



**Kaibos v Ngawa 2019 Assets Limited (Petition E001 of 2023)
[2023] KEHC 22696 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
PETITION E001 OF 2023
CM KARIUKI, J
SEPTEMBER 28, 2023**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 19,
25, 28, 31 AND 40 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA RIGHTS
ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

DANIEL LARAYAN KAIBOS PETITIONER

AND

NGAWA 2019 ASSETS LIMITED RESPONDENT

RULING

1. The Respondent herein filed the Notice of Preliminary Objection dated 24th March 2023 against the Petitioner's petition dated based on the following grounds: -
 1. That the petition does not raise any constitutional issues. Rights to dignity and privacy are facets personality. A person's privacy includes their identity, image, likeness, signature etc. The photograph purportedly used by the Respondent does not include the Petitioner's image, personality or likeness. The advertisement using the said image could be argued as a breach of copyright and therefore no constitutional issue is used in this petition. A constitutional issue is one whose resolution requires the interpretation of the constitution rather than of a statute.
 2. That this honourable court sitting as a constitutional court in this case does not have the jurisdiction to entertain the petition where there exist parallel or alternative statutory remedies that the Petitioner could explore.



3. That the entire petition is fatally defective, is bad in law and should be dismissed with costs to the Respondent.

Petitioner's Submissions

2. On the right to privacy, the Petitioner submitted that in this case the Respondent had an image of the Petitioner's private home taken and used for advertisement without his consent. That a person's privacy includes private family and home life and home life and that means the Respondent's use of the image of the Petitioner's house has resulted in violation of the Petitioner's and his family's privacy rights as people flood at his gate claiming they are visiting the site.
3. It was stated that privacy can be more or less extensive involving a broader range of matters bearing on an individual's personal life. It is not limited to a person's likeness or signature. It also includes his identity which means even his personal space/ his home also defines his identity thus taking a photograph of someone's house and using that image for financial gain without the consent of the owner is interference of the owner's privacy which amounts to violation of his constitutional rights.
4. Reliance was placed on article 31 of the Constitution, Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others [2018] eKLR, JW1 & another v Standard Group Limited & another [2015] eKLR, Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR
5. The Petitioner argued that the Respondent used one of the aspects of his identity which is taking and using the image of his private home and used it for commercial purposes by advertising his business using the said image without the Petitioner's consent.
6. Further, it was averred that this court has the jurisdiction to hear and determine the petition against the Respondent for violating the Petitioner's constitutional right of privacy as per article 23 (1) of the Constitution.
7. Lastly, it was submitted that the petition is not fatally defective as claimed by the Respondent, it is not bad in law and so it should not be dismissed instead the preliminary objection raised by the Respondent should be the one dismissed.

Respondent's Submissions

8. The Respondent reiterated that this petition does not raise any constitutional issue and that the photograph purportedly used by the Respondent does not include the Petitioner's image, personality or likeness. The advertisement using the said image could be argued as a breach of copyright and therefore no constitutional issue is raised in this petition.
9. It was contended that this court sitting as a constitutional court does not have the jurisdiction to entertain the petition where there exist parallel or alternative statutory remedies that the Petitioner could explore. That the entire petition is fatally defective, is bad in law and should be dismissed with costs to the Respondent. Reliance was placed on Tony Hillary Omondi v Silverstone Air [2019] eKLR
10. The Respondent averred that the Petitioner does not disclose any infringement of a constitutional right as the photograph relied upon does not include his likeness, image or anything personal. Thus, the entire petition is fatally defective, frivolous and an abuse of this honourable court.



Analysis and Determination

11. I have considered the preliminary objection filed by the Respondent as well as the written submissions filed by both parties.
12. The nature of a preliminary objection was elaborated on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 E.A as follows: -
 - a. ...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.
 - b. ...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”
13. Additionally, in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR, the Court of Appeal stated as follows: -

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the excise of judicial discretion.”
14. First and foremost, the Respondent raised an objection as to the jurisdiction of this court to handle the petition. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. (See The *Owners of Motor vessel Lillian 'S' v Caltex Kenya Limited* [1989] KLR 1)
15. The jurisdiction of the High Court is derived from article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the Bill of Rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
16. Accordingly, in the instant case, the Petitioner alleges violation of his fundamental rights. The Petitioner’s suit primary seeks to enforce his fundamental right to privacy as framed in the constitution. The alleged violation of the same by the Respondent is a question which can only be determined by the High Court. It is therefore clear that this court has the requisite jurisdiction to handle the petition herein.
17. The validity of a preliminary objection is weighed against the requirement that it must raise pure points of law that may extinguish the dispute at one.
18. The Respondent asserted that the petition does not raise any constitutional issues. That the rights to dignity and privacy are facets personality and a person’s privacy includes their identity, image,



likeness, signature etc. They argued that the photograph purportedly used by the Respondent does not include the Petitioner's image, personality or likeness. That the advertisement using the said image could be argued as a breach of copyright and therefore no constitutional issue is used in this petition. A constitutional issue is one whose resolution requires the interpretation of the constitution rather than of a statute.

19. However, it is my opinion that the issue of the Respondent's alleged violation of the Petitioner's right to privacy and right to human dignity as protected under article 31(a) & (c) & 28 of the Constitution raises a valid constitutional issue that this court should resolve particularly on the right not to have one's private affairs unnecessarily revealed as alleged by the Petitioner. Moreover, I disagree with the Respondent's averment that the entire petition is fatally defective and that it is bad in law as it seeks to enforce the Petitioner's right to privacy as demonstrated.
20. For the foregoing reasons, I find that the Preliminary Objection lacks merit and thus make the orders;
 - i. The P O is hereby dismissed with costs to the Petitioner.

DATED AND DELIVERED AT OLKALAU THIS 28TH DAY SEPTEMBER 2023

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CHARLES KARIUKI

JUDGE

