



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 298 OF 2017

PURITY WANGECHI NJOGU.....PETITIONER

VERSUS

WPP- SCANGROUP LTD.....1ST RESPONDENT

KENYA AIRWAYS LIMITED2ND RESPONDENT

SCANAD KENYA LIMITED.....3RD RESPONDENT

JUDGMENT

1. The petitioner herein, who describes herself as an adult of sound mind and a Kenyan citizen sued, the respondent herein through her petition dated 29th May 2017 in which she sought the following orders:

- a. A declaration that the advertisements and or use of the petitioner's photo image or pictures with effect from October 2011 to date in media or social platforms offends and or violates the petitioner's right to privacy as guaranteed under Article 31 of the Constitution.**
- b. A permanent injunction to be issued against the respondents, their employees and or agents, business partners restraining them from using , advertising and or assigning the petitioners image or pictures in any media or social platforms or at all.**
- c. An order for compensation for the violations of her rights.**
- d. Special damages for the unpaid years at KES 328,408 in line with paragraph 24 and 25 herein above.**
- e. Costs of the suit.**
- f. Interest on c and d above.**
- g. Any other directions and or orders that the Honourable court may deem fit to grant.**

2. The petitioner's case is that sometime in early 2007, she entered into a written advertisement contract with the 1st respondent wherein she agreed to play the role of a model for the 2nd respondent in a term promotion campaign and that between February 2009 and 30th October 2009, the respondents continued to use the petitioner's image both locally and in international platforms.

3. The petitioner states that on 30th October 2009, the contract was renewed upon expiry of the intended term and that in the years 2012 and 2016, she approached the 1st respondent for a further renewal of the contract in view of the fact that the respondents continued to use her image in a host of the 2nd respondent's platforms, but that in a strange turn of events, the 1st respondent declined to renew the contact citing reasons that:

- a. The petitioner's image was not in use.

b. The petitioner had signed a contract for perpetuity.

4. The petitioner's case is that her image continues to be used by the respondents in their various advertisements, despite the non-renewal of the contract, without her consent and in breach of her right to privacy as guaranteed under Article 31 of the Constitution.

5. The petitioner states that she has suffered economic loss in the hands of the respondents who have failed and/or refused to pay her for the use of her image which loss she has quantified at Kshs. 328,408 as follows:

A. KES 8,000 that the 1st respondent did not pay for the 2009 renewal where the consideration for that contract should have been KES 88,000 a 10% increase from the initial amount paid to the petitioner.

B. KES 96,800 for the 2011 renewal.

C. KES 106,480 for the 2013 renewal and

D. KES 117, 128 for the 2015 renewal.

6. The petitioner further claims that her friends have continued to alert her that her image is up and running in social platforms including social media thereby leaving her with low social esteem as her personal worth, self-esteem and dignity has been taken away in violation of Article 28 of the Constitution. She also states that her right to fair administrative action under Article 47 of the Constitution has also been violated.

7. At the hearing of the petition, Mr. Chigiti, learned counsel for the petitioner submitted that the instant petition meets the standards set in the case of **Anarita Karimi Njeru vs Attorney General [1979] eKLR** and that the claim is rightly before the constitutional court. Counsel submitted that under Articles 22 and 24 of the Constitution, the fundamental rights of a person can only be limited by law and that the petitioner's right to privacy and dignity could therefore not be limited by an agreement.

8. Counsel argued that the agreement that the petitioner signed with the respondents was unconscionable as she was young at the time she signed it and that the respondents jointly elected to continue exploiting her images for commercial gain without any consideration whatsoever to the petitioner and to her detriment. Counsel argued that if indeed the respondent's case was that the agreement was to operate in perpetuity, then there would have been no need to sign a new agreement for the same images whose rights they claim to have acquired in perpetuity in 2007.

9. On assignment of the petitioner's copyrights, counsel submitted that even though the petitioners did not limit the assignment to a particular time or to any specified country or geographical area, Section 33(7) of the Copyright Act stipulates that assignment for such unspecified period terminates after 3 years in which case, the contract signed in 2009 expired in 2012 by which time the respondents ought to have stopped using the petitioner's image in their advertisements. **1st respondent's response.**

10. Through the replying affidavit of the 1st respondent's Company Secretary, **REUBEN MWANGI**, dated 30th October 2017, the 1st respondent denies that it ever entered into any agreement/contract with the petitioner as it is only a shareholder in the 1st respondent company and thus a separate legal entity to which no liabilities can attach on behalf of the said company.

11. The 1st respondent maintains that it has been wrongly joined as party to this petition and further states that the petitioner has not explained, with any degree of precision, the manner in which her rights under Articles 26, 28 and 31 of the Constitution have been violated.

2nd respondent's response

12. Through the replying affidavit of its Senior Legal Counsel, **Laura Wandera**, the 2nd respondent confirms that it is aware that Lowe Scanad procured the petitioner's services and entered into a model Release Agreement (herein after "the Agreement") with the petitioner on 30th January 2007 which agreement involved having the petitioner's photographs taken or filmed by the said Lowe Scanad, or its agents or contractors.

13. She further states that the petitioner was aware the terms of the said agreement and clause on presentation which stipulates that the photographs belonged to Lowe Scanad and that the petitioner had no right to them and any other reproductions or adaptations thereof and further that the petitioner granted Lowe Scanad, its licensee's assignee or clients unrestricted use of the said photographs for an indefinite period of time and for whatever purposes it deemed fit.

14. She further states that on 30th October 2009, Lowe Scanad entered into another agreement with the petitioner for advertising 2nd respondent's print renewal products or services. She attached copies of the agreements as annexures marked "**LW1**". She maintains that no contractual period was stipulated in the agreements and that under the clause on exclusivity the petitioner had agreed not to model for any other product competing with the 2nd respondents products for which any of the photographs was to be used and/or for contradicting any advertisement that the respondent may have published for at least 4 years (or such shorter or longer period as may be agreed in writing) from the dates of the contracts or the first day the photographs are screened, aired or published.

15. She states that the petitioner confirmed that she had fully read and understood the meaning and implication of the agreement before she signed it. It is the 2nd respondents contention that the petitioner had, pursuant to the agreement promised not to prosecute or institute any proceedings or make any claims or demands against either Lowe Scanad, its assignees or clients or in respect of any use by it or it's assignees

or clients of the said material whether or not the petitioners name was used with such material.

16. She confirms that the petitioner did not limit the assignment of her copyright to the 2nd respondent to a particular time or to any specified country or other geographical area. She further states that the 2nd respondent has not violated the petitioner's right to dignity, self-worth or privacy.

17. Mr. Masika, learned counsel for the respondents submitted that the two contracts that underlie the petition are an admission by the petitioner that her cause of action arises from agreements executed between herself and the 3rd respondent who was acting as an agent of the 2nd respondent and that while on the face of it, the agreements may look similar, they deal with two different issues as while the first agreement relates to the advertisement of KQ Sky Team, the 2nd agreement relates to KQ print renewal.

18. It was therefore respondent's case that the petitioner's position that the 2009 agreement was a renewal of the 2007 agreement was incorrect as each of the agreements subsist independently. Counsel submitted that a constitutional court does not have jurisdiction to sit in a case challenging agreements between private persons and added that the petitioner had the opportunity to challenge the validity of the contracts before the commercial division of this court. It was also the respondent's argument that there is a mischief being perpetuated by the petitioner in filing the commercial claim before this court as she seeks to escape the 6 year limitation period that would have technically knocked off her claim on contract and that she had therefore 'panel beaten' the suit to fit it into a constitutional petition.

19. For this argument, counsel relied on the decision in the case of **Bernard Murage vs Finserve Limited & Others** [2015] eKLR wherein it was held *inter alia* that a party has to choose a proper forum to address its claim. Counsel argued that the petition rests with the agreement and that having agreed to grant the respondents rights for an indefinite period, the petitioner cannot turn around and claim that the use of her photographs violated her rights. Counsel observed that nowhere in the petition did the petitioner challenge the manner in which the agreements were executed and further, that she has not sought to have the agreements cancelled or nullified for being unconscionable.

20. On damages, counsel submitted that the law on special damages is well settled that they not only have to be pleaded but they must also be proved. Counsel maintained that the figures laid before the court had not been proved and added that because there was no proof of violation of rights, the prayer for damages could therefore not be granted.

Analysis and determination.

21. I have carefully considered the pleadings filed herein together with the parties submissions and the authorities that they cited. The main issues for determination are as follows:

- a. Whether the jurisdiction of this Court has been properly invoked.
- b. If the answer to (i) above is in the affirmative, whether the Petitioners' rights to dignity and privacy under **Articles 28** and **31 (a)** and **(d)** of the Constitution have been violated.
- c. What remedy, if at all, is available to the Petitioners.

Jurisdiction

22. It was the Respondents' case that the dispute between the Parties is one which raises questions relating to validity of a contract and thus falls under the realm of Commercial Law. The Petitioners on the other hand have argued that their Petition is one pegged on a violation of **Articles 28** and **31** and therefore falling for determination under the jurisdiction of this Court to determine constitutional issues.

23. It has been held time and time again that jurisdiction is everything and without it, no Court should wade into the determination of any dispute without such jurisdiction as would enable it to do so – See **Supreme Court Petition No.4 of 2012 Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others**.

24. In addition to the above, the doctrine of constitutional avoidance is well and truly alive in our realm. That doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such. It is for this reason that the Supreme Court in **Communication Commission of Kenya v Royal Media Services Ltd & 5 Others** [2014] eKLR stated thus:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."

25. The respondent argued that the instant petition is, in fact, a commercial dispute disguised as a constitutional petition in order to circumvent the 6 years limitation period imposed on disputes arising out of claims of breach of contract. It was not in dispute that the genesis of this suit is a contract signed between the petitioner and the respondents in respect to the use of the petitioner's image in advertisements. It was also not disputed that under the said contract, the petitioner agreed that her image be used by the respondents for purposes of promoting its products at an agreed cost. The petitioner however alluded to the fact that she lacked the capacity to enter into the contract and that the terms of the contract were oppressive. My finding is that as far as the validity of the contract or its alleged breach is concerned, this court lacks the jurisdiction to entertain the claim as that is a matter that falls squarely within the province of the Commercial division of this court.

26. The above finding on the Commercial angle of this case notwithstanding, I am still minded to consider the issue of infringement of right to privacy and dignity. I agree with the Petitioner that once she specifically invoked **Articles 28 and 31** of the **Constitution** as the basis for their Petition, then a constitutional question arises for determination by this court even though the merits or otherwise of that question is a wholly different matter because proof thereof would have to be on the basis of constitutional principles as set out in the case of **Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272** which are to the effect that a party alleging violations of the Constitution must at the very least indicate the constitutional basis for the violation, the manner in which the same was done and the remedies sought – See also **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR.

27. In the present Petition, I have no doubt that the Petition has largely met that threshold and the merits or lack of it is a matter to be determined shortly. This court has been called upon to determine whether the petitioners' right to privacy and by extension, dignity was violated by the publication of their images by the respondents in the promotion of their products.

28. Article 28 of the Constitution stipulates that *every person has an inherent dignity and the right to have that dignity respected and protected* while Article 31 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.**

29. The nature and importance of the right to privacy was articulated in the case of **JW1 & Another vs Standard Group Ltd** (supra) as follows:

"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 give or received by the individual confidentially."

30. As I understand it, privacy and dignity rights are intertwined and are to be protected in the context of the person hence the decision in **Brooker v the Police (2007) NZSC 30** where the Supreme Court of New Zealand stated thus;

"Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognizing and asserting this personal and private domain is essential to sustain a civil and civilized society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person."

31. Further, in **Kennedy v Ireland (1987) I.R. 587, Hamilton J.** stated thus;

"The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with."

32. The right to privacy is however not an absolute right as it is one of those rights that may, under Article 24 of the Constitution, be limited. Article 24(1) of the Constitution stipulates as follows:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a. The nature of the right of fundamental freedom;**

b. The Importance of the purpose of the limitation;

c. The nature and extent of the limitation;

d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental of others; and

e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

33. In the instant case, it was not in dispute that the petitioner entered into an agreement with the respondents in which she expressly consented to the use of her image by the respondents and, their assignees, in the promotion/advertisement of their products. The said agreement was reduced into writing and was duly signed by both parties together with their witnesses. The petitioner's point of challenge, however, was that the respondents continued to use her image without her consent as, according to the petitioner, the contract had an expiry date and was subject to a renewal in the event the respondents desired to continue using her image. The respondents' case, on the other hand, was that the contract in question was for an indefinite period. The above scenario leads this court to the next question which is, whether the contract had an expiry date. The answer to the above question calls a perusal of the said contract that was produced by the petitioner as exhibit "PWN-1".

34. A perusal of the said contract document signed by the parties shows that under the title 'presentation' the petitioner agreed to the following terms:

"I also agree that any person authorized or acting for you may also use the said material or any reproduction or adaptation of them for advertising with any reasonable retouching, alteration or editing. You and your licensee's assignee or clients shall have unrestricted use of the said material for an indefinite period for whatever purposes you may think fit."

35. From the above term of the agreement, it is clear that the petitioner gave the respondents and their assignees a *carte blanche* or a free hand to use her image in whichever manner and for whatever purposes that they deemed fit. Under the above circumstances, I am unable to find that the agreement was intended to be for a limited period only as alleged by the petitioner. I further find that the petitioner's claim that she had legitimate expectation that the contract would be renewed after some time was neither here nor there since no renewal clause exists in the terms of the said contract document which is instead clear on the indefinite period of its existence.

36. I further find that the petitioner's claim that the contract signed on 30th October 2009 was a renewal of an earlier contract signed on 30th January 2007 was not proved through any cogent evidence as nowhere in the two documents is it shown that the latter contract was a renewal of the earlier one. For the above reasons, this court cannot speculate on the purpose of the later contract.

37. In sum, I find that by agreeing, in writing, to have her image used by the respondents to market their products for an indefinite period, the petitioner expressly gave up her right to privacy, at least in as far as the use of her image is concerned, and she cannot therefore turn around and claim that her rights under Articles 28 and 31 of the Constitution have been infringed.

Remedies

38. It follows that if no violation of **Articles 28 and 31** has been proved, no remedy is available to the Petitioner.

Disposition

39. For the above reasons, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2019

W. A. OKWANY

JUDGE

In the presence of:

Miss Kirui for the petitioner

Court Assistant - Fred