



REPUBLIC OF KENYA



**Kirimi & another v Mobi Changa Limited (Civil Suit E038 of 2021)  
[2023] KEHC 25772 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL SUIT E038 OF 2021  
TW CHERERE, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JOEL MUTUMA KIRIMI ..... 1<sup>ST</sup> PLAINTIFF**

**SHARON CHEPKORIR KOSKEI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOBI CHANGA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs who are husband and wife are advocates of the High Court of Kenya residing in Meru County. 1<sup>st</sup> Plaintiff is also the chairperson of the Law Society of Kenya Mt. Kenya Chapter and both Plaintiffs practice under the name M/S Mutuma & Koskei Advocates based in Meru town.
2. It is the Plaintiffs' case that on or about May, 2003, 1<sup>st</sup> Plaintiff posted on his Facebook page a photographic image of both Plaintiffs. Subsequently on or about August, 2021, 1<sup>st</sup> Plaintiff came across the said photographic image that Defendant had used in a commercial advertisement for purposes of promoting their M-changa product embossed "What Are You Fundraising For" with an M-Changa logo besides the Plaintiffs' photograph.
3. It is the Plaintiffs' case that the commercial advertisement has attracted unnecessary and uncalled for attention especially on Instagram where Defendant used the Plaintiffs' photographic images to promote a campaign dubbed "Baby Shower Sisters" which turned to be a scam.
4. Plaintiffs claim that the unauthorized use of their photographic image by the Defendant resulted into breach of their right to human dignity and privacy as protected by the Bill of Rights under *the Constitution* of Kenya.



5. Having not given consent for their photographic image to be used by the Defendant, Plaintiffs instructed an advocates who by a letter dated 22<sup>nd</sup> November, 2021 demanded the pulling down of the image and general damages for infringement on their privacy.
6. Subsequently by plaint dated and filed on 17<sup>th</sup> December, 2021, Plaintiffs commenced this suit in which they seek the following orders:
  - a) A declaration that the defendant's acts of publishing the plaintiffs image for purpose of commercial advertisements without their consent is a violation of the plaintiffs' fundamental rights to privacy and human dignity
  - b) An order of injunction compelling the defendant to pull down the advertisement featuring the plaintiffs image on social media pages to wit, Facebook Instagram and Twitter and any other website
  - c) An order of permanent injunction restraining the defendant from publishing and/or using the plaintiffs image in any way of its advertisements or posting and reposting the plaintiffs image in any way of its social media and websites without the plaintiffs' consent
  - d) General damages for breach of plaintiffs' right to human dignity and privacy
  - e) Exemplary and aggravated damages
  - f) Cost of the suit
  - g) Any other relief that this honorable court may deem fit and just to grant.
7. The suit proceeded for hearing and 1<sup>st</sup> Plaintiff conceded that the photographic image in issue was taken by Bob Marjawa and had been used by other entities that he had previously sued and obtained judgment against. 1<sup>st</sup> Plaintiff also conceded that he did not have evidence that he had posted the photographic image on his Facebook page but denied Plaintiff had given consent for its use by anyone for whatever purpose.
8. On its part, Defendant by its defence amended on 29<sup>th</sup> May, 2023 and filed on 05<sup>th</sup> June, 2023 denied illegally retrieving Plaintiffs' image from 1<sup>st</sup> Plaintiff's Facebook page or using it for commercial purposes. Defendant pleaded that the image was available in numerous websites from way back in 2018 but the one in issue had been retrieved from a stock website with the authority and permission of the stock website and the owner of the image was acknowledged as Bob Marjawa and had caused it to be pulled down from its website upon receipt of the demand notice.
9. DWI Kyai Molle, a director of Mobi Changa Ltd reiterated the defence, He conceded that Plaintiffs photographic image was published denied that the photographic image in issue was used to fundraise and tendered evidence in the form of numerous photographic images of the image in issue which he said were available on different websites and social media pages.
10. I have considered the pleadings, the evidence on record and submission by both parties and I have identified the following issues for determination.
  - 1) Whether the Plaintiffs' suit offends the doctrine of exhaustion
  - 2) Whether DWI had authority to testify on behalf of the Defendant
  - 3) Whether Defendant published Plaintiffs' photographic image in their website for commercial purposes



- 4) Whether Defendant had consent to publish Plaintiffs' photographic image
  - 5) Whether Plaintiffs are entitled to the orders sought
  - 6) Who bears the costs of the suit
11. I will begin with the issue of whether the Plaintiffs' suit offends the doctrine of exhaustion for the reason that it is fundamental as it touches on this court's procedural jurisdiction to hear and determine this suit.
  12. The doctrine of exhaustion ensures the postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.
  13. Defendants submitted that Plaintiffs ought not to have filed this suit before this court but instead ought to have filed their claim with the Data Protection Commissioner and in support thereof have placed reliance on *Mwanzia v Rhodes* (Constitutional Petition E115 of 2022) [2023] KEHC 2688 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment) and *Kweri v Beehive Media Limited; Capwel Industries Limited* (Interested Party) (Constitutional Petition E321 of 2021) [2023] KEHC 2684 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)
  14. Plaintiffs did not make submissions on this significant issue which if determined in the affirmative has the effect to vanquish their claim in totality.
  15. The Plaintiffs claim is for damages for breach of their right to privacy and other related orders arising out what is pleaded to be publication by the Defendant of their photographic image without their consent.
  16. The preamble to The [Data Protection Act, 2019](#) provides that it is:
 

An Act of Parliament to give effect to Article 31(c) and (d) of *the Constitution*; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes (Emphasis added)
  17. Section 3 of the Act provides for the objectives as follows: - The object and purpose of this Act is-
    - (a) to regulate the processing of personal data;
    - (b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
    - (c) to protect the privacy of individuals;
    - (d) to establish the institutional mechanism to protect personal data; and
    - (e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act. (Emphasis added)
  18. The Office of the Data Protection Commissioner headed by the Data Commissioner is established under section 5 of the Act and one of the functions of the Data Commissioner under Section 8(1)(f) is 'to receive and investigate any complaint by any person on infringements of the rights under this Act.



19. The Data Commissioner has power under Section 65 of the Act to determine compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the Data Act and for enforcement of compliance with any provisions of the Act under Section 58.
20. The Act under Section 64 provides for the right of appeal to the High Court by any person offended by any administrative action taken by the Data Commissioner.
21. The foregoing provisions demonstrate that any person claiming a breach of the provisions of Article 31 of *the Constitution* MUST first file a complaint with the Office of the Data Commissioner and that such a party can only approach the High Court on appeal of the Data Commissioner's administrative actions.
22. No doubt the process of determination of a claim such as the one filed by the Plaintiffs' is provided for explicitly under the Data Act as well as remedies available to the Plaintiffs in the event that their complaint is successful and the question is whether the process was exhausted.
23. The Court of Appeal in the case of Speaker of National Assembly v Karume [1992] KLR 21 reiterated the importance of adhering to special procedures in *the Constitution* and the law in the following terms:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
24. Use of alternative dispute mechanisms is commanded Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution and in these times when the courts are bogged down by case backlog, consideration of disputes that can be resolved by other legal means should be postponed until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
25. The wording of the *Data Protection Act* as to filing and processing of a claim filed under the said Act are couched in mandatory terms. Any party that defies the process laid down in the Act must be prepared to bear the painful consequences of such non-compliance.
26. Plaintiffs have not demonstrated that their claim cannot adequately be determined under the *Data Protection Act* and having not exhausted the legal redress mechanism available to them, this court finds that it lacks the procedural jurisdiction on the foundation of the doctrine of exhaustion.
27. From the foregoing, I find that to determine the other issues in this matter will be an exercise in futility.
28. In the end, this suit is struck out with costs to the Defendant.

**DATED AT MERU THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

For Plaintiff - Mr. Mwirigi for Mutuma & Koskei Advocates

For Defendant - Ms. Ambani for Gichina Macharia Matotse & Co. Advocates

