**Systems Africa Ltd v Kalamazoo Ltd and another**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 20 December 1973

**Case Number:** 34/1971 (3/74)

**Before:** Sir William Duffus P, Spry V-P and Law JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Chanan Singh, J

*[1] Copyright – Artistic work – Accounting forms – Artistic work may be constituted by such forms –*

*Copyright Act* (*Cap.* 130), *s.* 2 (*K.*)*.*

*[2] Copyright – Artistic work – Original character – Whether sufficient labour and skill expended to*

*give original character – Copyright Act* (*Cap.* 130), *s.* 3 (*K.*)*.*

*[3] Copyright – Commission – Time at which artistic work commissioned – Copyright vesting in person*

*giving commission – Copyright Act* (*Cap.* 130), *s.* 11 (*K.*)*.*

[**Editorial Note:** In *Con Planck v. Kolynos* (4) the trial judge stated at p. 813 that he found “that the defendants being the persons by whom the *original* was ordered are the first owners of the copyright, if copyright there be.”]

**JUDGMENT**

The following considered judgments were read. **Law JA:** The respondents in this appeal are Kalamazoo Ltd., a company carrying on business in England which designs and produces accounting systems and forms and cards for use therewith, and Taws Ltd., a Kenya company which is the sole distributor in Kenya of Kalamazoo’s products and has a licence to manufacture print and publish in Kenya forms and cards under the trade mark “Kalamazoo”. The appellant is a company carrying on business in Kenya *inter alia* as printers. By their plaint in a suit instituted in the High Court of Kenya the respondents, the plaintiffs in the suit, claimed to have copyright in the forms and cards printed and published by them in Kenya under the trade mark “Kalamazoo”. They alleged that the appellant, the defendant in the suit, had deliberately copied and sold large quantities of the respondent’s forms and cards, thereby infringing their copyright therein, and claimed to restrain these activities by injunction, and also claimed damages. The appellant, by its defence, denied that any copyright subsisted in the forms and cards sold under the trade mark “Kalamazoo”, or that any copyright therein vested in the respondents, or that if any copyright existed the respondents were the owners thereof. The appellant further denied that the said forms and cards involved on the part of the respondents the exercise of any independent knowledge, labour, judgment or effort such as to give an original character thereto, and they denied copying these forms and cards. The appellant further denied having committed any infringement of copyright or having caused any loss or damage to the respondents. At the trial of the suit, before Chanan Singh, J., the following issues were agreed–

(1) Were Taws Ltd. the exclusive licensees of Kalamazoo Ltd.? This issue was answered affirmatively by the judge, and is not the subject of any ground of appeal;

(2) Whether the production of the respondent’s forms and cards involved knowledge, labour, skill, etc. giving them an original character;

(3) Whether copyright subsists in those forms and cards;

4) Whether the appellant has copied those forms and cards; (5) to what relief are the respondents entitled. The judge answered issues 2, 3 and 4 in the affirmative, and issue 5 by ordering the issue of an injunction to restrain the appellant from reproducing or selling any of the twelve specified forms and cards, and by ordering the appellant to deliver up all plates used or intended to be used for the making of copies thereof, and all stocks of such copies. The decisions on issues 2 to 5 inclusive are all subject of grounds of appeal in the appeal to this Court. Before dealing with the appeal, it is necessary to set out the facts. The first respondent Kalamazoo Ltd. markets an accounting system based on a solidly made loose-leaf binder, which is so designed as to enable the three basic accounting records of journal, ledger and statement to be posted in a single writing operation. The system is not unique, several other similar systems being available. It can be supplied as a general system for use with forms and cards of standard design. In some cases the standard equipment has to be modified to suit the requirements of individual customers. In such an event, special forms and cards are designed by Kalamazoo’s salesmen and staff. The various papers have to be so designed that a writing in one column on the top form will be reproduced in the same column in other forms, and the forms have to be provided with punch holes in precisely calculated positions to ensure that this happens. All systems, according to the evidence, require the expenditure of thought, effort and experience in order to evolve an efficient and economical method of putting into operation the accounting requirements of an individual customer. To design and produce the necessary special forms involves original work and research, which may extend over several months. Some of the forms and cards, the subject of this appeal, were designed to meet the special requirements of such customers such as the Post Office, the Railways, and the Kenya Co-operative Creameries. It is in all the forms and cards, whether standard or specially produced for customers such as these that the learned trial judge has found copyright to subsist. It is these forms and cards which, as the evidence abundantly establishes, have been exactly reproduced by the appellant, the size, format, headings and lines being in each case identical, the only difference being the omission of the words “Kalamazoo Taws Ltd.”, and the printing reference number, which appear on the forms and cards printed by the respondents. When a system involving the use of specially designed forms and cards is evolved, the prospective customer is under no obligation to buy it, in which case no charge is made for the work and labour involved. If the customer accepts the system, he is charged for the plates made for printing the special forms and cards, and for the supply of these forms and cards, in accordance with the respondents’ official price list. When the forms and cards are exhausted, the respondents supply, and charge for, reprints. This is how they expect to make their profits, and to recoup the expenditure incurred by them in designing the forms. If the forms and cards are pirated by outsiders, who can no doubt afford to quote lower charges for reprinting them because they have no initial expenditure to recover, then of course the respondents are at a financial disadvantage, as it is from reprinting that they hope to derive the bulk of their profits. Whether the respondents can protect themselves from such pirating depends on whether they can bring themselves, and their specially designed forms and cards, within the scope of the Copyright Act (Cap. 130), hereinafter referred to as the Act. The Act is stated by its long title to have the object of making provision for copyright in literary, musical and artistic works. The judge found, and it has not been challenged, that if the forms and cards the subject of this appeal can be said to come within any of these categories, it is in that of artistic work, and, in the course of considering issue No. 2, he held that he was satisfied that sufficient effort was expended on these papers to give them an original character and that they are artistic works within the meaning of the Act. In s. 2(1) of the Act, the expression artistic work is defined as follows– “ ‘artistic work’ means, irrespective of artistic quality, any of the following, or works similar thereto– (*a*) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; (*b*) maps, plans and diagrams; (*c*) works of sculpture; (*d*) photographs not comprised in a cinematograph film; (*e*) works of architecture in the form of buildings and models; and (*f*) works of artistic craftsmanship, and also, subject to section 3 (3) of this Act, pictorial woven tissues and articles of applied handicraft and industrial art.” By s. 3 of the Act, artistic work is eligible for copyright, if sufficient work has been expended on it to give it an original character, and if it has been reduced to material form. The trial judge found that the forms and cards, the subject of this appeal, were works which, although not specifically referred to in the definition, were similar to diagrams, which are specified in paragraph (*b*) of the definition; he held that they were not general stationery but works reduced to material form on which sufficient effort had been expended to give them an original character, and he held that copyright subsisted in those forms and cards, and that the copyright vested in the respondents. Mr. Nazareth for the appellant began his arguments by submitting that no copyright exists in ideas, schemes, systems or methods, which must be reduced to some tangible material form to be capable of protection by copyright. This proposition is undoubtedly correct and supported by abundant authority to which there is no need to refer, and Mr. Le Pelley agrees with it. Mr. Nazareth submitted that the respondents were claiming copyright for a system of accounting, of which the forms are an integral part. He cited the case of *Libraco v. Shaw Walker* (1913), 30 T.L.R. 22, in which it was held that cards designed for a card index system were not eligible for copyright. He submitted that the words “irrespective of artistic quality” in the definition of “artistic work” do not govern the words “or works similar thereto”, and that as the forms and cards, the subject of this appeal, were held to fall within the words “or works similar thereto” some aesthetic quality must attach to them before they became eligible for copyright. Some effect, he submitted, must be attached to the word “artistic”, otherwise one would be embarking on an uncharted sea, fraught with danger for printers of commercial forms, who would be restricted in their right to complete openly for work, and he urged the Court to be very careful not to extend the field of copyright unduly. Mr. Nazareth referred to a dictum by Russell, L.J. in *Hensher v. Restawile Upholstery*, [1973] 3 W.L.R. 453, that in order to qualify as a work of artistic craftsmanship, in the case of furniture, its utilitarian or functional appeal should not be the primary inducement to its acquisition, and he submitted that the forms and cards in this case are acquired solely for utilitarian purposes and are entirely devoid of the slightest element of artistic quality. Finally, Mr. Nazareth submitted that these forms and cards had been commissioned, and that the copyright therein, if any existed, had transferred to the purchaser, under s. 11 of the Act. On this last point, I agree with Mr. Le Pelley, and the judge, that no question of commissioning arises in this case. In my view, when a work is commissioned, a contract comes into existence, and the customer is bound to accept and pay for the end product, provided of course there has been no total failure of consideration or other factor justifying rescission of a contract. In this case, no obligation is incurred by the customer when the forms and cards are designed and produced; he is entitled to reject them and refuse to pay for them if he so wishes. It is only if he accepts them, after they have been produced, that a contract arises and he is under an obligation to pay. I am satisfied that no transfer of the copyright in these forms and cards took place in this case, if copyright existed. The main question in this appeal is whether these forms and cards are eligible for copyright, as being works similar to diagrams. I am satisfied that they are, as was the judge. Each one was designed to meet special accounting requirements and sufficient work was expended on each to give it an original character. These forms and cards are not items of general commercial stationery, as they can only be used by the customers in conjunction with the basic system. As to the interpretation of the definition of artistic works, I am satisfied, as was the learned judge, that the words “irrespective of artistic quality” apply not only to the works specified in the definition, but to works found to be similar thereto. A diagram can be eligible for copyright, and is normally devoid of any artistic or aesthetic quality. The same applies to the forms and cards the subject of this appeal, which I consider were correctly held to be similar to diagrams. They are eligible for copyright, irrespective of artistic quality. The *Hensher* case can be readily distinguished, as it concerned a work of craftsmanship, and to be eligible for copyright, such a work must be of “artistic craftsmanship”, see paragraph (*f*) of the definition of “artistic work”. Some artistic or aesthetic element must therefore exist in a work of craftsmanship, but no such requirement exists in respect of a diagram or work similar thereto. In *Van Oppen & Co. v. Leonard Van Oppen* (1903), 20 R.P.C. 617 a specially designed form of consignment note was held to be eligible for copyright, and in *Walker* (*Charles*) *v. British Picker Co*., [1961] R.P.C. 57 a parcel label was likewise held eligible. Both these forms were forms in common commercial use which had acquired an original character as a result of work expended on them. The same applies in my view to the forms and cards the subject of this appeal. They resulted from the exercise of thought, work and ingenuity which has given them an original character in that they are of no use except to the customers who make use of the basic system. When these forms and cards were copied by the appellant, this was done for those self-same customers, as is apparent from the fact that the names of those customers appear at the head of the pirated forms. They were not copied by the appellant for resale as ordinary commercial forms in general use. For these reasons I agree with the judge that the forms and cards, the subject of this appeal, are artistic works within the meaning of the Act, that they have acquired an original character as a result of sufficient work being expended on them, and have been reduced to material form. I would dismiss this appeal. **Sir William Duffus P:** The facts have been fully set out in the judgment of Law, J.A. The respondents claim a breach of copyright of different accounting forms or cards. The trial judge found that the respondents had copyright in several of the various forms tendered in evidence and ordered an injunction to issue to restrain the appellants from reproducing, selling or distributing any of these forms. Various accounting forms were considered during the trial and these forms may be considered under three heads: (*a*) general stationery, or general printing, in respect of which clearly no copyright exists, (*b*) “the system forms”: these are the forms devised by the respondent and used in their general system of accounting as sold to the public. The “system” consists of a loose-leaf binder containing the journal sheets, and a “Posting Tray” in which the ledger cards and statements are kept. The main advantage of this system is that by using a flat piece of board with studs called the Collator, three sheets of paper consisting of the customer’ statement, the ledger account and the journal are all written in one operation. These sheets have punch holes which fitted into the studs of the Collator. (*c*) The third type of forms were the “special” forms prepared for individual customers to suit their particular needs. The Copyright Act (Cap. 130) affords protection to original works coming within the requirements of s. 3 of the Act. The relevant portion of which states:

“3. (1) Subject to this section, the following works shall be eligible for copyright– (*a*) literary works; (*b*) musical works; (*c*) artistic works; . . . . . .

2) A literary, musical or artistic work shall not be eligible for copyright unless– (*a*) sufficient effort has been expended on making the work to give it an original character; and (*b*) the work has been written down, recorded or otherwise reduced to material form.” The respondents claimed and the judge found that the accounting forms in this case came within the definition under the sub-head “artistic works”. The issues on this aspect of the appeal were whether these forms were first “artistic works” and then whether they complied with the requirements of sub-s. (2)(*a*) of s. 3, i.e. whether sufficient effort had been expended on making the work to give it an original character? Artistic work is defined in the interpretation section as, *inter alia*– “means, irrespective of artistic quality, any of the following, or works similar thereto– (*a*) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; (*b*) maps, plans and diagrams; . . . . . . (*f*) works of artistic craftsmanship, and also, subject to section 3 (3) of this Act, pictorial woven tissues and articles of applied handicraft and industrial art;” The trial judge in finding that the respondents had copyright to the various forms held: “Mr. Nowrojee draws my attention to the use of the word ‘means’ instead of the more common ‘includes’ in definition. I agree with him that this implies that only the items actually listed are within the definition and that nothing else can be. But I think he has omitted to look at all the opening words of the definition. These are: ‘ “artistic work” means, irrespective of artistic quality, any of the following’. If the expression had stopped here, Mr. Nowrojee’s argument would have been perfectly sound. But the opening words and with the following words: ‘or works similar thereto’. This, I think, clearly means that ‘artistic work’ includes not only ‘drawings’, and ‘diagrams’ but also ‘works similar thereto’. The last words have more or less the same effect as the use of the word ‘includes’ would have had. I have, therefore, no doubt that the accounting forms in question are ‘artistic work’.” The judge held here that the accounting forms came within the definition of an “artistic work” as they were works similar to a plan or diagram as described in the definition of “artistic work”. By the words “similar thereto” the legislature must have meant that the work in question although not strictly a plan or a diagram were works having a marked resemblance or likeness to a plan or diagram and were works of a like nature. A diagram is perhaps a more appropriate word here but can it really be said that there is any similarity between these accounting forms and a diagram? I would first examine what I have called the “system” forms. These are the accounting forms used by the respondents in its general accounting system and consists of the various forms in exhibits 3, 4 and some of the forms in the annexure “A” of exhibit 7. It is necessary before finding copyright in any document to carefully examine each of the documents in which copyright is claimed. Exhibit 3 consists of two large sheets of paper. One is a general sheet which fits in to the large binder in evidence as exhibit 2 and also a large sheet of a loose-leaf ledger. Exhibit 4 is what the respondents claim is its new “Kalamazoo Compact Accounting System” and this consist of the binder for the journal containing various journal accounts, several examples of the loose-leaf ledger cards and an example of the statement. All three forms fit through the punch holes on to the Collator with its studs. One of these Collators is included in exhibit 4. All the three sheets fit together so that one entry made on the statement is reproduced in its proper line on the ledger sheet and on the journal sheet. The “system” forms in exhibit 7(A) are of the same type as those appearing in exhibit 3 and 4. The issue at first is whether these account forms or cards of the general system of accounting can be included in the definition “artistic works”. These forms are account sheets consisting of headings of the columns at the top of the sheets and then there are the columns for the proper entries to be made. There are straight lines dividing the headings into columns and the series of punch holes on one side for these sheets to fit into the Collator and also into the binder for the journal sheets. The headings are ordinary account headings such as are used in any account and are in effect the date, the details, the value of the transaction and the balance with a column for a reference number. The journal itself has a blank sheet on the right hand side with several columns which can be used to break down entries in the journal into further details if desired. There is nothing original in any of the headings of the columns. They appear to be headings common to any simple book-keeping account and hardly carry the originality needed by the copyright Act. The lines are only simple lines marking out each column more effectively. The binder system and the use of Collator and the punch holes are most ingenious but these could hardly, in my view, be the subject of copyright although they might claim protection under the law relating to patents. The idea of writing three forms in one operation is fairly common and Mr. Hatt the sales director of Taws Limited, one of the respondent companies agrees to this. I am of the view that these forms and accounts forming part of the accounting system do not come within the meaning of “artistic works” and cannot be protected by the Copyright Act. I am further of the view that these forms and cards in exhibits 3, 4 and part of 7(A) cannot be said to be of an original character so as to come within the meaning of s. 3 (2) (*a*). I have no doubt that much work and expert knowledge must have gone into preparation and design of the binders and the Collator and the “system” but I can find no originality in the actual accounting sheets or cards for which protection is sought. They appear to me to be ordinary and general accounting forms but made to a specific size and punched in a particular manner. The actual headings columns could be easily changed or varied to suit any particular system and are not such as would be protected by the Copyright Act. The purchaser of the system which includes the binder, the Collator and the ledger posting tray must be able to have subsequent sheets prepared either by himself or by another printer, otherwise if the respondents were unable or refused to supply any further account sheets or cards or charged some quite exorbitant rate, the whole system could become useless to the purchaser. These forms or cards are merely forms to be filled in and used by the purchaser to keep his accounts. There are no unusual arrangements in the forms in themselves. In my view these simple statements, ledger or journal sheets could not possibly be described as “literary” or “artistic works” within the meaning of the Copyright Act. Numerous decisions were cited to the court but none really deal with the issue as to whether a copyright can exist in an accounting form. The old English case of *Hollinrake v. Truswell*, [1894] 3 Ch. 420 refers with approval to an American case of *Baker v. Selden* (11 Otto, 103) and the following reference by Davey, L.J. is of some interest here. He said: “I agree with what is said in an American case of *Baker v. Selden*: ‘Where the art cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.’ In that case it was held that a man could not have copyright in the model pages of an account book contained in a work explaining a peculiar system of book-keeping.” In the case of *Libraco v. Shaw Walker* (1913), 30 T.L.R. 22, Warrington, J. said in considering a case in which copyright was claimed in a card index system: “. . . that the question which he had to determine was whether the alleged subject matter of copyright was or was not a ‘literary work’ within the meaning of section 1 of the Copyright Act, 1911. By section 35 of that Act ‘literary work’ included maps, charts, plans, tables, and compilations. It was clear that a card, if the matter written on it was capable of copyright, might be a ‘literary work’ – the mere fact that it was a card would not prevent its being the subject of copyright. Was this an original literary work? In his Lordship’s opinion it was impossible to hold that it was. It was part of an outfit, and by itself useless and conveyed no meaning. There was no unusual arrangement of words on the card; simply the words ‘name’, ‘address’, and other words which might be used by anybody.” These two cases and other cases quoted to us are based on English law and show how the courts in England dealt with the particular facts in each case. Our law is different in detail but the main basic principles of the law of copyright are the same. There are no East African cases that would assist us in considering the facts of this case. This case must be decided in accordance with our law and on the facts as established by the evidence. The “special” forms ordered and prepared for individual customers have to be separately considered. The judge found that the respondents had copyright in the special forms. These “special” forms appear to vary from fairly simple bank lodgment forms to the much more complicated forms prepared for the General Post Office. There can be no doubt that the preparation of some of these forms must have entailed much work and research, they were prepared for special customers to fit their requirements. Even, however, if copyright does exist in these forms, the question further arises whether ownership was vested at the time of the trial in the respondents or in the customer for whom the forms were produced. I would first consider this point. S. 11 of the Copyright Act applies and this states:

“11. (1) Copyright conferred by sections 4 and 5 of this Act shall vest initially in the author: Provided that, notwithstanding section 12(6) of this Act, where a work– (i) i s commissioned by a person who is not the author’s employer under a contract of service; or ( ii) not having been so commissioned, is made in the course of the author’s employment,) the copyright shall be deemed to be transferred to the person who commissioned the work or the author’s employer, subject to any agreement between the parties excluding or limiting such transfer. ( 2) Copyright conferred by section 6 of this Act shall vest initially in the Government or such international bodies or other government organizations as may be prescribed, and not in the author.” Then the relevant portion of section 6 states: “6. (1) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the Government and also such international bodies or other governmental organizations as may be prescribed.”

This issue was raised by the defence and also raised and argued at the trial and before us. The judge considered this question and found *inter alia*, at p. 244: “We do not know whether the forms which are the subject matter of this suit were ‘commissioned’ within the meaning of section 11. No evidence on this exact point has been produced. The plaintiffs’ witnesses have stated, however, that when they are approached by customers they design forms to meet their requirements, but that in the end the customer is free to say that he does not want the forms and he is under no obligation to pay for the labour and skill used. I cannot hold, therefore, that the forms in question were commissioned by anyone. The person or firm or organisation for whom forms are produced in these circumstances can of course, not be said to be the plaintiffs’ employer within section 11.” With respect to the judge evidence was given by both Mr. Hatt and Mr. Cresswell for the respondents on this point. From their evidence the position appears to be that the special forms are in fact ordered by the customer. They are then drafted and submitted for the customer’s approval. If they are approved by the customer and the customer places an order, the forms are then produced and purchased by the customer. No charge is made for the designing of the form or for any advice on the matter. The respondents make their profit from the supply of the forms and from any equipment sold to be used with the forms. In this case it appears to have been accepted generally that the respondents did produce these various forms for the customer and that in each case an order was placed and supplied to the customer. The evidence also shows that the respondents made an extra charge on the first order to cover the cost of the manufacture of a plate for the printing of the forms. There has been no suggestion in this case that the appellants stole or copied the respondents’ draft forms. The respondents’ claim is that the appellants copied these forms after they had been printed. In other words that the appellants secured a repeat order for the supply of fresh forms and thereby deprived the respondents of themselves obtaining the repeat order. The order for the special work would therefore appear to have been done in two stages. First the tendering and the acceptance of a draft of the required forms. At this stage the customer would be under no liability to pay for the planning and designing of the forms and then followed the second stage and that is the placing of a firm order for the supply of a quantity of the special forms. There would then be a valid contract between the respondents and the customer for the supply of these according to the design as ordered by the customer. In my view at this stage the commissioning of the special work would be complete and according to s. 11 the copyright would be deemed to be transferred to the customer subject to any agreement between the parties excluding or limiting such transfer. There is no evidence that there was any such special agreement and accordingly I am of the opinion that on the evidence in this case the copyright would be deemed to be transferred to the customer. I agree therefore with Spry, V.P. that on the evidence here the respondents would not be the owners of the copyright in these special forms and could not therefore in any event, maintain this action for a breach of copyright in these forms. A copyright in the forms, if copyright exists, would be vested in the customer and it does not really matter whether they were a company or a Government organisation within the meaning of s. 6 of the Act. I would therefore allow the appeal and as Spry, V.P. agrees the appeal is allowed with costs to the appellants. The judgment and decree of the High Court are set aside and in lieu thereof the suit in the High Court will be dismissed with costs on the higher scale and as both Spry, V.P. and Law, J.A. agree there will be a certificate for two advocates on the appeal. **Spry V-P:** This appeal involves three questions: first, whether there can be any copyright in accounting forms; secondly, if there can, whether the forms with which we are concerned are eligible for copyright and, thirdly, if so, in whom that copyright is vested. The first question depends on the interpretation of “artistic work” in s. 2 (1) of the Copyright Act (Cap. 130). Mr. Nazareth submitted that the words “irrespective of artistic quality” do not govern the words “works similar thereto”. With respect, I cannot agree. I think those words govern everything that follows in the definition, except for paragraph (*f*), where the artistic element is expressly re-introduced. I think accounting forms may fall within, although perhaps only just within, the definition by virtue of paragraph (*b*), as being in the same general category as plans and diagrams. We are not concerned, as would be a court in England, with the question whether they are registrable as designs. I think it is immaterial that they are not complete in themselves but are of value only when used. Neither of the advocates who addressed us placed any reliance on the English case of *Football League v. Littlewoods Pools*, [1959] 2 All E.R. 546 but while I would agree that it is easily distinguishable, I find the reasoning behind the judgment of Upjohn, J., helpful. That case concerned a list of football fixtures. The actual preparation of the list was a mere clerical function. The information it contained could not be the subject of copyright. Yet despite these facts, the plaintiff company succeeded because of the skill, labour, time, judgment and ingenuity that had gone into the planning of the fixtures. Similarly, accounting forms consist merely of lined sheets bearing words of ordinary day-to-day use. They may be part of a system, but the system itself cannot be the subject of copyright. But time, skill and ingenuity may have gone into the composition of the forms. Indeed, the very art of designing forms is to achieve the end sought with the greatest simplicity. There may be originality in their lay-out. I would hold, therefore, that the learned trial judge was right in holding that forms might be eligible for copyright. Mr. Nazareth also argued, on grounds of public policy, that copyright ought not to be allowed in forms that are in day-to-day use, because the first designer of a form could then achieve a monopoly of them. I do not think there is any substance in this. A person precluded by copyright from copying any particular forms could go to a rival producer and obtain comparable forms to meet his needs. Copyright in a form does not mean, as Mr. Le Pelley readily conceded, that another form cannot be designed to serve the same purpose. As regards the second question, I think it is necessary to divide the forms with which we are concerned into two classes. The respondents, to whom it is convenient to refer collectively, have a set of forms which give effect to their basic system of accounting. These are available for purchase by anyone. Some potential customers, particularly large organisations such as the Post Office and the Kenya Meat Commission, require more elaborate and complex forms to meet their particular needs. I have no doubt that a great deal of work and thought went into the design of the general forms, but I am not persuaded, either from a study of the oral testimony or by inspecting the exhibits, that they have sufficient originality to be eligible for copyright. It is otherwise with the forms produced for particular customers. These are produced only after a study of each business concerned, its methods and its accounting needs. The forms prepared for one business would normally be of no use for another, except possibly where the nature of the business was very similar. I am satisfied that these forms are the result of time, skill and ingenuity and have sufficient originality to be eligible for copyright. I think there is no copyright in Exhibits 3, 4 and some of the forms included in Exhibit 7 but that there is copyright in all the other forms. I turn now to the final question, in whom is vested such copyright as exists. The way the forms were produced appears to have been as follows. There would be discussions between a representative of the respondents and a potential customer. The representative would then sketch out modified forms adapted from the basic system. There would be further discussions, sometimes resulting in modifications. The respondents would then produce a photoproof, and sometimes, in difficult cases, a second photoproof. This seems to have been the critical moment. The potential customer was free to say, without any financial obligation, that he did not wish to adopt the system and that was the end of the matter. If, however, he liked the system, he would place a firm order and the necessary forms would be printed. At some stage, a printing plate was prepared. It is not entirely clear from the record when this was done but I think it must have been when the order for printing was placed. The problem is, when copyright arises. If the forms are to be regarded as commissioned, the original copyright belongs, under s. 11 of the Act, to the persons for whom the forms were prepared, otherwise it belongs to the respondents. The various draft forms were, in my opinion, certainly not commissioned, because I accept Mr. Le Pelley’s submission that the word “commissioned” connotes a contractual relationship. I think, however, that the printed forms were commissioned at the time when the order for printing was placed and the printing plates (for which the customer was charged) prepared. I should have found this a very difficult decision in the absence of authority but I think there is persuasive authority in the English case of *Con Planck v. Kolynos*, [1925] 2 K.B. 804. That decision is nearly fifty years old and does not appear to have been challenged. It is unfortunate that it was not cited during the hearing of the appeal and therefore that we did not have the benefit of hearing argument on it, but it does appear to me to have been based on substantially similar facts. There, a sketch was offered to a potential customer, modified in accordance with its requirements and a plate prepared after an order for a number of copies had been placed. It was held that the sketch as printed was an engraving and that in the absence of any agreement to the contrary, the original copyright was in the persons by whom the copies were ordered. There is no suggestion in the present case that there was any agreement between the respondents and their customers as regards the copyright. To sum up: I would hold that there was no copyright in the general forms and that the copyright in the special forms was vested in the persons for whom they were prepared. I think, therefore, that the respondents had no right of action and I would allow the appeal and set aside the judgment and decree of the High Court and substitute an order dismissing the suit with costs. *Appeal allowed.* For the appellant: *JM Nazareth, QC* and *J Rayani* For the respondents: *P Le Pelley* (instructed by *Hamilton Harrison & Mathews*, Nairobi)