



**Kibunja v Rohto Mentholatum (K) Limited & another (Civil Case 306 of 2016)
[2023] KEHC 22792 (KLR) (Civ) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 306 OF 2016**

**CW MEOLI, J
SEPTEMBER 28, 2023**

BETWEEN

JOSEPH KIBUNJA PLAINTIFF

AND

ROHTO MENTHOLATUM (K) LIMITED 1ST DEFENDANT

HARLEY'S LIMITED 2ND DEFENDANT

JUDGMENT

1. By his plaint dated 22nd November 2016 Joseph Kibunja (hereafter the Plaintiff) sought against Rohto Mentholatum (K) Limited and Harley's Limited (hereafter the 1st and 2nd Defendants) the following reliefs *inter alia*:
 - a. A declaration that the usage of the Plaintiff's image by the Defendants in the promotion of their product without his consent was illegal.
 - b. A declaration that the Plaintiff is entitled to be compensated for the usage of his image by the Defendants for their own gain.
 - c. A permanent injunction against the Defendants be issued restraining them against using the Plaintiff's image in their advertising merchandising without the Plaintiff's consent.
 - d. Pecuniary damages shall be calculated during the hearing of this suit for having used the Plaintiff's image since 2012 without his consent and/or remuneration.
 - e. Exemplary and punitive damages for the usage of the Plaintiff's image without his consent.
 - f. Any further and/or other relief as this Honourable Court may deem fit and appropriate to grant.



2. It was pleaded that the Plaintiff is an athlete of good reputation and that he previously featured as a guide for the renowned blind athlete Henry Wanyoike in various paralympic events, the particulars of which are set out in the plaint. It was further averred that sometime in the year 2013 the Plaintiff discovered that his image had been used in a billboard advertisement promoting a product known as 'Deep Heat', produced, and distributed by the 1st and 2nd Defendant's respectively. That the Plaintiff further discovered that his image had been used since 2012 on various occasions as follows:
 - i. The Asian Weekly
 - ii. Promotional calendar
 - iii. Promotional fliers
 - iv. Corporate sponsorship materials including banners, fliers and tee shirts.
 - v. The Defendants' Facebook page, Deep Heat East Africa
 - vi. On some vehicles
3. It was pleaded that the said images of the Plaintiff were used without his consent and without any consideration.
4. The 1st and 2nd Defendants filed their joint statement of defence dated 7th February 2017 denying the totality of the averments made in the plaint and liability. Furthermore, the Defendants stated in their pleadings that the 2nd Defendant had entered into a contract with the Henry Wanyoike Foundation (the Foundation) by which the former would support the Foundation which in turn would promote the products of the former. It was averred that the contract was executed in the presence of the Foundation's directors, Henry Wanyoike and the Plaintiff. Hence, the Plaintiff was at all material times privy to the arrangements made between the Foundation and the 2nd Defendant.
5. It was also the Defendants' averment that the Plaintiff's image was used purely due to his association with and in the capacity of being guide/aide to Henry Wanyoike and that the Plaintiff did not claim any monetary compensation for such use. That the Plaintiff's image appeared alongside that of Mr. Wanyoike. The Defendants stated in their pleadings that upon subsequent information regarding the Plaintiff's resignation from the Foundation coupled with the request that his images be taken down, the Defendants complied by pulling down the said images.
6. The hearing of the suit commenced on 19th October 2022. The Plaintiff testifying as PW1 adopted his signed witness statement dated 24th April, 2020 and produced his bundle of documents of like date (marked P. Exhibit 1) as part of his evidence-in-chief. The Plaintiff stated that he was seeking compensation from the Defendants for the illegal use of his image in various platforms and without his consent.
7. During cross-examination, the Plaintiff stated that he has competed as a professional athlete since the year 2003 whilst also assisting Henry Wanyoike on the track due to his visual impairment. The Plaintiff further testified that he was merely a signatory to the Foundation's bank accounts alongside one Gideon, and that he did not play any official role therein. He was referred to a contract entered into between the Foundation and the 2nd Defendant, and by which Henry Wanyoike was appointed to act as brand ambassador for 'Deep Heat' products and various images of himself alongside Henry Wanyoike, wearing and holding brand products for 'Deep Heat' which he confirmed.
8. He testified that he was not compelled to participate in the brand promotion between the years 2013 and 2016. It was his testimony that he resigned from the Foundation following a disagreement



regarding use of his image, but that the complaints surrounding use of his image for the promotion arose following his resignation. It was also his testimony that he wrote demand letters to the 2nd Defendant through his lawyer, but that he did not have any evidence to show any complaints made between 2012 and 2016 on the use of his image during that period. He admitted that he received an allowance during his time at the Foundation but that he was here seeking compensation specifically for the unlawful use of his image by the Defendants. However, he said he had no knowledge of the existence of any agreement between Henry Wanyoike and the 2nd Defendant, though he participated in the promotion of the 2nd Defendant's products.

9. In re-examination, the Plaintiff gave evidence that he was a Director of the Foundation's 'Kikuyu Run' which was an annual event, but that he was a volunteer who assisted Henry Wanyoike in his races. He further stated that he was neither a party to the contract entered into between Henry Wanyoike and the 2nd Defendant, nor authorized Henry Wanyoike to negotiate any agreement on his behalf. That while he had no objection to wearing any brand attire/products on behalf of the 2nd Defendant, he did not agree with the use of his image without his consent. This marked the close of the Plaintiff's case.
10. For the Defendants, Ravi Soni, who was DW1 testified that he worked for the 2nd Defendant at all material times as both a Finance and General Manager. He proceeded to adopt his signed witness statement dated 27th February, 2017 as his evidence-in-chief and produced his bundle of documents dated 14th March, 2018 as D. Exhibit 1-17. He testified that the 2nd Defendant is a pharmaceutical company which undertakes the distribution of medical products including 'Deep Heat' produced by the 1st Defendant. He further testified that the 2nd Defendant supported the Foundation's social activities in return for promotion of the requisite products by Henry Wanyoike. That the Plaintiff who acted as an assistant to Henry was always in his company and was therefore present during execution of the contract between the 2nd Defendant and the Foundation, in the capacity of Director thereof. That the Plaintiff voluntarily participated in the promotion of the requisite products.
11. In cross-examination, the witness stated that at the material time, he served the 2nd Defendant in the capacity of Finance Manager. He further stated that he was not present during the purported meeting; that following the complaint by the Plaintiff, the 2nd Defendant pulled down his image from all billboards; and that while the agreement did not specifically authorize use of individual images on billboards, it provided for such use by the 2nd Defendant's marketing department. Although the agreement referred to Henry Wanyoike, it did not mention the Plaintiff.
12. Further the witness stated that while it is apparent that the Plaintiff resigned from the Foundation in the year 2013, the 2nd Defendant only came to learn of his resignation in 2016 upon receipt of a letter from Henry Wanyoike. The witness further gave evidence that the 2nd Defendant did not have a particular interest in the Plaintiff's photographs but that his image was captured by virtue of his role as assistant and guide to Henry Wanyoike, the latter of who was the focus of the 2nd Defendant. That the Plaintiff was only known to him in his capacity as an assistant to Henry and not as an athlete.
13. In re-examination, DW1 asserted that it was not deemed necessary for the 2nd Defendant's representative to take minutes of the meeting which resulted in execution of the agreement between itself and the Foundation. It was also his testimony that while the contract did not make specific reference to the use of billboards and/or social media, the use of the word 'promotion' therein naturally extend to billboards and social media. He stated that the Plaintiff was present at the execution of the contract and that he read out the contents thereof to Henry, owing to his visual impairment. That the 2nd Defendant had no specific interest in the Plaintiff and only involved him because of his association as a guide and assistant to Henry Wanyoike.



14. Testifying for the defence, Henry Wanyoike (DW2) adopted his signed witness statement as evidence and stated that he is an athlete by profession, having participated in various global marathons. The witness gave evidence that he and the Plaintiff have been close friends for several years and that he relied on the Plaintiff for assistance in the training sessions since 2003. Together, they subsequently registered the Foundation in 2005, the Plaintiff taking up the role of managing the Foundation resources in addition to assisting DW2 in his daily life.
15. The witness testified that he entered into a contract with the 2nd Defendant in 2012 and which was set to run until 2022. That upon being satisfied with the contents thereof, the witness and the Plaintiff permitted the 2nd Defendant to utilize their images. That the funds payable by the 2nd Defendant in return were managed by the Plaintiff. It was the testimony by DW2 that all the while, the Plaintiff referred to himself as a Director of the Foundation, until the year 2015 when he approached the witness and stated that he had personal engagements to attend to, hence resigned from the Foundation. He stated that due to their relationship the Plaintiff's photographs had been used alongside his between the years 2003 and 2016 and that allowances due from the Foundation were paid to all its directors and employees.
16. In cross-examination, the witness restated his earlier evidence that the Plaintiff acted as his guide both in his races and his personal life, at all material times. The witness further restated that the Plaintiff came on board as a Director of the Foundation upon its registration in 2005, acting in addition as a signatory to its accounts. That the directorship of the Foundation consisted of the Plaintiff, the witness, and his wife all earning allowances received on behalf of the Foundation. It was his evidence that the Plaintiff voluntarily posed for his photographs during promotions in respect of the Defendant's product. That pursuant to the agreement, the 2nd Defendant was permitted to use the Plaintiff's and DW2's images for the marketing of the Defendant's products.
17. In re-examination, it was restated that the Plaintiff read the contents of the contract to the witness, and that funding received from the 2nd Defendant was deposited into the account belonging to the Foundation.
18. Upon close of the hearing, the parties were directed to put in written submissions. The Plaintiff's counsel anchored his submissions on *inter alia*, the decisions in [Joel Mutuma Kirimi & another v National Hospital Insurance Fund \(NHIF\)](#) [2020] eKLR and [Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others](#) [2017] eKLR as well as the provisions of Articles 28 and 31 of *the Constitution* on the right to privacy and dignity, to reiterate that the Plaintiff's image was severally used without his consent and for commercial/exploitative purposes by the Defendants. Thereby contravening his right to privacy. Counsel further submitted that the contract in question existed between Henry Wanyoike and the 2nd Defendant, and that the Plaintiff was not privy thereto and did not consequently agree to the use of his image by the Defendants. It was therefore asserted that the Plaintiff had proved his case against the Defendants to the required standard. Reliance being placed on the case of [Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited](#) [2021] eKLR where the court reasoned that the unlawful use of a person's image especially for profit, amounts to a violation of the person's constitutional right to privacy.
19. On quantum, counsel urged the court to award a sum of Kshs.250,000,000/- as compensation to the Plaintiff for the unlawful use of his photograph, citing the case of [Wanjiru v Machakos University](#) (Petition E021 of 2021) [2022] KEHC 10599 (KLR) (3 August 2022) in which the court awarded nominal damages in the sum of Kshs.800,000/- for unlawful use of the plaintiff's image and for profit.



20. The Defendants’ counsel also filed the submissions dated 23rd March, 2023. Concerning whether the Plaintiff herein had proved his case, counsel reiterated the evidence tendered at the trial on behalf of the Defendants, to the effect that the Plaintiff was at all material times privy to the contract entered into between the Foundation and the 2nd Defendant, and that it was a term of the said contract that the team associated with the Foundation would participate in the promotion of the material products. Counsel further reiterated that the Plaintiff willingly participated in the promotion process both in his capacity as a guide to Henry Wanyoike, and as a co-Director of the Foundation, and cannot be heard to assert otherwise. Reference was made to the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR earlier quoted in the Plaintiff’s submissions, to argue that infringement of the right to privacy have not been established in the present instance.
21. On the reliefs sought, counsel urged the court not to grant any award on damages sought, the Plaintiff having failed to discharge the burden of proof. Including punitive/exemplary damages in the absence of proof of oppressive or arbitrary actions on the part of the Defendants. He relied on *Bank of Baroda v Timwood Products Limited*, Civil Appeal No. 132 of 2001 and *Board of Trustees National Social Security Fund v Judy Wambui Muigai* [2017] eKLR. In the end, the court was urged to dismiss the suit with costs.
22. The court has considered the pleadings filed and the evidence tendered at the trial, as well as the rival submissions and authorities cited therein. Two broad issues fall to be determined, namely, whether the Plaintiff has established the case for unlawful/illegal use of his image, against the Defendants and whether the Plaintiff is entitled to the reliefs sought in the plaint.
23. Regarding the first issue, the burden of proof lies with the Plaintiff to prove his case against the 1st and 2nd Defendants, on a balance of probabilities. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya clarifies this position by providing that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
24. Moreover, the evidential burden of proof which is captured in Sections 109 and 112 of the same Act stipulates that:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
25. The above provisions were discussed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, where the Court of Appeal stated that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



26. From the oral and documentary evidence on record, there is no dispute that both the Plaintiff and Henry Wanyoike were professional athletes at all material times. It is also not in dispute that the Plaintiff served as both a personal and professional guide/assistant for Henry Wanyoike at all material times owing to the latter's visual impairment. The Plaintiff stated that he and Henry Wanyoike featured in various newspaper articles which were tendered in P. Exhibit 1 because of their athletic standing in society. Moreover, the use of the Plaintiff's image by the Defendants in the promotion of the 'Deep Heat' product and related pharmaceutical products produced and distributed by the 1st and 2nd Defendants respectively, is not in dispute. What is essentially being challenged in the suit is the legality of such use coupled with the question on whether the Plaintiff's right to privacy was violated consequently.

27. Pertinent here is Article 31 of *the Constitution* which provides that:

“Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.”

28. Furthermore, Section 26 of the *Data Protection Act* provides that:

“A data subject has a right—

- (a) to be informed of the use to which their personal data is to be put;
- (b) to access their personal data in custody of data controller or data processor;
- (c) to object to the processing of all or part of their personal data;
- (d) to correction of false or misleading data; and
- (e) to deletion of false or misleading data about them.”

29. The right to privacy has been the subject of several pronouncements, some of which appear in the parties' respective submissions. The court, however, did not come across decisions by the Court of Appeal in this regard and therefore sought to draw from decisions of the High Court. In *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR the court observed that:

“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. 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...

“The right to privacy consists essentially in the right to live one's life with minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant



and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information give or received by the individual confidentially.”

30. The right to privacy was also discussed in some detail in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others* [2015] eKLR with the court reasoning that:

“The right to privacy is guaranteed under Article 31 of *the Constitution*.

.....

The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples’ Rights.

B. Rossler in his book, *The Value of Privacy* (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

As to whether there is need to protect privacy, he goes on to write that:

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part.”

31. In this case, it is the Plaintiff’s case that the Defendants used his image without seeking and obtaining his prior consent, thereby infringing on his constitutional right to privacy. That the Defendants benefited in terms of profits from the commercial use of the Plaintiff’s image but neglected and/or failed to offer any compensation in return. On their part, the Defendants asserted that , firstly, by virtue of his directorship position in the Foundation, the Plaintiff wilfully permitted the use of his image through his conduct and awareness of the promotional projects being undertaken between the Defendants and the Foundation. And secondly, that in any event, the person of interest in this instance was Henry Wanyoike who under the contract was to act as the brand ambassador at all material times, and that the use of the Plaintiff’s image was due to his association with Henry Wanyoike and his role as his assistant and guide which necessitated him being in the presence of Mr. Wanyoike at all material times.
32. The court considered the Plaintiff’s document at page 147 of P. Exhibit 1 a which is a letter dated 27th November, 2017 issued by the Assistant Registrar of Societies, to the effect that the official directorship of the Foundation (registered on 29th March, 2005 according to the Certificate of Registration produced as D. Exhibit 10) comprised Henry Wanyoike, Gideon Gachara and Myllow Wanja, the latter being Henry Wanyoike’s wife.



33. The Plaintiff admitted to having been one of the signatories to the Foundation's account at all material times but denied being a director therein. However, he did not tender evidence regarding directors of the Foundation prior to his resignation in 2015. Indeed, the contents of the Plaintiff's resignation letter dated 13th January, 2015 and captured on page 151 of P. Exhibit 1, indicate that his resignation related to his role as both director and signatory of the Foundation, contradicting his testimony that he was merely a volunteer at the Foundation. Furthermore, the Defendants tendered copies of various vouchers which have not been controverted to indicate that the Plaintiff received allowances from the Foundation. Hence, it appears more plausible than not that the Plaintiff was a director or at worst an official of the Foundation.
34. The Plaintiff also tendered a copy of the agreement entered into between the 2nd Defendant and the Foundation, appearing on pages 149-150 of P. Exhibit 1. The main terms thereof are that the agreement was set to run from 1st June 2012 to 31st May 2022. According to the terms thereof, the Foundation was to act as the brand ambassador of the 'Deep Heat' range of products; that both Henry Wanyoike and his team would assist in the promotion of the said products through wearing the relevant attire, with Henry Wanyoike also engaging in other promotional activities; and that in return, the Foundation would receive a sum of Kshs. 5,000/- for each brand appearance.
35. The contract did not mention any personal compensation/benefits either to Henry Wanyoike or any member of his team and no evidence was tendered to that effect. Moreover, the Plaintiff did not refute by way of any credible evidence, that he was at all material times aware of the contents of the said agreement and that he is the one who read out its contents to Henry Wanyoike prior to the execution thereof.
36. Be that as it may, the real question remains: was the consent of the Plaintiff a condition to the use of his image by the Defendants and in particular, the 2nd Defendant? On the one part, it is apparent from the record that the Plaintiff's consent was not directly sought prior to the posting of the images on the various platforms by the 2nd Defendant. On the other part, it is apparent from the pleadings and evidence on record that the Plaintiff's image appeared alongside that of Mr. Wanyoike at all material times, and it has already been stated that he acted as his guide and was privy to all the happenings in the Foundation, including the promotion of the products pursuant to the agreement in place at the time. It could be said that he was part of Henry Wanyoike's team.
37. The Plaintiff admitted that he was not compelled to participate in the promotional activities or to show how the use of his image constituted a violation of his right to privacy or other constitutional, especially taking into account the nature of his duties alongside Mr. Wanyoike who is a world-renowned athlete with visual impairment and a public figure. A perusal of the images at pages 82-97 of the defence exhibits, it is apparent that the Plaintiff was at all material times aware of or privy to the taking of his photos, including collective photographs of team members of the Foundation. It is also apparent that the Plaintiff willingly participated in the promotional drives by the Defendants and benefitted from allowances drawn from monies raised through the promotions.
38. In any event, the Plaintiff has not demonstrated by way of any credible evidence that he had at any time objected to the use of his image prior to the time of his resignation from the Foundation following which the 2nd Defendant was advised accordingly and the Plaintiff's images were pulled down. No firm evidence has been adduced to support the assertions by the Plaintiff that even after expressing his dissatisfaction, the Defendants persisted in using his images in the promotion of their products.
39. From the evidence tendered, the Plaintiff at all material times was aware of the nature of the agreement entered into between the 2nd Defendant, and given his undisputed relationship with Henry Wanyoike



and the Foundation, cannot convincingly claim by virtue of his participation and use of his image alongside that of his principal who, on all accounts was the person of interest to the Defendants, that he was entitled to receive compensation from the Defendants. The Plaintiff was a member of Henry Wanyoike's team and personal assistant/guide who necessarily always accompanied Henry Wanyoike, a visible and highly placed athlete. The Plaintiff may have been an athlete too in order to effectively play his role as guide in Henry Wanyoike's races, but he was, with regard to the contract in question, an appendage to Henry Wanyoike. In the court's view, the Plaintiff has not demonstrated how the use of his image was unlawful, illegal or interfered with his private life or reputation.

40. In view of all the foregoing circumstances, the court opines that the Plaintiff has failed to discharge the burden of proof on the claim in respect of unlawful use of his image/photograph. Consequently, the suit must fail.
41. Had he succeeded, The Plaintiff would have been entitled to the declaratory orders and permanent injunction sought in the plaint. Equally, the court would have granted damages, considering the Plaintiff's societal standing, the nature and extent of the purported violation, and the case of [Ann Njoki Kumena v KTDA Agency Ltd](#) [2019] eKLR where the court awarded damages in the sum of Kshs. 1,500,000/- for violation of privacy arising from unlawful use of a plaintiff's image, and the more recent case of [Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited](#) [2021] eKLR where an award of Kshs. 2,000,000/- was made in respect of a similar cause of action. The Court would have awarded a sum of Kshs. 1,800,000/- in damages.
42. However, the court would have declined to make any award of exemplary and/or punitive damages, in the absence of any extenuating circumstance based on the decision by the Court of Appeal in [Board of Trustees National Social Security Fund v Judy Wambui Muigai](#) [2017] eKLR. In that case the Court held that:

“It is our understanding that exemplary damages are damages awarded to punish a defendant and seek retribution, as well as being aimed at deterring the defendant from repeating the outrageously wrongful conduct and others from acting similarly, and to convey the disapproval of the court, mostly in tort and constitutional cases. (See “The Law Commission, Item 2 of the sixth programme of Law Reform, Aggravated, Exemplary and Restitutionary Damages, page 53.)

Such damages are in our view called for in situations of oppressive, arbitrary or unconstitutional actions by servants of the Government; or wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and finally, where such an award is expressly authorised by the statute. See the case of *John v MG Ltd* (1966) 1 ALL E.R. 35 where the court held that exemplary damages go beyond compensation and are meant to punish the defendant. They will be ordered against a defendant who acts out of improper motive or where he is actuated by malice. This court in the case of *Ken Omondi Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company Advocates* (2013) eKLR adopted a similar approach. In the circumstances of this case, none of the above is easily discernible.”

43. That said, the court, having found that the Plaintiff failed to prove his case on a balance of probabilities will dismiss the suit with costs to the 1st and 2nd Defendants.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI



JUDGE

In the presence of:

For the Plaintiff: Mr Njoroge

For the 1st and 2nd Defendants: Mr. Gakunga

C/A: Carol

