



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J)

PETITION NO. 15 OF 2019

BETWEEN

TONY HILLARY OMONDI.....PETITIONER

AND

SILVERSTONE AIR.....RESPONDENT

JUDGMENT

Petitioner's case

1. The Petitioner complains that the Respondent, a company incorporated in Kenya to conduct air transport business used his photographic image bearing the aerial view of Kisumu City to advertise its fancy trip to the lakeside city of Kisumu on its Twitter, Instagram and Facebook pages. The gravamen of their case is that the action by Respondent violated Petitioner's right to dignity, privacy and property protected under **Articles 28, 31, and 40** of the Constitution respectively.

2. The Petitioner asserts that the Respondent's allegation that the advisement using a photograph taken by the Petitioner was made by Arena Media Limited does not lie for the reason that the same was at the behest of the Respondent which was motivated by greed and the need to earn maximum profits at his detriment and expense. In support of his claim that a person's image or photograph deserves protection from commercial exploitation, the Petitioner placed reliance on the South African case of **Grutter v Lombard and Another 2007 (4) SA 89 (SCA)**, where it was noted as follows –

“The extent to which the features of a person's identify – for example his or her name or likeness – constitutes interests that are capable of legal protection has received little attention from our courts. In the United States the appropriation of a person's name or likeness for the benefit or advantage of another has come to be recognized as an independent tort during the course of the last century. The English common law seems to have been more reticent in that regard. In his illuminating dissertation on the subject P.P.J Coetser observes that in Germany ‘wide protection has been afforded by the positive law to an individual's interest in identity’ form which has emerged that ‘it is unlawful to use certain aspects of personality for commercial purposes without consent.’

In this country it appears to be generally accepted academic opinion that features of personal identify are indeed capable (and deserving) of legal protection.”

3. The Petitioner also relied on another South African case, **Angella Wells v Atoll Media (PTY) Ltd & Anor, Western Cape High Court Case No. 11961/2006** where it was held

“...the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in case, for the benefit of a magazine sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

4. Further to the foregoing, the Petitioner submitted that the Respondent is guilty of the tort of appropriation of personality for the reason that the advisements by the Respondent was for commercial gain and that the Petitioner was clearly identifiable in the medium used for the advertisement.

5. It is the Petitioner's case that the advertisement by the Respondent was unlawful since it was made without his consent. In support of this

assertion, Petitioner relied on Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR where the petitioner sought compensation from a plastic surgery center for allegedly using her photo on a billboard to advertise its services without her consent.

6. In answer to the Preliminary Objection, the Petitioner submits that its rights that have been violated are constitutional and not commercial. Flowing from the foregoing, the Petitioner seeks the following orders:

- 1) **A declaration be issued that the use by the Respondent of the Petitioner's photograph on social media pages violates his constitutional rights to human dignity, privacy and right to property**
- 2) **An order of prohibition be issued prohibiting the Respondent from using any kind of the Petitioner's photograph or image in any form of advertisement without his express authority**
- 3) **An order for damages for the constitutional rights violations perpetrated by the Respondent against the Petitioner**
- 4) **Costs be provided for**

Respondent's Case

7. In response, the Respondent on 30.07.19 filed a Notice of Preliminary Objection firstly, on the ground that the Petition contravenes the provisions of Article 24(1) (d) of the Constitution and secondly on the ground that this court lacks jurisdiction to enforce a public law remedy, specifically copyright infringements and the same ought to have been filed in the Commercial Division.

8. The Respondent through its Human Resource Manager Patricia Matu filed a replying affidavit sworn on 30.07.19. The deponent avers that the advertisements complained of were carried out on Respondent's behalf by Arena Media Limited who would be the proper party in this petition.

9. It is asserted that section 35(5) of the Copyright Act provides that liability cannot attach to the Respondent for the alleged infringement since at the time of the infringement, the Respondent was not aware and had no reasonable grounds for suspecting that copyright existed in the works to which this action relates.

10. The Respondent also contends that the implementation of provisions of Article 21 of the Constitution is incumbent upon the state and state officers and not on a private limited company such as the Respondent and that the wrong complained of can only be enforced under the provisions of civil laws. In support thereof, Respondent placed reliance on Kenya Bus Services Ltd & 2 others v Attorney General & 2 others [2005] eKLR where the court quoted the holding by Maxwell CJ in the Kiribati case of TEITIWNNANG v ARIONG & OTHERS [1987] LRC Const 517 at page 599 and held as follows:

“Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”

11. Respondent holds the view that the Petitioner's claim does not raise a constitutional issue but is instead a claim for copyright infringement and ought to have been brought under the substantive law. Reliance was placed on the following authorities:

i. Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where the court stated that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

ii. Wafula vs. Republic, H.C. Misc. Application No.343/2000, where it was stated thus;

“Our Constitution is a serious and solemn document. We think that invoking it ... be reserved for appropriate and really serious occasions.

iii. Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR where the court relied on NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC) and stated thus;

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice

and not every matter will raise a constitutional issue worthy of attention.”

Determination

12. From the details of the arguments, I find that these are the issues for resolution:

(a) **Whether a constitutional right can be enforced as against the Respondent**

(b) **Whether this petition raises any constitutional issues**

(c) **Whether the petitioner has proved his case to the required standard**

Whether a constitutional right can be enforced as against the Respondent

13. The crux of the petitioner’s case is that his right to dignity, privacy and property protected under **Articles 28, 31, and 40** of the Constitution respectively have been violated in that his photographic image of the aerial view of Kisumu City was used to advertise Respondent’s business and to earn profits at his detriment and expense.

14. The decisions in **Grutter v Lombard and Another, Angella Wells v Atoll Media (PTY) Ltd & Anor, Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others (supra)** support the Petitioner’s contention that a constitutional right can be enforced as against an individual or a limited liability company such as the Respondent. The decisions in **Kenya Bus Services Ltd & 2 others v Attorney General & 2 others [2005] eKLR** and **Richard Nduati Kariuki V Leonald Nduati Kariuki & Another [2006] eKLR** do not hold true under the 2010 constitution.

Whether this petition raises any constitutional issues

15. Whereas it is indeed not denied that the Petitioner’s photographic image of the aerial view of Kisumu City was used in the Respondent’s advertisement, this case is distinguishable from **Grutter v Lombard and Another, Angella Wells v Atoll Media (PTY) Ltd & Anor** and **Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others (supra)** where personal images of the Petitioners were used without their consent.

16. Rights to dignity, privacy and property are protected under **Articles 28, 31, and 40** of the Constitution respectively. Dignity and Privacy are facets of personality. A person’s privacy includes his or her identity, image, likeness, signature etc. The photograph used by the Respondent does not include the Petitioner’s identity, image or likeness and the tort of appropriation of his personality does therefore not apply. What is depicted on the photograph complained of is the aerial view of Kisumu City and not a personal photograph of the Petitioner. Dignity is the state or quality of being worthy of honour or respect. The advertisement made using the Petitioner’s photographic image of the aerial view of Kisumu City cannot be said to be a violation of the constitutional rights of the petitioners under article **Articles 28, 31 and 40** as alleged. It can in my view, if proved to be correct, be an infringement of a copyright which is not a constitutional issue. In my view there are no constitutional issues raised in this dispute.

17. It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. The common thread that ties together **Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi; Wafula vs. Republic Wafula vs. Republic** and **Uhuru Muigai Kenyatta V Nairobi Star Publications Limited** (supra) is that courts ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. From the facts before me, I find that this petition does not raise constitutional issues at all and on this ground, the petition fails.

Whether or not the Petitioner has proved his case to the required standard

18. Just in case I am wrong, I have taken the trouble to consider if the Petitioner has proved his case to the required standard. As observed above, this petition alleged violation of rights to dignity, privacy and property protected under **Articles 28, 31, and 40** of the Constitution. It is premised on the fact that the Petitioner’s photographic image of the aerial view of Kisumu City was used to advertise Respondent’s business and to earn profits at his detriment and expense. From the evidence tendered on behalf the Petitioner, I find that the alleged violation of his constitutional rights has not been demonstrated.

19. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any). (**See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007**). I find no infringement of constitutional rights at all that can be founded on publication of a photograph without a person’s image, likeness or anything personal. The only issue that can arise is the issue of infringement of copyright which is not a constitutional question.

20. Section 107 (1) of the Evidence Act provides that the **burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes** the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The standard of proof in civil cases is on a balance of probabilities. That balance to this court, having reviewed the evidence, has not sufficiently been discharged.

21. From the foregoing analysis, I find that this petition has no merits. It is consequently dismissed with costs the Respondent.

DATED AND DATED IN KISUMU THIS 28th DAY OF November 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Okodoi/Basil

For the Petitioner - Mr. Omondi hb for Mr. Awach

For the Respondent - N/A