



THE REPUBLIC OF UGANDA

IN THE MATTER OF THE COPYRIGHT AND NEIGHBOURING RIGHTS ACT, 2006
AND IN THE MATTER OF THE COPYRIGHT AND NEIGHBOURING RIGHTS
REGULATIONS S.I NO 1 OF 2010

AND

IN THE MATTER OF AN APPLICATION NO. 25 OF 2010 FOR REGISTRATION OF
COPYRIGHT BY YOWERI KAGUTA MUSEVENI IN THE SONG "YOU WANT
ANOTHER RAP"

AND

IN THE MATTER OF AN OBJECTION BY MR. MWAMBUSYA NDEBESA AND DR.
KATONO NZARWA DEO

- 1. MWAMBUSYA NDEBESA
 - 2. DR KATONO NZARWA DEO
- }OBJECTORS

Vs

YOWERI KAGUTA MUSEVENIAPPLICANT/DEFENDANT

DECISION OF THE REGISTRAR

BEFORE MERCY KYOMUGASHO KAINOBWISHO, ASSISTANT REGISTRAR OF
COPYRIGHT

FACTS

1. On the 26th October 2010, Yoweri Kaguta Museveni (*herein after referred to as the 'applicant'*) made an application for registration of copyright in a musical work titled "*You want another rap*" to the Registrar of Copyright at the Uganda Registration Services Bureau, through his lawyers Karuhanga , Tabaro & Associates. The said application was duly advertised in the Uganda Gazette, Vol. CIII No. 71 of 3rd day December 2010 under General Notice No. 664 of 2010. However, his application was objected to by Mr. Mwambusya Ndebesa and Dr. Katono Nzarwa Deo (*herein after referred to as the 'objectors'*), through their lawyers Mpeirwe & Co Advocates.

2. The grounds for objection to registration of the said application are contained in the letter lodged by the objectors lawyers, Mpeirwe & Co Advocates, dated 8th December 2010 but briefly; that the applicant is not the author of the rhythms “*Natema Akati Karara*” and “*Mpenkoni*”; that the work is not musical; that the work is in the public domain free for all to use; that the applicant has not made any improvement on the poems; that the applicant merely recited the poem as an act of performance; that the work constitutes public property and that the application is an abuse of intellectual property.
3. Accordingly the parties agreed on four issues to be decided by the Registrar and these are; (i) whether the objecting parties have locus; (ii) whether the applicants work is eligible for copyright; (iii) whether the applicant is entitled to copyright; and (iv) whether the work amounts to a derivative work.
4. The Applicant was represented by Counsel Edgar Tabaro of Karuhanga , Tabaro & Associates and the Objectors were represented by Counsel Arthur Mpeirwe of Mpeirwe & Co. Advocates.

Issue 1: Whether the objecting parties have locus?

The evidence by the parties:

5. The applicant’s counsel submitted that the objectors have no locus for these proceedings because they are not authors in relation to the works/poems adduced as evidence by the objectors titled “*Natema Akati Karara*” and “*Mpenkoni*”. In support of his argument, the applicant’s counsel cites *Section 4* of the Copyright and Neighbouring Rights Act of 2006 (*herein after referred to as “the Act”*) to wit the author of any work specified in *Section 5* of the Act shall have the right of protection of the work, where work is original and is reduced to material form in whatsoever method irrespective of the quality of the work or for the purpose for which it is created. Therefore according to the applicant’s counsel, the objectors lack *locus standi* under the law.
6. In defense of their *locus standi*, the objectors’ counsel submits that the objectors are Banyankole (*People from the Ankole Region of Uganda*), who have since childhood sang the songs “*natema akati karara*” and “*mpenkoni*”. Counsel further submits that the objectors are members of the public and as such are aggrieved by the application and therefore have *locus standi* to object to registration of the applicants works.
7. In response to this particular issue, the applicant’s counsel submits that by invoking the allegation that work is in the public domain by the objector’s counsel, they have no basis in law since *Section 7* of the Act is clear on the public benefit works that are prohibited from protection and the list doesn’t include derivative works.

8. I have examined the submissions of both counsel for the applicant and objectors and all the evidence before me and decide on this particular issue of *locus standi*. Regulation 6 (1) of the Copyright and neighboring Rights Regulations, 2010 is thus very clear on who has standing before the Registrar. The regulations provides that:-

“a person who wishes to object to registration of a copyright or neighbouring right may , by ordinary letter lodge an objection against the registration with the Registrar within sixty (60) days from the date of the publication of the application in the gazette”. (emphasis mine)

I therefore find that the objectors have *locus standi* to object to registration of this application .

9. However, I want to make it clear that copyright is not dependent on any formalities such as registration. Instead the right arises automatically. Registration under *Section 43* of the Act is for purposes of keeping evidence of ownership of the right, identification of works and authors, and maintenance of record of rights. It is also important to note that under the Act, registration is not mandatory so whether or not the author of a work eligible for copyright registers his/her work, does not take away the right as long as the work meets the criteria as required under the law.

Issues 2, 3, and 4:

Whether the applicant’s work is eligible for copyright; Whether the applicant is entitled to copyright; and Whether the work amounts to a derivative work.

Since the parties have opted to argue these issues concurrently, I shall proceed to do likewise.

10. As a mentioned, the grounds for objection to registration of the applicants work as submitted by the objectors’ counsel are that the applicant is not the author of the rhythms “*Natema Akati Karara*” and “*Mpenkoni*”; that the work is not musical; that the work is in the public domain free for all to use; that the applicant has not made any improvement on the poems; that the applicant merely recited the poem as an act of performance; that the work constitutes public property and that the application is an abuse of intellectual property. In response to the grounds for objection, the parties rely on the provisions of the Copyright and Neighbouring Rights Act, 2006, its implementing Regulations , case law and other evidence in support.

The evidence by the objectors:

11. The objector’s counsel relies on the affidavit of Mwambusya Ndebesa of Makerere Univeristy Department of History, dated 14th January 2011 in which he solemnly swears and states that the two songs ““*natema akati karara*” and “*mpenkoni*” are part of the *Banyankole/Bakiga* folklore which has been in

existence since time in memorial. That the applicant is not the author of the song in question and has only recorded and published a collection of two re-known Runyankole-Rukiiga writers, namely Benedicto K. Mubangizi of Ankole and Festo Karwemerwa of Kigezi as contained in paragraph 6 of the Affidavit. The deponent attached two publications. The first publication titled "*Oteebwa Orurimi Rwana*" by F.K. Karwemera first published in 1966 by the East African Literature Bureau where the poem "*mpa enkoni, mpa enkoni, mpa enkoni*" and "*nateema akati kalala*" are expressed in writing respectively. The second publication is titled "*Nkuzaanire 1: Ebitongero n'ebyesongoro by'abato*" by Benedikito K. Mubangizi which was published in 1994 by Fountain Publishers where the said poems "*Mpa enkoni*" and "*Naatema akati kaarara*" are expressed in writing respectively.

12. According to paragraphs 3, 4 and 5 of the Affidavit, the deponent (Mwambusya Ndebesa), states that he is conversant with *Banyankole* culture, practices, norms and beliefs and has since childhood sung many folksongs including the songs "*Mpa enkoni*" and "*Naatema akati kaarara*." And that the two folk songs were among the many folk songs composed time in memorial by 'their' forefathers and is to date recited and sung by children and in homes and nobody has ever claimed ownership of the said songs because they belong to everyone.
13. In paragraphs 8, 9 and 10 of the same Affidavit, Mwambusya Ndebesa states that he has carefully read the wording of the two songs as presented by the applicant and even listened to his rap of the same and observed that he did not make material alterations to the two songs and that there is nothing creative about asking a question "*you want another rap*" or making a statement "*today these young people taught me about this rap because I was not following what they were saying*."
14. Furthermore, the deponent states that the Banyankole used to put drum beats but the applicant has only included sound beats of modern instruments which accordingly do not substantially alter the song to make them original and that the sound beats in the song are the ordinary computer based which require no substantial effort, skill or judgment and as such cannot pass the test of originality in paragraphs 11 and 12 of the Affidavit.
15. Paragraph 18 of the same Affidavit states that ownership of the song by the applicant will deny the Banyankole/Bakiiga their freedom to freely use their two traditional songs and as such should be rejected.
16. In his submissions, the objectors' counsel cites Section 4(1) of the Act which requires originality as a prerequisite for copyright protection. The section provides that the author of any work specified in Section 5 of the Act shall have the right of protection of the work where work is original and is reduced to material form. Further the objector's counsel refers to Section 4(3) of the Act which provides that for purposes of Copyright and neighbouring rights Act, a work is original if it is the product of the

independent efforts of the author and submits that the applicant's work was a mere recitation of a folksong and lacks a modicum of creativity necessary to transform it into a copyrightable expression.

17. More so, the objectors submit that to be eligible for copyright protection, a derivative work must be different enough from the original to be considered a new work or must contain a substantial amount of new material and therefore making minor or adding a little of substance to a pre - existing work will not qualify the work as a new version for copyright purposes. The objectors' counsel cites the case of **Ashmore Vs Douglas-Hom (1987) FSR at 553** where it was held that where the author has made use of existing material, it has to be determined whether he has expended sufficient independent skill and labor to justify copyright protection for his result. In the same case, it was stated that in determining whether the work is original and entitled to copyright, the work must be looked at as a whole, and if, notwithstanding that the author has used existing subject matter, he has expended sufficient independent skill and labour, he will be entitled to copyright. The objectors' counsel further cites the case of **L.B (Plastics) Ltd Vs Swish Products Ltd(1979) RPC 551** where it was held that whether the work is entitled to copyright depends on whether there has been material alteration or embellishment which suffices to make the totality of the work an original work.
18. The objectors counsel submits that the said songs "*natema akati karard*" and "*mpenkoni*" are in the public domain and free for all to use and should therefore not be appropriated by anyone. And more so the same have been published in two publications earlier mentioned by Benedikito K. Mubangizi and Festo Karwemerwa respectively. These publications are categorized as literary works and may be protected as such and can therefore not be used as a bar to creating other works therefrom.
19. The objectors' counsel in his submissions echoes his concern on why there is no law to protect folklore and refers to the Draft Bill for protection of traditional knowledge and folklore and states that the bill was removed for unclear reasons and submits that the majority of Ugandans do not understand the implications of acquiring intellectual property rights in folklore and traditional knowledge.

The response by the applicant's counsel:

20. In response to the above claims, counsel for the applicant submits that this client, the applicant only applied for a derivative musical work titled "You want another rap" as can be seen from the application dated 26th October 2010 and the Gazette Notice No. 664 of 2010 dated 3rd December 2010 and the musical Compact Disc (CD) accompanying the application, which derivative work is purely an expression of the applicant .

21. Counsel for the applicant refers to Section 5 (2) of the Act which provides for the scope of *Derivative* works such as translations, adaptation and other transformation of pre-existing works under the Act and that the protection of a derivative work under subsection (2) shall not affect the protection of the pre-existing work used by a person for derivation purposes.
22. In defining the meaning of the word "adaptation" counsel for the Applicant relies on the Oxford Advanced Learners Dictionary 7th Edition to define adaptation as "film/movie/musical, book or play that is based on a particular piece of work that has been changed for a new situation or the process of changing to suit a new situation.
23. Counsel for the applicant further submits that paragraph 11 of the Affidavit of Mwambusya Ndebesa acknowledges that the applicants included beats of modern instruments which on its own falls within the definition of adaptation explicated herein above.
24. With regard to the attack on the quality of the derivative musical work of the applicant, counsel for the applicant submits that quality has no standing in copyright law and relies on Section 4 of the Act which provides thus;

"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".
25. With regard to the issue of originality, the applicant's counsel submits the applicants work is original within the meaning of originality in copyright law. In support of this position, the applicant's counsel cites the case of **University of London Press University vs University Tutorial Press [1916] 2 ch. 601** where courts gave effect to the meaning of "original" as used in copyright;

"the word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The originality which it requires relates to the expression of the thought....irrespective of whether the quality or style is high."
26. In the same respect, counsel for the applicant further submits that the objectors definition of originality within the copyright setting is misconstrued and wrong and should be excused for believing that the word "original" carries the same meaning as the definition provided in English dictionaries that connotes novelty or being innovative and that the applicants derivative musical work combined with the adaptation gives rise to a new expression which qualifies the instant work as original within the meaning of the copyright law .

27. The applicant's counsel further submits that the objector, Mwambusya Ndebese in his Affidavit refers to the applicant's work as belonging to Banyankole/ Bakiga mere poems which are recited through performance rather than the work of the Applicant who wishes to protect a musical expression.
28. The applicant's counsel submits that paragraph 18 of the Affidavit of Mwambusya Ndebese deposes to the belief that the Applicant's ownership of the song will deny the Banyankole/Bakiiga their freedom to freely use their two traditional songs, is without basis as the applicants elects to protect his derivative expression rather than restrict the use of earlier and differently expressed versions. Counsel for the applicant refers to the objectors fears as unfounded and at best speculative. The applicant's counsel rejects the application of the case of **Ashmove v Douglas-Hon** as relied upon by the objectors that it is no longer applicable since it was overtaken by the enactment of the Copyright, Designs and Patents Act, 1988 of UK.
29. And with regard to objector's counsel's concerns on the Traditional knowledge and folklore bill, counsel for the applicant submits that whereas the objectors sentiment about the bill are noted, sentiments and the current objection have no basis in law and prays for dismissal of the objection.

MY DECISION ON ISSUES 2 , 3 & 4

30. I have examined the submissions of the parties and because of the technical nature of the subject of copyright, I will endeavor to define and discuss the issues as raised. I will continue to use the term 'works' to refer to anything which is protected by copyright.

Whether the applicant's work is eligible for copyright

31. With regard to whether the applicants work is eligible for copyright, whereas Copyright laws have different approaches towards the definition of copyrightable works, the Copyright and Neighboring Rights Act, 2006 is very clear on what is eligible for copyright. This law provides for protection of literary, scientific and artistic intellectual works and their neighbouring rights. The Act uses an expansive definition of literary, scientific and artistic works which are eligible for copyright under Section 5 as to include among others, derivative works which by selection and arrangement of its content, constitute original work. The Act excludes ideas, concepts, procedures, methods or things of a similar natures and public benefit works such as Acts, Statutes, Decrees, statutory instruments reports made by committees or commissions of inquiry by government or their agencies, news of the day including reports of fresh events or current information by media from protection under copyright law.
32. One of the grounds for objection is that the applicant's work is not a musical work. The current case concerns the battle of the rhythms in the traditional folk songs/poems "*Natema Akati Karara*" and "*Mpenkoni*" and the applicant's musical work titled "*You want another rap*". Even though the current law

does not define a musical work *as such*, a musical work has been defined as one consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.¹ A song will therefore have two copyrights, one in the music and one in the words of the song, the latter being a literary work. This particular case a melody of a song will be protected but not the lyrics or the choreography which accompanies it as long as this music is fixed in some form. The applicant work qualifies to be a musical and using the 'hearing' test may be distinguished from the traditional poems/folk songs.

33. As long as this work is original and expressed, it doesn't matter whether it is beautiful or not. *What is beautiful music to one man might be a dreadful cacophony to another.* For example in relation to artistic works, if a child drew a picture of his parents like an emaciated cartoon, the picture might not look beautiful but is an original creation that is protected by copyright. Even mere small number of notes and chords have been held as sufficient for copyright protection as was upheld in the case of *Lawson Vs Dundas, The Times, 1985*. Therefore the applicant's expression whether or not good to the ears, I am convinced is of sufficient creativity to constitute an original derivative work to which the applicant is entitled to copyright protection.

Whether the applicant's work is Original

34. With regard to the issue of originality as argued by both parties, it should be noted that originality is the *sine qua non* of copyright. To qualify for copyright protection, a work must be original to the author. Literary, dramatic, musical or artistic works and databases are protected only if they are original. To this end, I will look at the way courts approach originality in relation to new works and derivative works. As pointed out by *Blakeney and McKeough*² that "to some extent the concept of what constitutes a "work" within the Act and the concept of originality are intertwined. It is difficult to discuss what amounts to a "work" without discussion "originality" since without a sufficient degree of "originality" a "work" will not come into existence."
35. I am persuaded and do agree with the applicant's counsel on what constitutes "Originality" as defined in the case of *University of London Press Ltd Vs University Tutorial Press Ltd [1916] 2 Ch 601 [UK]*. In this case the law does not require that the expression must be in an original or novel form but that work must not be copied from another work, that it should originate from the author. In the case of *Gormely Vs. EMI Records (Ire) Ltd [2000] 1 IR 74*, in which Barron J came to the conclusion that;

¹ Intellectual property by David Bainbridge, 5th Edition, Page 48

² Intellectual Property: Commentary and Materials (1987) at 27

‘originality does not require the work to be unique, merely that there should have been original thought. Where there is treatment of materials already in existence it necessary to show some new approach. It cannot be copied directly. The work must truly belong to the person claiming to be the author.’

36. In assessing originality, it is important to consider the skill, labour and judgment used to create the truly new work and not the actual work itself. The motivation and intentional of a person is also important in this case. Though every case depends upon its own facts. And although skill and labour must be expended to produce a work, it is not necessary for a work to be ‘novel’ or absolutely new and it is important not to confuse the Copyright Act’s requirement of originality with the Patent Act’s requirement of novelty. In the case of *Sands V McDougall Proprietary Ltd* [1917] 23 CLR 49, the Australian High court held that the word ‘original’ does not imply inventive originality when used in the context of copyright. It was held to be sufficient that the work be the production of something in a new form as a result of skill, labour and judgment of the author. Similarly, just writing down a note of somebody’s speech can be sufficient to give rise to copyright as was held in the case of *Water v. Lane* [1900] AC 539.
37. In this case, originality is more concerned with the relationship between an author or creator and the work. The same principle was upheld in the case of *British North Ltd Vs Texteam Blackburn Ltd* [1974] R.P.C 57 at 68. Originality in copyright law means that the author must have exercised the right kind of *labour, skill or effort* or otherwise known as “*intellectual creation*” in producing the work (*Ladbroke Vs, William Hill* [1964] 1 All ER 465,469. In such a case some level of *individuality* must be exhibited though this will always depend on the facts of the each case. Consequently, a person who writes a film based on an original story recounted by another produces an “original” work even though the story and characters have been widely known for thousands of years. This was the principle in the case of *Christoffer vs Pseidon Film Distributors* [2001] ECDR 481.
38. Therefore originality relates to the creative expression involved in the derived work. The applicant combined a traditional folk song with modern beats which he sang and performed. I do not think that the applicant is claiming that he created the lyrics or words of the song. However, the applicant transformed a traditional folksong into a modern song by use of modern beats and a modern rap where rhyming lyrics are enchanted to a musical accompaniment thus creating a musical work. The applicant did not merely include the beats but rather changed the whole rhythm of the folksong which formed musical significance. In the case of *Redwood Vs Chappell* [1982] RPC 109, *Robert Goff J* at p.119 stated:-

“it is perfectly plain that every musical arranger has a number of weapons in his armoury which he may use, depending upon the purpose for which the arrangement is required- ranging from simple arrangements for straight dance bands or for some singer, to more sophisticated or original arrangements for more substantial orchestra or for

groups; but in nearly every case a music arranger will so decorate, develop, transfer to a different medium, or otherwise change the simple music of a popular song as to make his arrangement fall within the description of an original musical work and so be capable of attracting an independent copyright."

39. The transformation of a folksong is to my mind an original creation which as expressed constitutes a derivative work. The creation might look obvious but the obviousness of the creation is only the idea which lies behind the expression that is, the idea seems obvious but the expression is original.
40. In the current case, there is a minimum degree of creativity in the applicants work and as argued by his counsel and as stated in the affidavit of one of the objectors, Mwambusya Ndebesa, as evidenced from the different beats/sounds of modern instruments and the creativity in the use of the local and English language and rhythm. In the case of *Wood Vs Boosey (1868) LR 3 QR 223*, where a musician expended a reasonable amount of skill in arranging and adapting a piece of music originally written for a rock group so that it was suitable for a traditional orchestra was held to have a copyright in the orchestral work. Therefore, making an arrangement of an existing piece of music may attract its own copyright in addition to, and running alongside, the copyright subsisting in the prior work. I find the applicants work in totality has a sufficient aural and musical significance to attract copyright protection.

Whether the work amounts to a derivative work

41. Derivative works are works which were derived from or based upon existing works whether or not they are protected by copyright. Copyright law has long recognized that it is important that authors should be rewarded not just for creating new works, but also for building upon existing works. As mentioned earlier a derivative work which by selection and arrangement of its content, constitute original work is eligible for copyright protection under Section 5 (1) of the Act. For example a new musical arrangement based on a traditional folksong is eligible for copyright as a derivative work. I find the new musical arrangement by the applicant based on a traditional folk song amounts to a derivative work and is therefore eligible for copyright protection.
42. I am persuaded by the applicant's counsel's submission on adaptation which accordingly includes transformation of the work in such a manner that the original or substantial features thereof remain recognizable. *For example writing a play or film script from a novel is an example of an adaptation.* In the **Case Number: 2005 (NE). 10023**. The word "Adaptation" under copyright law was defined as an act of a separate work by modifying, adding/subtraction, changing etc, a specific expression, based on an existing work while maintaining the same essential expression of the existing work, so as to creatively express a new thought or feeling. In this case it was held that the similarities and commonalities do not constitute an

infringement of the copyright (right of adaptation) or of the author's moral rights (right of attribution and right of integrity).

43. I have carefully considered the evidence on record, the pleadings and submission of learned Counsel for the objecting parties and the applicant and therefore find the applicant's work an original derivative musical which is eligible for copyright protection and it is important to note that copyright in a derivative work covers only the additions, changes or other new material appearing for the first time in the work and does not extend to any preexisting material and does not prevent anyone else from using the existing work for another derivative work.
44. I am aware that the objectors were under the impression that the applicant was attempting to monopolize a piece of heritage of the Banyankole/Bakiga. I hope that they can now rest assured that the heritage of the aforementioned people can still be enjoyed by anyone and has not in anyway been misappropriated but instead can now be enjoyed by anyone including the young generation whom I hazard to say may relate to the applicants new arrangement of the said works.
45. In the circumstance, the objection fails but I order no costs. I also order that the applicant's application of his derivative work "*You want another rap*" proceeds to be registered as such.

Dated this14th.....day of *February*.....2013



MERCY KYOMUGASHO KAINOBWISHO

Mercy Kyomugasho Kainobwisho
Assistant Registrar, Copyright

Decision delivered in the presence of:

1. EDGAR TABARO- Counsel for the Applicant
2. ANDREW MAUSO- of Karuhanga , Tabaro & Associates
3. MWAMBUSYA NDEBESA -Objector
4. DR. KATONO NZARWA DEO- Objector
5. TIMOTHY BRYAN MASIKO- of Mpeirwe & Co. Advocates