



**Mako v Mycredit Limited (Constitutional Petition E011 of 2023)  
[2024] KEHC 12069 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CONSTITUTIONAL PETITION E011 OF 2023**

**F GIKONYO, J**

**SEPTEMBER 30, 2024**

**IN THE MATTER OF ALLEGED THREAT TO AND CONTRAVENTION OF  
ARTICLES 19,20,21,22,23,24,25(C), 27, 28, 31, AND 47 OF THE CONSTITUTION.**

**BETWEEN**

**RORAT OLE MAKO ..... PETITIONER**

**AND**

**MYCREDIT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide petition dated 7<sup>th</sup> August 2023, the Petitioner seeks the following reliefs from the court;
  - i. An order of permanent injunction directed at the respondent either by themselves or their agents and/ or employees restraining them from further engaging and/ or conducting an unauthorized and/ or publication of the petitioner’s photographs, image, and/ or likeness in any platform.
  - ii. A declaration do issue that the respondent’s actions and/ or decision in using the petitioner’s photographs, image, and/or likeness on their website and brochures distributed in their branches including the Narok branch without the petitioner’s consent and/ or authority for purposes of advertisement of their banking services violated and/ or infringed the petitioner’s right to privacy as enshrined in article 31 of *the constitution* of Kenya, 2010.
  - iii. A declaration do issue that the respondent’s actions and/ or decision in using the petitioner’s photographs, image, and/ or likeness on their website and brochures distributed in their branches including the Narok branch without the petitioner’s consent and/ or authority for purposes of advertisement of their banking services violated and/ or infringed the petitioner’s right to inherent dignity enshrined in article 28 of *the constitution* of Kenya, 2010.



- iv. A declaration do issue that the petitioner is entitled to damages and/ or compensation as a consequence of the said violations of the petitioner's constitutional rights as enshrined in the constitution of Kenya, 2010.
- v. Interests on damages and/ or compensation at court rates from the date of the filing of this petition until payment in full.
- vi. That the respondent do pay the costs of this petition to the petitioner plus interest thereon at court rates.

## **Background**

2. The petitioner is aggrieved by the infringement of his image rights, right to privacy, and breach of human dignity. On diverse dates in the years 2022 and 2023, the respondent without any authority and/ or consent from him or his agents used the petitioner's image and/ or likeness on their website and brochures for purposes of advertisement of their banking services in their head office and various branches including their branch in narok town at Olmaa building.
3. The said photographs were taken between 2021 while working at Cottars luxury camp in Maasai Mara in narok county and at no time did he authorize the respondent to use his image, likeness, and/or photograph for any purpose.
4. The unauthorized and exploitative commercial use of the petitioner's image was aimed at advertising the respondent's banking services, especially during the opening of the narok branch.
5. The petitioner visited the narok branch office and sought an explanation for why his image was used to advertise the respondent's banking services without his authority. The respondent informed him that the said photograph was purchased from a third party whom they refused to disclose.
6. The petitioner further wrote a demand letter dated 17/07/2023 but the respondent never responded to the said letter.

## **Supporting affidavit**

7. The Petition is supported by the supporting affidavit sworn on 07/08/2023 by Rorat Ole Mako, the Petitioner herein wherein he deposed that the Respondent used the photograph without his consent.
8. He deposed that after the respondent refused to acknowledge using his image in advertising its banking services, he wrote a demand letter dated 17/07/2023 through his advocates on record. The letter was duly served upon the respondent through their official email (talktous@mycredit.co.ke) and office line via WhatsApp 0799707100 on 18/07/2023. The respondent never responded to the said letter.

## **Replying affidavit**

9. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 27/10/2023 by its managing director Wangaruro Mbira. He deposed that the petitioner had not produced sufficient material to link him with the impugned image. The petitioner has also not shown that the impugned image was used for commercial gain by the respondent.
10. The respondent contends that the image only appeared on a sample brochure which was presented for verification before final publication. The same was not circulated to the public as the petitioner raised a complaint through third parties prior to verification the respondent's officers froze any publication of the said sample brochures.



11. The respondent contends that the entire petition is unfounded, incompetent, misplaced and premature and the same ought to be struck out in limine with costs to the respondent.

### **Directions of the court**

12. The Petition was disposed of by way of written submissions.

### **Submissions**

#### **The petitioner's submissions.**

13. The Petitioner submitted that this court has the requisite jurisdiction to entertain the petition herein. The petitioner relied on articles 22, 23, 28, 31, and 165 of *the constitution*, and A.O.O & 6 Others v Attorney General & Another [2017] eKLR.
14. The petitioner submitted that he did not grant his consent to the use of his image and the respondent continues to benefit financially from using the said image to advertise their banking services hence economically exploiting the petitioner and he was not compensated. The petitioner urged this court to grant the declarations that his rights to privacy and human dignity were violated and proceed to award compensation for the same to the tune of Kshs. 5,000,000/=. The petitioner relied on articles 22,23,28, 31, and 165 of *the Constitution*, Michael Leparsaiya v NCBA Bank Kenya PLC & another [2022] eKLR, JW1 & Another v Standard Group Ltd & Another [2015] eKLR, Kenya Human Rights Commission v Communications Authority Of Kenya & 4 Other [2018] eKLR, M W K V Another v Attorney General & 3 Others [2017] eKLR, Section 2, 26, 29 of the *Data Protection Act, 2019*, TOS v Maseno University & 3 Others [2016] eKLR, Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR, Ahmed Issack Hassan v Auditor General [2015] eKLR, Anarita Karimi Njeru v The Republic [1976-1989] KLR 1272.
15. The petitioner submitted that he should be granted compensation for general damages as it is the suitable and effective remedy for addressing a proven violation of a fundamental constitutional right.

#### **The respondent's submissions**

16. The respondent submitted that this Court lacks jurisdiction to entertain this Petition in the first instance and the same is for striking out. The respondent contends that the petitioner has invited this court to be guided by the provisions of the Data Protection Act whereas section 56 of the Data Protection Act gives the data protection commissioner the first jurisdiction to enforce the provisions of the said act as such the petitioner was bound to invoke that forum. The appeals from the data protection commissioner go to the high court. The petitioner has not invoked the jurisdiction of the data protection commissioner at all. The respondent relied on *Mwanzia v Rhodes (Constitutional Petition E115 of 2022)* [2023] KEHC 2688 (KLR).
17. The respondent submitted that the petitioner does not disclose the link between himself and the impugned image. The said issue was raised by the respondent in the replying affidavit and was not controverted. The respondent contends that a third party, Cottars Luxury Camp in Maasai Mara in Narok County took the said image with the consent of the petitioner and was not invited to join the proceedings. The terms of the said engagements are not disclosed. The petitioner alleged the image was taken in 2021 and was not in his custody. The respondent contends that the third party in whose custody the image was had the capacity to deal with the image in a manner that limited the petitioner's rights. The petitioner also does not disclose the specific dates when he discovered the alleged use of the said image. In the petition, he refers to diverse dates between 2022 and 2023 while in the demand



letter, he refers to diverse dates in 2023. No evidence to support his allegations that the respondent used it all over the county on its website and brochures. The petitioner has also not disclosed the dates he visited the respondent's narok offices. Therefore, the petitioner has failed to prove his allegations. The respondent relied on *JMK & another v Standard Digital & another* [2020] eKLR.

18. The respondent submitted that the Petitioner admits that the image was taken by a third party and that he had no control at all over the same. His failure to disclose the terms of engagement with the third party outrightly limited the extent of his claim noting that he is not accusing the Respondent of taking the said image nor obtaining it directly from him. Consequently, having failed to demonstrate his engagements with the third party or limitations thereof the Petitioner cannot claim to have had absolute rights over the said image.
19. The respondent submitted that the petitioner has supplied no proof either documentary or witnesses to show such use of the image for commercial purposes or circulation of the same. Consequently, he failed to prove violations under Article 30 of *the Constitution* together with the provisions of the Data Protection Act.
20. The respondent submitted that the petitioner admitted that he authorized the taking of a photo by a third party as such the same could not have been obtained intrusively, secondly, it did not depict his intimate or personal life. The Petitioner has not disclosed the purpose for which the third party took the image and as submitted above the non-disclosure of the terms of engagement between the Petitioner and third party hence inviting the Court to imply that which the Petitioner himself has intentionally avoided to disclose. Finally, no evidence has been placed before the Court to show dissemination in the form of advertisement. To demonstrate this, whereas the petitioner pleaded that there was dissemination through website and brochures he did not even attempt to annex extracts of the same. The respondent relied on *Wanjiru v Machakos University (Petition E021 of 2021)* [2022] KEHC 10599 (KLR).
21. The respondent submitted that the Petitioner has not explained the factors leading to the claim of Kshs. 5,000,000/= or how he arrived at that amount save to allude to authorities relied on; *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another* [2019] eKLR, *Zipporah Seroney & 5 others v Attorney General* [2020] eKLR. Reliance on the two authorities highlighted above is misleading as the same has no bearing on the claim. The respondent relied on *Christian Juma Wabwire v Attorney General* [2019] eKLR cited the case of Lt. Col *Peter Ngari Kaguma & others v Attorney General Constitutional Application No. 128 of 2006*.

### **Analysis And Determination.**

22. This court has considered the Petition, the affidavits on record, and the submissions of the parties.

### **Issues**

23. The following issues fall for determination by the court: -
  - i. Whether this petition met the legal threshold of a petition.
  - ii. Whether the petition's right to privacy and dignity has been violated,
  - iii. Whether the petitioner is entitled to the reliefs sought in the petition, and
  - iv. Who bears the cost of these proceedings?



## **I. Of the threshold for a constitutional petition**

24. As a bare minimum; a constitutional petition should, with some reasonable degree of precision, identify the constitutional provisions as well as the specific rights that are alleged to have been violated or threatened to be violated, and the manner of the violation and/or threatened violation (*Anarita Karimi Njeru v Republic* (1979) KLR, *Mumo Matemu vs Trusted Society of Human Rights Alliance* [2014] eKLR).
25. This requirement is not merely an embodiment of technicalities. It serves noble legal purposes: Speaks to the constitutional imperative that a party should know the case he is faced with in order to prepare appropriate defense: And, enables the court to discern the cause of action it is trying and duly exercise jurisdiction.
26. This understanding forms the functional foundation for how the court relates to petitions which are devoid of the basic relevant information details, and whether relief may be granted in such petitions.
27. Applying the test: In this petition, the petitioner has alleged that his rights to human dignity, and privacy under Articles 28, and 31 of *the Constitution*, respectively, have been violated by the respondents. The manner of violation was stated to be through the publication of his photograph on the respondent's website and brochures for purposes of advertisement of the respondent's banking services in their head office and various branches including their branch in Narok town at Olmaa building without the petitioner's consent.
28. The petition does not suffer any deficiency or lack of procedural rectitude whatsoever. It passes the *Anarita Karimi* test. But, proof of the allegations, is a different thing altogether.

### **Any proof of violation of right(s)?**

29. The petitioner alleged a violation of the right to human dignity and right to privacy enshrined in article 28 and 31 of *the Constitution*, respectively.
30. The right to human dignity and the right to privacy stand in an almost inextricable inter- relation. See *Matavo J in MWK & Another v Attorney General & 3 Others* [2017] eKLR that: -  
Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy. The rights of equality and dignity are closely related, as are the rights of dignity and privacy.

### **Key elements of unlawful use of image**

31. Of the key elements in a claim for unlawful use of, inter alia image of a person, were discussed in the case of *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR where Matavo J stated:

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: -

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. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial and 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 reasonable relationship between the use of the plaintiff's



identity and a matter of legitimate public interest. No consent: The plaintiff must establish that he or she did not give permission for the offending use.

32. Is there such proof?
33. The specific complaint by the petitioner is the unlawful use of the petitioner's image or likeness on websites and brochures by the respondent for commercial gain.
34. The petitioner contends that on diverse dates in the years 2022 and 2023, the respondent without any authority and/ or consent from him or his agents used the petitioner's image and/ or likeness on their website and brochures for purposes of advertisement of their banking services in their head office and various branches including their branch in narok town at Olmaa building.
35. The petitioner averred that the respondent's action and/or conduct in using his protected image, photograph, and/or personal attribute for exploitative purposes or commercial advertisement without his consent and/or authority is unconstitutional and a violation of his right to privacy.
36. The petitioner adduced photographic evidence to demonstrate that his image was used by the respondents without his consent.
37. The respondent submitted that the petitioner has not produced sufficient material to link him with the impugned image. Also urged that, the petitioner has also not shown that the impugned image was used for commercial gain by the respondent.
38. The respondent contends that the image only appeared on a sample brochure which was presented for verification before final publication. The same was not circulated to the public as the petitioner raised a complaint through third parties prior to verification the respondent's officers froze any publication of the said sample brochures.
39. The respondent contends that a third party, Cottars Luxury Camp in Maasai Mara in Narok County took the said image with the consent of the petitioner and was not invited to join the proceedings. The terms of the said engagements are not disclosed. The petitioner alleged the image was taken in 2021 and was not in his custody. The respondent contends that the third party in whose custody the image has had the capacity to deal with the image in a manner that limited the petitioner's rights.
40. The petitioner has stated that the photograph was taken by Cottar's luxury camp and denies ever giving out any consent for his image to be placed on the websites and brochures by the respondent for advertisements of the opening of their Narok Branch and their services. The respondent seems to suggest that the petitioner ought to have joined Cottars Luxury Camp as a party in these proceedings. Any use of a person's image for exploitative purpose without his consent is an infringement of the right to privacy and dignity. The petitioner's claim is against the respondent whom he accuses of using his image for commercial gain without his consent.
41. The respondent seems to argue that the petitioner gave his consent to Cottars to take his image and use it in a manner that restricted the petitioner's rights. And, that it bought the photo from a third party. Thereby, basing their defense on some alleged assignment of right to justify or lay a basis for using the image. They are making a positive claim which they should prove.
42. The issue is not whether the photo was taken with his consent. But, the twin issues are; whether, he gave consent for his image to be used by the respondent; for exploitative purposes. Here, will be discussed whether the respondent used the image for exploitative purposes.
43. The petitioner was categorical that he did not give his consent to anyone to use his image for commercial purposes. His claim is directed at the respondent who he alleges used his image for commercial



purposes without his consent. His claim is not against Cottars luxury camp. Thus, his claim against the respondent is complete and does not suffer any deficiency as to require the impleading of Cottars luxury camp. For completeness of the argument, the alleged consent or assignment by the petitioner of his right to Cottars luxury camp to use the petitioner's image or offer it to third parties for commercial use would be for the respondent to prove.

44. The question therefore, is whether the petitioner has proved that the respondent used his image for commercial purposes without his consent.
45. Was the picture used by the respondent without the consent of the petitioner? And, was it used for commercial gain by the respondent?
46. The petitioner contends that on diverse dates in the years 2022 and 2023, the respondent without any authority and/ or consent from him or his agents used the petitioner's image and/ or likeness on their website and brochures for purposes of advertisement of their banking services in their head office and various branches including their branch in Narok town at Olmaa building.
47. The respondent contends that the image only appeared on a sample brochure which was presented for verification before final publication. The same was not circulated to the public as the petitioner raised a complaint through third parties prior to verification the respondent's officers froze any publication of the said sample brochures.
48. The petitioner has shown that his image was in the brochures and website for the respondent which were for purposes of advertisement; the effect of which was to inform the public of the opening of a new branch in Narok Town and their services. The petitioner has also proved that, this was done without his consent. he
49. The evidence shows on a balance of probabilities that, the petitioner did not give his consent for his image to be used for exploitative purposes. The petitioner also proved that, the respondent used his image in their websites and brochures for purposes of advertisement of the opening of the new branch at Narok and their services without his consent, which constitutes the infringement of right to privacy and dignity of the petitioner.
50. The Petitioner seeks compensation of Kshs 5,000,000 per violation for violation of image rights, right to privacy, and human dignity as well as breach of data rights. After considering the circumstances of the case, this court finds that the Petitioner has proved that his image was used without his knowledge and /or consent and was an intrusion into his privacy and therefore infringement of the right to privacy, right to dignity, and right to intellectual property.
51. However, it was not clear whether there was such financial gain by the Respondent from the advertisement of the opening of the new branch or that, marketing of the new branch really took place through the advertisements and increased customer base.
52. In the absence of demonstrable financial gain and specific damage or injury, the proposed award of Kshs. 5,000,000/- may not be supported for the infringement of his rights.
53. After considering the mitigation of injury by the respondent in stopping distribution of the brochures, the unlawful use of his image on the websites and brochures would attract a nominal award of damages.
54. The court has found a violation of his constitutional rights. In the circumstances of the case, the court awards nominal damages of Kshs 500,000/- to be paid by Respondent to the petitioner.



## Disposition

55. In the upshot this court hereby issues the following orders;

- i. A declaration is hereby issued that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Articles 28 and 31 of *the Constitution* by publishing the Petitioner's image for the purpose of commercial advertisement without the Petitioner's consent.
- ii. A declaration is hereby issued that the Petitioner's intellectual property rights, right of publicity and personality rights was infringed when the Respondent decided to publish the Petitioner's image in advertising and marketing the computer packages courses offered for financial gain without seeking authority/consent from the Petitioner.
- iii. An order of permanent injunction is hereby issued restraining the Respondent from publishing and/or using the Petitioners' image and likeness in its advertisement or promotion in any way without the Petitioner's consent.
- iv. Mandatory injunction is hereby issued for the respondent to pull down any image or likeness of the petitioner from their websites or brochures or computer programs with immediate effects.
- v. The petitioner is awarded nominal damages of Kshs 500,000/-to be paid by the respondent.
- vi. The costs of the Petition are awarded to the Petitioner.

56. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

- 1.Ms. Ondiek for Abitha for the respondent
2. Masikonde for the petitioner
- 3.Otolo C/A

