



**Leparsaiya v NCBA Bank Kenya PLC & another (Constitutional Petition
E002 of 2022) [2023] KEHC 22362 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E002 OF 2022**

F GIKONYO, J

SEPTEMBER 19, 2023

BETWEEN

MICHAEL LEPARSAIYA PETITIONER

AND

NCBA BANK KENYA PLC 1ST RESPONDENT

NCBA GROUP PLC 2ND RESPONDENT

JUDGMENT

1. The petitioner filed an amended petition dated 15/3/2022. The amended petition is supported by the affidavit sworn by the petitioner, Michael Leparsaiya on 25/01/2022. The petitioner also filed a further affidavit sworn by the petitioner on 16/01/2023.
2. The respondents opposed the petition vide the replying affidavit sworn by its Legal Counsel, Ibrahim Ngatia, on 21/10/2021 and filed in court on 09/03/2023.

The petitioner's case.

3. The petition concerns the unauthorized use of the petitioner's image or likeness on a billboard by the respondent's for commercial gain.
4. The petitioner contends that in the year 2018 and early 2019, the respondents used the petitioner's image and/or likeness on various billboards erected by the respondents for purposes of advertisement of their banking services in various places including Narok Town without his authority and/ or consent. That the billboard was used for advertisement during the opening of the Narok-NIC bank branch in February 2019 which is now NCBA bank branch.



5. The petitioner averred that the respondents' action and/or conducts in using his protected image, photograph and/ or personal attribute for exploitative purposes or commercial advertisement without his consent and/or authority is unconstitutional and a violation of his right to privacy.
6. The petitioner adduced photographic evidence to demonstrate that his image was used by the respondents without his consent.
7. The petitioner refuted claims that it has a relationship with Shutterstock and that it has never sold his image right to either the respondents or any other person. The petitioner further denied ever granting his consent nor was he consulted to the use of his image and averred that that the respondents have continued to benefit financially from using the said images to promote their work, hence economically exploiting the petitioner and he was not compensated.
8. The petitioner stated that the said photograph was taken between 2016 and 2017 while he was working at Bamburi Beach Resort in Mombasa county.
9. The petitioner averred that the respondents' actions and/ or decision in using the petitioner's photographs, image and/ or likeness on various billboards erected by the respondents' without the petitioner's consent and/ or authority for purposes of advertisement of their banking services in various places including Narok Town along Narok-Maasai Mara Road (near Mara -Link Hotel) was meant for profit and commercial gain and indeed the respondents' profit margin grew significantly. The petitioner produced Competition Authority of Kenya's Notice in respect to the merger between NIC Group PLC(NIC) and Commercial Bank of Africa (CBA) dated 30th September 2019. The said documents, according to the petitioner, demonstrate that during the post-merger period the CBA had a market share of 6.57% where NIC bank enjoyed a market share of 4.62% and thus the market share for the merged entity (the respondents herein) in 2019 stood at 10.67%.
10. The petitioner contends that due to the Bank's action and /or conduct he has suffered loss and damage for which he claims compensation and general damages of Kshs. 20,000,000/=.
11. The petitioner alleged violation of his various constitutional rights cited on the face of the petition and sought the following reliefs;
 - a. An order of permanent injunction directed at the respondents either by themselves or their agents and/ employees restraining them from further engaging and/or conducting an unauthorized and /or publication of the petitioner's photographs, image and/ or likeness in any platform.
 - b. A declaration do issue that the respondents' actions and /or decision in using the petitioner's photographs, image and/ or likeness on various billboard's erected by the respondents' without petitioner's consent and/ or authority for purposes of advertisement of their banking services in various places including Narok Town along Narok-Maasai Mara road (near Mara-Link Hotel) Violated and/or infringed the petitioner's rights to privacy as enshrined the petitioner's rights to privacy as enshrined in Article 31 of the *constitution* of Kenya , 2010.
 - c. A declaration do issue that the respondent's action and/ or decision in using the petitioner's photographs, image and /or likeness on various billboards erected by the respondents' without the petitioner's consent and/or authority for purposes of advertisement of their banking services in various places including Narok Town along Narok- Maasai Mara road (near Mara-Link Hotel) violated and/ or infringed the petitioner's rights to privacy as enshrined in article 28 of the *Constitution* of Kenya 2010.



- d. A declaration do issue that the petitioner is entitled to damages and/or compensation as a consequence of the said violation of the petitioner’s constitutional rights as enshrined in the *Constitution* of Kenya,2010 capped at Kenya shillings twenty million (Kshs. 20,000,000/=).
- e. Interested on damages and/or compensation at court rates from the date of filing of this petition until payment in full.
- f. That the respondents do pay the costs of this petition to the petitioner plus interests thereon at court rates.

The Respondents case

12. The 1st respondent stated that it obtained the image from an online platform known as Shutterstock after making a payment of annual subscription of USD 2,028.00. The image was obtained by James Mutiso of NIC Bank.
13. The respondents averred that the aforesaid subscription was subject to the license agreement between them and the aforesaid Shutterstock.
14. The respondents therefore denied violating the rights of the petitioner.

Directions of the Court.

15. The petition was canvassed by way of written submissions. Both parties have filed.

The Petitioner’s Submissions

16. The petitioner submitted that this court has jurisdiction to hear and determine this petition as it challenges violation of rights under chapter 4 of the *Constitution* of Kenya 2010.
17. The petitioner submitted that his rights to privacy and by extension, dignity was violated by the publication of his image and/or likeness on the billboard.
18. The petitioner submitted that having established that the respondents conduct is illegal, unconstitutional, award of damages will be necessary to remedy the injury suffered.
19. The petitioner submitted that on the basis of the report from Compensation Authority of Kenya, the petitioner therefore, proposed an award of Kshs. 20,000,000/=
20. The petitioner submitted that the relies sought and facts of the petition raises serious questions of contravention of not only statutory provisions but also violation of constitutional rights of the petitioner and most importantly Article 31. Therefore, the petition meets the threshold in Anarita Karimi case.
21. The petitioner submitted that license agreement produced by the respondent is not signed by parties but is a website print out.
22. The petitioner has relied on the following authorities;
 - i. Articles 22, 23(3), 28, 31, 165(3) (b) of the *Constitution* of Kenya ,2010.
 - ii. *A.O.O. & 6 Others v Attorney General & Another* [2017] eKLR.
 - iii. Sections 2, 26, 29 of the *Data Protection Act*.



- iv. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR.
- v. *JW1 & Another v Standard Group Ltd & another* [2015] eKLR.
- vi. *MWK v Another V Attorney General & 3 others* [2017] eKLR.
- vii. *TOS v Maseno University & 3 Others* [2016] eKLR.
- viii. *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR.
- ix. *Ahmed Isaack Hassan v Auditor General* [2015] eKLR.
- x. *Minister of Health & Others v Treatment Action Campaign & Others* [2002] 5 LRC 216.
- xi. *Peter Mauki Kaijenja & 9 Others v Chief of the Defence Forces & another* [2019] eKLR..
- xii. *Zipporah Seroney & 5 others v Attorney General* [2020] eKLR.
- xiii. *Arnacherry Limited V Attorney General* [2014] eKLR.
- xiv. *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272.
- xv. *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* [2013] eKLR , PET. No. 65 of 2010.

The Respondents' Submission

23. The respondents submitted that the petition has not met the constitutional litigation laid down in the Anarita Karimi case.
24. The respondents submitted that the petitioner's pleadings have not articulated with precision the manner in which the conducts and/or actions infringed on his rights and how the alleged violations caused him loss and damages amounting to a whopping 20 million.
25. The respondents submitted that the respondents are not the ones who violated the rights of the petitioner since the alleged violation was done prior to the merger. That the petitioner pointed out that the unauthorized use of the image occurred in February ,2019 and at the time to promote the opening of NIC Narok branch. Also, the petitioner acknowledged that the merger of NIC bank and CBA occurred in October 2019.
26. The respondents submitted that the petitioner has concealed the facts surrounding how the photo was taken.
27. The respondents submitted that the damages sought by the petitioner are excessive. That the petitioner has not demonstrated any monetary gain by the respondents from the allegation of using his image.
28. The respondent submitted that interest and costs are at the discretion of the court.
29. The respondent relied on the following authorities;
 - i. *Anarita Karimi Njeru v the Republic* (1976-1980) KLR 1272 as was quoted in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & AMP; 5 others* [2013] eKLR.
 - ii. *Herbert Hahn v Amrik Singh*[1985] eKLR .



- iii. *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with approval the decision of the supreme court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002.
- iv. *Masai Mara (SOPA) Limited v Narok County Government* [2016] eKLR.
- v. *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR.
- vi. *Lawrence Njeru Munyi & 10 Others v Musa Mithuro & 2 others* [2020] eKLR.
- vii. *Daniel Waweru Njoroge & 17 Others v Attorney General* [2015] eKLR
- viii. *Shiverenje Simani v Star Newspaper & Another* [2021] eKLR.
- ix. *Wangechi Waweru Mwende v Tecno Mobile Limited; Rodgers Ouma t/a Ojwok Photography (Third Party)* [2020] eKLR.
- x. Section 26(1), 27 of the *Civil Procedure Act*.
- xi. *Judicial Hints on Civil Procedure*, 2nd Edition at page 94.
- xii. *Universal Engineering Works v Mohamedali Suleiman Essaji* [1951] 2 LRK as quoted in Odunga's digest on *Civil Case Law and Procedure* 3rd Edition Volume 4 at Page 2228.

Analysis and Determination.

30. I have considered the Petition, the Affidavits on record and the submissions by both parties.

Issues

31. The following issues fall for determination by the court: -
- i. Whether this petition met the legal threshold of a petition.
 - ii. Whether the petitioner's right to privacy and dignity have been violated,
 - iii. Whether the petitioner is entitled to the reliefs sought in the petition, and
 - iv. Who bears the cost of this proceedings?

Whether the petition meets the threshold for a constitutional petition

32. As a bare minimum; a constitutional petition should, with some reasonable degree of precision, identify the constitutional provisions as well as the specific rights that are alleged to have been violated or threatened to be violated, and the manner of the violation and/or threatened violation (*Anarita Karimi Njeru v Republic* (1979) KLR, *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR)
33. This requirement is not merely formalistic. A party should know the case he is faced with. The court should also be able to discern the cause of action it is trying. These are necessary requirements in the pursuit of legal remedy.
34. In this petition, the petitioner has allege that his rights to human dignity, and privacy under Articles 28, and 31 of the *Constitution*, respectively, have been violated by the respondents. The manner of violation was stated to be through the publication of his photograph in billboards at different places for purposes of advertisement of the respondent's business without the petitioner's consent.



35. Accordingly, the petition does not suffer any deficiency or lack of procedural rectitude whatsoever.

Any proof of violation of right(s)?

36. The petitioner alleged violation of right to human dignity and right to privacy enshrined in article 28 and 31 of the Constitution, respectively.

37. Article 28 provides: -

Every person has inherent dignity and the right to have that dignity respected and protected.

38. Article 31 of the Constitution 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.

39. The right to human dignity and the right to privacy stand an almost inextricable inter-relation. See Mativo J in MWK & Another v Attorney General & 3 Others [2017] eKLR that: -

Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy. The rights of equality and dignity are closely related, as are the rights of dignity and privacy.

Key elements of unlawful use of image

40. Of the key elements of a claim for unlawful use of inter alia image of a person were discussed in the case of Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR where Mativo J stated: -

From the above leading decisions on the subject, the key elements of a claim for unlawful use of name or image which a petitioner must establish to succeed in a case of this nature are: -Use of a protected attribute: the plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial and other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest. No consent: The plaintiff must establish that he or she did not give permission for the offending use.

41. Is there such proof?

42. The specific complaints by the petitioner is the unlawful use of the petitioner's image or likeness on billboards by the respondent's for commercial gain.



43. The petitioner contends that in the year 2018 and early 2019, the respondents used the petitioner's image and/or likeness on various billboards erected by the respondents for purposes of advertisement of their banking services in various places including Narok Town without his authority and/or consent. That the billboard was used for advertisement during the opening of the Narok-NIC bank branch in February 2019 which is now NCBA bank branch.
44. The petitioner averred that the respondents' action and/or conducts in using his protected image, photograph and/or personal attribute for exploitative purposes or commercial advertisement without his consent and/or authority is unconstitutional and a violation of his right to privacy.
45. The petitioner adduced photographic evidence to demonstrate that his image was used by the respondents without his consent.
46. The petitioner refuted claims that it has a relationship with Shutterstock and that it has never sold his image right to either the respondents or any other person.
47. The 1st respondent did not deny using his image for advertisement of its business. It however proffered a defence; that it obtained the image from an online platform known as Shutterstock after making a payment of annual subscription of USD 2,028.00. The image was obtained by James Mutiso of NIC Bank. Further that the aforesaid subscription was subject to the license agreement between them and the aforesaid Shutterstock. The defence of the respondents is that the petitioner transferred his rights to a third party who in turn transferred the same to the respondents.
48. The petitioner denies any contract with the said Shutterstock and ever giving out any consent for his image to be placed in the billboard.
49. Perusal of the Shutterstock licence agreement(s) and the invoice/ receipt billed to James Mutiso on 23/02/2018 reveals that, under the licence, the respondents were granted the rights to download images and use them for advertising purposes. The respondent alleged that the petitioner transferred his right to the image to Shutterstock who in turn transferred the rights to the respondent. He who alleged must prove. It bears repeating that the petitioner has denied any contract with the said Shutterstock and ever giving out any consent for his image to be placed in the billboards. Any use of a person's image without his consent is an infringement of the right to privacy and dignity. And, therefore, because of the adverse element or possibility of violation of a right, there was a necessity to fortify their claim that Shutterstock was permitted to use the petitioner's image; the most feasible way of doing so is by joining them as a party or issuing notice seeking indemnity or contribution from them or calling them as a witness. In this manner, the question of alleged consent or assignment by the petitioner to Shutterstock to use the petitioner's image or offer it to third parties for use will be adjudge able. The respondents did not prove the transfer of right to shutterstock to licence third parties to use the petitioner's image.
50. The petitioner has proved that the respondent used his image in billboard without his consent. Of such publication see *TOS v Maseno University & 3 Others* [2016] eKLR (Chemitei J) that: -

From the above reasoning and expositions of the law it is clear that publication or use of images of an individual without his consent violates the person's right to privacy. I say so because a person's life is a restricted realm in which only that individual had the power of determining whether another may enter, and if so, when and for how long and under what conditions.
51. The petitioner also alleged that the publication of the petitioner's image, was to make profit. Proof of an Exploitative Purpose requires such evidence that the use was for commercial and other exploitative purposes.



52. According to the petitioner, use the petitioner's photographs, image and/or likeness on various billboards erected by the respondents' without the petitioner's consent and/ or authority was for purposes of advertisement of their banking services in various places including Narok Town along Narok-Maaasai Mara Road (near Mara -Link Hotel) which was meant for profit and commercial gain and indeed the respondents' profit margin grew significantly. The petitioner produced Competition Authority of Kenya's Notice in respect to the merger between NIC Group PLC(NIC) and Commercial Bank of Africa (CBA) dated 30th September 2019. The said documents, according to the petitioner, demonstrate that during the post-merger period the CBA had a market share of 6.57% where NIC bank enjoyed a market share of 4.62% and thus the market share for the merged entity (the respondents herein) in 2019 stood at 10.67%.
53. The court takes judicial notice that the respondents are a reputable banking institution carrying out business as a bank. The banks have been in existence way before the advertisements complained of. And, through its banking business over the years, it makes profit. Despite the information on merger and market share of the respondents, there is connection between the merger, profits and the use of his image for purposes of advertisement. This finding will also bear upon quantum of damages awardable to him.
54. The petitioner claims a sum of Kshs. 20,000,000. He did not prove the use of his image for advertisement purposes lead to increased market share of the respondents as alleged. In such case damages should be modest between Kshs. 500,000- 1,000,000. See *Wangechi Waweru mwende v. Techno Mobile Ltd* (supra). Accordingly, the court awards Kshs. 1,000,000 in general damages for violation of right to privacy and right to human dignity.

Conclusions and Orders

55. The petitioner has established that the respondents published the petitioner's image on billboard without the consent of the petitioner. The claim by the respondents that they used the image on the basis of a licence by Shutterstock was not substantiated. Therefore, the use of the petitioner's image on the billboards without the consent of the petitioner is an infringement of his right to privacy and human dignity. The petitioner did not however establish any link between the merger, market share or increased profits and market share of the respondents, and the unlawful use of his image.
56. In the circumstances, judgment is entered for the petitioner as follows: -
- i. General damages of Kshs. 1,000,000 for violation of his right to human dignity and right to privacy;
 - j. Costs and interest.
57. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO M.

JUDGE

In the presence of:

Mr. Lesaigor for the Petitioner



No appearance for the Respondents

Mr. Muraguri – Court Assistant

