

**REPUBLIC OF KENYA**  
**IN THE MATTER OF THE MEDIA ACT CAP 411B**  
**AND**  
**IN THE MATTER OF THE COMPLAINTS COMMISSION OF THE MEDIA COUNCIL OF KENYA**  
**COMPLAINT NO 18 OF 2011**

**MEDIAVISION LIMITED.....COMPLAINANT**

**-VERSUS-**

**MEDIA MAX T/A K24 TELEVISION.....RESPONDENT**

**DECISION OF THE COMMISSION**

**The Complaint**

Mediavision Limited complained to the Commission that Mediamax, trading as K24 television, plagiarized its material and dishonoured

an agreement to work together to produce a television program known as *Living*. The particulars of the complaint are set out in the Complaints Form which Mediavision completed and was received by the Commission on 16 September 2011.

Mediavision states that on 10 June 2011 it approached K24 TV to interest them into buying their television program *Living*. Thereafter they held discussions on various dates with K24's production manager Julius Njogu.

During one of the meetings held at K24 boardroom, Mediavision's production manager Joseph Mucheru states that he presented the pilot program and synopsis of the *Living* television show to Mr Njogu.

In the courses of the discussions, Mr. Njogu proposed a partnership (co-production) and asked Mediavision to prepare an agreement, which Mediavision did. The draft, "Agreement for Production of a TV Programme", which has been made available to the Commission, proposes

co-production of the program *Living*. According to the agreement, the program would consist of 26 episodes to run for two seasons of three months each. K24 would contribute KSh75,000 per episode while Media vision would take care of the production including the sourcing of content, resource persons and artists.

But that was never to be. About three weeks later, Mediavision noticed a similar program with the same content and theme being aired by K24. Mr Njogu told Mediavision that he was unable to continue with their agreement, citing lack of support from his management.

### **Respondent's Response**

In a written response dated 13 January 2012, the Respondent said there was no agreement entered into between him and the Complainant. He also denied he had been given "any pilot program, trailer or synopsis" by the Complainant, nor had he asked for one.

The Respondent also denied that he had plagiarized any program belonging to or produced by the Complainant. He said the show being broadcast by the Respondent as *Property Weekly* is "distinct, different and wholly produced and owned by the Respondent".

The Respondent further denied the claim, as set out in the Complaints Form, that the Complainant is "unable to strike a deal with any other broadcaster as the program [*Living*] is now secondhand".

### **The Hearing**

The first three episodes of the disputed *Property Weekly* and the pilot program *Living* were screened during the hearing on 9 February 2012. The Commission had an opportunity to see the similarities (and differences) of the two programs.

The Complainant told the Commission that in June 2012 he sought to pitch *Living*, the new television program on real estate with K24. He was introduced to Julius Njogu, the production manager at K24, on June 10 2011 by a sports reporter at K24, Githinji Njoroge, who facilitated the initial meeting.

According to the Complainant, a series of meetings were then held in K24's boardroom. The following is the chronology of the events:

13 June 2011:

Second meeting in which Mr Mucheru presented to Mr Njogu the pilot program and the synopsis of the *Living* television show. The meeting discussed a partnership in production which would cost Ksh230, 000 per episode if K24 decided to buy the program outright. Mr Njogu, however, suggested that K24 would prefer to have a co-production arrangement where K24 would contribute Sh80, 000 per episode and Mediavision the balance. K24 would also source for sponsorship of the program and Mediavision would get 30% of the sponsorship fee while K24 would retain 70%. Mr Njogu said he would consult the K24 management and report back in the next meeting on 17 June 2011.

17 June 2011:

Mr Njogu informed Mr Mucheru that he had finalized discussions with the management and that he was to travel to Tanzania to source for content. He set another meeting for the afternoon of 21 June.

21 June 2011:

When Mr Mucheru called him on 21 June to confirm the meeting, Mr Njogu said he was held up and postponed the meeting to 24 June.

24 June 2011:

Mr Mucheru met Mr Njogu, who again pushed the meeting to 27 June.

27 June 2011:

Mr Mucheru met Mr Njogu and handed him a draft contract ("Agreement for Production of a TV Programme") for his perusal and input. This was done in the presence of the head of studio operations of K24, Mr Paul Mugo.

All the visits to K24, the Complainant told the Commission, were recorded in K24's visitor's book.

The Complainant told the Commission that on 30 June he was made aware of a program airing on K24. The program had the same theme and content as the *Living* show he was pitching with K24. He described the K24 program as “pure plagiarism” as K24 had access to his *Living* pilot program and synopsis.

The Complainant called three witnesses. One of the witnesses, Edwin Nyutho, a television production lecturer at the University of Nairobi, told the Commission that when he saw the first episode of the K24 *Property Weekly* program he called Mr Mucheru to congratulate him on successfully launching his program. Mr Nyutho was familiar with the *Living* pilot program, having viewed it in Mr Mucheru’s office soon after it was produced. He told the Commission that he had no doubt in his mind that what he saw aired on K24 was Mr Mucheru’s program.

Mr Nyutho also told the Commission that a serialized television program would normally carry diverse content in each segment for consequent episodes. This testimony was corroborated by Mr Njogu, the Respondent’s witness.

The Respondent, however, maintained that there was nothing new, original, or copyrightable in the Complainant’s pilot program *living* that could be said to have been copied or plagiarized. The Complainant had not copyrighted or patented the material. Indeed, the Complainant admitted during cross-examination that his program *Living* was not registered as copyright, patent or trade mark.

The Respondent called one witness, Julius Njogu, the K24 production manager. While not denying that he held meetings in which the Complainant pitched the television program *Living*, Mr Njogu denied that he received a pilot program from the Complainant. He said K24 management was producing a real estate program of which he had not been aware when he was holding meetings with Mediavision.

### **Complainant’s submissions**

The Complainant made the following submissions. To avoid too much repetition, details already given in the section on the hearing are omitted:

1. He stated that he had submitted during the 9 February hearing “overwhelming and weighty evidence”, which substantially supports his claim against the Respondent as set out in his Complaint Form dated 14 September 2011. He described the Respondent’s response dated 13 January 2012 and its oral submissions made on 9 February 2012 as “evasive” and “a mere denial and a general traverse” of the issues raised in the complaint.
2. He said the evidence-in-chief of the Complainant’s production manager, Joseph Mucheru, on 9 February “conclusively determined” that the Complainant and the Respondent held a series of meetings between 10 June and 27 June 2011. In one of those meetings he presented a pilot television program to the Respondent’s production manager, Julius Njogu. The content of the program was real estate. The Respondent received the said program on DVD and promised to give a response on its contents.
3. On 13 June 2011 he again met with the Respondent and an agreement was reached on a partnership for the production of the program.
4. The Respondent proceeded to produce a similar version of the program and aired the first episode on 30 June 2011. The program had the same theme, content and segments as the Complainant’s program, including property profile, interview with a real estate professional, a property catalogue and a “Do it yourself” (DIY). This became evidently clear when the two programs were screened during the hearing on 9 February.
5. On the claim that the Respondent would not have had ample time to produce a program and air it on 30 June 2011 (and therefore had been planning one long before Media vision came into the picture), evidence adduced by witnesses Anne Wangui and Wilfred Kirigi for the Complainant clearly showed that such a program could be

produced in seven days, and during cross-examination, the respondents production manager, Julius Njogu, confirmed that their program is currently produced in one week.

6. The assertion by the K24 production manager, Julius Njogu, that the Respondent was producing a program without his knowledge “could at best be described as dishonest, a farce and a sham”. According to the authoritative British Broadcasting Corporation ([www.bbc.co.uk/newtalent/drama/advice\\_production.shtml](http://www.bbc.co.uk/newtalent/drama/advice_production.shtml)), the role of a television production manager includes overseeing a production from start to finish; a production manager keeps a tight rein on the budget and organizes all support facilities, including accommodation, catering and transport. He/she will also plan crew, equipment and facilities. The Respondent could, therefore, not produce such a program without the knowledge and involvement of the production manager.
7. The Respondent’s claim that the Complainant’s program was not registered at the time of presentation “only strengthens” the Complainant’s claim that the Respondent had the intent to plagiarize the program.
8. The Respondent’s evidence “cannot stand to any scrutiny and is a sham and does not meet the requirements of a substantive vindication”.

### **Respondent’s submissions**

The Respondent made the following submissions:

1. The Commission does not have jurisdiction to entertain the complaint lodged. The nature of the complaint and the remedy sought places the jurisdiction of the complaint with the High Court or the Anti Counterfeit Agency.
2. In the event the Commission does not uphold the Respondent’s defence of jurisdiction, the Respondent adopts the following defence:

- (a) The Complainant has not registered any trade mark for its show *living* under section 4(1) and 6 of the Trade Marks Act. The remedy for the violation of a trade mark is provided under section 5 of the Act.
  - (b) The Complainant has also failed to prove that the Respondent was passing off the show under common law. See Lindsell on Torts 16<sup>th</sup> Edition.
3. The Complainant has also not registered the *Living* program under section 22(1) of the Copyright Act; hence, there is no breach of any copyright.
4. The Complainant alleged in evidence his program *Living* was a new invention. The Complainant did not patent the invention as provided by sections 22, 23(1) (2) (3) and (4) of the Industrial Property Act. Registration of the proposed patent is done under section 34(1). Remedy of any breach of registered patent is provided by section 55, including an injunction. Therefore, there was no breach of any invention under this statute.
5. It has come to the Respondent's attention after closure of the hearing that a similar and same program called *Hot Property* was being aired by Kenya Broadcasting Corporation before the Respondent's program *Property Weekly* was aired in June 2011. The respondents requested and urged the Commission in the interest of justice, in order to establish whether or not there was a same and similar program before *Living* and before broadcast/airing of *Property Weekly* by the Respondent, to summon under section 28(1) (a) and (b) of the Media Act, Rich Productions (Mr Macharia Muhoho is willing to play/exhibit the CD of *Hot Property*).

## **Remedies**

The Complainant is seeking the following remedies:

1. Order stopping the broadcasting of the disputed program
2. Damages equal to the lost opportunity for revenue (as the Complainant is unable to strike a deal with any other broadcaster as the program is now second hand)
3. Any other relief the Commission may deemed fit.

## Issues for Determination

Although many issues were raised by both the Complainant and the Respondent, the Commission finds it unnecessary to delve into them unless they are germane to the disputed facts and the remedies sought. For example, the Commission did not summon Rich Productions, as requested by the Respondent, to establish that a “similar and same program” called *Hot Property* was being aired by Kenya Broadcasting Corporation before the Complainant’s *Living* program and before the Respondent’s program *Property Weekly* was aired in June 2011. The suggestion here being that *Living* itself, apparently, was not new or original, or could itself be an infringement of somebody else’s work. The Commission rejected this expedition because a copyright defense cannot be premised on another infringement. Section 22(4) of the Copyright Act states:

*A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.*

The Respondent argued that the Complainant has not registered the *Living* program under section 22(1) of the Copyright Act, “hence there is no breach of contract”. The Commission also did not find it necessary to look into whether the Complainant’s program *Living* was registered under the Copyright Act because it is not necessary to register a work for it to enjoy copyright protection. Protection is automatic. Rule 8(3), of the Copyright Regulations, 2004, states:

*The subsistence, enjoyment and enforceability of copyright shall be independent of whether or not it is registered under these Regulations.*

Similarly, the Commission did not probe whether or not the Complainant should have protected his program under the Anti-Counterfeit Agency, Trade Marks Act, or Industrial Property Act, as the Respondent seemed to suggest, because the Complainant was not making claims against infringement of patent or trademark rights, nor was the *Living* show eligible for patentability or treatment as a trademark. We will return to this issue later.



Thus, after carefully listening to all the evidence presented, the Commission has identified the following issues for determination.

1. Does the Commission have jurisdiction in this case?
2. Did K24 plagiarize the work of Mediavision or violate its intellectual property?
3. Did the Respondent violate any provisions of the Media Act?
4. Is the Complainant entitled to the remedies sought?

#### **Does the Commission have jurisdiction in this case?**

The issue of jurisdiction was raised for the first time by the Respondent in his delayed written submissions received by the Commission on 11 May 2012, nearly three months after the conclusion of the hearing. Needless to say, the Respondent should have raised this issue as a preliminary.

He argues the Commission does not have jurisdiction to entertain the complaint because of the nature of the complaint, as contained in paragraph 3, and the remedy sought, as contained in paragraph 7, of the Complaints Form. This argument is probably inspired not only by paragraphs 3 and 7 in the Complaints Form but also by the Complainant use of the word "invention" during the hearing. The Respondent capitalized on this word during the cross-examination of the Complainant's witness Joseph Mucheru . However, we believe it was a mistake on the part of the witness to describe the television program *Living* as an "invention". Neither the title of the program nor the contents are "inventions". Section 2 (c) of the Industrial Property Act states:

*"Invention" means a new and useful art (whether producing a physical effect or not), process, machine, manufacture or composition of matter which is not obvious, or any new and useful*

*improvement thereof which is not obvious, capable of being used or applied in trade or industry and includes an alleged invention.*

The Commission holds the view that the television program *Living* is literary or artistic work or broadcast material that is protectable under the Copyright Act, not under the Trade Marks Act or the Industrial Property Act. Quoting the authoritative source in the area, *Clerk & Lindsell on Torts*, 16<sup>th</sup> Edition, the Respondent submitted that the Complainant has also failed to prove that the Respondent was passing off the show under common law. However, we believe *Living* does not qualify for, or lend itself to, “passing off” in the circumstances of this case, nor did the Complainant claim that his work was being passed off. In any case, the Copyright Act abrogates the common law rights. Article 51 of the Act states:

*No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.*

Back to the nature of the complaint contained in paragraph 3 and the remedy sought in paragraph 7 of the Complaints Form, which the Respondent is relying on to argue that the Commission does not have jurisdiction on this matter. The nature of the complaint can be summarized as infringement of copyright or stealing of a story idea (plagiarism). The remedy the Complainant is seeking is an order to stop the Respondent from further broadcasting of the program *Property Weekly* and “any other relief that may be deemed fit”.

According to the Respondent, the matter should, therefore, be resolved under the Copyright Act or the Anti-Counterfeit Agency and the jurisdiction for such a complaint lies with the High Court of Kenya or the Anti-Counterfeit Agency. That position is correct if our reading of the Copyright Act is confined to section 38 (9) (b), which requires that no prosecution for an offence under the section shall be instituted except before the High Court or a Resident Magistrate’s Court. The offences under section 38 are punished as crimes with fines and imprisonment. However, the program *Living* is eligible for copyright protection as literary works, artistic works or broadcast material under section 22 of the Copyright Act the infringement of which is covered by section 35, which deals with infringement as a tort

remedied by damages. Prosecution of such torts can be instituted in any court which has jurisdiction. Does this Commission have such jurisdiction?

It is sufficient to look into the relevant provisions of the Media Act, under which this Commission is established, to determine whether this matter falls under its jurisdiction. Firstly, the Act in section 2 defines “journalism” to include the collecting, writing, editing and presenting of news in radio and television broadcasts, and “media” to include electronic media engaged in any production for circulation to the public. Secondly, section 4 of the Media Act states that one of the functions of the Council *is to mediate or arbitrate in intramedia disputes, to enhance professional collaboration among media practitioners, to promote ethical standards* among journalists and *in the media* and *to uphold and maintain the ethics* and discipline of journalists as set out in this Act *and any other relevant law* [emphasis added]

The Media (Complaints Commission) Rules, 2009, provides in Rule 7 that the jurisdiction of the Commission shall be limited to the matters set out in section 26 (1) of the Media Act. Section 26 (1) (a) states:

*Any person aggrieved by any publication, or any conduct of a journalist, media enterprise or the Council may make a written complaint to the Council setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.*

Section 26 (2) further states that upon receipt of the complaint, the Council shall within 14 days refer the complaint to the Complaints Commission for determination.

It is clear from the above foregoing that this matter is properly before this Commission.

Rule 11, however, requires the Commission to reject complaints if they are not within the mandate of the Commission, justifiable or otherwise merits admission. The Commission is also required to reject a complaint where it considers that the complaint is the subject of court proceedings, external to the mandate of the Commission. Or if it considers the complaint to be vexatious, frivolous, or otherwise an abuse of the procedures for dealing with

complaints, or if it is repetitious, or no provision of the Act or rules has been breached . No such grounds exist to reject the present complaint.

The Commission, therefore, finds it has jurisdiction over the matter and section 35(2) of the Media Act empowers the Commission to adjudicate on matters of “professional and ethical standards” including the enforcement of the Code of Conduct for the Practice of Journalism in Kenya (hereafter referred to as the Code) set out in the Second Schedule to the Act.

### **Did K24 plagiarize the work of Mediavision or violate its intellectual property?**

One of the fundamental tenets of international and national copyright laws is that ideas cannot be protected by copyright law. Section 22 (3) (b) of the Copyright Act states that a literary, musical or artistic work shall not be eligible for copyright unless the work has been written down, recorded or otherwise reduced to material form. In other words, ideas in and of themselves are not copyrightable. So one is perfectly free to "steal" ideas and use them in a program. What is protected is the form in which the ideas are described, explained, illustrated, or embodied in the work.

It is widely accepted that *copyright protects the expression of ideas and not the ideas themselves. This was illustrated in a high profile court case in the United Kingdom (U.K.) in April 2006. In **Michael Baigent and Richard Leigh v The Random House Group Limited [2006] EWHC 719 (Ch)**, Random House UK, publisher of the best-selling book, *The Da Vinci Code*, was sued in London's High Court by two of three authors of a 1982 book (also published by Random House UK), *The Holy Blood and the Holy Grail*. Michael Baigent and Richard Leigh claimed that Dan Brown, the author of *The Da Vinci Code* published in 2003, stole their ideas and therefore breached their copyright. They claimed that 'the whole architecture' of their book was stolen by Brown, not that he literally copied passages of their published text. For example, a central theme of both books is that Jesus and Mary Magdalene were married, had children, and their descendants exist today. Baigent and Leigh alleged that Dan Brown had copied the way in which they had made the sequence of connections of the facts of the merging of the bloodlines. There was little copying of the actual text of *The Holy Blood and**

*The Holy Grail*, but they claimed that there had been **non-literal copying of a substantial part** of their literary work. Mr. Justice Peter Smith, however, dismissed the case.

The two authors appealed against this decision but the Court of Appeal, ***in Baigent and another v. Random House Group Ltd [2007] EWCA Civ 247***, upheld the high court verdict, which ruled that while both books explored similar ideas this did not constitute a breach of copyright. Lord Justice Mummery, one of three appeal judges, said copyright law protected Baigent and Leigh over the research and composition of their book, and the way the ideas in it were originally expressed. "It does not, however, extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about," he ruled.

The *Da Vinci Code* case made it clear that in English law, which Kenya closely follows, it is not enough to have a similar theme to another work, or even to be inspired by it. For plagiarism to occur, a "substantial part" of the original work must have been copied, either in terms of how the work was composed or how its themes were expressed. The case re-affirmed the well-established rule of thumb that "ideas cannot be copyrighted, only their expressions".

The Complainant claims that his program *Living* was plagiarized. What is plagiarism? Plagiarism is the use of another's words, works, thoughts, or ideas without giving proper attribution to the original author. It becomes a crime or tort only when it violates the copyright law.

*Black's Law Dictionary* (Second Pocket Edition) defines "plagiarism" as: "The act or an instance of copying or stealing another's words or ideas and attributing them as one's own." Chambers English Dictionary defines "plagiary" as one who steals the thoughts or writings of others and gives them out as his own and plagiarism as practising literary theft or stealing from the writings or ideas of another. The dictionary compares plagiarism with kidnapping, which is an apt comparison as a plagiarist runs away with somebody else's thoughts or words. To be liable

for plagiarism it is not necessary to exactly duplicate another's work, it being sufficient if unfair use of such work is made, for example by lifting substantial portions of the work or the ideas.

Not all plagiarism is an infringement of copyright. However, all plagiarism is an ethical and moral issue, not far removed from the 8th Commandment "Thou shalt not steal" (Exodus 20:15). Plagiarism is an ethical issue which concerns the Commission because section 35(2) of the Media Act) requires the media to "keep and maintain high professional and ethical standards".

The transaction that is the subject of this case raises questions of ethical conduct. Mediavision accuses K24 of plagiarizing its program. K24 denies it plagiarized the program. K24, however, does not deny that it held a series of meetings with the Respondent with a view to partnering in producing the program *Living*. But K24 denies that the Complainant gave them a copy of the pilot program and synopsis. Who is telling the truth?

In its written submissions received by the Commission on 24 February 2012, Mediavision states it gave the program on a DVD to K24 on 10 June 2011. But in a statement of "chronology of events", Mediavision says it was on 13 June 2011 when Joseph Mucheru presented to Julius Njogu the pilot program and the synopsis of the *Living* television show at K24 boardroom.

If no copy of the pilot was given to K24, then the claim of plagiarism would probably not hold as K24 would have had no access to the material to copy from. However, despite the discrepancy in the dates given by Mediavision, the detailed evidence given by the Complainant seems to suggest that K24 had access to the pilot program. In any case, we find it inconceivable that a party would hold meetings to discuss partnership for the production of a television program based on a pilot program whose contents were unknown to them. We also find it inconceivable that the Complainant would try to pitch a program without making its prototype or synopsis available to the person he is trying to sell it to.

All things considered, we find Mr Mucheru a credible witness and the Commission accepts his version of the story that he gave a copy of the pilot program to the production manager, Mr Njogu. The actual date of the receipt of the copy is immaterial for the purpose of establishing whether or not it was given.

Having determined on a preponderance of evidence that K24 had access to the Respondent's pilot program, does it follow that K24 plagiarized the program? It is of course possible that K24 already had a similar story idea in mind which it was quietly working on before it had access to the *Living* pilot program. But such an argument is weakened by the fact that K24's production manager, in view of the meetings he held with Mediavision, was initially interested in the *Living* program, suggesting this was a story idea new to them.

After viewing the first three episodes of the *Property Weekly* aired by K24 and listening to the testimony of Mr Nyutho who, after watching the first episode, called Mr Mucheru to congratulate him for the launch of the program, we are convinced that the program broadcast by K24 bears a strong resemblance to the pilot program made available to them by the Respondent. The Commission, therefore, finds on a balance of probabilities that K24 was inspired by the Complainant's work and even plagiarized it by stealing the story idea for the program including the themes and architecture. But following the *Da Vinci Code* case, the Commission is unable to make a finding of the infringement of copyright. And even if the Commission could have found it possible to make a finding of the infringement of copyright, we would be obliged to recommend that the Complainant pursues the matter further with a court of law for restitution. This is so because the Media Act does not make provisions for restitution for damages for copyright infringement. We shall return to this question when we consider the remedies sought by the Complainant.

As we have already noted, plagiarism is the use of another's words, works, thoughts, or ideas without giving proper attribution to the original author. We have seen that story ideas are not copyrightable. One can therefore take someone else's idea for a program, put his own spin on it with his own characters without violating the copyright law. Nevertheless, in this case in which the Complainant actually invested in producing a prototype and pitched it with the Respondent, stealing the idea goes against the traditional international practice in the

profession where it is considered unethical and unprofessional to steal ideas from contributors and freelancer journalists. Worldwide, when a media organization prefers to use a story idea offered by a contributor or free-lance journalist to produce its own story, it is common practice to pay for the idea. Stealing story ideas is considered unethical and unprofessional.

### **Did the Respondent violate any provisions of the Media Act?**

Section 4 of the Media Act states that one of the functions of the Council is **to enhance professional collaboration among media practitioners, promote ethical standards in the media and uphold and maintain the ethics** and discipline of journalists as set out in the Act and any other relevant law [emphasis added]. And Article 4 of the Code (on Accountability) requires that all media practitioners should recognize that they are **accountable for their actions** to the public, **the profession** and themselves and that **they should “recognize that they are duty-bound to conduct themselves ethically”** [emphasis added]. In addition, although Article 3 of the Code (on Integrity) is concerned with the presentation of news, it also requires journalists not to “engage in activities that may compromise their integrity or independence”. The Commission finds that the Respondent violated at least Article 4 of the Code, and feels it is important to uphold the article to encourage ethical behavior and to arrest any trend likely to bring the entire profession into disrepute.

### **Is the Respondent entitled to the remedies sought?**

The Complainant is seeking an order to stop the broadcasting of the disputed *Property Weekly* program. The Commission is unable to grant this remedy on justiciability grounds. While we have condemned the plagiarization of the work of the Complainant on account of Article 4 of the Code, the Media Act does not give the legal basis for stopping the program. In any case, the program has been running for a year and today probably resembles nothing close to the *Living* pilot program. Too much water has passed under the bridge.



The Complainant is also seeking “damages equal to the lost opportunity for revenue” and “any other relief the Commission may deemed fit”. For the same reasons as above, we are unable to award the remedy or remedies.

### **Orders of the Commission**

Before issuing any orders, the Commission would like to take note of the tardiness on the part of the Respondent in responding to the complaint. The Commission notified the Respondent of the complaint on 7 November 2011, requiring him to respond to the complaint in writing within 14 days, i.e. by 21 November 2011.

The Respondent did not comply. Instead, two weeks after the expiry of the deadline, the Respondent’s counsel wrote to the Commission on 7 December 2011, asking for extension of time by 30 days to file a response. As a way of explanation, he said: “We have requested for certain information from our client in order to respond to the complaint. As soon as we have the information requested for, we will respond.”

The Respondent finally filed a response to the complaint in a letter dated 13 January 2012, one week after the deadline they had set for themselves.

As for the written submissions, while the Complainant filed his on 24 February 2012, that is within seven days following the hearing on 19 February, the Respondent took nearly three months after the conclusion of the hearing to file his submissions. In a letter dated 3 April 2012, the counsel for the Respondent requested for extension of time to file the written submissions by 30 April 2012. He said he had not been able to file the submissions “because of presence of work in the High Court and Court of Appeal”.

However, the Commission wrote to the Respondent on 18 April requiring him to file his submissions within seven days, that is by 25 April. The Respondent did not comply. He finally filed his written submissions on 11 May 2012, that is nearly three months after the conclusion of the hearing.

Because of this tardiness on the part of the Respondent, this case has taken nearly eight months to resolve, which is unconscionable.

We have only one order to make, as follows:

We order and direct that the Respondent pays a fine of two hundred thousand shillings for failing to observe professional and ethical standards, and failing to have due regard to the Code of Conduct set out in the Second Schedule of the Act in contravention of section 35(2) of the Media Act. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.

Any party aggrieved by these orders may, as stipulated in section 32(1) of the Media Act, appeal to the Media Council of Kenya, in the prescribed manner, within 14 days from today.

It is so ordered.

**Delivered at Nairobi this 3<sup>rd</sup> Day of July 2012**

Chairperson Grace N Katasi.....

Commissioner Murej Mak'Ochieng.....

Commissioner Priscilla Nyokabi.....

Commissioner Peter Mwaura.....