



**Mohammed v Momentum Credit Limited (Constitutional Petition E319 of 2020)
[2022] KEHC 17133 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E319 OF 2020**

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

SWALEH MOHAMMED PETITIONER

AND

MOMENTUM CREDIT LIMITED RESPONDENT

JUDGMENT

1. The dispute before this Court concerns violation of the right to privacy as occasioned by the use of a person's image, name and videos for business promotion.
2. The Petitioner herein, Swaleh Mohammed, a Muslim by religion, was approached by the Respondent, Momentum Credit Limited, a structured non-banking lender, to promote a log-book financing product christened Sahih Logbook Financing Facility.
3. In doing so, the Respondent represented to the Petitioner that the product was Shariah compliant and as such was not charging interests on it.
4. On the understanding that he was at liberty to withdraw his consent at any time, the Petitioner allowed the Respondent to use his image for promotional purposes at no fee.

The Petition:

5. Through the Petition dated 7th October, 2020 supported by the affidavit of Swaleh Mohammed deposed to on a similar date and a supplementary affidavit disposed to on 11th June, 2021, the Petitioner lodged his complaint contesting the continued use of his image, names and video by the Respondent.



6. Together with the Petition was the Notice of Motion Application (hereinafter referred to as ‘the application’) filed under certificate of urgency of similar date as the Petition. It was duly supported by the Affidavit of the Petitioner.
7. Upon hearing the application, this Court issued a conservatory order restraining the Respondent from using the Petitioner’s image for promotional purposes pending the hearing and determination of the main Petition.
8. In giving a synopsis of what led to the dispute, the Petitioner pleaded that he was approached by the Respondent’s Compliance Officer for purposes of using his name and image to promote the Respondent’s financing product.
9. On the information that the product was Shariah-compliant, the Petitioner gave consent to have his image used for promotional purposes.
10. However, when the Respondent released the promotional product, the Petitioner posited that he was informed by friends and acquaintances that the product was not Shariah-compliant.
11. He posited that upon pursuing expert opinion about the product, it dawned on him that the log-book product was marketed as an interest-based borrowing, which fundamentally offended principles of Shariah.
12. On the foregoing, the Petitioner posited that his image was being used in promoting prohibited (haram) interest lending in violation of his Islamic faith that negatively impacted his spiritual wellbeing
13. Consequently, the Petitioner averred that he wrote an email dated 12th September, 2020 withdrawing his consent from any further use of his image for promotional purposes.
14. He averred further that he requested that his image be pulled down and despite the Respondent’s Marketing Officer acknowledging receipt of his request, the Respondent kept using his image for promotional purposes.
15. It was the Petitioner’s case that the continued use of his image caused him psychological torment for not only being against Islamic principles but also tainting his societal standing since most people believe image are used for monetary compensation.
16. The Petitioner further relied on expert evidence through the Affidavit of Fatma Mohammed Abdallah deposed, a Master’s Degree holder in Islamic Finance Law from the International Islamic University of Malaysia, deposed to on 11th June, 2021.
17. It was the expert’s position that upon diligently examining the Respondent’s financing document she formed the opinion that the document christened Sahih logbook was not shariah compliant because the Respondent levies the impermissible late payment charges and realizes it as income yet the same is not premised on actual loss but rather pre-estimates of actual loss.
18. She referred to opinions by Scholars among them the paper titled “The principles of Compensation and Penalty Charges in Dealing with Loan Default in Islamic Finance, by Dr- Idohamad Akram Laldin among others where there was consensus that those who permit levying penalty, makes it mandatory to base it on the actual costs and not pre-estimates of actual loss. The excess is Riba which is impermissible in Islamic law.
19. On the foregoing, the Petitioner prayed for the following reliefs: -



- a. A declaration be and is hereby made that the use of the Petitioner's images for purposes of commercial advertisement without his consent is unlawful, unconstitutional and a violation of their fundamental rights and freedoms as enshrined in Article 28, 31 and 32 of the *Constitution*.
- b. An order of Permanent Injunction restraining the Respondent from publishing an or using the Petitioner's images, names and or videos for promotional purposes without his consent.
- c. An Order that the Respondent do pay damages and compensation for contravening the Petitioner's rights and fundamental freedoms secured in the Bill of Rights;
- d. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.

The Petitioner's submissions:

20. The Petitioner filed written submissions and a set of supplementary submissions dated 7th June, 2021, 6th December, 2021 and 11th January, 2022 respectively.
21. It was his case that his right to human dignity and to privacy as provided for and guaranteed under Articles 1 and 12 of the *Universal Declaration of Human Rights* as read with Article 28 and 32 of the *Constitution* of Kenya were violated by the Respondent's actions.
22. The decision in the South African case of *S -vs- Makwanyane* was relied on to demonstrate the importance of human dignity where it observed that without human dignity life is substantially diminished.
23. It was submitted that human dignity safeguards a person's right to privacy and as such the right to privacy is intrinsically intertwined with the right to human dignity. To that end, the decision in *JWI & Another -vs- The Standard Group Ltd* was relied upon where it was observed that: -

Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the dignity of the society of which the individual is part.
24. The Petitioner submitted that his freedom of conscience, religion, thought, belief and opinion otherwise protected under Article 32 of the *Constitution* was violated by the Respondent since the promotional product he consented to was not compliant to the dictates of Shariah Law.
25. He buttressed his case by relying on the decision in *Nyakamba Gekara -vs- Attorney General & 2 others* 2013 eKLR where it was observed that: -

...religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals' respect each other's beliefs. this enables them to live in harmony...
26. On the right to privacy, the Petitioner relied on the decision in *Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others* (2017) eKLR where it was established that infringement of the right to privacy arises upon use of a protected attribute, for an exploitative purpose and without consent.
27. The Petitioner submitted that he was entitled to damages as per the principles established in *John Atelu Omilia & Another -vs- Attorney General & 4 Others* (2017) eKLR where it was *inter alia* observed that damages are remedy for enforcement and protection of fundamental rights available when it is the only mode of redress available.



28. In urging the Court to grant a quantum of Kshs. 25 Million for general, exemplary and for contempt of Court, it was submitted that the Petitioner's failure to pull down his images and delay tactics and continued display of his images were enough to justify the violation he suffered.
29. In the supplementary submissions dated 11th January, 2022, the Petitioner discredited the Expert evidence of Dr. Abdulkadir Hashim bin Shaykh Abubakar for not proving that indeed he is an expert in Islamic Finance.
30. It was reiterated that Sahih Logbook product allows its customers to reschedule the instalments by a maximum of 9 days on condition that they pay 5% of rental value (Principal) two days to the due date which payment is Riba.
31. The Petition was opposed.

The Respondent's case:

32. The Respondent opposed the Petition through the Replying Affidavit and Supplementary Affidavit of Yusuf Rajab the Respondent's Shariah-Compliant Officer deposed to on 10th March, 2021 and 21st October, 2021 respectively.
33. He deposed that the log-book product encouraged interest free, flexible rental payment for up to 18 months and risk sharing.
34. It was his case that he approached the Petitioner and was cooperative and agreeable to it as he would gain some publicity by use of his image.
35. He stated that he subsequently met the Respondent's Marketing Officer where it was made clear that he would not receive any payment for the use of his image.
36. Thereafter, the Petitioner executed the written consent and had no complaints that the product was not Shariah Compliant, and one month later, his image was commissioned for public advertising.
37. It was his case that upon using the Petitioner's image, the Petitioner called informing him that he had been advised that he ought to have been compensated for the image.
38. He deposed that it is after the Petitioner was referred to the consent and knew that he was not getting compensation that he instituted the instant suit.
39. The deponent denied there being anything in the product that offended Sharia requirements.
40. He deposed that when differences arose, the Respondent requested for several meetings to resolve what component of the product was not Shariah Compliant but the Petitioner declined the meeting and instead resorted to demanding immediate take down of all his images, a process, the Respondent asserted, started on 7th October, 2020.
41. The 1st Respondent denied the claim that the Petitioner had suffered any psychological torment as there was no evidence to that end.
42. In the supplementary affidavit Mr. Rajab deposed that there were no flyers being distributed near Al-Huda at South B in Nairobi since all images on Billboards and flyers were cancelled and removed from 8th October, 2020.
43. It was his deposition that it was unclear the nature of misrepresentation the Petitioner was given about the log book product since the Respondent communicated that the product was rolled out according to shariah law.



44. Further to the foregoing, it was his deposition that the Petitioner admitted to executing a consent with the Respondent and the Petition was an attempt to rewrite the terms of the consent and falsely assert that upon withdrawal of the consent, images were to be pulled down within 3 working days when in fact there were no timelines for removal after the withdrawal of the consent.
45. It was his case that the Petitioner provided no credible information as to why he was to be paid for his images.
46. He deposed that the Petitioner had been misadvised by the experts as the Respondent's product passed the Shariah compliance test and a certificate issued.
47. In rebutting the claim that the late payments and defaulted payments attracted profit for the outstanding amount, it was his case that the Petitioner only made reference to part of the policy and not to the whole clause thereby misleading the Court on compliance.
48. It was his deposition that penalties charged on debtors who deliberately withhold payments was only used for charitable purposes and not by the financing institution.
49. It was his case that the Respondent pulled down all the Petitioner's images and that there were no longer any images used for marketing.
50. He deposed that the images used by the Petitioner to support its case were sourced from unknown third parties whom the Respondent had not control over.
51. It was therefore his case that the Respondent complied with Court Orders.
52. He deposed that the Respondent ought to be compensated Kshs. 661,200/- by the Petitioner for causing loss on the company on the logistical costs of removing and replacing images on the Billboards all over the country for no justifiable reason.
53. In conclusion, it was his case that the product had not been impeached by Shariah-Compliance Board. He prayed that the Petition be dismissed with costs.
54. The Respondent further relied on expert evidence of Dr. Abdulkadir Hashim Bin Shaykh Abubakar deposed to on 20th October, 2021.
55. In his evidence, Dr. Abdulkadir Hashim Bin Shaykh Abubakar, a holder of LLB in Sharia & Law from Ombudsman Islamic University (Sudan) and Master's Degree in Law from London School of Economics, University of London and currently a senior lecturer in Sharia and Islamic studies in the Department of Philosophy and Religious Studies at the University of Nairobi, denied any impropriety on the part of the Respondent on its Sahih Logbook product.
56. In a bid to shed light on what Sahih Logbook Financing Facility is, Dr. Abubakar referred to the Article called Essential Readings in Islamic Finance and deposed that Sahih Logbook Facility is not a borrowing and lending facility but instead, it is a leasing facility whereby the Respondent purchases a motor vehicle belonging to a customer who is in need of funds, pays the Customer an agreed amount of money, then leases out the motor vehicle back to the Customer for a specified duration of time.
57. It was his case that the Customer then uses the vehicle the same way they had been using it before, while paying back to the Respondent specified monthly rental amount.
58. In seeking to clarify the bone of contention, he deposed that penalty for late payments on the part of a procrastinating lessee is permissible on the condition that it is treated as an income for the Respondent, which is channelled to charity funds.



59. In further asserting propriety of the penalty for late payments, Dr. Abubakar, while referring to the Article A Guide to Islamic Banking, deposed that since the penalty is not warranted by Shariah, the lessee is asked to pay the rent due to charity and for that purpose, the financier/lessor maintains a charity fund where such amounts may be credited and disbursed for charity purposes.
60. He deposed that the idea of payment of the penalty was designed with the purpose of deterring procrastinating debtors but do not evolve into prohibited riba.
61. It was his deposition that in consonance with resolution of Shariah Advisory Committee of 14th February, 1998, 95th Meeting dated 28th January, 2010, compensation based on reasonable pre-estimate of actual loss is similar to that based on actual loss suffered by the Bank and it treated as an earning of the bank and is included as banks profit distributable to depositors and shareholders.
62. On the totality of the foregoing, it was his case that penalty for late payment on the part of procrastinating lessee is permissible and as such, Sahih Logbook Financing Faculty of Respondent is Shariah Compliant.
63. In conclusion, Dr. Abubakar deposed that the amount made to the Respondent for late unpaid payments are sent to charitable activities under approval and guidance of Shariah Advisory Board Committee of the Respondent.
64. It was his case that the Sahih Logbook Financing facility has the approval of Sharia Supervisory Board run by qualified and competent members of Shariah, Law and Islamic Banking and Finance.

The Respondent's submissions:

65. The Respondent further urged its case through written submissions dated 8th December, 2021.
66. The Respondent contested the admissibility of the evidence tendered by the Petitioner claiming that the author of the social media posts sought to be relied upon were authored by the Advocate for the Petitioner.
67. It was his case that the Petitioner was in Court based on misadvised application of Islamic Law.
68. The Respondent denied any violation of the Right to freedom of conscience, religion and belief under Article 32 of the *Constitution* on the basis that no particulars were stated and the manner of violation a requirement established by the case of *Anarita Karimi Njeru -vs- Republic* (1979) KLR.
69. As regards the alleged right to privacy and dignity, it was submitted that the Respondent cannot be found in violation since the Petitioner's consent was sought and obtained.
70. The Respondent faulted the Petitioner for failing to itemize or plead the manner in which the contract was breached and to the extent the said breach constituted constitutional violations. Support to that end was drawn from the decision in High Court Miscellaneous Application No. 612 of 2002, *Cyprian Kubai -vs- Stanley Kanyonga Mwendu* where it was observed that: -

An applicant moving the court by virtue of section 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph of the section out of 70 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.



71. The Respondent further faulted the validity of the Affidavits filed on 15th June, 2021 and 16th June, 2021 on the basis that they were filed without leave of Court and do not conform to the dictates of *Oaths and Statutory Declarations Act* for failing to be sealed by a Commissioner for Oaths.
72. The Respondent further submitted that there was conflict of interest where Fatma Mohammed administered oath in a matter where she would be called as a witness.
73. Reliance was placed on the decision in *Francis Angueyah Ominde & another -vs- Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties)* [2021] eKLR where it was observed as follows;

It would appear to say that where the affidavit is sworn at one place by the deponent, and executed by a Commissioner for Oaths at a different place, it would be invalid, for it would suggest that the deponent did not appear before the Commissioner for Oaths, at the time the affidavit is alleged to have been filed. That would be a correct statement of the law, for the deponent of the affidavit is required to appear before the Commissioner for Oaths for the purpose of the commissioning of the affidavits, because the oath ought to be taken in the presence of the person administering.
74. With respect to the violation of image rights, it was submitted that the Petitioner's case fell outside the test as established by the decision in *Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR where it was stated that for one to claim unlawful use of his name or image they must establish use of a protected attribute, for an exploitative purpose without consent.
75. On the aspect of quantum of damages, the Respondent submitted that the Petitioner was underserving as he had not proved his case to the required standard.
76. With respect to punitive and exemplary damages it was urged that they were not pleaded and in any event were not appropriate. The decision in case of *The Bank of Baroda (Kenya) Ltd v Timewood Products Ltd* Civil Appeal No.132 of 2001(2008) eKLR was relied upon.
77. In the end, it was urged that the Petition be dismissed with costs.

Analysis:

78. Upon considering the parties' respective pleadings, submissions and evidence, the issues that arise for determination are as follows: -
 - i. Preliminary Issues
 - ii. In the peculiar circumstances the case, whether the Respondent misrepresented facts to the Petitioner in order to obtain consent.
 - iii. Depending on (ii) above, the general principles governing the right to privacy and whether the Petitioner's right to privacy and human dignity were violated in violation of Articles 31 and 28 of the *Constitution* respectively.
 - iv. Whether publication of the Petitioner's image and videos violated his freedom of conscience, religion, belief and opinion protected under Article 32 of the *Constitution*.
 - v. Remedies, if any.
79. I will hence deal with the issues sequentially.
 - (a) Preliminary issues:



80. Two preliminary issues arose that this Court must dispense with from the onset.
81. The first one was the claim by the Respondent that the Petition falls short the requirement that constitutional Petitions must identify with reasonable precision the constitutional entitlement violated and the manner of violation as established by the long-standing authority in the case of *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154.
82. The second one regarded propriety of the Petitioners' affidavits. The Respondent in its submissions contested the legality and admissibility of both the expert evidence put in by Ibrahim Lethome Asmani and the evidence tendered by Salim Mohammed Salim, and the one of Fatma Mohammed Abdallah another expert for Petitioner
83. In Anarita Karimi Njeru case (*supra*) the Court is hailed for developing among other principles, the following requirement with respect to Constitutional Petitions: -
.... the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement....
84. The Respondent took issue particularly with the alleged infringement of the freedom of conscience, religion, belief and opinion provided for under Article 32 of the *Constitution* stating that it was not pleaded with precision.
85. The Respondent's claim arises for the first time in the submissions. Its pleadings do not raise the shortcoming.
86. As a matter of principle, save for jurisdictional contests which can be raised in any form and at any stage, parties are required to raise all issues in their pleadings and as far as possible confine themselves within the four corners of the pleadings during the subsistence of the case.
87. The Supreme Court in *Raila Amolo Odinga & Another -vs- IEBC & 2 Others* (2017) eKLR, sounded a warning to the Courts below not to crystallize as issues for determination matters not captured by parties' pleadings. The Learned Judges remarked as follows: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is 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. 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. The issues arise only when a material proposition of fact is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....
88. Finding due guidance from the foregoing coupled with the fact that precision requirement is not a jurisdictional issue, this Court finds that the Respondent's contest is prima-facie without merit.
89. As regards the second issue on legality and admissibility of evidence tendered by the Expert and the Advocate on behalf of the Petitioner, the former issue was dispensed with upon withdrawal of the expert evidence of Ibrahim Lethome Asmani.
90. What is outstanding, therefore, is the sustainability of the Affidavit of the Salim Mohammed Salim deposed to on 11th June, 2021.



91. The general principles on Affidavits is provided for by Order 19, Rules 3 of the [Civil Procedure Rules](#) 2010 as follows: -

3. Matters to which affidavits shall be confined:

- (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.
- (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

92. Further, [Halsbury's Laws of England](#), 3rd Edition, at paragraph 845 provides as follows: -

Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the services and grounds thereof are stated..... However, under Rule 9 of the Advocates (practice) Rules, 1966, Advocates are not permitted to swear affidavits in contentious matters.

93. Under Rule 8 of the [Advocates \(Practice\) Rules](#), 1966 it is provided: -

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

94. The question, therefore, that this Court must resolve is whether the Affidavit deposed to by Salim Mohammed dated 11th June, 2021 is proper for consideration.

95. This Court has intently inspected the Affidavit in contention. As can be discerned, it was deposed to by Salim Mohammed Salim. The deponent is not the Petitioner's Advocate, rather, a recipient of unsolicited flyers of the Respondent's Sahih Logbook financing, near AL-Huda Mosque at South B in Nairobi. His evidence was being used to corroborate circulation of the Petitioner's image under the Respondent's logbook financing product.

96. The rest of the Affidavits in support of the Petitioner's case are deposed to by the Petitioner himself.

97. In addition to this Court having granted leave to the Petitioner to file Supplementary Affidavit, then said Affidavits are in accordance to Order 19 Rule 3 of the [Civil Procedure Rules](#), as the Affidavit deposed to facts known personally to the Petitioner.

98. The Court, hence, finds that the Affidavit of Salim Mohammed Salim deposed to 11th June, 2021 is within the bounds set by Order 19 Rule 3 of the [Civil Procedure Rules](#) and accordingly, hold that it is admissible.

99. Having found so, I now consider the substantive dispute before this Court.

(b) The consent:



100. The resolution of the question whether the Petitioner's constitutional right to privacy, dignity and freedom of religion, belief and conscience were violated revolves around interrogation of the issue whether his consent to have the Respondent use his images and videos for publication of Sahih Lodgbook Financing Product was freely obtained.
101. It is from that premise, having all due regard to the expert evidence, that this Court can project to what extent if any, the Respondent's conduct unwarrantedly ate into the Petitioner's constitutional rights guaranteed under Articles 28, 31 and 32 of the Constitution.
102. That said, it is necessary to first understand what the term consent entails.
103. The Concise English Dictionary defines the word 'consent' at page 304 to mean;

Permission for something to happen or to be done.

104. The same Dictionary defines "informed consent" as: -

Permission granted in the knowledge of the possible consequences.

105. The Black's Law Dictionary, Thomson Reuters Publishers defines the term 'consent' at page 380 as follows: -

Voluntary yielding to what another proposes or desires; agreement, approval or permission regarding some act or purpose esp. given voluntarily by a competent person; legally effective assent.

106. The making of the consent, subject of this dispute, was instigated by the Respondent's Shariah Compliance Officer upon approaching the Petitioner over the use of his image.
107. The negotiations yielded an undated Consent Form, signed by the Petitioner in the presence of Cecilia Bosire whose contents, *inter-alia*, are as follows: -
- ...grants permission to the Respondent to use the Petitioner's personal images (photographs), names and videos for broadcasting on the Company's digital, print, audio, visual and other various platforms for promotional and any other lawful purposes.
108. Importantly, the Consent Form further indicated as follows: -

This form releases the company from any infringement or violation of personal and or property rights of any sorts whatsoever based upon the use of your personal images (photographs) names and or videos photo(s)...

...your consent can be withdrawn at any time by advising the company via e-mail or in writing. The Company hereby acknowledges that there will be NO payments for the use of personal images (photographs), names and and/or videos for promotional purposes."

109. Consequent upon executing the consent form, on 12th September, 2020, the Petitioner wrote an email to the Respondent in the following terms: -

...I, Swaleh Mohammed, do here by instruct Momentum Credit Bank, to have my initially advertised posters (image) with yourselves, pulled down with immediate effect.

This instruction must be complied with within the next 3 working days. Every effort towards this directive will be highly appreciated.



110. Upon receipt of the Petitioner's e-mail, the Cecilia Bosire responded through her email of 15th September, 2020 in the following manner: -

Thank you for your e-mail...

As per the consent signed by yourself kindly note that the consent withdrawal is duly noted.

111. The bedrock of this dispute emanates from the negotiations that preceded the signing of the consent form and the intrigues that ensued upon signing of the consent form.

112. From the inception of the dispute, there is no cogent evidence that was led by the parties in the manner the consent was facilitated and obtained.

113. The Respondent deposed that the product was approved by its Shariah Compliant Committee as falling within the four corners of the Shariah law. It was also posited that the Shariah Board had not cited the product for any infringement. The Respondent further deposed that it was on the said basis that it engaged the Petitioner into giving his consent and that it did not misrepresent any facts to him.

114. Even after the Petitioner raised the issue of the product being shariah non-complaint, there is evidence *vide* the Respondent's e-mail of 29th September, 2020 between the parties whereby the Respondent stated as follows: -

... As per your text you wanted the images taken down because we were not shariah compliant.

We were advised by your lawyer. Mr. Feisal on changes we need to make in regards to the wording of the application forms and the requirements and we did make those changes.

I request for a meeting so we resolve this issue.

115. The Respondent contended that the Petitioner did not honour the invitation for the meeting.

116. This Court has patiently considered the evidence by the experts. They contradict each other. The experts were also not examined before Court.

117. Be that as it may, in this case, there was need for evidence on the manner in which the negotiations were undertaken. That evidence was missing from the Petitioner. Even with that evidence missing, the Petitioner was still under a duty to settle the issue of whether the product was shariah-compliant or not.

118. The Petitioner deposed that the Respondent informed him that the product was shariah-compliant and he believed it. From the record, there was evidence upon which the Respondent made the representation. The evidence was that the product had been internally distilled by the Respondent's Shariah Complaint Committee and approved for marketing.

119. The Petitioner, therefore, ought to have taken time to interrogate the product and preferably seek advice, opinion and guidance before ascribing his consent. That he did not do. Instead, the Petitioner believed the Respondent and freely gave his consent.

120. On filing the instant Petition, the burden was on the Petitioner to prove that his consent was obtained by otherwise unlawful means. That is the calling in Sections 107 and 109 of the *Evidence Act*.

121. In discharging that burden the Petitioner filed an Affidavit by an expert. The opinion was that the product was not shariah-compliant because it charged interest known as 'riba'. To counter that evidence, the Respondent also filed an Affidavit by an expert. The opinion was that the product was



- compliant since any interest derived from the product was to be applied for charitable purposes which was allowed in Islamic shariah law.
122. The Petitioner's expert did not respond to the aspect of applying any interest derived from the product for charitable purposes. That evidence, therefore, remain uncontroverted.
123. This issue is at the heart of the tenets of Islamic law. The Petitioner ought to have done more to enable this Court resolve the issue especially after the Respondent's expert roped in the aspect of applying any interest derived from the product for charitable purposes. Given that lacuna on the part of the Petitioner, this Court has to resolve the issue in favour of the Respondent.
124. It is, hence, the finding of this Court that the Petitioner failed to prove that the Respondent's product in issue was not in line with the Islamic shariah law and further failed to prove that his consent on the product was obtained in any unlawful manner.
- (c) Whether the Petitioner's right to privacy under Article 31 of the Constitution and the right to the protection of human dignity under Article 28 of the Constitution were violated:
125. This issue hinges on the period taken by the Respondent in continuing to use the Petitioner's image, if any, despite withdrawal of the consent.
126. The Petitioner's first intention of withdrawal of the consent was contained in his message of 3rd September, 2020 to one Cecilia Bosire. Subsequently, the Petitioner wrote an email of intention to withdraw his consent dated 12th September, 2020.
127. On 15th September, 2022, three days later, the Respondent acknowledged of receipt of the Petitioner's e-mail and notice of withdrawal of consent.
128. The Petition is dated 7th October, 2020 and was filed on 8th October, 2020.
129. From the record, the parties engaged variously through emails dated 28th and 29th September 2020 with a view of amicably settling the issue. Whereas the Petitioner was following up on the extent of compliance with his withdrawal of consent, the Respondent made effort to ascertain the alleged violation of the Islamic shariah law on its product.
130. The consent form made no reference to the time within which the Petitioner's images were to be pulled down. However, the Petitioner's request gave a 3 days' notice of withdrawal.
131. In the absence of the time specification within which the Respondent was to pull down the images, this Court calls upon this Court to employ the principle of reasonable time.
132. In *Republic -v- Attorney General & Another, Baps International Limited (Interested Party) Ex parte* (2020) eKLR 'reasonable time' was discussed as follows: -

The concept of what is reasonable time is flexible, and will depend on the circumstance of a case, as held in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision make, and adverse consequences of delay, and the need to ensure fairness. In the present case it is not disputed that the 2nd Respondent sought to extend the time in which to issue directives on change of name after a period of eight (8) years from the date of registration of the Applicant. The 2nd Respondent did not give any reasons for the delay in so acting, and the only explanation given was that there was an inadvertent error on its part in registering the name.



133. From the foregoing, the principles that underpin reasonable time include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision maker, any adverse consequences of delay and the need to ensure fairness.
134. The inaction in this case related to the alleged continued publication of disallowed images.
135. This Court has carefully looked into this issue with introspection. The reason being that on one hand, a person's rights and fundamental freedoms must be vehemently protected by this Court, and on the other hand, the Court must look at a matter so objectively so as to determine any issue on a balance of scales.
136. The Respondent deposed that it received the official communication from the Petitioner on the withdrawal of consent on 12th September, 2020. It, then commenced negotiations to ascertain where the problem really was. By early October, 2020 it was apparent that the parties were not likely to settle the matter amicably and the Respondent began the process of pulling down the posts. The exercise was completed on 8th October, 2020.
137. On institution of the Petition, the Court, on 8th October, 2020 issue a conservatory order restraining the Respondent from using the Petitioner's image. The Court further directed the parties to discuss settlement. The parties were unable to agree.
138. The period in issue is, therefore, from the 12th September, 2020 and the 8th October, 2020 when the Petition was filed. That was a period of about 3 weeks.
139. Was the Respondent indolent during that period? Not so. There is evidence that the Respondent took steps to discuss the matter with the Petitioner more so with a view to ascertain how its product was contrary to the Islamic Shariah law. It is also on record that the Respondent, being a financial institution, had expended money in rolling out of the product, hence, the need to try and mitigate on possible financial loss. That approach was vouched by this Court which also asked the parties to discuss the matter.
140. By considering the totality of the foregoing circumstances, this Court is not convinced that the Respondent took unreasonably long in effecting the Petitioner's withdrawal of consent. This Court, therefore, finds and hold that the Respondent acted diligently in resolving the dispute and the effecting of the withdrawal of the consent was not unreasonable. As such, the Respondent did not, in any manner whatsoever, infringe upon any of the Petitioner's rights under Articles 28 and 31 of the Constitution.

Remedies and Disposition:

141. Deriving from the analysis in this matter, the remedy which commends itself is that the Petition is unmerited.
142. In the end, this Court hereby makes the following final orders: -
 - a. The Petition and the Notice of Motion both dated 7th October, 2020 are hereby dismissed.
 - b. The Petitioner shall shoulder the costs of the Petition.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA



JUDGE

Judgment virtually delivered in the presence of:

Mr. Hussein, Learned Counsel for the Petitioner.

Mr. Mutegi, Learned Counsel for the Respondent.

Kirong/Regina – Court Assistants.

