



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**CIVIL CASE NO. 857 OF 2010**

**ANTHONY CHEGE**  
**MBURU.....PLAINTIFF**

**VERSUS**

**NUTURN BATES LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**MABATI ROLLING MILLS LIMITED.....2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

1. Anthony Chege Mburu, (hereinafter referred to as the applicant) has sued Nuturn Bates Limited and Mabati Rolling Mills Limited (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively). He is seeking *inter alia* a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from advertising utilizing or doing any other act, using the applicant's images and or voice, in park benches, bill board, television, print, advertisement, work or any other thing or continuing to do so.
2. The applicant has now come to this court by way of chamber summons dated 16<sup>th</sup> December, 2010 seeking an interim order of injunction against the respondents restraining them from using his image pending the hearing of his suit.
3. In support of his application the applicant has sworn an affidavit in which he explains that he entered into a two year contract with the 1<sup>st</sup> respondent in December, 2006 for him to act as a television and print model, in respect of advertisement of the 2<sup>nd</sup> respondent's product at a consideration of Kshs.60,000/= . The contract lapsed in the year 2008. In January, 2010 the applicant discovered that in breach of the contract, the 2<sup>nd</sup> respondent was using the applicant's photographic images after the agreed period without any consideration to the applicant or the applicant's consent or authority thereby enriching themselves unjustly.
4. The applicant averred that the use of the images has caused embarrassment to him and his family. This is because he has changed status having gotten married in May, 2010. The applicant is particularly concerned that the continued use of his images juxtaposed with that of another lady is causing mental anguish and strain in his new marriage. Thus the court was urged to issue the order of injunction

to restrain the respondents from further breach of the contract and to spare the applicant from further embarrassment. The 1<sup>st</sup> respondent although served did not file any reply to the application.

5. The 2<sup>nd</sup> respondent opposed the application through an affidavit sworn by its legal adviser Anthony M. Kung'u. In the affidavit Kung'u deposes that the 2<sup>nd</sup> respondent entered into an advertisement agreement with the 1<sup>st</sup> respondent on the 7<sup>th</sup> of August, 2006 for providing advertising services for the 2<sup>nd</sup> respondent's products. The agreement was terminated on 31<sup>st</sup> March, 2007, but another agreement was entered on 1<sup>st</sup> February 2008 on substantially the same terms as the previous agreement.

6. According to the agreement the intellectual properties and the rights to all the adverts films, artwork, stay board and any other materials produced by the 1<sup>st</sup> respondent and paid for by the 2<sup>nd</sup> respondent, became the property of the 2<sup>nd</sup> respondent irrespective of whether the 1<sup>st</sup> respondent's contract with the other party run out.

7. The 2<sup>nd</sup> respondent maintained that there was no privity of contract between it and the applicant, and that its use of the images complained of by the applicant was lawful. Counsel for the 2<sup>nd</sup> respondent argued that since the applicant has prayed for damages in his plaint, he is not entitled to an injunction as damages would provide an adequate remedy. The court was urged to dismiss the application.

8. Order 40 Rule 2 (1) of Civil Procedure Rules 2010 states as follows:-

***“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right”.***

9. Therefore, the main issue for determination herein is whether the applicant has demonstrated the existence of a right or contract, and if so whether there has been a breach or threatened breach of contract or any injury to the applicant such as to call for intervention by this court. From the affidavit filed in support of the application and in reply to the application it is not disputed that the applicant's images are being used by the 2<sup>nd</sup> respondents in its advertisement. It is further evident that the images were made pursuant to two contracts. The first contract was entered into between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. The second contract was entered into between the applicant and the 1<sup>st</sup> respondent. It is clear from the copy of the model release form exhibited by the applicant that the applicant's contract with the 1<sup>st</sup> respondent was entered into by the 1<sup>st</sup> respondent in execution of the 1<sup>st</sup> respondent's contract with the 2<sup>nd</sup> respondent.

10 There is an issue as to whether in entering into the contract with the applicant the 1<sup>st</sup> respondent was acting as an agent of the 2<sup>nd</sup> respondent or a principal. There is also the question whether the continued use of the applicants' image by the 2<sup>nd</sup> respondent is lawful. These are however issues to be canvassed and determined at the full trial.

11. Suffice to note, that the two contracts are closely related and that the applicant has demonstrated that the use of his image without his consent or authority, after the contractual period may be a breach of the contract he entered into with the 1<sup>st</sup> respondent. It is noteworthy that the 1<sup>st</sup> respondent has not seen it fit to file any response or objection to this application. Furthermore, the applicant's contention that the 2<sup>nd</sup> respondent's continued use of the images is likely to cause him irreparable loss since it is threatening his marriage has not been controverted. In the circumstances, the applicant has established a prima facie case with a probability of success.

12. An argument was raised that the applicant having sought general damages in the plaint, he is not

entitled to an order of interlocutory injunction. That argument cannot hold as the damages sought by the applicant in the plaint relates to past use of the images, while the interlocutory injunction seeks to prevent the continued use of the images. The applicant has also demonstrated that the continued use of the images is posing a threat to his marriage. Obviously that poses a threat of a loss that cannot be adequately compensated by an award of damages.

13. For the above reasons, I am satisfied that the applicant has met the threshold for granting an order of interlocutory injunction. I therefore grant the application and issue an interlocutory order of injunction restraining the respondents, their agents, assigns, or servants from using advertising branding, marketing or doing anything whether on television, print, billboard, press, poster, park benches, magazines etc using the plaintiff's photographs and vocal productions, pending the hearing and final determination of this suit. I further direct that the applicant shall take all necessary action to facilitate the speedy disposal of this suit and that in the event that the suit is not disposed of within 12 months from the date hereof, the order of injunction shall stand discharged unless otherwise extended by the court.

Those shall be the orders of this court.

**Dated and delivered this 11<sup>th</sup> day of March, 2011**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -  
Ms Mburu H/B for Kithi for the applicant  
Advocate for the respondents absent  
Jason - Court clerk