

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)
CIVIL SUIT NO. 545 OF 2015

GARFIELD SPENCE [a.k.a KONSHENS] PLAINTIFF

VERSUS

1. AIRTEL UGANDA LIMITED

2. ONMOBILE GLOBAL LIMITED

3. MTECH LIMITED

..... DEFENDANTS

AND

SOLUNET BUSINESS SOLUTIONS LIMITED THIRD PARTY

(Before: Hon. Justice Patricia Mutesi)

JUDGEMENT

Introduction

1. The Plaintiff is a Jamaican singer who is stated to be the author and composer of among others, the songs titled '*Simple Song*', '*Gyal a Bubble*', '*So Mitán*', '*Stop Sign*', '*Jamaican Dance*', '*Konshens Jazz Version*', '*No Retreat*' and '*Jah Love me*' (hereinafter referred to as 'the suit songs/works'). The Plaintiff averred that he owns the exclusive intellectual property in the suit songs and has never assigned, or in any way divested his copyright in the suit songs to the Defendants. Further that the 1st, 2nd and 3rd Defendants unlawfully accessed the suit songs and availed them as caller tunes to the 1st Defendant's subscribers at a fee of UGX 600/= per download under a program dubbed "*Hello Tunes*". The Plaintiff contends that the defendants jointly and severally infringed his copyright in the suit songs and have refused to account for the proceeds obtained from the said infringement or to pay him any royalties.

2. The Plaintiff is therefore seeking for declarations that the Defendants' sale of his songs as caller tunes without his consent and without passing to him the proceeds thereof amounted to infringement of his copyright and unjust enrichment. He also prayed for an order for the account and remission of profits which had accrued from the sale of his songs, general and exemplary damages, plus interest and costs of the suit.
3. The 1st Defendant a telecommunications service provider, filed a Written Statement of Defence in which it stated that it executed a Caller Ring Back Tone (CRBT) Services Agreement with the 2nd Defendant for content provision of artistic works to be digitally distributed to its customers as caller tunes. That under the said agreement the 1st Defendant only provided the 2nd Defendant with access to its mobile network and customers, but the caller tunes were obtained and distributed by the 2nd Defendant through its own systems and software. Further that the 2nd Defendant guaranteed and demonstrated that it had the necessary authorization and permission to use, distribute and provide content to the 1st Defendant's subscribers. The 1st Defendant denies that it infringed on the plaintiff's copyright and asserts that it is indemnified by the 2nd Defendant against the suit claims under the CRBT Agreement.
4. The 2nd Defendant a software and content provider, filed a defence stating that it entered into Content Provider Agreements with the 3rd Defendant and the Third Party to provide artistic works digitally distributable to the 2nd Defendant's clients. That under their respective agreements the 3rd Defendant and Third party guaranteed and demonstrated that they had the necessary authorization and permission to use and distribute the content to the 2nd Defendant. The 2nd Defendant denies that it infringed on the plaintiff's copyright and claims for indemnity from the 3rd Defendant and 3rd Party in respect of the suit claims.
5. The 3rd Defendant filed a Written Statement of Defence stating that in 2011 it entered into a contract with the 2nd Defendant to provide Caller Ring Back Tunes (CRBT) to the 1st Defendant. That thereafter it only supplied the 2nd Defendant with licensed content from their content catalogue which was shared with the 2nd Defendant and which did not contain any of the Plaintiff's songs. Further that it

has never uploaded any of the Plaintiff's songs and if the same were uploaded to the 2nd Defendant's CRBT platform, they were wrongly attributed and assigned to the 3rd Defendant. The 3rd Defendant thus denies liability for the suit claims contending that it has never accessed, used or distributed the Plaintiff's suit songs without consent.

Representation and hearing

6. The Plaintiff was represented by Mr. Cyrus Baguma of M/s Kalenge, Bwanika, Kisubi & Co. Advocates while the 1st and 2nd Defendants were represented by Mr. Kanyike Yusuf of M/s Katende, Ssempebwa & Company Advocates. The 3rd Defendant was represented by Mr. Amos Masiko and Sadam Solomon of M/s Ortus Advocates.
7. The 2nd Defendant applied for and obtained an order to add Solunet Business Solutions (Solunet) as a Third Party on the basis that there was evidence showing that the said company had uploaded some of the Plaintiff's caller tunes on the 2nd Defendants Atlantis platform. After failing to locate and serve the company at its last known address of service, the 2nd Defendant obtained an order for substituted service and served the Third Party Notice in the New Vision newspaper, as evidenced by the affidavit of service deposed by Natuhwera Princess a court process server, which was filed on court record on 6th July 2022. However the Third Party did not file any defence and the suit accordingly proceeded *ex-parte* as against it.
8. The Plaintiff filed a witness statement in support of his case. The 1st Defendant adduced evidence through a witness statement of its Legal Manager Mr. Hudson Andrew Katumba (DW1), while the 2nd Defendant filed witness statements from its Product Manager Mr. Ashish Malik (DW3) and Legal Manager Mr. Manas Kumar Dev (DW4). The 3rd Defendant filed a witness statement of Mr. William K. Chesire its Chief Executive Officer (DW2). All the said witnesses confirmed their statements on oath and they were duly cross examined on the same. Counsel for the parties on record filed their respective written submissions which I have carefully considered together with the authorities cited therein.

Issues

The parties framed the following issues for determination by this court;

1. Whether the Plaintiff has a cause of action against the Defendants?
2. Whether the Defendants infringed the Plaintiff's copyright in the suit artistic works?
3. Whether the 1st and 2nd Defendants distribution of the suit songs without remitting any of the proceeds to the Plaintiff amounted to unjust enrichment?
4. Whether the 1st Defendant is entitled to indemnity from the 2nd Defendant?
5. Whether the 2nd Defendant is entitled to indemnity from the 3rd Defendant?
6. Whether the 2nd Defendant is entitled to indemnity from the Third Party?
7. What are the available remedies?

I note that Issue 2 is a sub-issue of Issue 1 and I will therefore resolve the said issues jointly. Issues 5 and 6 will also be resolved jointly.

Issues 1 & 2: Whether the Plaintiff has established a cause of action against the Defendants for infringement of his copyright in the suit works?

9. It is now well settled that in order to establish a cause of action, a plaintiff must prove three essential elements namely; (i) That the Plaintiff enjoyed a right known to the law, (ii) That the right has been violated, and (iii) The defendant is liable for the said violation. (See **Auto Garage v Motokov (No. 3) [1971] EA 514** and **Civil Appeal No. 21 of 2001; Tororo Cement company Limited Vs Frokina International Limited**).

i) Whether the Plaintiff enjoyed a right.

10. The plaintiff alleges that the Defendants infringed his copyright in the suit songs when they unlawfully accessed and distributed them as caller tunes without his consent.

A copyright is characterized as a property right subsisting in a certain specified type of work. This can be literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, architectural, audiovisual work, scientific or artistic works, among others. Copyright broadly refers to the right of an author to commercially exploit their work through selling, licensing, assigning and other ways permitted by the law. Copyright law therefore protects such work from being distorted, protects the economic rights of the author and also provides redress and remedies in cases of infringement thereof. (**Blacks Law Dictionary (8th Edition)**, at p. 361). The term 'copyright' has also been defined as follows;

“ In general terms, copyright refers to a regime of law that protects literary, scientific and artistic works. It is a branch of intellectual property that is concerned with the mode of creation, regulation, protection and enforcement of qualifying works. The law of copyright therefore, gives an author of original work exclusive rights for an ascertainable period of time to exploit and benefit from the work including its publication, distribution and reproduction.”

(See **Intellectual Property Law in East Africa**, David Bakibinga & Ronald Mayambala Kakungulu 2016; Law Africa, p. 1-2)

11. It was not disputed by the Defendants that the Plaintiff is the author and composer of the following songs; 'Simple song', 'Gyal a bubble', 'So mitan', 'Stop sign', 'Jamaican dance', 'Konshens jazz version', 'No retreat'; 'Jah love me', and that he owns the intellectual property rights in the said songs. As rightly submitted by counsel for the Plaintiff, in Uganda the Plaintiff's rights in the suit works are protected under **Sections 4 and 5 of The Copyright and Neighbouring Rights Act, 2006** ('the CNRA') which state as follows;

4. Author entitled to copyright protection.

(1) The author of any work specified in section 5 shall have a right of protection of the work, where work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created.

(2) The protection of the author's work under subsection (1) shall not be subject to any formality.

5. Work eligible for copyright.

(1) The following literary, scientific and artistic works are eligible for copyright—

(....)

(b) dramatic, dramatic-musical and musical works;

Therefore the Plaintiff as author of the suit songs, owns the 'copyright' in the said songs and he is therefore entitled to protection of the same as musical works.

12. Furthermore **Section 9** of the Act provides for economic rights of authors as follows;

9. Economic rights of author.

The owner of a protected work shall have, in relation to that work, the exclusive right to do or authorize other persons to do the following—

(a) to distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership

(....)

(g) to commercially rent or sell the original or copies of the work;

As the owner of the copyright in the suit songs, the Plaintiff also has the exclusive right to sell and commercially exploit them or authorize others to do so on his behalf.

- ii) **Whether the plaintiff's copyright in the suit songs /works was infringed.**

13. It is the Plaintiff's case that the Defendants infringed his copyright when they recorded and offered the suit songs for sale as caller tunes to the 1st Defendant's subscribers without his consent.

Section 46 of The Copyright and Neighbouring Rights Act, 2006 defines what amounts to copyright infringement as follows;

46. Infringement of copyright

*(1) Infringement of copyright or neighbouring right occurs **where, without a valid transfer, licence, assignment or other authorisation under this Act a person deals with any work or performance contrary to the permitted free use and in particular where that person **does or causes or permits another person to –*****

(a) reproduce, fix, duplicate and extract, imitate or import into Uganda, otherwise than for his or her private use

*(b) **distribute in Uganda by way of sale, hire, rental or like manner***

14. The Plaintiff (**PW1**) testified that as the owner of intellectual property rights in the suit songs he has never assigned, leased, sold or in any way divested his copyright therein to the Defendants. That in June 2014 he learnt that the Defendants had unlawfully accessed the suit works which were provided to the 1st Defendant's customers as "caller tunes" under its program dubbed "Hello Tunes". That when contacted by his manager about the said copyright infringement, the 1st Defendant indicated that the suit works were provided to it by the 2nd Defendant. That the 2nd Defendant similarly responded that it had obtained the suit works from the 3rd Defendant who had represented to it that they had the intellectual property rights in said the songs. (See par. 3, 4 and 5 of PW1's witness statement)
15. The 1st and 2nd Defendant's witnesses (DW1 and DW3) testified that pursuant to the respective Content Provision Agreements entered between the 1st and 2nd Defendants and between the 2nd Defendant and the 3rd Defendant and Third Party, the plaintiff's suit songs were uploaded onto the 2nd Defendants Atlantis

platform from where they were distributed as caller tunes to the 1st Defendants subscribers at a fee. DW4 admitted in paragraph 21 of his witness statement that the following suit songs were purchased or subscribed as caller tunes; '*Simple song*', '*Jamaican dance*', '*Gyal a bubble*', '*No retreat*', '*Stop sign*' and '*So mi tan*'. However there was no evidence adduced by any of the Defendants that the Plaintiff had assigned them with the copyright in the songs or authorized their distribution as caller tunes. I therefore find that the distribution and sale of the suit songs as caller tunes without the Plaintiff's authorization or consent amounted to an infringement of his copyright in the said works.

iii) Whether the Defendants are liable for infringement of the Plaintiff's copyright in the suit works?

16. The Plaintiff (**PW1**) testified that the Defendants unlawfully accessed eight (8) of his songs without his consent and recorded them in their data bank systems from where the 1st Defendant customers could purchase and use them as caller tunes. That the 1st Defendant published on its website an invitation to its customers to subscribe for the suit songs to use as their caller tunes at a fee of UGX 600/= per download. He adduced evidence of screen shots from the 1st Defendant's website (**EX P1**) which listed the suit songs and contained instructions on how subscribers could download them as caller tunes. He testified that after his manager complained about the copyright infringement to the 1st Defendant, it's Marketing Director Mr. Prasoon Lal through an email directed a one Henry Mukiza also an officer of the 1st Defendant, to remove the suit works from their catalogue. The said email (**EX P2**) was forwarded to the Plaintiff. (See paragraphs 4, 7, 8 & 9 of PW1's witness statement). The Plaintiff also testified that he never received any payment from the distributed caller tunes of his suit songs. PW1's evidence was not rebutted by the Defendants.

17. Counsel for the Plaintiff cited the decision in **HCT-00-CS-373-2010; Obsessions Company Limited V Warid Telecom & DMark Company Limited** where court upon finding that the defendant had no permission to use the Plaintiffs songs as it had done, held that the Plaintiff's artistic works protected by copyright were infringed by the defendant. He submitted that the Plaintiff proved that he did not assign the copyright in the suit songs to the Defendants, however even

without the plaintiff's consent the Defendants sold the said suit songs as caller tunes and obtained financial benefits and therefore their actions amounted to infringement of the Plaintiff's copyright in the suit works.

a) Whether the 1st Defendant (Airtel) is liable for copyright infringement?

18. The 1st Defendant's Legal Manager Hudson Katumba (**DW1**) testified that the 1st and 2nd Defendants entered into a Caller Ring Back Tone (CRBT) Services Agreement for content provision of artistic works which were to be digitally distributed to users as caller tunes. (The CRBT agreement was exhibited as **Ex D1**.) That pursuant to this agreement, the 1st Defendant provided the 2nd Defendant with its mobile network and access to digitally distribute the 2nd Defendant's content to Airtel customers in Uganda in the form of caller ring back tunes. Further that the 2nd Defendant guaranteed and demonstrated that it had the necessary authorization and permission to map the content on its CRBT platform and to use and distribute the same. He testified that when the 1st Defendant was notified of the copyright infringement, its then Marketing Director Mr. Prasoon Lal directed that all content belonging to the Plaintiff be immediately removed from the 2nd Defendant's CRBT platform and immediately made it unavailable for subscription (See paragraphs 2, 3, 4 and 9 of DW1's witness statement).
19. DW1 further testified that the 1st Defendant (Airtel) does not have a license to undertake content provision and it could only grant the 2nd Defendant (OnMobile) access to its subscribers, and it is the 2nd defendant who provided the content and vended it to Airtel subscribers in the form of caller tunes. He asserted that the 1st defendant did not infringe on the Plaintiffs intellectual property rights because it is the 2nd Defendant which obtained the suit works and digitally distributed them using its own CRBT platform and Airtel customers accessed the caller tunes via a USSD code that was owned by the 2nd Defendant. Further that since the 1st Defendant did not play any role in obtaining or creating the caller tunes and it also did not vend them, therefore it did not infringe the Plaintiffs copyright, and it is not liable in payment of any royalties to the plaintiff. (See paragraphs 5, 8 and 14 of his statement). During cross examination DW1

admitted that the suit songs were among those distributed as caller tunes to Airtel subscribers, and that the 1st Defendant had received a share of the revenue accrued from the distribution of these songs as caller tunes.

20. Counsel for the 1st Defendant submitted that the 1st Defendant cannot be held liable for any copyright infringement because it is the 2nd Defendant which obtained and distributed the suit works. He argued that the 1st Defendants actions of providing OnMobile with access to its subscribers does not fall within the definition of copyright infringement as envisioned under Section 46 of the CNRA. He submitted in the alternative that the 1st Defendant is not liable for copyright infringement because under clause 8.4.3 of the CRBT Agreement, the 2nd Defendant guaranteed and demonstrated that it had the necessary authorization and permission to use, distribute and provide content to the 1st Defendant's subscribers. He concluded that the Plaintiff had failed to prove that he has a cause of action against the 1st Defendant and prayed that the suit against it be dismissed with costs.

Determination

21. Under **Section 46 (1)** of the CNRA infringement of copyright occurs where a person without a valid transfer or license, among others, does or causes or permits the distribution by sale of any work protected under the Act. Thus copyright infringement is not restricted to persons who unlawfully deal with protected works but it also applies to any person who 'causes' or 'permits' such unlawful dealings to be done. This position reflects the principal of secondary infringement of copyright, which is to the effect that abettors of the primary infringement are also to be held liable for infringement. Thus *'Copyright law recognizes that it is also necessary to provide owners with protection against those who aid and abet the primary infringement. Such accessory infringement is known as secondary infringement.'* (See **Intellectual Property Law, Bentley L & Sherman B; Oxford 3rd Edition, 2009 at page 195-198**)
22. From the evidence on record, it was established that the 1st defendant did the following actions in respect of the suit songs; The 1st Defendant gave the 2nd Defendant access to its mobile network system for the purpose of enabling it to

distribute the suit songs to Airtel subscribers. It published on its website an advertisement inviting its customers to subscribe for the songs as caller tunes, with instructions on how to purchase and download them (See **EX P1**). It is clear that the 1st Defendant's actions enabled and facilitated the 2nd Defendant (On Mobile) to distribute or sell the suit works through its Airtel network and to its subscribers. The 1st defendant also financially benefited from the said distribution, as DW1 admitted in cross examination that Airtel had received a share of the revenue accrued from the distributed caller tunes. From the plaintiff's unchallenged testimony it was established that the plaintiff who is the author and owner of the suit songs has never permitted or authorized the Defendants to use or commercially distribute them as caller tunes. I therefore find that the 1st Defendant caused and permitted the 2nd defendant's distribution of the suit works without the consent of the Plaintiff, and it thereby infringed on the Plaintiff's copyright in the said works.

23. Counsel for the 1st defendant further argued that it should not be held liable for copyright infringement because under clause 8.4.3 of the CRBT Agreement the 2nd Defendant had 'guaranteed and demonstrated' that it had the necessary authorization and permission to use and distribute the provided content, including the suit works. Clause 8.4.3 of the Agreement (**EX D1**) provides as follows;

8. Representations and Warranties.

8.4.3. The service provider acknowledges and warrants that it has the right and authority to assign all the rights in the reports and other information/data to Airtel under this agreement or the relevant contract of adherence free from any valid claim by any third party and these do not infringe the contractual right of a third party, including without limitation, rights under patents, trademarks, copyright, trade secret or confidentiality obligations.

24. However there is no evidence on record to show how the 2nd Defendant 'demonstrated' that it obtained the Plaintiffs authorization to use or distribute his songs as caller tunes. In my view the 1st Defendant had a due diligence

obligation to confirm with documentary proof that the 2nd Defendant had been authorized by the Plaintiff to distribute the suit songs. For instance I take note that DW2 the 3rd Defendant's CEO testified that as a practice, before the approval of content provision agreements MTech as a content provider was required to avail the 2nd Defendant (OnMobile) with a catalogue of artistic works (songs) together with the necessary license from the artist. However not only the CRBT Agreement did not require the 2nd Defendant to avail proof of assignment of the rights in the suit songs, it absurdly did not even specify which songs were to be provided as content by the 2nd Defendant.

25. Specifically the agreement did not indicate that the suit songs were part of the content agreed to be provided by the 2nd Defendant to Airtel. In the agreement where the 2nd Defendant (OnMobile) was referred to as the 'Service Provider', 'content' was broadly defined under clause 1.1 (xv) to mean *'any content that is procured from a third party content provider by Airtel or content provided by the Service Provider'*. The Agreement did not contain any Appendix containing a catalogue of the songs to be provided by the 2nd Defendant as caller tunes. This is in contrast to the Content Provision Agreements between OnMobile and the 3rd Defendant and Third Party (EX D2 and EXD3-E1 respectively) which defined 'content' by reference to an attached Catalogue or list containing the artists or music referred to. As such the 2nd defendant cannot rely on Clause 8.4.3. to avoid liability for its infringement of the plaintiffs copyright.

I therefore find that the 1st Defendant is liable for infringement of the Plaintiff's copyright in the suit works or songs.

b) Whether the 2nd Defendant (OnMobile), 3rd Defendant (MTECH) and / or Third Party (Solunet) are liable for infringement?

26. The 2nd Defendant contends that it should not be held liable for the said copyright infringement because the Plaintiff's songs were provided to it by the 3rd Defendant (MTech) and Third Party (Solunet) pursuant to Content Provision Agreements in which MTech and Solunet warranted that they had obtained the necessary approvals and license over the said content, and granted the 2nd Defendant rights to use and distribute and exploit the same. The 2nd defendant

also asserted that the 3rd Defendant and Third Party as content providers are the ones who uploaded the suit songs to its Atlantis Platform from where they were distributed to Airtel subscribers.

27. On the other hand the 3rd Defendant contends that the suit songs were not the subject of their Content Provision Agreement, specifically that the songs were not part of the content it had agreed to provide to OnMobile because it had no rights over the said songs. The 3rd Defendant also asserts that it never uploaded the songs onto OnMobile's Atlantis platform and that the 2nd Defendant erroneously attributed the suit songs to it. Essentially the 3rd Defendant denied that it had any dealings in the suit works.

These disputed factual claims give rise to the following questions for determination;

- (i) Were the suit songs the subject of the Content Provision Agreements which were executed between the 2nd Defendant and the 3rd Defendant / Third party?

28. The 2nd Defendant's Legal Manager Mr. Manas Kumar Dev (**DW4**) testified that on the 30th August 2011, the 2nd Defendant entered into a Content Provider Agreement with MTech Limited a content provider, wherein the 3rd Defendant granted it non-exclusive rights to *inter alia* use, distribute and exploit content which it represented to have rights over. The agreement was exhibited as **EX D3-E1**. That the 2nd Defendant also executed a Content Provider Agreement with Solunet Business Solutions (the Third Party) in September 2011 wherein the Third Party granted it rights to use, reproduce and distribute the content. The said agreement was exhibited as **EX D2**. (See paragraphs 4, 5 and 6 of DW4's witness statement). DW4 testified that under these respective agreements the 3rd Defendant and Third Party warranted that they had the necessary rights over the content to be provided (to 2nd Defendant), and that in making it available to the 2nd Defendant, they were not infringing the intellectual property rights of any third party. Further that the said content providers granted the 2nd Defendant the

non-exclusive rights to use, reproduce, license, distribute or exploit content which they had rights over. (See par 8 and 9 of his statement).

29. However the 3rd Defendant contends that the suit songs were not part of the content it agreed to provide under the Agreement. The 3rd Defendant also denies that it uploaded any of the suit songs and states that the 2nd Defendant wrongly attributed the downloads of these songs to it. The 3rd Defendant's CEO Mr. William K. Chesire (**DW2**) testified that under the Content Provider Agreement (**EX D3-E1**) MTech only granted the 2nd Defendant rights to use and distribute content which the 3rd Defendant has rights over. That the 3rd Defendant had no rights over the Plaintiff's songs and upon execution of the agreement it had provided the 2nd Defendant with a catalogue containing a list of musicians over whose works it had rights. Further that from time to time the 3rd Defendant used to send to the 2nd Defendant an updated catalogue reflecting artists over whose works it had rights. He availed copies of the catalogues sent to OnMobile in 2012 and 2013 (See **Ex D3 - E2**), which also did not list the Plaintiff or any of his songs. He thus asserted that MTech had never provided the suit songs to the 2nd Defendant or licensed it to exploit them. (See paragraphs 6, 8 and 9 of his statement as well as Exhibits **D3-E2**). The 2nd defendant did not rebut or discredit this evidence.

Determination

30. I have considered the witness testimony and I note that DW3 & DW4's witness statements were vague and did not explicitly state that the suit songs were part of the content which was the subject of the CP agreement. I have also perused the Agreement between the 2nd and 3rd Defendant (**Ex D3-E1**), and MTech's content catalogues and they do not indicate that the suit songs were part of the content agreed to be provided by MTech.
31. The said contract stated in paragraph (ii) of the preamble that "*Content Provider is holding rights over certain content which is more fully described in Annexure A (.....) and hereby grants non-exclusive rights to OnMobile to use, reproduce, license, distribute, or exploit the content in various media through its clients in the territory.*"

The definition section defined 'content' as follows;

*"Content" shall mean such content owned or controlled or newly published from time to time or which are assigned to the Content Provider that is provided / assigned by the Content Provider to OnMobile for the delivery of such content to the telecom operators and End Users of the telecom services. **The details of the content provided by the Content Provider to OnMobile pursuant hereto shall be as set out in Annexure A hereto.** As and when the parties add further material to the Content the same shall be captured by way of a letter as set out in Annexure D hereto. Such additional content shall be deemed to be part of the content as set out herein'*

32. However Annexure A to the said Agreement which is titled as 'Description of Content and Vectors' does not indicate that the Plaintiff's suit songs were part of the content to be provided by MTech. The 2nd Defendant did not adduce any evidence showing that MTech ever availed it with any music catalogue which included the plaintiff's songs. The updated content catalogues which were sent by MTech to Onmobile in 2012 and 2013 (**Ex D3-E2**) listed singers from Uganda Kenya, Zambia and Nigeria and the Plaintiff (a Jamaican national who resides in the USA) was not among the listed artists. The catalogues also did not include any of his songs as content.

33. Similarly the Content Provision Agreement between the 2nd defendant and the Third Party (**EX D2**) does not indicate that the suit songs were part of content agreed to be provided by Solunet thereunder. In the agreement where Solunet was referred to as the 'Content Provider', content was defined under clause 1.1.2 as follows;

*"Content shall mean such content owned or controlled or which are assigned to the Content Provider that is provided / assigned by the Content Provider to OnMobile for the delivery of such content to various telecom operators and End Users of the telecom services. **The details of such content provided by the Content Provider to OnMobile pursuant hereto shall be as set out in Annexure A hereto.**"*

Annexure A to the Agreement titled "Content Schedule" has a list of various artists, which does not include the Plaintiffs name. The 2nd Defendant did not adduce any evidence to prove that Solunet sent any other catalogues which contained the suit songs as content.

34. I therefore find that the suit songs were not within the scope of the Content Provision Agreements entered between the 2nd Defendant and the 3rd Defendant and the Third Party respectively, and specifically they were not part of the content which MTech and Solunet agreed to provide to OnMobile thereunder.

(ii) **Did the 3rd Defendant and / or Third Party upload any of the suit songs onto the Atlantis platform?**

35. The 2nd Defendant's Product Manager Ashish Malik (**DW3**) testified that pursuant to the Content Provision agreements the 2nd Defendant granted MTech and Solunet access to its online Atlantis platform and these content providers would directly upload content onto this platform from where it was distributed to Airtel subscribers as caller ring tones (See paragraphs 4, 5, 6, 7 of DW3's witness statement). That after the Plaintiff raised a copyright infringement claim, the 2nd Defendant checked its Atlantis platform and found that the 3rd Defendant had uploaded the plaintiffs caller tunes '*Jamaican Dance*', '*Simple Song*', '*Gyal A Bubble*', '*No Retreat*', '*Stop Sign*', and '*So Mitani*'. That it further found that the Third Party (Solunet) had uploaded the caller tunes '*Jah Love Me*', '*Simple Song*', and '*No Retreat*' and the song '*Konshens Jazz Version*' was uploaded onto the platform by another content provider Spice Uganda, who is not party to this suit. (See par. 10 of his statement.) He further testified that in exceptional cases where content providers do not have enough bandwidth, they request the 2nd Defendant to upload their content onto Atlantis on their behalf. That the 2nd defendant thus uploaded two of the suit songs '*Simple Song*' & '*No Retreat*' upon the instruction of the 3rd Defendant. (See par. 14 of his statement).

36. The 2nd Defendant's Legal manager Manas Kumar Dev (**DW4**) further testified in paragraph 15 of his statement that upon learning of the alleged infringement, the 2nd Defendant immediately asked the content providers to take down the suit

songs from the Atlantis platform. DW4 therefore asserted that the 2nd Defendant is not liable for infringement of the Plaintiff's intellectual property rights since the suit songs were uploaded on its platform by content providers who had warranted that they had procured all the necessary approvals and consent for the said content.

37. For the 3rd Defendant, its CEO Mr. Chesire (**DW2**) testified in paragraph 6 of his statement that the 3rd Defendant only uploaded content over which it has rights on the 2nd Defendant's platform. That however it was discovered that the 2nd Defendant had erroneously attributed two of the Plaintiff's songs to MTech without their knowledge, yet the songs had never been part of their music catalogue. He testified that on 11th September 2015 he held a meeting with Pradeep Khuranat the 2nd Defendant's Key Accounts Manager - Africa in which he protested the erroneous attribution of the Plaintiff's songs to MTech. Further that in an email dated 23rd September 2014 addressed to Biswajit Nandi the 2nd Defendant's Content Manager - Emerging Markets, he again protested that MTECH had been named as the supplier of the Plaintiff's songs yet it never uploaded the same, and he proposed to approach the Plaintiff to resolve the matter. (See paragraphs 15 and 16 of DW2's witness statement and copies of the email correspondences which were exhibited as **EX D3- E2**) DW2 further testified in paragraph 19 of his witness statement that he requested the 2nd Defendant to conduct a joint reconciliation with MTech so as to establish the source of the Plaintiff's songs but the 2nd Defendant did not respond to the request. DW2's evidence was not rebutted or discredited by the 2nd Defendant.

Determination

38. First of all it was not disputed by the 2nd Defendant that the suit songs were uploaded onto its Atlantis platform and it is from this platform that they were distributed as caller tunes to Airtel subscribers. (See paragraph 10 of DW3's statement and paragraph 14 of DW4's statement.) As already determined, the Plaintiff did not license or authorize any of the defendants to use or distribution his songs as caller tunes. Therefore regardless of who uploaded the suit songs, simply by allowing the songs to be uploaded onto its Atlantis platform the 2nd

Defendant caused and permitted the unlawful distribution of the same, and it thereby infringed on the Plaintiff's copyright.

39. It is trite that in civil proceedings the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. The **Evidence Act Cap 6** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. (See Section 101 and 103) Thus the 2nd Defendant had the burden to prove its claim that the 3rd Defendant and Third Party uploaded or authorized the uploading of the suit songs onto the Atlantis platform.

I have considered the witness testimony and supporting documentary evidence. The 2nd Defendant's claims that MTech and Solunet uploaded the suit songs were not supported by evidence, as the document which it intended to rely on was rejected by court as an exhibit for being adduced after the close of the plaintiff's and 3rd Defendant's case. Whereas it was not disputed that the 2nd Defendant gave access to MTech and OnMobile to upload content on the Atlantis platform, the 2nd Defendant failed to prove that the said parties had actually uploaded any of the suit songs onto its Atlantis platform. Furthermore DW3 asserted that the 2nd Defendant had been instructed by MTech to upload two of the suit songs and he explained that such instructions would usually be given by email. However there was no such email adduced to prove that the 2nd Defendant had received such instructions from MTech.

40. In contrast MTech availed supporting documentary evidence to prove that it did not upload the suit songs or instruct the 2nd Defendant to do so. These include email correspondences to OnMobile where it complained that some of the Plaintiffs songs uploaded onto the Atlantis platform had been wrongly attributed to MTech without their knowledge. It is notable that the 2nd Defendant acted indifferently and did not even respond to MTech's proposal for a joint reconciliation to determine how the suit songs were uploaded. The 2nd Defendant also failed to adduce any documentary evidence to support DW4's testimony that after the Plaintiff made a complaint of copyright infringement,

OnMobile had immediately requested MTech and Solunet to remove the suit songs from the Atlantis platform.

41. Finally the Content Provision Agreements provided that the content providers would receive a share (60%) of any revenue earned by OnMobile from distribution of the caller tunes and it was admitted by DW4 that the 2nd Defendant had received revenue from the sale of the suit songs. However while the 2nd Defendant alleges that these songs were provided by MTech and Solunet, it did not adduce any evidence to prove that it had paid any share of the revenue to the content providers. To the contrary DW2 testified in paragraph 18 of his witness statement that the 3rd Defendant never received any payment in respect of the said songs. During cross examination he explained that under the CP agreement the 2nd Defendant was supposed to avail MTech with statistics showing the number of times its provided songs were downloaded and the accrued revenue from these downloads, and the 3rd defendant was supposed to be paid a share of such proceeds. That however MTech never used to receive records of revenue for the content which it provided to OnMobile. This further discredits the allegation that the said content providers had uploaded the suit songs.
42. Finally I take note that the 2nd Defendant's witnesses DW3 and DW4 admitted that they never dealt directly with MTech or Solunet in respect of the copyright infringement claims. DW2's witness statement clearly showed that Pradeep Khurana its Key Accounts Manager and Biswajit Nandi its Content Manager Emerging Markets were the principal persons who corresponded with MTech in respect of the copyright infringement claims. However they were not called to testify for the 2nd Defendant in the suit and no reason was given for this failure. I agree with the submission of counsel for the 3rd Defendant that the failure by a party to call a witness whose evidence is material and relevant creates an adverse reference that the witness was not called because his / her evidence would have been adverse to the interests of the party who was expected to call such a witness. (For this proposition counsel cited the decision of Hon. Justice Stephen Mubiru in **Civil Appeal No. 051 of 2016; Ocan Amos V Oyoo Wilson**). I accordingly find that the 2nd Defendants failure to call the said Managers who

directly dealt with MTECH on the copyright infringement claim was because their evidence would have confirmed DW2's testimony and would likely have been adverse to the 2nd Defendant's case.

43. Considering the evidence on record I find that the 2nd Defendant failed to prove that the 3rd Defendant and Third Party uploaded or authorized the uploading of the suit songs on the Atlantis platform. I accordingly find that the 3rd Defendant and Third Party did not infringe the Plaintiff's copyright in the suit songs. I however noted that as the owner of the Atlantis platform, the 2nd Defendant had overriding control over the use of the platform including the capacity to upload and remove content. This is evidenced by DW3's admission that the 2nd Defendant had uploaded two songs on the platform, and that it pulled down the suit songs from the platform after the plaintiff's complaint. I therefore find that on a balance of probabilities the suit songs were uploaded by the 2nd Defendant who wrongly attributed them to have been uploaded by the 3rd defendant and Third Party.

c) What is the scope of the copyright infringement?

44. The 2nd Defendant did not dispute that it distributed the suit songs by selling them as caller tunes from its Atlantic platform. DW4 admitted in paragraph 21 of his statement that there was revenue generated from the following suit songs; *'Simple Song', 'Jamaican Dance', 'Gyal a Bubble', 'No Retreat', 'Stop Sign' and 'So Mitan'*. Furthermore DW1, DW3 and DW4 admitted that both the 1st and 2nd Defendants had received a share of the proceeds of the purchased caller tunes. It therefore appears that there are six songs whose caller tunes were subscribed for, while the caller tunes of two songs were apparently not purchased.
45. Under Section 46 (1) (b) of the CNRA, copyright infringement occurs where a person acting without valid authorization, does or causes or permits another person to distribute the copyrighted works by way of sale. Accordingly I find that for the caller tunes which were purchased, the 1st and 2nd Defendants infringed the copyright in the said suit songs when they distributed them by way of sale.

46. In respect of the other two caller tunes which were not purchased, under Section 46 (1) (a) copyright infringement also occurs when a person does, causes or permits another to '*reproduce, fix, duplicate and extract, imitate or import into Uganda otherwise than for his or her own private use*'. The Plaintiff testified that the Defendants unlawfully accessed the suit songs without his consent and recorded them in their data bank systems from where the 1st Defendant customers could purchase and use them as caller tunes. That the 1st Defendant published an advertisement on its website inviting to its customers to subscribe for the suit songs to use as their caller tunes at a fee of UGX 600/= per download. He adduced evidence of screen shots from the Airtel website (**EX P1**) which listed the suit songs and contained instructions on how subscribers could download them as caller tunes. These actions of the 1st and 2nd Defendants were not authorized by the Plaintiff.
47. In making these caller tunes the 2nd Defendant reproduced or created a derivative work from the suit songs. Furthermore the 2nd Defendant's actions of recording the caller tunes and uploading them onto the Atlantis Platform was for the purpose of offering them for sale to the public. This is further evidenced by the 1st Defendant's advertisement on its website inviting the customers to subscribe for the said caller tunes. Therefore the fact that the caller tunes were not purchased is immaterial since they were recorded and uploaded with the intention that they would be purchased.
48. In accordance with Section 46 (1) (a), I further find that the 1st and 2nd Defendants infringed the Plaintiff's copyright in all the suit songs when they, acting jointly and in concert and without valid authorization, recorded the suit songs as caller tunes, uploaded them onto the Atlantis platform and offered them for sale to Airtel subscribers. In conclusion on Issue 2, I find that the 1st and 2nd Defendants are jointly and severally liable for infringement of the Plaintiff's copyright in the suit songs.

Issue No. 3: Whether the 1st and 2nd Defendants distribution of the suit songs without remitting any of the proceeds to the Plaintiff amounted to unjust enrichment?

49. The Plaintiff further contended that the defendants' sale and distribution of the Plaintiff's works without passing on the proceeds thereof to him amounted to unjust enrichment. In **Cloth Link (U) Ltd v Africa Traders Investments Fund Ltd & Anor Civil Suit 234 of 2010** it was held that *'The principle of unjust enrichment requires; first that the Defendant has been enriched by the receipt of a benefit; secondly that this enrichment is at the expense of the Plaintiff and thirdly, that the retention of the enrichment is unjust.'*
50. From the evidence on record it was established that the 1st and 2nd Defendants acting jointly and in concert, offered for sale and distributed the suit songs as caller tunes. PW1 adduced screenshots of the Airtel website which was inviting its customers to subscribe for the suit songs as caller tunes at a fee of 600/= per download. (See **EX P1**). In paragraph 21 of his witness statement DW4 admitted that there was revenue generated from the sale of the following subscribed caller tunes; *'Simple Song', 'Jamaican Dance', 'Gyal a Bubble', 'No Retreat', 'Stop Sign' and 'So Mitán'*. It was also established that none of the revenue from the caller tunes was passed to the Plaintiff. Specifically DW1 and DW4 admitted that the 1st and 2nd Defendants shared the revenue from the sale of the caller tunes, and that they did not remit any of the proceeds to the Plaintiff.
51. The 1st and 2nd Defendant's receipt of such proceeds was at the expense of the Plaintiff as the owner of the copyright in the songs who did not authorize them to sell them as caller tunes. It was also unjust in as far as the Plaintiff had the exclusive right under Section 9 of the CNRA to commercially exploit the suit songs or authorize others to do so on his behalf, which right was infringed by the unauthorized distribution of caller tunes. I therefore find that the 1st and 2nd Defendants unjustly enriched themselves when they distributed and sold the suit songs without the Plaintiff's permission and without remitting to him any of the money generated from the distribution.

Issue No. 4: Whether the 1st Defendant is entitled to indemnity from the 2nd Defendant?

52. Counsel for the 1st Defendant submitted that in the event that this Honourable Court finds that the Plaintiff's intellectual property was infringed upon, the 1st Defendant should be indemnified by the 2nd Defendant because it had warranted under Clause 8.4.3 of CRBT Services Agreement that it had the necessary authorizations to deal with the content provided, and under Clause 16.1 the 2nd Defendant also agreed to indemnify the 1st Defendant against any third party claims arising under the agreement. That accordingly the 1st Defendant is indemnified by the 2nd Defendant against liability for the plaintiff's claims for copyright infringement, damages and costs. Counsel relied on the case of **Obsessions Company Ltd Vs. Warid Telecom (Uganda) Limited** (*supra*) where the Defendant (a telecom company) claimed an indemnity from the content provider D-Mark Company Limited which had supplied it with the infringing content. In the said case court held that the Defendant was entitled to compensation from the Third Party because under the agreement, the Third party had warranted to the Defendant that it had the legal right and capacity to deal with the intellectual property content the way it did.

53. Clause 8.4.3 of the said Agreement (**Ex D1**) provided as follows;

8. Representations and Warranties.

8.4.3. The service provider (the 2nd Defendant) acknowledges and warrants that it has the right and authority to assign all the rights in the reports and other information/data to Airtel under this agreement or the relevant contract of adherence free from any valid claim by any third party and these do not infringe the contractual right of a third party, including without limitation, rights under patents, trademarks, copyright, trade secret or confidentiality obligations.

54. Clause 16.1 of the Agreement provides as follows;

16 Indemnification

16.1 Service provider hereby indemnifies, holds harmless & undertakes to defend Airtel and Airtel Company affiliates and their respective employees, officers and directors against any claim as a result of such claim and with regard to;

i) The extent that the intellectual property rights used in providing the RBT solution and services to Airtel by the service provider under this agreement infringes any third party's intellectual rights.

55. However whereas it was established that the 1st and 2nd defendants acting jointly and in concert distributed the suit works, I determined in Issue 2 above that the suit songs were not within the scope of the said Caller Ring Back Tune Services Agreement between Airtel and OnMobile. As such the above clauses are not applicable in respect of the suit songs which are the subject of this suit and accordingly the 1st Defendant is not entitled to indemnification from the 2nd Defendant under the CRBT Agreement.

56. Regardless of this finding, I wish to state my view that courts should not give effect to contractual indemnity clauses in circumstances like the present one where the party claiming indemnification for copyright infringement did not conduct any reasonable due diligence to ascertain the indemnifying party's legal right and capacity to deal with the intellectual property content. In such circumstances giving effect to such clauses would not be in the interest of justice as it would prevent copyright owners from seeking legal redress against persons who negligently or willfully aid and abet copyright infringement in order to obtain financial benefits.

Issue No. 5 & 6: Whether the 2nd Defendant is entitled to indemnity from the 3rd Defendant (MTECH) and / or the Third Party (Solunet)?

57. Counsel for the 2nd Defendant also submitted that it is entitled to be indemnified by the Third Defendant and Third Party because they had warranted under the respective Content Provision Agreements that they had the necessary authorizations to deal with the content provided and they also agreed to

indemnify the 1st Defendant against any third party claims that would arise from the agreements. That accordingly the 2nd Defendant is indemnified by MTech and Solunet against liability for the plaintiff's claims for copyright infringement, damages and costs.

58. However I determined in Issue 2 above that the suit songs were not the subject of the Content Provision Agreements and specifically they were not part of the content which MTECH and Solunet agreed to provide to OnMobile. As such it cannot be said that either MTech or Solunet had made any warranties in respect of the suit songs or that they agreed to indemnify OnMobile for liability or claims relating to these songs. In any event for a claimant to be indemnified, the liability of the indemnifying party must first be established. (See **Shakil Pathan Ismail v DFCU Bank Limited Civil Suit No. 236 of 2017.**) Having found in Issue 2 above that the 3rd Defendant and Third Party were not liable for copyright infringement, the 2nd Defendant is therefore not entitled to indemnity from them under the said agreements.

Issue No. 7: What remedies are available to the parties

General Damages

59. The Plaintiff prayed for damages of USD 360,000 (United States Dollars Three Hundred Sixty Thousand) being the claimed value for the eight (8) suit songs, as compensation for the copyright infringement. Counsel relied on the case of **Obsessions Company Ltd v Warid Telecom (Uganda) Limited** where court held that if the Defendant has dealt with the Plaintiff's copyright as if he had a license the Defendant ought to pay as damages an amount equivalent to the fair fee or royalty which he would have to pay for such license. The Plaintiff who is resident in Miami Florida USA, testified that his songs have enjoyed international success and have been featured on leading music charts in the world. He adduced in evidence a copy of an agreement to assign rights for one of his artistic works, dated 14th December 2016. (The said agreement was exhibited as **EX P8**). Relying on this agreement he testified that he previously assigned the rights in one of his songs called '*Broke off Yah back*' to Empire Distribution at Inc. at a fee of USD 45,000 (United States Dollars Forty-Five Thousand). The Plaintiff asserted that EX

P8 shows court the range of fees which he would likely have negotiated with the Defendants to use the suit songs. (See par. 17 and 18 of his witness statement)

60. On the other hand, Counsel for the 1st and 2nd Defendants submitted that the Plaintiff is not entitled to general damages as prayed. Counsel cited **Stella Atal v Ann Abels Kiruta T/A '97 Africa Arts & Crafts HCCS No. 0967 of 2004** where Justice Kiryabwire relying on the authority of **Claydon Architectural Metalwork Limited v Dj Higgins and Sons [1997] FSR 475** held that the normal measure of damages for copyright infringement is the amount by which the value of copyright as a chose in action has been depreciated. He also cited the **Obsessions** case (*supra*) for the proposition that the measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action. Counsel submitted that the Plaintiff is not entitled to any general damages because he did not adduce any evidence to show the level of depreciation suffered as a result of the infringement or how it affected the sales of the suit songs in Uganda. Further that the Plaintiff's agreement (Ex P8) where he assigned rights for artistic works cannot be relied upon for the assessment of general damages because it was for the assignment of the entire rights in two songs and these rights were assigned in respect to the whole world as per article 5 which stated that the licensee had the exclusive rights to distribute the content throughout the universe. Finally that the said agreement and the value for the licensed rights is not applicable to the present case where the suit songs were only used as Caller Tunes and specifically for the Ugandan market.
61. As rightly submitted by Counsel for the 1st and 2nd Defendants, general damages are awarded at the discretion of court and they are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the Defendant's actions. (**Luzinda Marion Babirye v Ssekamatte & 3 Others Civil Suit No. 366 of 2017**). The Plaintiff proved that he suffered injury and financial loss after the 1st and 2nd defendants unlawfully used and distributed his songs and failed to remit to him any of the distribution proceeds from the purchased caller tunes. He is therefore

entitled to general damages as compensation for the Defendant's infringement of his copyrighted works.

62. In respect of the quantum of general damages, while it is true that courts have held that the measure of damages for copyright infringement is to be determined by the actual depreciation caused by the infringement to the value of the copyright as a chose in action (See **Stella Atal V Ann Abels Kiruta and Obsessions Vs. Warid Telecom** cases (*supra*)), it has also been established that where a Plaintiff cannot prove the actual damage or fails to adduce evidence of depreciation, the correct measure of damages is what the plaintiff would have charged for the use of his intellectual property by the Defendant.

63. In **Obsessions Company Ltd v Warid Telecom (Uganda) Ltd HCCS No. 373 of 2010 [2014]** Hon. Justice David Wangutusi while assessing damages, cited with approval **Copinger & Shane James on Copyright 13th Edition Pg 343** thus;

*“ The measure of damages is the depreciation caused by infringement to the value of the copyright as a chose in action. **Thus if the Defendant has dealt with the Plaintiff's copyright as if he had a license, the Defendant ought to pay as damages an amount equivalent to the fair fee or royalty which he would have to pay for license to do the acts which he has done** and damages may be said to be at large. (.....) It is therefore not only the money acquired from the caller tune fee by the Defendant that should be considered but also the depreciation in value of the song. Just as PW2 testified if every time a person uses his phone he hears the same caller tune he is not likely to go to a shop and buy a recording of that music. The caller tune project might popularize a song without increasing a song's sale on the market. The song even in its popularity does not benefit the copyright holder, in this case the Plaintiff, because while the song is being heard many times, no CD is leaving the shops. Similarly while no CD is leaving the shops, the song is depreciating. In the instant case however, Counsel for the Plaintiff did not assist Court much in assessing how much depreciation of the songs had taken place. This Court however cannot sit and fold its hands in resignation. **Where the Plaintiff cannot prove actual damage the correct measure of damages is what the***

Plaintiff would have charged for the use of his or her property by the Defendant. The Plaintiff can only recover the actual loss suffered which is on balance of probabilities.” (Emphasis mine)

64. Therefore while the Plaintiff did not adduce evidence to prove the measure of depreciation of the suit works, he can still be awarded damages of an amount equivalent to what he would have charged if the Defendants had negotiated for a license to use and distribute the caller tunes. The question to be determined then is: How much would the Plaintiff have reasonably charged the Defendants for the use of the suit songs as caller tunes?
65. The Plaintiff relied on the exhibited agreement (**Ex P8**) to claim USD 45,000 as the value for assigning the rights in one of his songs. Whereas the Defence counsel argued that the agreement cannot be relied on in the present case, I find that it is relevant to enable Court determine how much the Plaintiff would have charged the Defendants if he had an opportunity to negotiate with them prior to their exploitation of the suit songs. I note that clause 3(a) thereof provided that the sum of USD 20,000 was paid as an advance for the single ‘*Bruk off ya back*’ and clause 3 (b) provided that a further advance of USD 45,000 was to be received by the Plaintiff upon the delivery of a second single. Furthermore under the said agreement the licensee was granted exclusive rights to exploit and distribute the songs throughout the universe.
66. However while the sum of US\$65,000 were payable for exclusively assigning the entire rights in two songs in the entire world, in the instant case the suit songs were specifically used as caller tunes and only in the Ugandan market. Therefore taking into consideration the foregoing plus the scope of the infringement I find that the sum of USD 22,500 (United States Dollars Twenty- Two Thousand Five Hundred) per song is a reasonable amount that would be chargeable for the use of the Plaintiff’s songs as caller tunes by the 1st and 2nd Defendants. Considering that there are eight suit songs in which the Plaintiff’s copyright was infringed, I therefore award him a total sum of USD 180,000 (United States Dollars One Hundred Eighty Thousand) as general damages for the said infringement.

Exemplary Damages

67. The Plaintiff's Counsel cited the **Obsessions case** where court held that exemplary damages carry a punitive aim of both retribution and deterrence for the wrong doer and others who might be considering similar conduct. Further that exemplary damages will be awarded where the Defendant's conduct was calculated to procure him some benefit at the expense of the Plaintiff. Counsel submitted that despite having made demands for compensation in 2014 (See **EXP3**) the defendants did not make any offer of settlement. He prayed that the 1st and 2nd Defendants be ordered to pay exemplary damages of UGX 50,000,000/= and UGX 30,000,000/= respectively, for their indifferent conduct towards the Plaintiff's claim. On the other hand Counsel for the 1st and 2nd Defendants submitted that court should not award exemplary damages because after the Defendants found out that they never had rights in the suit songs, they immediately pulled down the same from their platforms and made them unavailable for subscription.
68. It is trite that exemplary damages are punitive in nature and are awarded in addition to compensatory damages, in order to punish and deter the Defendant from repeating the wrongful conduct. (See **O'Connor Vs Hewiston [1979] Crim. LR 46, CA; Archer Brown [1985] QB 401**). In my opinion the 1st and 2nd Defendants acted arbitrarily and with impunity in dealing with artistic works which were not even referred to in the CRBT Agreement or the Content Provision Agreements. Furthermore the 2nd Defendant acted maliciously when it wrongly attributed its unlawful dealings in the suit works to the 3rd defendant and Third party. These impugned actions were calculated to procure financial benefits for the Defendants at the expense of the Plaintiff. It is therefore necessary to award exemplary damages so as to deter the 1st and 2nd Defendants from dealing unlawfully with intellectual property rights in the future.
69. In those circumstances, and considering the principle that exemplary awards should not be excessive, I would award exemplary damages of UGX 20,000,000/= (Uganda Shillings Twenty Million) against the 1st defendant, and UGX 30,000,000/= (Uganda Shillings Thirty Million) against the 2nd defendant.

An Order for account and remission of profits that have accrued overtime to the defendants jointly and severally.

70. Since the Plaintiff has already been awarded damages being the amount he was likely to have charged for the use of the suit songs by the 1st and 2nd Defendants, I decline to grant this order. _

Interest

71. Under Section 26 (2) of the Civil Procedure Act Cap 71, court has discretion to award interest where there is a decree for payment of money. Considering that this is a commercial dispute and that the Plaintiff first made demands for compensation in 2014, I award him interest on the awarded general damages at the rate of 15% per annum from the date of filing suit until payment in full. I also award an interest on the awarded exemplary damages at a rate of 10% per annum from the date of judgment until payment in full.

Costs

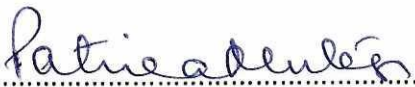
72. The Plaintiff and 3rd defendant prayed for costs of the suit. Under Section 27 of the Civil Procedure Act Cap 71, costs follow the event unless court for good cause orders otherwise and accordingly the Plaintiff being the successful party is awarded costs of the suit. Similarly the suit having been dismissed against it, the 3rd Defendant is also awarded costs.

73. In the final result, judgement is entered for the Plaintiff against the 1st and Defendants in the following terms;

- a) It is declared that by using and distributing the Plaintiff's suit songs as caller tunes without his consent, the 1st and 2nd Defendants are jointly and severally liable for infringement of the Plaintiff's copyright in the said songs.
- b) It is declared that the 1st and 2nd Defendants' distribution of the Plaintiff's songs without remitting the proceeds thereof to the Plaintiff amounted to unjust enrichment.

- c) The Plaintiff is awarded general damages of USD 180,000 (United States Dollars One Hundred Eighty Thousand) as compensation for infringement of his copyright in the suit songs.
- d) Interest is awarded on (c) above at the rate of 15% per annum from the date of filing suit until payment in full.
- e) The 1st Defendant shall pay the Plaintiff the sum of UGX 20,000,000/= (Uganda Shillings Twenty million) as exemplary damages for copyright infringement.
- f) The 2nd Defendant shall pay the Plaintiff the sum of UGX 30,000,000/= (Uganda Shillings Thirty million) as exemplary damages for copyright infringement.
- g) Interest is awarded on (e) and (f) respectively at the rate of 10% per annum from the date of judgment till payment in full.
- h) The Plaintiff and 3rd Defendant are awarded costs of the suit.

It is so ordered.


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PATRICIA MUTESI

JUDGE

(21/08/2023)