. 218**.

In the matter beforehand, the Plaintiff brought seven witnesses, their gist of their evidence have been outlined herein above. PW2, the Plaintiff, testified in Court on how she comes of the idea of PENZI BIASHARA in the year 2016. She put that idea by coordinating 27 persons as actors and actress. Further she contacted various persons who provided services and support to accomplish her idea. PW3 on his part, provided to the Plaintiff Mgazija Social Hall for performing and conducting rehearsal and PW5 did provide makeups and beautify 27 actors and actress.

PW6 on his side, provide food and drinking services to the Plaintiff and her 27 actors and actress when they are in preparation of the work and PW7 took video picture of the movie 'PENZI BIASHARA', and edited the same.

After completion, the Movie titled PENZI BIASHARA, was submitted to Film Board of Tanzania by the Plaintiff where it was examined and found to be fit for exhibition by PW4, witness from the Film Board. PW4 issued stage permit No. 006900, Exhibit P1 after Plaintiff being paid the requisite fee for the process.

Subsequently, PW2 took the film to COSOTA where it was registered title No. CO840177, Exhibit P2 by PW1.

According to PW1, when a work has been registered, the registered person become exclusive owner of the work.

The evidence of DW1 does not controverts on the ownership of the Plaintiff as it was pleaded in paragraph 5 of the Written Statement of Defence, instead, he only testified that, the Defendant does not own channel referred by the Plaintiff.

As stated before, under **Cap. 218**, artist become owner upon registration of the work of art. In this regard, evidence available in record does not suggest owner other than Plaintiff because she narrated on how she come with idea and manner she developed the



same up to registration of the work. In the premises, I hold first issue in favour of the Plaintiff that she is a real owner of the work as against the whole world.

On the second issue that *whether Claim against Plaintiff is Maintainable.*

In order to prove second issue, the plaintiff has to prove the followings subsidiary issues:-

- a) *That she is registered owner of the movie in contention,*
- b) *That the movie was broadcasted by channel mentioned in plaint,*
- c) *That the broadcasting channel owned by Defendant and*
- d) *That the broadcasting was made without justifiable cause or authorization by the Plaintiff.*

With regard to the first element, I have already decided in the first main issue that the Plaintiff is the owner of work.

On the second aspect, in relation to whether the movie was broadcasted in channel mentioned in the plaint; the Plaintiff testified that in various date indicated in the plaint, Defendant aired the movie title PENZI BIASHARA, this fact was neither disputed by sole witness of the Defendant in his testimony nor cross examined by Defendant counsel while Plaintiff was testifying. It is well settled principle that, failure to cross examine important question is tantamount to admission.

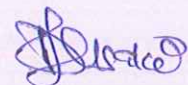
So the fact that, the movie was aired on those dates, in eyes of law, remain undisputed.

Next question is whether, broadcasting channel owned by the Defendant.

The Plaintiff pleading and evidence, irresistibly indicates that, the channel aired the Movie in dispute was owned by the Plaintiff. On the other side, the Defendant vehemently was denying. DW1 testified that Multichoice Tanzania do not own Television in Tanzania. But this fact is against DW1 testimony that DSTV is digital satellite television which allows people to subscribe and pay fees so as to have service to its channels; and DW1 manages subscription and services of DSTV.

If the Defendant manages services of DSTV, it goes without saying that, the Company coordinates even services to be aired in the satellite originates from Tanzania.

Apart from the foregoing, the Defendant was intending to join third party who, according to the Application read together with WSD, the third party was in better position to answer the claim. Nevertheless, the Defendant abandoned to join the third party and he also failed to call Third Party as a witness on his party. This situation raises adverse inference on party of the Defendant.



Where witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. See the case of **Azizi Abdalah vs. Republic** 1991 TLR 71 (Court of Appeal).


With regard to last ancillary issue, that the broadcasting was made without justifiable cause or permission, the Plaintiff testified that the Defendant aired her movie without prior consultation. Even where she issued demand letter, the Defendant remain deaf. DW1 evidences do not account if the Defendant permitted to air the movie in dispute on specified dates.

In line with finding and analysis, I find that, claims of Plaintiff against Defendant is maintainable.

In regard to the third issue, *Whether the Defendant has prerequisite permit to air the movie PENZI BIASHARA*, I see no rationale to discuss as I already hold on the same herein above under issue two.

The last issue is *what are remedies entitle to the parties*.

Since this Court has been observed that there is an infringement of copyright of the work prepared by the Plaintiff, then she entitle remedy in line with legal maxim "*ubi jus ibi remedium*" (for every wrong, the law provides a remedy). These words used by Justice Kerner of the



Circuit Court of Appeals of the USA in **Leo Feist Versus Young** 138 F. 2d 97 (1943).

To take his words, he said:-

*"If a man has a right, he must, it has been observed, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal."*

In this regard therefore, for the first claim, I order that, the defendant is preventing from airing the movie title PENZI BIASHARA.

For the second claim, the Plaintiff is claiming a total of Tanzanian Shilling of Four Billion and Two hundred million (Tshs. 4,200,000,000/=); two hundred million being specific damage and four billion being general damages.

Before going to the remedy, I should point on pecuniary jurisdiction of this court.

Generally, original jurisdiction of the District Court is governed the provision of **Section 40 of the Magistrate Court Act, Cap 11** read together with **Section 6 of the of Judicature and Application of Laws Cap. 358.**



Pecuniary jurisdiction of the District Court is provided under **Section 40(2) (b) of the Magistrates Court Act**, as amended by **the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016**. According to the amendment, the District court should determine on movable properties which subject does *not exceed* two hundred million.

Notwithstanding however, in determination of the pecuniary Jurisdiction of the court, **specific claims (damages)** are what dictate jurisdiction of the Court or Tribunal (not general claim/ damages). The guiding principle is depicted in the case of **Tanzania China Friendship vs. Our Lady of Usambara Sisters [2006] TLR 70, Court of appeal** and reiterated in the case of **Peter Joseph Kilibika vs. Partick Aloyce Mlingi Civil Appeal No. 37 OF 2009** (Court of Appeal). In this case, the Court, at page 7, said:- "*It is the substantive claim which determines jurisdiction and not general damages which determines jurisdiction as general damages are awarded at the court's discretion.*"

In this case, Plaintiff is claiming Tshs. 200,000,000/= being specific damages.

For the Court to award specific damages, the Court must satisfy that, the claim is pleaded and specifically proved. According the record, the Plaintiff amply demonstrated that, she incurred costs of preparing a



movie and paid various fees. Since the same was not challenged by the Defendant, then the Plaintiff is entitled sum of Tshs. 56,273,000/= million being a specific damage from: -

1. Shooting and Editing the movie, Tshs. 3,000,000/=
2. Hiring five artists, Tshs. 150,000/=
3. Fee paid at registration Board Tshs. 93,000/=
4. Cosmetics and makeups for 27 actors/actress, Tshs. 5,120,000/=
5. Food and drinks, Tshs. 20,410,000/=
6. Transport (Minibus coaster), Tshs. 4,500,000/=
7. Hiring Hall, Tshs. 10,000,000/=, and
8. Sound track and graphic Tshs. 3,000,000/=

Apart from specific damages, there is no doubt that, Plaintiff loosed profit to gain from her artistic work, which she consumed time and energy.

The plaintiff is also entitled remedy of legitimate expectation from her work which proved to be profitable as it was aired by defendant in various dates. Thus, the plaintiff is entitled general damage to the tune of Tshs. 140,000,000/= for economic and moral rights.

Since the Court awarded the plaintiff specific and general damages, I see no reason to direct the defendant to provide detailed account reflecting profit obtained from airing a movie, to provide



detailed account reflecting money received from airing a movie and to produce all programs broadcast by DSTV on 31<sup>st</sup> November, 2018; 31<sup>st</sup> January, 2019; 31<sup>st</sup> March, 2019; 30 June 2029 and 02<sup>nd</sup> August, 2019 as to they are nothing than an academic exercise.

Further, an interest is awarded to the plaintiff to the tune of 7% from institution of suit to the date of judgment and 12% from the date of judgment to the date of fully satisfaction of the decree.

Finally, as the day follow the night, costs follow the event, thus, the Plaintiff is entitle costs of the suit.

It is so ordered.



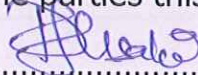
**Donasian**  
**RESIDENT MAGISTRATE**  
**08/06/2020**

Right of Appeal has been explained



**Donasian**  
**RESIDENT MAGISTRATE**  
**08/06/2020**

Delivered in absence of all of the parties this 8<sup>th</sup> June, 2020.



**Donasian**  
**RESIDENT MAGISTRATE**  
**08/06/2020**

