Ndirangu v Nation Media Group Limited & another (Civil Case E149 of 2020) [2024] KEHC 6981 (KLR) (Civ) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E149 OF 2020

JN MULWA, J

JUNE 12, 2024

BETWEEN

CAROLINE WAMBUI NDIRANGU ..... PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... 1ST DEFENDANT

JOSEPH KANYI ..... 2ND DEFENDANT

RULING

1. The Plaintiff sued the Defendants by a plaint dated 14/09/2020 in which it is alleged that as from the year 2013 to 2020, the plaintiff discovered a picture depicting herself as being used by the 1st Defendant, Nation Media Group Limited over its telecommunication based commercial articles since 2013 throughout up-to-date. It is her case that the defendants have breached her image rights and have failed to address the breach are rights that are constitutionally protected. The Plaintiff further alleges that on conducting online search on Domain Names under the Business Daily, Daily Nation and the East African owned by and or managed by the 1st Defendant she learnt of the fact that there was extensive breach of her image rights as a result of the Commercial Posts that are made by the 1st Defendant all using photographs depicting the Plaintiff.

2. Additionally, the plaintiff claims in her plaint that while acknowledging that she authorized use of her picture and image on beadwork for commercial use by the Plaintiff in favour of the 1st Defendant, the rights did not extend to image of the Plaintiff at rooftop around a satellite; that she did not consent nor authorize the 2nd Defendant to have her pictures with a view of being shared with third party, and therefore claims that the Defendants violated her image and data rights for which she prays for judgment against the defendants for several declarations that: -

a. The Defendants offensive publications to commercialize the images did breach and violate the plaintiff's image and data rights.

b. General damages for continued violation of image rights and/or data rights as from 6/01/2020 to December, 10/2019.

c. Costs of the suit.

d. Any other relief as the court may deem just and fair to grant.

3. The Defendants filed their statements of defence dated 9/08/2023 denying the contents in the plaint save admitting that they published telecommunication based articles in 2013 and used a picture allegedly depicting the plaintiff in the article, and further denied having violated or breached the plaintiff's images and data rights.

4. The defendants in addition denied the jurisdiction of this court and urged for dismissal of the suit with costs.

5. On 15/01/2024 the defendants filed a Preliminary Objection (P.O) premised on following grounds: -

That the Honourable Court lacks requisite jurisdiction to hear and determine the suit on the basis that it was filed in total disregard of the *Fair Administrative Action Act*, No. 4 of 2015 and Section 64 of the *Data Protection Act*, Act No. 24 of 2019;

And urged that the suit be struck out with costs to the defendants.

6. Both parties filed submissions. The Defendants are represented by Archer & Wilcock Advocates while the plaintiff is represented by Ong'anya Ombo Advocates.

Defendants Submissions on the P.O.

7. The defendants have relied heavily on the Doctrine of exhaustion to argue that the plaintiff conferred Jurisdiction on the Court before following the procedure and mechanism provided under the *Data Protection Act* (the Act) Section 64 that provides: -

> "A person against whom any administrative action is taken by the Data Commissioner including in enforcement and penalty notices, may appeal to the High Court".

8. In addition, it submits that where a special procedure is provided by statute it must be strictly adhered to citing the case *Speaker of National Assembly v. Karume* [1992] where the court of Appeal rendered: -

> "where there is clear procedure for redress of any particular grievance prescribed by the *constitution* of an Act of Parliament, that procedure should be strictly followed"

9. The defendant also cited the supreme Court of Kenya decision in *Bernard Murage V Fineserve Africa Limited & 3 others* [2015] eKLR wherein it held that; -

> "Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then, it is desirable that such a statutory remedy should be pursued first"

10. Further in regard to infringement of Article 31(C) and (d) of the *constitution*, they cited the case *Kwere v Beehive Media Limited; Capwell Industries Limited (Interested party)* Constitutional Petition E321 of 2021 [2023] KEHC 2684 [KLR], where the court observed that;

> "a close scrutiny of the Data Protection Act reveals a deliberate design to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of the *constitution* are wholly dealt with by the Commissioner as the first port of call---- it means that the commissioner has such power to determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened."
>
> Also cited for similar observations and sediments *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR.

11. It is therefore the defendants case that the doctrine of exhaustion must first be exhausted before any other alternative procedures provided by statue before moving to the High Court in its appellate jurisdiction as the data commissioner has powers to investigate complaints by data subjects for compensation claims for breach of the rights of data subject's registration of data controllers and processors and other aspects of personal data.

12. Lastly, it is submitted that the doctrine of exhaustion applies in this matter and bears a complete bar to further exercise of jurisdiction by this court and therefore the preliminary objection dated 15/11/2021 and the suit herein should be struck out with costs.

Plaintiff's submissions on the Preliminary Objection.

13. Citing the case *William Odhiambo Ramogi & 3 Others v AG & 4 others and Muslims for Human Rights & 2 others (interested parties)* [2020] eKLR, it is submitted that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redness from a court of law on an action without pursuing available remedies before the agency itself; as well as citing the case *Speaker of National Assembly v Karume* (*supra*) for the proposition that where there is a clear procedure for redress of any particular grievance prescribed by the *constitution* or an Act of Parliament, that procedure should be strictly adhered to.

14. However, the plaintiff submitted that the Data Protection Act 2019 was assented to on 25/11/2019, and was not operationalized and remained a skeleton for lack of regulations that would effect or operationalize the provisions of the Act up to 14/01/2021.

15. Additionally, the plaintiff submitted that the Data Protection Commissioner an office established under the Act was effected on 1/11/2020 a year after its ascent and therefore the underpinning regulations were enacted in 2021 without which the *Act* could not be operationalized in terms of Section 71(1) and (3) of the *Act* and Article 94(6) of the *constitution* stating that it is cabinet secretary who ought to have authorized making of the regulations to fulfill the objects and purpose of the Act, and therefore the Act could only come into operation upon the necessary regulations and the office of the Data commissioner being properly setup. Reliance was placed on the cases *Okiya Omtata Okoiti & 4 Others v. A. G & 4 others (Interested Parties)* [2020] eKLR, and *Republic v. Registrar of Companies & 2 others, ex parte Schindler Limited* [2020] eKLR.

16. The plaintiff further submits that statutes are generally prima facie prospective, and have no retrospective effect as held in *Kamau Macharia & Another v Kenya Commercial Bank* [2012]eKLR that the *Data Protection Act* 2019 could not be given a retrospective effect.

17. It is the Plaintiffs further submission that not all disputes under the act ought to be referred to the Data Protection agency as the first port of call citing Section 56(1) of the Act that does not make it mandatory as held in *Karaini Investment v. National Land commission & Another* [2018] eKLR where the court gave meaning to the word "may" in a statute as being persuasive and therefore not mandatory as well as in the cases *Kenya Wildlife service's v Karura Bulle Kussen Galaato* [2019] eKLR; and *Karen Blixen Camp Limited v Kenya Hotels & Allied Workers Union*[2018]eKLR".

18. Upon the above submissions the court was invited to find that it is properly seized with jurisdiction to hear and determine the suit and proceed to dismiss the Preliminary Objection with costs.

Analysis and Disposition

19. Two issues arise for determination: -

    a. Whether the High Court has jurisdiction to hear and determine the suit as filed in view of section 64 of the Data Protection Act 2019.

    b. Who bears costs of the Preliminary Objection.

20. It is trite that once a court finds itself without the requisite jurisdiction to entertain a suit before it, it ought to down its tools as anything done without jurisdiction amount to nothing as stated in the celebrated case *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.

21. Section 64 of the Data Protection Act as submitted by both parties is the principle law in regard to grievances under the Act and gives the High Court appellate jurisdiction.

    Whereas both parties agree that where a special procedure is provided by statute on the procedure of bringing a suit to court, tribunal or agency such procedure ought to be followed, there are also exceptions. I have considered the holding in several decisions of the superior court, notably in *The Speaker of National Assembly v Karume* (*Supra*), *Bernard Murage v Fine services Africa Ltd* (Supra) among others, and both parties agree, in respect of the first port of call for claims arising from infringement of Article 31 (c) and (d) of the *constitution*, the Data Commissioner has been donated immense power to not only investigate complaints but also to compensate the victims if violations of their rights have been breached.

22. The question that arises then, is if such breaches were committed before the enactment and operalization of the Act, and appointment of the Data Commissioner and registration of Data controllers have been effected, would a litigant not be able to move the High Court under its special original and inherent jurisdiction for reliefs?

    I agree with submissions by both parties that I need not repeat, the doctrine of exhaustion ought to be adhered to as it is well provided under statute and buttressed by learned decisions of the superior courts.

23. In the instant case by the plaint dated 14/09/2020, the cause of action arose from 2013 to 2020. There is no dispute that at the time the Data Protection Act had not been enacted until 2019, was assented to on 25/11/2019 but was not operationalized until 14/1/2021 when the Data Commissioner was appointed. In *Omtata Okoiti & 4 Others v AG & others* supra the court stated: -

    > ".....Once in force, data protection legislation must also be accompanied by implementation and enforcement. The implementation of the Data Protection Act of 2019 requires all implementation framework to be in place including appointment of the Data commissioner, registration of data controllers and processors, as well as enactment of operational regulations, adequate protection of the data therefore finding that while there

is in existence a legal framework on the collection and processing of personal data requires operationalization of the said legal framework".

24. It is also worthy to note that the regulations which underpin the operationalization of the Act were enacted in 2021, after this suit was filed. In that regard therefore, the Act became operational after the regulations, to fill requirement under Section 71(3) of the *Act* and Article 94(6) of the *constitution* were enacted.

25. Without the regulations being in place and setup of the office of the Data Commissioner and appointment and registration of its Data Controllers and processors, it remained a skeleton. A litigant would as a result not be held back from filing a suit in a court with competent jurisdiction for failure by the cabinet secretary who had the mandate to appoint the data commissioner. That in my view is what the plaintiff considered that due to the non-operational of the Act and there being no definite period which the above could be done, found it prudent to seek relief at the High Court as submitted by the plaintiff.

26. With due respect the defendant's submissions, though very sound after the Data Act was operationalized in 2021, they are not applicable to the present suit and circumstances. When the act was operationalized and in terms of Section 64 thereof any administrative action under the Act ought to be first filed and determined by the Data Commissioner and after which an aggrieved party may appeal to the high court.

27. I agree with the parties that where a special procedure is provided under any statute adherence thereto is paramount but where circumstances do not permit as was the case in the instant case, the High Court becomes the savior to the litigant.

However, had the full mechanisms and procedures under the Data Act been set up and operationalized in 2020 the plaintiff would have had a difficult time convincing the court as to reasons why it could not adhere to the principle of exhaustion by first seeking reliefs from the office of the Data Commissioner as held in Capwell Industries Limited (supra) and others cited above.

Pursuant to the submissions above, I do not think that it would be just and fair nor appropriate to fault the plaintiff for faults of other agencies as stated above.

28. In regard to whether a party's claim from infringement of Article 31 (c) and (d) of the *constitution* are wholly to be dealt with by the Data commissioner as the first port of call, and whereas I prescribe to adherence to the doctrine of exhaustion there are circumstances that may force a departure from the same. In *Capwell Industries Ltd case* (*supra*) and as at the Supreme court of Kenya decision in *Bernard Murage v Fineservice Africa* (*supra*) wherein the court rendered: -

> " Where there exists an alternative remedy through statutory law then it is desirable that such a statutory remedy should be pursued first".

29. As it is evident, at the time the instant suit was filed, there was no alternative remedy where the plaintiff would have sought remedy other than at the High Court under its inherent jurisdiction.

30. For the foregoing, I am persuaded to find and hold that the Defendant's Preliminary Objection dated 15/1/2024 is devoid of merit. It is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE