



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 410 OF 2016

In the matter of contravention of Articles 19, 25, 28, 31 and 40 of the Constitution of Kenya 2010

and

**In the matter of Constitution of Kenya Rights enshrined in chapter four thereof in so far as the
Petitioner's Constitutional Rights were infringed**

and

In the matter of Nairobi City County Finance Act

and

In the matter of constitutional petition by:-

JESSICAR CLARISE WANJIRU.....PETITIONER

VERSUS

DAVINCI AESTHETICS & RECONSTRUCTION CENTRE.....1ST RESPONDENT

DR. NANG'OLE WANJALA.....2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....3RD RESPONDENT

JUDGEMENT

1. It is axiomatic that the **right of publicity**, often called **personality rights**, is the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's [identity](#). It is generally considered a property right as opposed to a personal right.

2. Personality rights are generally considered to consist of two types of rights: the right of publicity, or to keep one's image and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a [trademark](#); and the [right to privacy](#), or the right to be left

alone and not have one's personality represented publicly without permission. In [common law](#) jurisdictions, **publicity rights** fall into the realm of the [tort](#) of [passing off](#).

3. A commonly cited justification for this doctrine, from a policy standpoint, is the notion of [natural rights](#) and the idea that every individual should have a right to control how, if at all, his or her "[persona](#)" is commercialized by third parties. Usually, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of [commercial speech](#).

4. The uncontested facts of this case are that in or July 2016, the first Respondent used the petitioners image in its Bill Boards erected along Kenyatta Hospital Road in Nairobi advertising reconstruction and plastic surgery. A similar advertisement appeared in its website *www.da-vinci.ke*.

5. The petitioner denies ever granting her consent to the use of her image and avers that the first and second Respondents have continued to benefit financially from using the said images to promote their work, hence economically exploiting the petitioner. The petitioner also avers that third Respondent has also benefitted financially from levies imposed on Bill boards within Nairobi County.

6. The petitioner maintains that the use of the Bill boards for commercial gains is a violation of her rights to property under article 40 of the constitution, hence the reliefs sought in the petition.

7. The Respondents response is contained in the Replying affidavit of **Dr. Ferdinard Nangole Wanjala** filed on 18th November 2016, the crux of which is that he is not a director of the first Respondent, hence he has been wrongfully enjoined, and that on or about November 2015, they decided to set up a website for their business. They engaged the services of a one Tony Bogoko, a designer trading as loopah Experience.

8. He avers that the designer gave them a quotation and they agreed on a working plan for him to develop their website including logos, and upon payment he commenced the work and as he was about to finish, they noticed that he had used part of a female's face and upon inquiring he informed them that it was proper to use someone's face. He further informed them that the lady was his girl friend and that he had obtained her consent and approval before using her face on the website.

9. Satisfied with the said explanation and with no reason to doubt it, they asked the designer to improve website, but upon failure to do so, they terminated the services of the designer on 14th April 2016 and on 16th April 2016, the designer wrote to them confirming that he had terminated the website and that the same was no-longer accessible by the general public.

10. He further avers that, prior to the termination, they had also engaged an outdoor advertisement agency, Discovery Media Services, who set up four lamp posts long hospital road from the beginning of July 2016. He relied on the above information, but upon receiving a demand letter from the petitioners advocates, they pulled down the Bill boards and cancelled the advertisements. Despite having pulled down the advertisements, they were sued in these proceedings on 7th October 2016.

11. He denies malice, bad faith or ill will and insists that this suit is a scam between the designer and the petitioner to extort money from the Respondents. He adds that this petition was filed after a failed attempt by the petitioner to obtain **Ksh. 1,837,000/=** from the Respondents and further, the petitioner herein has approached the court with unclean hands having failed to disclose that the designer was her boy friend.

12. The Respondents application also to enjoin the said Tony Bogonko T/A Loopah Experience as an interested party was allowed by consent on 6th February 2017. However, there is nothing to show that the intended interested party was served.

13. The crux of the submissions by counsel for the petitioner is that no consent was sought and obtained from the petitioner and that there was "injury to her person and exploitation, and, that she suffered emotionally.

14. The Respondents counsel submitted that the petitioner has not established violation of her rights,^[1] that the provisions of the constitution alleged to have been violated have not been set out and that the violations have not been particularized and reiterated that the petitioner did not prove that she suffered any damage.^[2]

15. The following passages from two decisions by the European Court of Human Right are worth quoting:-

"[A] person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof ..."^[3]

"[F]reedom of expression includes the publication of photos ... This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family ..."^[4]

16. The right to privacy is guaranteed under Article 31 of the Constitution of Kenya. Privacy has been defined as "The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."^[5] In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy.

17. In simple terms, image rights refer to a person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them. In a claim of this nature, the plaintiff raises wrongful infringement of three inter-related, but distinct, personality interests, namely identity, privacy and dignity.

18. Identity is defined as a person's uniqueness which individualizes such person, and is manifested in various facets of personality (*or indicia*) which include, among other things, one's physical appearance or image and is considered a separate right of personality.^[6]

19. Features of a person's identity have been held to be deserving of legal protection.^[7] Identity is infringed by the falsification of a person's true image or identity. A recognized form of falsification occurs where a person's image is used or appropriated without his or her permission for advertising purposes, creating the false impression that such person has consented to such conduct or supports the advertised product, service or business.^[8]

20. But an infringement of identity may also, although not necessarily, be accompanied by an infringement of privacy. The concepts of privacy and identity are closely related. A breach of privacy

occurs when there is a disclosure of true facts to outsiders contrary to the determination and will of the person concerned. A right to privacy encompasses the competence to determine the destiny of private facts, and the individual concerned is entitled to dictate the ambit and method of disclosure of such facts.^[9]

21. Academic writers are divided as to whether it is the right to privacy or identity that is primarily violated when a person's image is used without permission for advertising purposes. Professor McQuoid-Mason contends that such use is a violation of a person's right to decide for themselves who should have access to their image and likeness – something that goes to the root of individual autonomy or privacy.^[10] Professor Neethling holds, to the contrary, that it is primarily the right to identity that is infringed in such circumstances.^[11] For present purposes it is unnecessary to resolve these differences.

22. As the South African court authoritatively put it:-

"... The unauthorized publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's dignitas. It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like. ... " ^[12]

23. 'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.

24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual.

25. A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.^[13]

26. Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one's image, likeness or persona include but are not limited to name, face, body or recognizable body part, voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action, costume or personals signature.

27. Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right of privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain.

28. The tort of misappropriation of personality was first introduced in Canada in the case of *Krouse v. Chrysler Canada*.^[14] The tort can be expressed by stating that every individual has an exclusive right to market, for financial gain, their personality, image and name, and that the law entitles an individual to protect that right, if it is invaded. The tort of misappropriation of personality can be invoked when all of the following four elements are met:-

i. There is an element of commercial exploitation of a person's personality. There must be a sufficient link between the individual and the exploiting medium to establish that the plaintiff's personality was "used" for the defendant's commercial gain.

ii. The person is clearly identifiable in the medium used and to their respective community or communities.

iii. The person does not consent to the use of their personality.

iv. Damages, either emotional or financial losses, are proven (although recent judicial rulings would indicate the right of privacy is recognized even in the absence of damages).

29. Emerging case law has developed two torts that allow for an individual to seek damages for the use of their personal image: the "misappropriation of personality" and the "passing off" of personality.

30. A clearly illustration is the U.S. case of *Weller vs Associated Newspapers Limited*,^[15] where in a land mark judgment, the court identified the following issues, namely:-*Was there a reasonable expectation of privacy;" If so, how should the balance be struck as between the Claimants' rights to privacy on the one hand and the Defendant's right to publish on the other," Did the publication amount to a breach of the law," What relief were the Claimants entitled to"*

31. The court^[16] considered the relevant legal principles^[17] and reached the following conclusions amongst others, namely:-

i. *what the publisher knew, and ought to have known, was relevant to whether there was a reasonable expectation of privacy.*

ii. *the fact that it was lawful to take the photographs would be taken into account when assessing the legal tests in the case. Whether it was lawful to publish them did not determine either the first or second tests that had to be applied.*

iii. *the authorities establish that a person's image constitutes one of the chief attributes of his personality.*

iv. *when considering the rights of children in this area courts should accord a primacy of importance to their interests.*

32. From the above leading decisions on the subject, the key elements of a Claim for unlawful use of Name or image which a petitioner must establish to succeed in a case of this nature are:-

a. Use of a Protected Attribute: *The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.*

b. For an Exploitative Purpose: *The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.*

c. No Consent: *The plaintiff must establish that he or she did not give permission for the offending use.*

33. This third test has not been established to the satisfaction of the court. The petitioner alleges she did not give consent at all while the Respondent states that he contracted a designer to do the work and that the designer informed him that he had used the image of his girl friend. It is important to note that petitioner did not rebut these allegations nor did she find it fit to file a supplementary affidavit to shed light on this issue or even deny the allegations or cast doubts. Instead, she opted to leave it to the court to weigh the two accounts. In my view, she had a duty to discharge the burden of prove and prove to the court beyond doubt that she did not grant consent nor did she authorize the designer to use her image.

34. It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[18] The standard of proof is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,^[19] Lord Denning said the following about the standard of proof in civil cases:-

'The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

35. In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

36. The Respondent also stated on oath that the said designer attempted to extort money from them and after this did not work this case was filed by the petitioner in collusion with the designer. The petitioners failure to respond to such serious allegations casts doubts on whether or not the photographs were published without her consent.

37. The Respondents successfully applied to enjoin the designer as a party, but he was not served. To me, the presence of the designer in these proceedings was of great value to the petitioner who had a burden of proving that there was no consent at all.

38. From the material before me, there is absolutely nothing to demonstrate that the petitioner has discharged her burden of prove to the required standard on the question of whether or not there was a consent. I find that there is no sufficient evidence to demonstrate absence of consent on the part of the petitioner.

39. Similarly, I find no material before me to prove a case against the third Respondent. The fact that the third Respondent licenses and grants permission for erecting Bill boards is not sufficient to hold them liable nor has it been shown that its role includes ascertaining whether or not the advertiser has sought the consent of the persons whose image is used.

40. Thus, in view of my finding above, I find that the petitioner has not established liability against the Respondents to the required standard.

41. On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[\[20\]](#)

42. From the material presented in this case, the evident lack of clarity as to whether or not there was consent and considering the swiftness with which the bill boards were removed I find that there is no material before me to demonstrate that the petitioner suffered any loss.

43. Accordingly, I am compelled to conclude that the petitioner has not proved her case to the required standard. Consequently, I dismiss this petition with no order as to costs.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this **21st** day of **September** 2017.

John M. Mativo

Judge

[\[1\]](#) Counsel cited the tests laid down in *Karimi Njeru vs A.G* {1979} KLR 54

[\[2\]](#) Charles Muturi Macharia vs Standard Group & 4 Others {2017}eKLR cited.

[\[3\]](#) Von Hannover v. Germany (no. 2), Grand Chamber judgment of 7 February 2012, § 96.

[\[4\]](#) Von Hannover v. Germany (no. 2), Grand Chamber judgment of 7 February 2012, § 103

[\[5\]](#) The Right to Privacy in Nigeria Review of Nigerian Law and Practice Vol. 1(1) 2007

[\[6\]](#) Neethling's "The Law of Personality" (2ed) (2005) 36.

[\[7\]](#) (see *O'Keeffe v Argus Printing & Publishing Co Limited and Another* 1954 (3) SA 244 (C).; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 386G.; *Bernstein v Bester* 1996 (2) SA 751 (CC) para 65; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (CC) para 28.; *Grütter v Lombard and Another*, 2007 (4) SA 89 (SCA).

[7] PPJ Coetser: “Die Reg op Identiteit (1986) 146; Neethling’s “The Law of Personality”(2 ed) pp 255-257; see also Neethling: “The Concept of Privacy in South African Law 122 (2005) SALJ 18 at 24.

[\[9\]](#) *National Media Limited and Another vs Jooste* 1996 (3) SA 262 (A) at 271C-H).

[\[10\]](#) D McQuoid-Mason, “Invasion of Privacy: Common Law v Constitutional Delict – Does it make a difference” 2000 *Acta Juridica* 227 at 231.

[\[11\]](#) Neethling: “The Concept of Privacy in South African Law” op cit 24.

[\[12\]](#) *O'Keeffe vs Argus Printing & Publishing Co Limited and Another*, Supra

[\[13\]](#) *Von Hannover v. Germany* (no. 2), Grand Chamber judgment of 7 February 2012, § 96

[\[14\]](#) {1974} 1 O.R. (2d) 225

[\[15\]](#) [2014] EWHC 1163 (QB), High Court (QBD) Judge Dingemans J, Date of Judgment 16 Apr 201

[\[16\]](#) Mr Justice Dingemans

[\[17\]](#) Paragraphs [15]-[79]

[\[18\]](#) Koinange and 13 others vsKoinange {1968} KLR 23

[\[19\]](#) {1947} 2ALL ER 372

[\[20\]](#) *Mbogo & Another vs Shah*{1968} EA 93



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