



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. E008 OF 2021

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND RIGHTS AND FREEDOMS
UNDER ARTICLES 19, 22,23, 25, 27 (1), 28, 29 (D), 30, 31 & 41 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS
THE PETITIONERS CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

MOSES AUDI.....1ST PETITIONER

CHRISTOPHER OMORE.....2ND PETITIONER

VERSES

THE STANDARD GROUP PLC.....RESPONDENT

JUDGMENT

1. Vide their Petition and supporting affidavit sworn on the 7.10.2021 and filed in court on the 14.10.2021, the two Petitioners herein Moses Audi and Christopher Omore seek the following orders;

a) A declaration be issued that the impugned decision by the respondent to use the petitioners' identity, image/likeness and persona without consent abrogates the rights of the petitioners to privacy and thus in violation of Article 31 of the Constitution.

b) A declaration be issued that the impugned decision by the respondent to use the petitioner's identity, image/likeness and persona without consent for commercial gain subjects the petitioners to forced labour and servitude and in tandem afflicts Article 25(b) and Article 30 of the Constitution.

c) A declaration be issued that the impugned decision by the respondent to use the petitioner's identity, image/likeness and persona without consent has exposed them to ridicule and apprehension hence exposing them to psychological torture and thus is in violation of Article 29 (d)of the Constitution.

d) An order for significant compensation be given against Standard Group Limited the respondent herein in favour of the petitioners for violation of Articles 25 (b), 29 (d), 30, 31 & 41of the Constitution

e) Costs of this petition; and

f) Any other or further relief as this honourable court may deem fit to grant.

2. The petition is supported by the affidavits sworn by the two Petitioners Moses Audi and Ck Christopher Omore deposed on the same date.

3. It is the petitioners' case that being persons of good standing in the society and very hardworking individuals, the respondents used their image/likeness and persona without express consent to advertise their product specifically the digital newspaper which infringed on the

fundamental rights and freedoms of the Petitioners.

4. The petitioners averred that on the 1st June 2021, the respondent published on its website the image/likeness of the petitioners showing one of them yawning. They further averred that on the 3rd June 2021, the respondent via its twitter handle, The Standard Digital, published a story with the intention of attracting wide readership and boost its sales titled “*TAKE YOUR LEAVE, CLOCK OUT AT FIVE, WORK WILL STILL BE THERE TOMORROW*” with the petitioners’ image/likeness and persona. They stated that the post stated:

“You need to appreciate that just like any other machine, your body needs some rest and it undergoes wear and tear. And with the work daily life stresses your body goes through every single day, you can’t afford not to find an outlet.”

5. The petitioners averred that the actions of the respondent cited above were an infringement on their fundamental freedoms and rights as the petitioners ought to have consented to-

a) Being models for the respondent’s products;

b) Being retained by the respondent to offer modelling services in a bid to advertise their products and boost their sales;

c) Be sufficiently paid by the respondent to enable him waive his privacy and dignity at the expense of their commercial gain and in the eyes of the society;

d) Work for the respondent having been contracted or on salary to offer modelling services.

6. The petitioners averred that the respondent exploited their images to gain commercially thus violating their right to control and make money from the commercial use of their identity and that the actions of the respondent subjected them to forced labour and servitude and psychological torture as their peers and the society perceive them to have gained financially from the said advertisements.

7. It is further averred by the petitioners that the actions of the respondent in utilising the petitioners’ image/likeness clawed back their right to inherent dignity as it was done without their consent and further that it was an invasion of the petitioners’ privacy.

8. Opposing the petition, the respondent vide a replying affidavit sworn on the 4th November 2021 by Millicent Ngetich and filed in court on the 5th November 2021 contented that the instant petition was fatally defective as the purported supporting affidavit signed by the 1st petitioner was signed by a person other than the 1st petitioner, this being the petitioners’ advocate and the same was not commissioned in line with the law guiding making of oaths and was thus defective and incompetent.

9. It was further sworn by the respondent that the supporting affidavit sworn by the 2nd petitioner was sworn in his personal capacity and not on behalf of the 1st petitioner or in a representative capacity and thus did not depose facts about the 1st petitioner and as such this was evidence that the 1st petitioner failed to place any information before court in support of the assertions made in the instant petition and as such the petition in so far as it relates to the 1st petitioner ought to be dismissed with costs.

10. It was sworn on behalf of the respondent that no rights of the petitioners were breached and that their allegations that they were held in slavery or servitude were baseless as they had never been held at the respondent’s direction, subjected to servitude or slave-like practices and further that the petitioners had failed to provide any material to show that they were subjected to slavery, servitude or forced labour. The respondent further deposed that it had never subjected the petitioners to torture and further that the petitioners had failed to demonstrate the same.

11. On the infringement of the petitioners’ right to privacy by use of their image/likeness, it was contended that the image published by the respondent was taken in the County Assembly of Siaya where the petitioners work and which is a public space where journalists and the general public are allowed to follow various proceedings and thus the petitioners could not legitimately expect privacy in such a space.

12. It was further deposed that the tweet published accompanying the petitioners’ images/likeness was not meant for the respondent’s financial gain but was informational and educative to the general public and further that the petitioners had failed to demonstrate the financial gain by the respondent and thus there was no evidence that the respondent appropriated the petitioners’ image/likeness for financial gain.

13. The respondent further deposed that the petitioners’ image was used for illustrative purposes in public interest as the topic of work-life balance was of great interest to the public. It was further deposed that the portrayal of the petitioners in the manner pleaded could only be inferred by their said peers but that no such material had been placed before court to demonstrate the same.

14. It was further deposed that the petitioners’ petition was marred with material misrepresentation as to the petitioners’ status and also on the purported allegation that the petitioners’ image was used to advertise the respondent’s products, misrepresentation designed and couched to hoodwink the court, a clear demonstration that the petition was brought in bad faith.

15. It was deposed that the petitioners had failed to demonstrate that their rights were violated and were thus not entitled to any compensation but to have their suit dismissed with costs.

16. On the 8th November 2021 the petitioners both swore separate supplementary affidavits which were filed in court on the 10th November 2021 in which they both deposed that a draft affidavit of the 1st petitioner was mistakenly uploaded and filed to court instead of the intended affidavit, which mistake had since been remedied as they had filed the proper affidavit that was intended to be filed.

17. The petitioners further deposed that the filed affidavit was competent and properly before court as the pleadings had not closed and further that despite the mistake, the petition was not defective as there was still on record the 2nd petitioner's affidavit that was not controverted and that addressed the same violations raised in the petition.

18. It was further deposed that the petitioners' had a common purpose as contained in the 2nd petitioner's affidavit and thus the petition was meritorious.

19. The petitioners' further deposed that the averments by the respondent that the publication was in the public interest and not for financial gain was a misrepresentation of facts as the e-newspaper required a daily subscription of Kshs. 10 while the hardcopy sold for Kshs. 60.

20. The petitioners further denied giving their consent for use of their image and reiterated that the respondent continued to benefit financially from using the said images to promote their work hence economically exploiting the petitioners which was tantamount to slavery and forced labour.

21. It was further averred by the petitioners that the publication of their images was intrusive and defamatory and that working in a public space as they did not in any way interfere with the petitioners' expectation to privacy and further that the opinion carried out by the respondent was not related to the key functions of the County Assembly.

22. The petitioners further denied misrepresenting any facts and stated that they are Committee Clerks at Siaya County Assembly, normally referred to as Clerks.

23. The respondent filed a further affidavit on the 15th November 2021 in which it averred that the supporting affidavit filed by the 1st petitioner ought to be struck out by court for having been filed without leave of court.

24. It was further deposed that the respondent's digital product did not translate to profits as most articles that are educational like the impugned one are accessible for free provided that the reader had an account. The respondent further reiterated that the article with the petitioner's image was not an advertisement.

25. It was further deposed that the tweet as presented by the petitioners was cut out to hoodwink the court that the petitioners' image was only accompanied by the words at the top when in the real sense it was a post of the article itself.

26. It was further deposed that the article addressed a matter of public interest specifically a joint report by the International Labour Organisation and World Health Organisation on the effects of long working hours which report was released in May 2021 and it was thus inaccurate for the petitioners to assert that the article was for promotional or advertisement purposes.

27. It was deposed that contrary to the petitioners' allegations, their images were applied with the sole aim of contributing to public debate on a matter of interest.

28. The parties agreed to dispose of the petition by way of written submissions.

Petitioners' Submissions

29. Relying on the cases of **Kenyan Human Rights Commission v Communications Authority of Kenya & 4 Others [2018] eKLR** and that of **MWK & Another v Attorney General & 3 Others [2017] eKLR** it was submitted that the right to privacy extends to more than possessions of a person and is concerned with their identity and conduct of their private affairs and thus by using their images, the respondent intruded into the petitioners personal sanctum and distorted their identity and gained commercially from the said act. It was further submitted that a person's image was a fundamental feature of their identity deserving legal protection.

30. The petitioners submitted that the use of their image without their consent violated their right to privacy as was similarly held in the case of **T.O.S v Maseno University & 3 Others [2016] eKLR**. The petitioners further relied on the case of **Coalition for Reform and Democracy (cord) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR** where the court stated that protecting privacy was necessary if an individual was 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.

31. Relying on the case of **Julia Basetsana Kumalo v Cycle Lab (PTY) LTD 2011** it was submitted that a person's identity is infringed by the falsification of a person's true image or identity or where one'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.

32. The petitioners also relied on the case of **O'Keefe v Argus Printing and Publishing Pty Ltd 1954 3**, where a photograph was used unauthorised for advertising purposes leading the court to hold that the unauthorised publication was capable of constituting an aggression upon the person's dignitas.

33. It was submitted that the test to determine whether the right to publicity had been breached was enunciated in the case of **Krouse v Chrysler Canada [1974] 1 O.R. (2d) 225** as whether there was, i) Use of a protected attribute, ii) For an exploitative purpose and iii) No consent.

34. It was submitted that the image of the petitioners was published in the respondent's website which was a paid subscription service and further that the contents of the article did not relate in any way to the petitioners conduct of work nor did it mention their names.

35. It was further submitted that the petitioners consent was not obtained by the respondent and a such their right to privacy was violated as there was no evidence adduced by the respondent that the petitioners consent was obtained as was held in the case of **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR.**

36. As to whether the article published by the respondent was newsworthy in the sense that it was educational, the petitioners relied on the case of **Lahiri v Daily Mirror Inc 295 N.Y.S. 382, 386** where the Supreme Court of New York defined non-commercial use in cases where it involved the current news or immediate public interest. Further it was submitted that a news item will not be considered newsworthy if the images in use are not reasonably connected with the contents of the publication.

37. It was submitted that the statements published in the impugned article by the respondent were defamatory as it lowered the petitioners' reputation as their workmates now perceived them to be idlers and persons not capable of handling their jobs with the seriousness it deserves.

38. The petitioners submitted that the publication made by the respondent was read by the general public and everyone who knew them which occasioned acute personal embarrassment, forcing the petitioners to hide and seek court intervention. It was further submitted that the publication of the advert was reached by many people and no amends were made by the respondent by way of apology or pulling down the post.

39. Relying on the case of **Ibrahim Mukhtar Abasheikh v Royal Media Services & Another [2020] eKLR** where it was held that the court will without fear find their conduct actionable if the publication complained of goes beyond the limits of a fair comment and justification on the subject matter in issue between the disputants, it was submitted that the petitioners need not prove that any harm was occasioned rather that the publication went beyond the limit of fair comment and justification.

40. It was further submitted that the pleaded claim herein was confined to publication of the information and did not include the intrusive method by which it was acquired which was through clandestine filming and which caused the petitioners distress.

41. It was further submitted that being in a public building/space did not waive the petitioners' reasonable expectation to privacy and that the publication by the respondent of the petitioners' image amounted to an intrusion of their private life. Reliance was placed on the case of **Aubry v Editions Vice Versa Inc [1998] 2 SCR 591** where the Supreme Court of Canada held that there had been a violation of a young woman's rights of privacy notwithstanding the fact that she had been sitting on the steps of a public building.

42. It was submitted that the qualified privilege defence cannot be raised by the respondent as the picture that the respondent relies on in making their fair comment was neither obtained with consent or with verification. Reliance was placed in the case of **Bonnick v Morris [2003] 1 AC 300, 309** where the court stated inter alia that *there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify*. The petitioner further relied on the case of **Daily Nation v Mukundi & Another [1975] EA 311** where the court expressed the view that *a publisher had a duty to see whether such item (accepted for publication) contains seditious or libellous matters failing which it always publishes at its own risk*.

43. On quantum of damages to be awarded, the petitioners submitted that they were persons of good standing in the society and working for the county government of Siaya with various ambitions which were dimmed by the publication of the respondent's belittling and defamatory statement and as such were entitled to damages of Kshs. 6,000,000 each. They relied on the case of **Agnes Zani v Standard Group Limited [2019] eKLR** and the case of **Miguna v The Standard Group Limited 7 4 Others [2017] eKLR** where the court awarded Kshs. 5,000,000 in respect of general damages and Kshs. 1,000,000 for aggravated damages.

44. On whether the 1st petitioner's petition was defective it was submitted that they had since filed a properly signed and commissioned affidavit by the 1st petitioner and no prejudice had been occasioned on the respondent and further that failure to file a supporting affidavit was not fatal to his petition as was held in the case of **Henry Okello Nadimo v Independent Electoral And Boundary Commission & 2 Others [2013] eKLR** where the court proceeded to determination without a supporting affidavit after it was persuaded that the affidavit was not an integral part of the petition and its absence could not deal a fatal blow to the proceedings.

45. The petitioners further submitted that the respondent had the signed and commissioned copy of the 2nd petitioner which raised similar claims to that of the 1st petitioner.

Respondents' Submissions

46. It was submitted that the impugned affidavit did not conform to the Act and was incurably defective and consequently, all documents annexed thereto were not before Court for lack of a proper Affidavit introducing them. Reliance was placed on the provisions of section 5 of the Oaths and Statutory Declaration Act that requires *every commissioner for oaths before whom any oath or affidavit is taken or made to state truly in the jurat or attestation at what place and on what date the oath or affidavit was taken or made* as well as Rule 11 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that provides; *that a petition filed under these rules may be supported by an affidavit and secondly that If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.*

47. Further reliance was placed on the decision of **Lady Justice MAUREEN ONYANGO** in the case of **Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020] eKLR** who termed a Petition which did not have any documents as hollow and proceeded to strike it out for want of evidence upon having struck out a Supporting Affidavit.

48. The respondent further submitted that that the "Supporting Affidavit" of Moses Audi was improperly on record for want of leave and reliance was placed on the Court of Appeal decision in the case of **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 13 others [2019] eKLR** where Affidavits were struck out for having been filed without leave. It was further submitted that consequently, the Petition in respect of Moses Audi should be dismissed for absence of evidence on which the Court can make a determination.

49. It was submitted that the Petitioners had not led any evidence to the effect that they were held under the Respondent's direction under slave-like conditions or that they were directed, required, commanded or forced to work for the Respondent so as to avoid certain sanctions and therefore the court was invited to return that the Petitioners had failed to demonstrate that they were subjected to slavery, servitude and forced labour hence no violation of Articles 25 (b) and 30 of the Constitution.

50. The Respondent further submitted that the Petitioners had not demonstrated involvement of a public official in their alleged torture as neither they or their employees were public officials and that no evidence of extreme pain and suffering had been furnished to Court other than them stating that they had been subjected to psychological torture without any proof and as such the court was invited to dismiss the Petitioners' claim on violation of their right under Article 29 (d).

51. It was submitted that the petitioners' right to privacy was not violated. The respondent refuted allegations by the petitioners that the use of their image was for an exploitative purpose or qualify as commercial as the wording of the article did not allude to any product other than discussing the need of balancing between the amount of time persons dedicate to work, social, family and personal time. Reliance was placed on the case of the case of **Dworkin v. Hustler, 867 F.2d 1188 (9th Cir. 1989)** where the United States Court of Appeals found that *even where a photo is used to express a newspaper's opinion is not exploitative and the fact that Hustler Magazine is operated for profit does not extend a commercial purpose to every article within it* as well as the case of **JMK & another v Standard Digital & another [2020] eKLR** where it was held that

"67. In the present case, the plaintiffs were able to prove that there was use of their protected attribute and that it was without their authority or consent. They contended that the same was for commercial purposes. That the topic under discussion was a lifestyle topic heavily branded with the defendants' trademark and created to allow further dissemination.

68. To this Court's mind, the cardinal principle of evidence is that he who alleges must prove. The Court viewed the video severally and carefully considered the still photo and the words accompanying it. There was no evidence that the same was used to advertise the services of the defendants. While it may be true that the defendants exist as profit making entities by virtue of being quoted at the stock exchange, that perse does not make each and every endeavour they undertake to be for commercial purposes. Other endeavours may be for the enlightenment of society. In this regard, there was no prove that the photo was used for commercial purposes. The claim for violation of personality rights was therefore not proved."

52. It was submitted that while the Respondent is a media house, the article in which the Petitioners' image was used was not geared towards making profits and further that there was no single statement in the article inviting subscription or imploring the readers to subscribe to the digital newspaper and that paid subscription to the news website does not apply to all articles. The respondent further submitted that the Petitioners failed to place any evidence before Court to prove that the Respondents subscription increased as a result of the publication and in absence of such evidence, the court was inclined to find that the petitioners image was not commercially appropriated.

53. It was submitted that the image subject of the instant Petition was used for expressive purposes as there was reasonable relationship or connection between the image and contents of the publication. The respondent submitted that the Petitioners made a skewed representation of the tweet published by the Respondent as while the tweet was clearly sharing the article with the image appearing in the preview, the Petitioners made it appear as though the image was tweeted against the words in the tweet.

54. The respondent submitted that in so far as the publication addressed the topic of work and life balance, illustratively using an image of a person yawning, this established the relationship between the contents of the article and the image used and as such a reasonable person juxtaposing the contents therein with the image would definitely note the connection between the two. Therefore, it was submitted that there was reasonable connection between the image and the contents of the article hence no violation of the Petitioners right to privacy.

55. The respondent submitted that the court ought to balance between the petitioners' right to privacy and the respondent's freedom of expression as was held by the European Court of Human Rights in the case of **Von Hannover v Germany (No. 2) (Applications nos. 40660/08 and 60641/08)** where the Court faced a similar question and proceeded to hold that there was no violation of the right to privacy as the photo was published in furtherance of a public debate.

56. It was submitted by the respondent that the subject of work life balance resonated with many as this court appreciated in the case of **Republic v Public Procurement Administrative Review Board & another Exparte Kleen Homes Security Services Limited [2017] eKLR.**

57. The respondent submitted that that the Petitioners did not reasonably expect privacy in the surroundings where their image was taken as the image was not taken in an intrusive manner but in public space during a County assembly session where there was all expectation by the Petitioners that photos were likely to be taken in coverage of the proceedings and debates and further that the image did not contain any intimate details of the Petitioners. Reliance was placed on the cases of **J W I & another v Standard Group Limited & another [2015] eKLR** where it was held inter alia that *One can have no expectation of privacy if [one] has consented explicitly or implicitly to have one's privacy invaded... and that One's subjective privacy intuitions must be reasonable to qualify for the protection of the right. What is reasonable, of course, depends on the set of values to which one links the (empty) standard of reasonableness,* as well as the case of **Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)**, where the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question and proceeded to state that one ought to consider; *whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.*

58. It was submitted that the petitioners were not entitled to general damages but if the court found to the contrary, it ought to award the Petitioners nominal damages of Kshs. 50,000 each. Reliance was placed on the case of **FAE (suing on her own behalf and as a next friend of SAS and NAMS) v Norwegian Refugee Council [2019] eKLR** where each Petitioner was awarded Kshs. 70,000 as the case involved

minors.

59. It was submitted that the petitioners should be granted nominal damages as despite proposing a sum of Kshs. 6,000,000 as general damages, the Petitioners argued in favour of such amount on the footing of defamation and as compensation for defamation, which issue they did not raise in their Petition and further as no submission was expressly made on compensation for violation of rights and as such the proposed figure cannot be considered in that respect.

60. It was submitted that that despite not pleading defamation the Petitioners had generously dedicated a portion of their submissions to the tort and thus by submitting on defamation, the petitioners sought to take a journey and travel beyond what was pleaded in the Petition which was tantamount to calling this Court to pronounce itself on matters the Respondent had no notice of and the Court not called upon to adjudicate. Reliance was placed on the cases of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** where the Supreme Court of Kenya cited the Supreme Court of India with approval in **Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R.**, where it was stated in part that *In absence of pleadings, evidence if any, produced by the parties, cannot be considered and that it was also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them as pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.*

61. Reliance was also placed in the Court of Appeal case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** where the Court faulted the trial judge for considering matters not properly before her and in so doing approved “The Present Importance of Pleadings”.

Analysis & Determination

62. I have considered the pleadings herein as well as the submissions filed by both parties and the authorities relied therein. It is my humble opinion that the issues for determination are;

- a) *Whether the 1st Petitioner’s case should be dismissed for lack of valid supporting affidavit,*
- b) *Whether the petition raises any constitutional issues*
- c) *Whether the petitioners proved their claims to warrant grant of relief sought*
- d) *Whether the court should entertain submissions of defamation not pleaded by the petitioners*

Whether the 1st Petitioner’s case should be dismissed for lack of valid supporting affidavit

63. It was contended by the respondent that the instant petition was fatally defective as the purported supporting affidavit signed by the 1st petitioner was signed by a person other than the 1st petitioner, this being the petitioners’ advocate and the same was not commissioned in line with the law guiding making of oaths and was thus defective and incompetent and that even the subsequent supporting affidavit was incompetent as it was filed without leave of court.

64. On their part the petitioners stated that a draft affidavit of the 1st petitioner was mistakenly uploaded and filed to court instead of the intended affidavit, which mistake had since been remedied as they had filed the proper affidavit that was intended to be filed and that the filed affidavit was competent and properly before court as the pleadings had not closed and further that despite the mistake, the petition was not defective as there was still on record the 2nd petitioner’s affidavit that was not controverted and that addressed the same violations raised in the petition and thus demonstrated a common purpose with the 1st petitioner’s claims.

65. It is not in dispute that the supporting affidavit purported to be deposed by the 1st petitioner in support of the petition herein is not properly attested. The making of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

66. Accordingly, I have no hesitation in finding that the purported Supported Affidavit filed by the 1st petitioner deemed to be sworn on the 7.10.2021 is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us.

67. The question thus turns as to whether the claim by the 1st petitioner should fall. The respondent proposes so asserting that even the supporting affidavit filed on the 10th November 2021 by the petitioners purported to have been deposed by the 1st petitioner was not properly before court as the same was filed without leave of court. The petitioners on their part assert that they need not sought leave as pleadings had not closed and in any case the supporting affidavit deposed by the 2nd petitioner demonstrated a common purpose for both petitioners’ claims.

68. I am guided by the provisions of Order 19 Rule 6 of the Civil Procedure Rules, 2010 which provide for instances when the court may strike out an affidavit. It stipulates that an affidavit cannot be struck out merely on technicalities as set out in Order 19 Rule 7 of the Civil

Procedure Rules, 2010. The said provision states as follows-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

69. Rule 10(1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as ‘**the Mutunga Rules**’) provides seven key contents of a Petition. They are as follows: -

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

70. Sub-rules (3) and (4) further provide as follows:

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

71. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

72. Rule 11 of the Mutunga Rules state as follows: -

(1) The Petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

73. In this case, it is clear that the supporting affidavit deposed by the 1st petitioner in the 1st instance was defective. The Petitioner, however, takes refuge in the fact that the same was mistakenly filed and that in any case the 2nd petitioner’s supporting affidavit is competent and raises the same issues. The 1st petitioner further filed another supporting affidavit which he alleges was the one intended to be initially filed in support of the petition, the same was deposed on the same date with the initial supporting affidavit deemed defective.

74. The Respondent filed its respective Replying Affidavit. A perusal of the said affidavit reveals that it responded to the issues raised in the Petition and the supporting affidavit. Further, the Respondent has not demonstrated the prejudice it stands to suffer in the absence of the affidavit specifically stated to be in support of the Petition. A look at the Petition, the Supporting Affidavits and the submissions supports the position that the issues in this matter are crystal clear such that had the affidavit in support of the Petition been initially properly deposed, the same would have contained similar contents as the affidavit subsequently filed by the petitioner.

75. Article 159(2)(d) of the Constitution call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities. The Supreme Court while addressing itself to the said provision in **Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013** held that: -

[46] In arriving at this conclusion, by no means do we underestimate the importance of Rule 33(1) of the Supreme Court Rules, which stipulates that an appeal is complete when it has the full package– a notice, a petition and a record. We agree with counsel for the other respondents, through learned counsel Messrs. Khaminwa, Ojiambo and Mwenesi, that the applicable rules must be complied with by those who seek justice from the Courts. Indeed, this Court has had occasion to

remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR).

[47] We believe that the application before us is one such case, where the provisions of Article 159(2) (d) of the Constitution are applicable to save an appeal from waste occasioned by failure to observe one limb of a procedural rule.

76. I am thus persuaded that, in the unique circumstances of this matter, the affidavit in support of the application filed on the 10.11.2021 can be safely deemed to be in support of the Petition though filed without leave of court. Rules 10 and 11 of the Mutunga Rules do not state that for a Petition to be competent it must be supported by an affidavit. In fact, Rule 11 of the Mutunga Rules, provides a scenario where an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom may be deemed as a competent Petition.

77. Accordingly, I find that the 1st Petitioner’s claim is properly before court and I shall proceed to determine the merits of the same.

Whether the Petition raises any constitutional questions

78. The petitioners herein allege that their rights under Articles 28, 29 (d), 30, 31, 41, and 41 (e) have been infringed by the respondent in its publication of their images for commercial gain. In other words, the Petitioners seek the intervention of this Court on the basis that the Respondent has infringed upon their rights and fundamental freedoms guaranteed under the Bill of Rights.

79. The Petition, therefore, raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of the Constitution to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.

Whether the petitioners proved their claims to warrant grant of the relief sought

Invasion of Privacy

80. It was submitted by the petitioners that use of their image without their consent violated their right to privacy. Article 31 of the Constitution 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*

81. In Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR, Mativo J, held that;

“The right to privacy consists essentially in the right to live one’s life with a 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 given or received by the individual confidentially.”

82. The Consultative Assembly of the Council of Europe has defined Article 8(2) of the European Convention on Human Rights, which provides for the right to privacy of an individual as follows;

“The right to privacy consists essentially in the right to live one’s own life with a 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 given or received by the individual confidentially.”

83. The court in J W I & another v Standard Group Limited & another [2015] eKLR while dealing with the question of the scope of the right to privacy had this to state:

“In the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967, the following additional elements of the right to privacy are listed; the prohibition to use a person’s name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information.”

84. The court stated further thus:

"...Secondly, in *Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)*, the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld."

85. It is thus clear that publication or use of the images of an individual without his consent violates that person's right to privacy. This was the position advanced by the petitioners in their claim that their right to privacy had been infringed and that the same had been infringed for commercial gain by the respondent.

86. The respondent denied infringing on the petitioners' right to privacy or that the use of their image was for an exploitative purpose.

87. In the instant suit it is clear that the petitioners' consent was not sought prior to use of their images in the respondent's publication. Indeed, in *Aubry (supra)*, the Canadian Supreme Court held that publication of the photograph of an individual without her consent was actionable as a breach of privacy.

88. In the end, I find and hold that there was breach of privacy of the petitioners' image.

89. The question is whether there was unlawful use of the image of the petitioners.

90. As was held in the case of *Jessica Clarise Wanjiru (supra)*, 'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality and that 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).

91. In the case of *Jessica Clarise Wanjiru (supra)*, the court stated, and I am in agreement with it that 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.

92. This first and third test are not in contention in this case. Indeed, the petitioners' image was used by the respondent and such use was without their consent. The question is whether the use of the petitioners' image was for an exploitative purpose.

93. The petitioners submit that the use of their image was for an exploitative purpose as the site on which the same was posted is for subscription at Kshs. 10 and further that the respondent's daily retails at Kshs. 60 and thus the respondent gained from views on its sites and from purchase of its newspaper.

94. On their part the respondent avers that the Petitioners' image was use was not geared towards making profits and further that there was no single statement in the article inviting subscription or imploring the readers to subscribe to the digital newspaper and that paid subscription to the news website does not apply to all articles and that the Petitioners failed to place any evidence before Court to prove that the Respondents subscription increased as a result of the publication.

95. The respondent submitted that in so far as the publication addressed the topic of work and life balance, illustratively using an image of a person yawning, this established the relationship between the contents of the article and the image used and as such a reasonable person juxtaposing the contents therein with the image would definitely note the connection between the two. Therefore, it was submitted that there was reasonable connection between the image and the contents of the article hence no violation of the Petitioners right to privacy.

96. the question is whether the use of the petitioners' image showing them yawning created a reasonable relationship with a matter of legitimate public interest. The picture itself was captured in the Siaya County Assembly.

97. According to a study published by the World Health Organization on the 17th May 2021, Long working hours led to 745 000 deaths from stroke and ischemic heart disease in 2016, a 29 per cent increase since 2000, leading the Organization to come up with actions that governments and companies can take to minimize the same. In my view this was a matter of public interest and which was addressed by the respondent's publication. A prima facie look at the image published by the respondent, in my view, resonates with the contents of the article published.

98. In the *Mistry case (supra)* the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.

99. In the instant case, it is my view that the petitioners' image was not captured in an intrusive manner as the same was captured during a public hearing of the Siaya County Assembly in which the press had been allowed and was thus not an intimate aspect of the petitioners' life.

100. Taking all the above into consideration, I am not convinced that the petitioners claim for unlawful use of image is merited.

On alleged forced Labour and Servitude

101. It was the petitioners' case that the publication by the respondent subjected them to forced labour and servitude and psychological torture as their peers and the society perceive them to have gained financially from the said advertisements whereas the respondents averred that the petitioners had failed to demonstrate that they were subjected to slavery, servitude and forced labour

102. Article 36 of the Constitution provides:

30 (1) A person shall not be held in slavery or servitude.

(2) A person shall not be required to perform forced labour.

103. By virtue of Article 25, the freedom from slavery and servitude cannot be limited.

104. The generally accepted definition of slavery is contained in the Slavery Convention of 1927 at Article (1) which defines slavery as, **"the status or condition of a person over whose any or all powers attaching to the right of ownership are exercised."** Article 4 of the Universal Declaration of Human Rights prohibits slavery and servitude. Servitude refers to "slavery-like practices."

105. The definition of forced labour set out by International Labour Organization Forced Labour Convention of 1930 is provided in Article 2(1) as, **'all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'**

106. I would also add that it is now well established that the international prohibition against slavery and servitude is one of the pre-emptory norms in international law (*ius cogens*) and which apply to Kenya as part of the general rules of international law by dint of Article 2(5) of the Constitution.

107. From the definitions cited above, it is my opinion that the petitioners were in no way subjected to forced labour, servitude or slavery by the publication of their images by the respondent. To this extent this claim is not satisfied.

Whether the court should entertain submissions of defamation by the petitioners not pleaded

108. The petitioners submitted that they were persons of good standing in the society and that their ambitions were dimmed by the publication of the respondent's belittling and defamatory statement and as such they were entitled to damages of Kshs. 6,000,000 each.

109. In response, the respondents submitted that despite not pleading defamation the Petitioners had generously dedicated a portion of their submissions to the tort which was not pleaded in the Petition which was tantamount to calling this Court to pronounce itself on matters the Respondent had no notice of and the Court not called upon to adjudicate.

110. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR** thus;

"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

111. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or

defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

112. The foregoing position was also reiterated in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013 [2014] eKLR.**

113. In the instant case, I have perused the orders/ reliefs sought by the petitioner and note that it is only in paragraph (d) that they seek compensation and even then the compensation sought is for violation of the petitioner's right.

114. That being said, I had previously found that the petitioners' right to privacy had been infringed. The Petitioners prayed for Kshs. 6,000,000 as compensation. The respondents have suggested that the Petitioners be awarded Kshs 70,000 each as compensation for the violation of their right and rely on the decision in **FAF case (supra)** where the Court awarded the 3 petitioners a global sum of Kshs. 210,000 as compensation for violation of their right to privacy as enshrined in Article 31 of the Constitution.

115. I find that the authority relied on by the respondent is much more comparable to the violations suffered by the petitioners. I award to the petitioners damages in the sum of Kshs 80,000 each together with costs of the petition and interest from date of this judgment until payment in full.

116. **Dated, Signed and Delivered virtually at Mombasa this 17th day of January, 2022**

R.E .ABURILI

JUDGE