



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO 280 'A' OF 2016**

ANASTASIA WANGUI KIMANI.....PLAINTIFF

VERSUS

UNAITAS SACCO SOCIETY LIMITED.....DEFENDANT

AND

CATAPULT BRAND CONSULTING LIMITED.....THIRD PARTY

**JUDGMENT**

**INTRODUCTION**

1. In her plaint dated 23<sup>rd</sup> June 2016 and filed on 28<sup>th</sup> October 2016, the Plaintiff sought the following reliefs against the Defendant herein:-

- a. **General damages for infringement of her rights of privacy and dignity, passing off, misrepresentation and false endorsement, breach of confidence and unjust enrichment.**
- b. **Aggravated damages for the unconstitutional, insolent and malicious manner in which the privacy and dignity of the Plaintiff was infringed.**
- c. **Interest on (a) and (b) at court rates from the date of judgment until payment in full.**
- d. **Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the Plaintiff.**

2. The Plaintiff's Supplementary List of Witnesses, Witness Statements and List of issues were dated 6<sup>th</sup> March 2017 and filed on 7<sup>th</sup> March 2017. Her Reply to Amended Defence was dated 19<sup>th</sup> January 2018 and filed on 22<sup>nd</sup> January 2018.

3. The Defendant filed its Defence dated 1<sup>st</sup> December 2016. On 15<sup>th</sup> January 2018, it filed a Notice of Motion application dated 29<sup>th</sup> December 2018 seeking to amend its Defence. The said application was allowed by Thurairaja J on 17<sup>th</sup> January 2018 whereupon it filed its Amended Defence dated 18<sup>th</sup> January 2018 on 19<sup>th</sup> January 2018. Its List of Bundles of Documents was dated 10<sup>th</sup> April 2018 and filed on 12<sup>th</sup> April 2019.

4. On 6<sup>th</sup> February 2018, the Defendant filed a Notice of Motion application dated 5<sup>th</sup> February 2018 seeking leave to join the Third party herein. The said application was allowed by Mbogholi Msagha J on 7<sup>th</sup> February 2018. The Third Party Notice dated 7<sup>th</sup> February 2018 was filed on 8<sup>th</sup> February 2018.
5. On 3<sup>rd</sup> October 2018, this court directed the parties to file fresh witness statements cross-referencing their indexed and paginated Bundle of Documents. The Plaintiff filed her documents on 11<sup>th</sup> October 2018. The Defendant's Witness Statements were dated and filed on 30<sup>th</sup> January 2019.
6. The Plaintiff's Written Submissions and List of Authorities were dated and filed on 14<sup>th</sup> February 2019. The Defendant's Written Submissions were dated 19<sup>th</sup> February 2019 and filed on 20<sup>th</sup> February 2019. The Third Party did not participate in the proceedings herein from the time orders were issued to it to be enjoined in the proceedings herein. In addition, Third Party directions pursuant to Order 1 Rule 22 of Civil Procedure Rules, 2010 did not appear to have been given.
7. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

### **THE PLAINTIFF'S CASE**

8. The Plaintiff's case was that sometimes in 2013, the Defendant's representatives approached her with an offer to appear and feature on an online and broadcast media advertisement to promote and endorse the Defendant at its branch in Kasarani along Mwiki Sports View Road.
9. It was her contention that she was made to believe that the Defendant would compensate her adequately for the use of her image, reputation and voice to promote its business. However, the Defendant uploaded the video titled **Unaita's Chama Video 3** on the YouTube platform <https://www.youtube.com/user/unaitas> sacco without her consent and further failed to compensate her.
10. She stated that her family and friends believed that she entered into a commercial arrangement with the Defendant and she was paid.
11. She averred that Unaitas Chama Video 3 was pulled down from the Youtube platform where she had addressed her complaint but that Unaitas Chama Videos 1,2,4,5 and 6 were still running online.
12. She contended that the use of her image and voice had propelled the Defendant's sales and visibility of its products and/or services to the extent that it was poised to transform into a fully fledged commercial bank. She further asserted that the advertisement had suggested that she had recommended or approved the Defendant's products.
13. It was her further averment that the said advertisement constituted an unjustifiable invasion of her rights as an individual particularly, those of dignity and privacy.
14. She therefore urged this court to allow the prayers that she had sought in her plaint.

### **THE DEFENDANT'S CASE**

15. The Defendant's case was that the Plaintiff appeared and featured in an advertisement endorsing it out of her own volition without its inducement. It further contended that if it appropriated her identity, name and voice vide the Youtube platform, it was with her knowledge and consent. It was emphatic that its actions were legal and lawful.
16. It denied having infringed on her constitutional rights of privacy and dignity and contended that her demand was solely motivated by greed and the need to earn maximum profit.
17. It was emphatic that she was not entitled to any compensation as sought and urged this court to

dismiss the suit with costs to it.

## **LEGAL ANALYSIS**

18. The Defendant did not file any list of Agreed Issues. The Plaintiff listed the following issues as those for determination by this court:-

- 1. Whether the Plaintiff was approached by the Defendant's representatives with an offer to appear on an online and broadcast media advertisement to promote the Defendant's product.**
- 2. Whether the Plaintiff was made to believe that she would be compensated.**
- 3. Whether upon appearing in the advertisement, the Defendant failed to compensate the Plaintiff.**
- 4. Whether the Defendant's actions of appropriation of the Plaintiff's identity, likeness, name and voice without compensation was illegal and a gross violation of the Plaintiff's rights to privacy and dignity.**
- 5. Whether the Plaintiff was in order to believe that a section of the society believed that she entered into a commercial arrangement with the Defendant.**
- 6. Whether the Defendant violated the Plaintiff's personality rights as itemized in the Plaintiff's Complaint.**
- 7. Whether the Defendant was served with demand letter.**
- 8. Whether the Plaintiff was entitled to damages, both general and aggravated.**
- 9. Which party should bear the costs of the proceedings.**

19. Having considered the said issues, this court found the same to have been related. It therefore analysed the same together.

20. All the witnesses adopted their Witness Statements as their testimony. The Plaintiff's evidence-in-chief was as had been summarised hereinabove.

21. In her Cross-examination, she admitted that she signed a document for the video to be produced but stated that she did so without knowing what it was about. She said that she found cameras had been set up when she went to the Defendant's bank hence she did not read the contents of the document.

22. She was shown an Agreement between the Third Party and herself that was dated 15<sup>th</sup> November 2013 and acknowledged that the signature endorsed thereon was hers. She added that the Defendant was not party to the said Agreement and conceded that she gave the Third Party authority to use the video for promoting or publicising the Defendant.

23. She confirmed that the said Agreement had indicated that there would be no financial obligations but that she did not read it to confirm what it was saying. She was, however, emphatic that a Mr. Meshack, the Defendant's Training Officer for their Chama told her that the Defendant would compensate her.

24. In being Re-examined, she agreed that she had not been forced to sign the said Agreement but was categorical that the Defendant was to compensate her. She added that she said Mr Meshack had told her that the Defendant had chosen her to feature in the video but she had never been paid a single coin to endorse the Defendant's products.

25. Jacob Abade Anywaya (hereinafter referred to as "PW2") was the Plaintiff's husband. His evidence was that the Plaintiff informed him about the shooting of the video and since they banked at its branch at

Kasarani Branch, he did not oppose the idea.

26. He stated that he was distraught because the Plaintiff was not compensated for the use of her beautiful image, likeness, name and voice. He added that he had all along believed that she was paid huge financial compensation and that he felt deeply violated and injured in terms of his dignity and privacy.

27. In his Cross-examination and Re-examination, he said that the Plaintiff did not show him any Agreement with the Defendant and hence he could not comment on the terms and conditions thereof.

28. Josephine Wanjiku Gituiria (hereinafter referred to as “PW3”) was the Plaintiff’s friend for about ten (10) years. She said that they were in the same chama/group christened Star of Hope with a membership of ten (10) members and they used to get loans from the Defendant.

29. Her evidence was that while watching one of the prominent Kikuyu Stations in her house, she saw the advertisement by the Defendant which had featured the Plaintiff. She was surprised because the Plaintiff never informed her that she would feature in an advertisement. She said that she called the Plaintiff to enquire about the products but the Plaintiff told her that she had not seen the video.

30. She was dismayed to watch the advertisement on the You tube platform and through other broadcast media forums (sic) titled “**Unaitas Chama Video 3**”. It was her further testimony that she believed that the Plaintiff received a huge financial compensation for the advertisement involving her identity, likeness, name and voice.

31. When she was Cross-examined, she also stated that the Plaintiff never showed her any Agreement indicating that she was to be paid.

32. In her evidence, Claire Wambui Gachui (hereinafter referred to as “DW1”), the Defendant’s Customer Service Co-ordinator, confirmed that the only document the Defendant would rely upon was the aforesaid Agreement. She was emphatic that the Defendant was not privy to the contract.

33. She added that the Plaintiff expressly gave the Third Party authority to broadcast, exhibit, market or otherwise distribute the product (video) for promoting and publishing.

34. During her Cross-examination, she admitted that she was not present when the said Agreement was purportedly signed by the Plaintiff. She was, however emphatic that the Defendant was not privy to the said Agreement.

35. On being re-examined, she said that the Defendant was given the said Agreement by the Third Party. This answer was contested by the Plaintiff’s Counsel but this court upheld the answer, having noted that it was a relevant question as she had stated that she was not present when the same was purportedly signed.

36. It was not in dispute that a video featuring the Plaintiff was shot by the Third Party on behalf of the Defendant herein and was circulated on the You tube platform.

37. Whereas she produced in evidence newspaper reports showing the Defendant’s improved financial performance, she did not adduce any oral or documentary evidence to demonstrate that the said financial performance were attributed to the sole use of her image, likeness and voice in the video that was shot by the Third Party herein on behalf of the Defendant herein.

38. The burden was on her to show the nexus between her image and voice in the video and the profit margins that were realised by the Defendant herein. This was in line with Section 107 of the Evidence Act Cap 80 (Laws of Kenya) which stipulates that:-

**1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

39. Further, Section 109 of the Evidence Act states that:-

**“...The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”**

40. Notably, the Plaintiff could not approbate and reprobate. She could not purport to deny the existence of the aforesaid Agreement but yet at the same time purport that because the video was shot for the benefit of the Defendant, it could not therefore escape liability herein or that she was made to sign the said Agreement and/or there was misrepresentation.

41. Her arguments about passing off were therefore irrelevant because if in her own admission the said Agreement did not exist, then she could not have been misled into signing the same. The said Agreement could not therefore have been a red herring and created purportedly to exonerate the Defendant from liability as she had contended because rather, it did, in her own admission, exist.

42. This court also noted her arguments that the said Agreement was abstract, inconclusive and ambiguous and that it did not make reference to the subject video and/or series of videos made for marketing the Defendant's products or state that the Third Party acted for the Defendant.

43. She further submitted that DW1 was the Defendant's employee and that since the Defendant was not privy to the Agreement, her testimony was inadmissible as she could not comment on the same. That may very well have been so. However, she (the Plaintiff) admitted that the signature on the said Agreement was hers. It was not forged.

44. In that document, it was stipulated as follows:-

**“..The undersigned enters into the following agreement (“Agreement”) with Catapult Brand Consulting (“Producer”). I have been informed that Producer is capturing footage and that my name, likeness, image, voice, appearance and/or performance is being recorded and made part of the recording in which I appear (“Product”)**

**1. I grant Producer and its designees the right to use the Product in any format now known or later developed. I grant without limitation, the right to edit, mix or duplicate and use or re-use Product in whole or in parts as Producer may elect Producer or its designees have complete ownership of the Product including copyright interests.**

**2. I grant Producer and its designees the right to broadcast, exhibit, market and otherwise distribute the Product, in whole or in parts, and alone or with other products for any purpose Producer or its designees determine. This grant includes the right to use Product for promoting or publishing.**

**3. I have the right to enter into Agreement and am not restricted by commitments to third parties.**

**4. Producer has no financial commitment or obligations to me as a result of Agreement.**

**5. In consideration of all the above, I hereby acknowledge receipt of reasonable and fair consideration from Producer. I have read, understand and agree to all of the above and that the rights granted Producer herein are perpetual and worldwide.**

**Print Name: ANASTACIA WANGUI KIMANI**

**Signature:** Signed - 0722XXX901

**Date** 15<sup>th</sup> /11/2013

**If this person is under age 18, legal guardian must sign below. I certify that I am the legal guardian of the model named above I give my consent to the foregoing on his or her behalf.**

**Print Name** \_\_\_\_\_

**Signature** \_\_\_\_\_

**Date**\_\_\_\_\_”

45. Assuming that the said Agreement did not exist as the Plaintiff had wanted this court to believe, she did not adduce any written evidence showing that the Defendant had contracted her to advertise its products and that it was to compensate her.

46. The fact that there was a video in which she was endorsing the Defendant’s products was not proof that she was in fact contracted by the Defendant to endorse its products, if at all. It was her case and she was obligated by the law to have called Mr Meshack as her witness to confirm the terms and conditions of the contract she had purportedly entered into with the Defendant.

47. Going further, this court looked at the 3.35 minute Unaitas No 3 (Plaintiff’s Exhibit No 2) Video and noted that different customers in Chamas explained how they joined the bank and the benefits they had accrued from being granted loans by the Defendant. They shared positive experiences of having been the Defendant’s customers.

48. One customer spoke of how the Defendant helped them purchase a thirty three (33) seater mini-bus. Another customer spoke of how the group of thirty (30) members purchased and developed a five (5) acre piece of land through the help of the Defendant.

49. The Plaintiff spoke of how their Chama comprising of ten (10) members who were business women opened an account and the bank gave them **“an advise”** (sic) and they started as a group.

50. The last speaker spoke of how the Defendant helped their Chama and they were now generating a monthly turnover of Kshs 300,000/= up from a monthly turnover of Kshs 10,000/=.

51. Notably, in that video, the Plaintiff did not say how her Chama had benefitted from their relationship with the Defendant save to say that they got **“an advise (sic) and they started as a group.”**

52. The video appeared to have been shot in the Defendant’s banking hall. There were several other persons in the video in addition to the four (4) speakers. It was not possible to say with certainty under which circumstances the four (4) customers including the Plaintiff herein looked into the camera and shared out their experiences. It could either have been a normal unplanned or a pre-planned interview. In the absence of any documentation from the Plaintiff, this court was unable to conclude that the said video was not to be shared in public.

53. In the second video titled **“Unaitas Video 6 Personal & chama”**, several persons appeared therein and gave the progress they had made in their chamas after they joined the Defendant. The same was in the Youtube Platform and appeared to have also been shot in the Defendant’s Banking Hall. It did not feature the Plaintiff herein.

54. Having carefully listened and analysed the two (2) videos, it was clear to this court that the Plaintiff’s right to privacy and dignity that is enshrined in Article 31 of the Constitution of Kenya, 2010 was not infringed upon. The same provides as follows:-

**“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.**

55. This court fully associated itself with the Defendant’s submissions and in particular with the holding in the case of **Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR** which held that for one to demonstrate that his right to privacy had been infringed upon, he had to demonstrate that:-

- 1. An aspect of his identity had been used.**
- 2. An aspect of his identity had been used for exploitative purposes.**
- 3. His aspect of identity was used without his consent.**

56. In the said decision, the court recognised one’s name, likeness or other personal attributes constitutes his identity.

57. Bearing in mind that the Defendant was not the maker of the Agreement, Defendant’s Exhibit 1, it was inadmissible in evidence. That notwithstanding, as the Plaintiff testified that she signed document without reading the small print, she could not be said not to have given her consent. She was under an obligation to satisfy herself of what was printed thereon before appending her signature.

58. However, as she was adamant that the said Agreement did not exist, having heard her oral evidence and that of PW2 and PW3 and having looked at the **“Unaitas Video No 3 Chama”**, this court was not satisfied that the Plaintiff had proved on a balance of probability that the Defendant used an aspect of her identity for exploitative purposes.

59. Accordingly, she failed to prove her case on a balance of probabilities. She approbated and reprobated in her entire submissions. However, if the court were to have admitted the said Agreement, it was clear that the Plaintiff had granted the Producer all the rights over the video and that she had acknowledged receipt of reasonable and fair consideration from the Producer. In addition, the Plaintiff had consented to the term of the Agreement that the Producer had no financial obligation to her as a result of the said Agreement.

## **DISPOSITION**

60. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s suit that was dated 23<sup>rd</sup> June 2016 and filed on 28<sup>th</sup> October 2016 was not merited and the same is hereby dismissed with costs to the Defendant.

61. It is so ordered

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of September 2019**

**J. KAMAU**

**JUDGE**