



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. 7 OF 2019**

**JOEL MUTUMA KIRIMI .....1<sup>ST</sup> PLAINTIFF**

**SHARON CHEPKORIR KOSKEI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND (NHIF) .....DEFENDANT**

**JUDGEMENT**

1. The plaintiffs commenced this suit by way of a plaint dated 10/5/2019 where they sought for the following:

- a) *A declaration that the defendant's acts of publishing the plaintiffs image for purpose of commercial advertisements without their consent is a violation of the plaintiffs fundamental rights to privacy and human dignity*
- b) *An order of injunction compelling the defendant to pull down the advertisement featuring the plaintiffs image on social media pages to wit, Facebook Instagram and Twitted and any other website*
- c) *An order of permanent injunction restraining the defendant from publishing and/or using the plaintiffs image in any way of its advertisements or posting and reposting the plaintiffs image in any way of its social media and websites without the plaintiffs consent*
- d) *General damages for breach of plaintiffs' right to human dignity and privacy*
- e) *Cost of the suit*
- f) *Interest on (e) & (f) above*
- g) *Any other relief that this honorable court may deem fit and just to grant.*

2. It is the plaintiff's case that on 6 - 7/2/2018 the defendant caused to be published a picture of the plaintiffs for commercial advertisements in the defendant's Facebook page; on 5/3/2018 its Twitter account; and on 6/3/2018 and 9/4/2018 on its Instagram account. The defendant used the picture for commercial advertisement which was gotten from the 1<sup>st</sup> plaintiff's private Facebook account which he had posted on or about May 2013. The defendant did not obtain the plaintiffs' consent to use their image, establish whether they were a couple or monetary compensate them.

3. On the part of the defendant they denied the averments of the plaintiffs in their statement of defence dated 2/8/2019 and put them to strict proof. The defendant stated that it has never published the plaintiffs' picture for commercial advertisement as alleged as it has not engaged in commercial affairs for it is a Social Insurance Scheme expanding the Government of Kenya's mandate to universal and affordable healthcare. It is not engaged in commercial affairs. That the pictures they used were obtained from pixabay.com which is a community of creative sharing copyright free images and videos

4. The plaintiffs' in their reply to defence dated 2/10/2019 stated that they are strangers to the said pixabay.com and puts the defendant to strict proof. It is their contention that the defence is a mere sham and does not constitute a good defence.

5. The suit proceeded for hearing and the plaintiffs' called one witness. **PW1 Joel Mutuma Kirimi** an advocate of the High Court of Kenya adopted his statements dated 10/5/2019 and 1/10/2019 and relied on the demand notice, photos from social media, certificate of production of electronic evidence and marriage certificate which he produced. He stated that he is the 1<sup>st</sup> plaintiff while the 2<sup>nd</sup> plaintiff is his wife and an advocate of the High Court of Kenya as well. They practice under the name of Mutuma, Kosgey & Co. Advocates.

6. That sometime in 2013 he posted the picture of him and his wife on his private Facebook account. The defendant took the said photo and used it to in their image in a commercial advertisement for purposes of promoting their products dubbed #Supacover calling people to add their spouses to their NHIF card. The use of the picture which has attracted a lot of public attention has eroded their public confidence as it has affected their professional career as respectable advocates.

7. The picture was never meant to be used by the defendant who did not seek their permission to use the picture as their image on their advertisement. They feel aggrieved with the infringement of their right to privacy and breach of human dignity. At no point did they intend to pose as models either for fun, fame or pay. They take their profession seriously and would not want anyone to think otherwise of which the defendant has tainted. They never offered the said photograph or any other of their image to any website for free use. He does not know a website called Pixabay neither did he post photos there.

8. At the close of the plaintiffs' case the defendant called one witness. **DW1 Henry Kimathi** Digital Communications Officer for the defendant adopted his statement dated 20/9/2019 and relied on his documents which he produced. He stated that the defendant provides packages such as SupaCover. In promoting the cover they entered a website called pixabay.com to find pictures which they could use for promotion of the cover. Pixabay.com is an online platform for photographers where people share images freely and according to the user terms is that everyone who has access to the site can use any photograph found there provided it is does so in a positive sight.

9. The user terms are in the creative commons conventions and any imagery used in social media must subscribe to. The terms of usage are to the effect that when uploading a picture it is presumed that permission was granted or that the up-loader is the author of the work. They did not know that the persons depicted in the picture were the plaintiffs. On publication of pictures on their social media platforms he sought to know the position from pixabay.com who categorically informed him that the sub-licensable clause of CCO does not prevent the user from uploading a work to a social media platform. It simply articulates that the user is not granting any rights. Those rights have already been waived.

10. At the close of the defendant's witness evidence written submissions were filed by both parties. The plaintiffs submitted that the defendant published their photo for commercial purposes and without their consent which was a violation of their rights. The defendant's defence was implied on third party liability which it failed to prove. The documentary evidence adduced by them as being terms and conditions of pixabay.com and email conversation between the latter and defendant is inadmissible as it did not comply with evidential law. Resultantly they are entitled to be compensated with an award of Kshs.20,000,000/- jointly as general and exemplary damages. The defendant had not filed their submissions at the time of writing this.

11. The issues of determination are:

- a) ***Whether the defendant published the plaintiffs photograph for commercial purposes without their consent?***
- b) ***Whether the plaintiffs right to privacy and human dignity was violated.***
- c) ***Are the plaintiffs entitled to be compensated?***

12. With regard to the first issue, the factors that this court ought to consider were stated by Lenaola J in the case of **J W I & another v Standard Group Limited & another [2015] eKLR** where he made reference to *Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)* by stating:

***“Secondly, in Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC), the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants’ personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.”***

13. From the plaintiffs' pleadings and photos from social media it shows that the picture was posted on his Facebook account. According to **PW1** the facebook account is private and can only be accessed by people who are connected to him. He did not post that photo for purposes of them being used as models either for fun, fame or pay. They did not give consent to the defendant to use their photo to promote their #Supacover. When the photo was used on 6/3/2018 when the defendant had 49,143 following the page and 48,876 people liking the page.

14. **DW1** confirmed that the defendant did not seek the consent of the plaintiffs to use their picture to promote their #Supacover which was successful. That they got a picture from the pixabay.com which allows a user access to use any photographs found on the site provided they use them in a positive sight, like they did. According to the terms of usage the plaintiffs waived their rights. He adduced print outs of emails between him and pixabay as well as terms of usage.

15. These being electronic record **the Evidence Act** has stipulations on how such material ought to be produced so as they may be admissible in court and regarded as authentic record. **Section 106B (2)** of the Act states that the document must satisfy the following conditions:

- a) ***the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***
- b) ***during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***

c) *throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and*

d) *the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

Moreover, the above ought to be accompanied by a Certificate under **Section 106(4) of the Act**. This was so explained in the case of **Republic v Mark Lloyd Steveson [2016] eKLR**. Joel Ngugi J held that:

**“48. For completeness, it is important to refer to the provisions of sections 106B(1), (2) and (3) as well as section 106(I) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B(2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:**

**a. It must identify the electronic records and production process;**

**b. It must show the particulars of the producing device; and**

**c. It must be signed by the responsible person.**

**49. In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in section 106B(2) namely that:**

**a. The output must have been produced during regular use;**

**b. It must be of a type expected in ordinary use;**

**c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and**

**d. Where multiple computers are involved, those operating in succession and considered as one.**

**50. It should be fairly obvious that the Prosecution does not satisfy the conditions for section 106B(1) to apply. For one to come under this section, the computer output proposed as evidence must both certify the conditions in section 106B(2) and be accompanied by a Certificate under section 106(4). In this case, the accompanying certificate serves the authenticating purpose.”**

16. It is trite law that whoever alleges must prove. From the evidence adduced by the plaintiffs which was confirmed by the defendant the plaintiffs did not give consent for the use of their photographs in defendant’s website. The defendant alluded that they got the picture from pixabay.com website which allowed them to use the picture. The plaintiff denied having used using the said website or even uploading pictures on it. The exhibits produced by the defendants having failed to pass the test of production of electronic evidence under S. 106 B(2) and 106(4) of the Evidence Act and the Defendants having admitted that they did not seek consent of the plaintiffs to use their photographs this court finds that the defendant published the plaintiffs photograph for commercial purposes without their consent.

17. On the second issue is whether the publication violated the plaintiffs’ right to privacy and human dignity. **Article 28 of the Constitution** states:

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

**Article 31** states:

**“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.”**

In the case of **T O. S v Maseno University & 3 others [2016] eKLR** Chemitei J held that

**“From the above reasoning and expositions of the law it is clear that publication or use of the images of an individual without his**

*consent violates that person's right to privacy. I say so because a person's life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions."*

Having established that the consent was not given it is apparent that the plaintiffs' right to privacy and human dignity were infringed by the defendant. When the defendant took the plaintiffs picture out of the 1<sup>st</sup> plaintiff's private account and used it for promotional purposes without their consent and using it for a purpose that they never intended to be part of.

18. Which leads to the third issue, are the plaintiffs entitled to be compensated? The award of damages is an exercise of judicial discretion which must be based on sound reason and principle. In the case of **M W K v another v Attorney General & 3 others [2017] eKLR** Mativo J awarded the first petitioner a global sum of Kshs. 4,000,000/- by way general damages for violation of her constitutional rights to dignity, degrading treatment and privacy. In **Ann Njoki Kumena v KTDA Agency Ltd [2019] eKLR** Gitari J awarded the plaintiff Kshs. 1,500,000 for violation of her rights. Moreover the plaintiffs asserted that the publication tainted their image professions in the legal industry. The fact that this was only alleged and not proved does not take away their entitlement of damages for the violation of their rights.

19. Accordingly, I am of the view that the following orders be granted:

- a) *A declaration that the defendant's acts of publishing the plaintiffs image for purpose of commercial advertisements without their consent is a violation of the plaintiffs fundamental rights to privacy and human dignity*
- b) *The Defendants are hereby ordered to pull down the advertisement featuring the plaintiffs images on their social media pages to wit, Facebook, Instagram and Twitter and any other website forthwith and not later than 7 days from the date of this judgement.*
- c) *An order of permanent injunction restraining the defendant from publishing and/or using the plaintiffs image in any way for its advertisements or posting and reposting the plaintiffs image in any way of its social media and websites without the plaintiffs consent*
- d) *An award of Kshs. 5,000,000 as general damages for each of the plaintiffs for breach of plaintiffs' right to human dignity and privacy*
- e) *Cost of the suit as well as interest from the date of judgment is also awarded.*

**HON A. ONG'INJO**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 6<sup>TH</sup> DAY OF FEBRUARY 2020.**

**In the presence of :**

C/A: Kinoti :-

1<sup>st</sup> Plaintiff :- present in person

Defendant :- Ms Mugo holding brief for Migos Ogamba Advocate for Defendant

**HON A. ONG'INJO**

**JUDGE**

**MS Migo:**

We pray for a copy of the ruling and 30 days stay

**Mr Mutuma Advocate**

We pray for a copy of the judgment.

**Order**

Defendants Counsel granted 14 days stay of execution to notify the defendants of judgment. Copies of judgment to be supplied on payment of copying charges.

**HON A. ONG'INJO**

**JUDGE**