



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 361 OF 2016

BETWEEN

ROSHANARA EBRAHIM.....PETITIONER

VERSUS

ASHLEYS KENYA LIMITED1ST RESPONDENT

TERRY MUNGAI.....2ND RESPONDENT

FRANK ZAHITEN3RD RESPONDENT

EVELYNE NJAMBI.....4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner was crowned Miss World Kenya 2015 a position that entitled her to participate in Miss World Beauty Pageant slated for December 2016. The 1st and 2nd Respondent, respectively the organizer and franchise holder of the Miss World Kenya from the Global Miss World pageant and its Chief Executive Officer, (hereinafter the organizers) subsequently announced the dethronement of the petitioner by a Press Release of 29th July 2016 for alleged breach of their Code of Conduct. The allegation of breach was based on nude photographs of the petitioner allegedly given to the organisers by the petitioner’s boy-friend, the 3rd Respondent. Aggrieved by the decision to dethrone her, the petitioner sued the organizers, her said boy-friend and the runners-up in the pageantry who was enthroned as Miss World Kenya following the dethronement of the Petitioner, as the 4th Respondent.

2. By the Petition dated 29th August 2016 supported by her affidavit of same date, a supplementary affidavit of 28th October 2016 and a further affidavit of 16th November 2016, the petitioner seeks final orders as follows:

“PETITIONER’S PRAYERS DATED 29TH AUGUST 2016

- i. A DECLARATION be and is hereby made that the harassment, intimidation, intended or threatened publication of the Petitioner's private and confidential photographs and/or information by the respondents is unconstitutional unlawful and a violation of the fundamental Rights of the Petitioner as enshrined in Articles 28, 29, 31, 35 and 47 of the Constitution.
- ii. AN ORDER of Injunction be and is hereby granted restraining the Respondents, whether by themselves, agents, servants, proxies and/or any other person acting under their authority from posting, publishing or broadcasting on social media or any other media whatsoever private and confidential photographs and/. or information of the petitioner in possession of the Respondents, and/or intimidating the petitioner in any way whatsoever or further interfering in the petitioners enjoyment of the fundamental rights as guaranteed by the Constitution.
- iii. A DECLARATION that the purported dethronement of the Petitioner by the 1st Respondent through a press release dated 29th July 2016 is unlawful, unconstitutional and flies in the face of due procedure and Article 47 of the Constitution.
- iv. A DECLARATION that the purported crowning of the 4th respondent as the new Miss world Kenya, and consequent replacement of the Petitioner as Miss World is unlawful, unfair, unconstitutional and of no legal effect.
- v. A DECLARATION that the Petitioner is the rightful holder of the title of Miss World Kenya 2016 having duly earned the title through a competition.
- vi. AN ORDER of injunction be and is hereby granted restraining the 4th respondent or any other person purporting to have replaced the Petitioner as the reigning Miss world Kenya 2016 from in any way, directly or indirectly carrying out herself as the title holder of Miss World Kenya 2016.
- vii. ADECLARATION that the petitioner is entitled to compensation for economic loss and hardships unreasonably, unconstitutionally and illegally visited upon her by the respondents.
- viii. A DECLARATION that the Petitioner is entitled to compensation for defamation, psychological suffering, social low esteem and damage to her reputation.
- ix. A DECLARATION that the Petitioner is entitled to deletion and / or correction of the untrue and misleading information passed to the public by the respondents in giving the untrue information regarding the unlawful dethronement of the Petitioner.
- x. AN ORDER that the respondents be and are hereby jointly and severally compelled to compensate the petitioner for damages and /or loss arising from the wrongful dethronement.
- xi. AN ORDER that the 1st and 2nd Respondents do correct and offer an unconditional apology regarding the untrue and misleading press release dated 29th July 2016, and any other information regarding the unlawful dethronement of the petitioner published in the media by the respondents.
- xii. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.
- xiii. This Honourable Court be pleased to grant the costs of this petition to the petitioner.”

Responses

3. The 1st and 2nd Respondent filed a replying affidavit sworn on 18th October 2016, emphasising the commercial nature of the dispute and exhibiting the correspondence with the petitioner in furtherance of affording a right to hearing to the petitioner, and events leading to the dethronement of the Petitioner and the photographs in question showing the petitioner in the nude. The 1st and 2nd respondent asserted a

right to terminate the Miss World Kenya Management Contract between the 1st Respondent and the Petitioner on account of the breach thereof by the conduct of the Petitioner.

4. The 3rd Respondent justified the sending of the petitioner's photographs to the 2nd respondent on grounds of public interest filing a replying Affidavit and a Supplementary Affidavit, respectively sworn on 19th September and 10th November 2016. The 3rd Respondent painted the Petitioner as an unfit person as an alcoholic and drug addict.

5. The 4th respondent did not file any reply.

Submissions

6. In addition to written submissions filed, Counsel for the parties – Ms. Mogire for the Petitioner, Mr. Odhiambo for the 1st and 2nd Respondents and Mr. Mboya for the 3rd Respondents made oral submissions *in camera* on 17th November 2016 and judgment was reserved for the 5th December 2016 in view of the urgency of the forthcoming Miss World pageantry in December 2016.

7. The petitioner asserted the violation of her rights under the Bill of Rights with regard to fair hearing and right to privacy. She relied on the decisions of the ***Trusted Society for Human Rights v. Attorney General***, Pet. No. 229 of 2012 and ***Rose Wangui Mambo v. Limuru Country Club***, Pet. No. 160 of 2013 on the High Court as the right forum with jurisdiction to determine of constitutionality. Pursuant to Rule 10 (2) of the Rules of the Court, the petitioner identified the violations of rights in relation to her as the right to fair hearing (under Article 47 right to fair administrative action) before the decision to dethrone her and Article 31 right to privacy by the leakage of private photographs by the 3rd respondent as a person who was in a relationship with her pointing out that the petitioner did not pose for any other person and that some of the photographs had been taken by the 3rd respondent urging in reliance to ***JWI v. Standard Group Ltd*** HC Pet. No. 466 of 2012, that she had a reasonable expectation of privacy of private photographs. The petitioner also asserted violation of her Article 40 right to property through a right to earn a living and Article 35(2) right to correction of untrue information. The Petitioner sought compensation for infringement of her rights, and in reference to the allegations that she was a drug addict, it was submitted that there no evidence thereof and the 3rd Respondent was only injuring her reputation.

8. The 1st and 2nd Respondents' case is that there was demonstrated no violation or threatened violation of the petitioner's rights by leakage of her private photographs as alleged. It was maintained that the respondents did not give any hint as to why the petitioner was dethroned except a reference to the breach of code of conduct, and the photographs were never disseminated to the public. It was submitted that while the High Court has jurisdiction, the structure of the Court reserves constitutional litigation to the Constitution and Human Rights Division of the Court and submitted that there was no constitutional question in the petition but purely a matter of contract between the Petitioner and the 1st Respondent which has termination or disqualification clause on breach of its terms. As a contractual issue the remedy, it was submitted, should be sought in the Commercial Division of the Court, pointing out that the petition is expressed to be based upon the Defamation Act and the Law of Contract Act as well. Citing Article 159 provisions on Alternative Dispute Resolution (ADR) and Clause of 11 of the Contract subject of the relationship between the petitioner and the 1st Respondent, it was contended that there was no evidence of attempt to comply with the arbitration clause of the contract before approaching the Court. The decision of ***Rose Wangui Mambo***, supra, was distinguished as a case of grave violation of on grounds of gender and one where there was no avenue to settle the dispute by ADR, unlike the present case which it was contended was purely a contractual matter. It was urged in reliance of ***Gabriel Muheria & Ors.*** that where there is an avenue for redress the petitioner ought to invoke those remedies pursuant to Article 10 principle of the Rule of Law. On the substantive case, it was submitted that the petitioner was granted opportunity to defend herself and reference was made to correspondence between the petitioner and the 2nd Respondent via text messages culminating in the petitioner saying that she had destroyed the photographs and she could therefore be given opportunity to receive the crown. Counsel objected that the 4th Respondent had not violated or threatened to violate any rights of the petitioner and

she had only been joined as the runner-up in the contest. Public interest was weighed in as against the Petitioner in view of the evidence of her conduct pointing that the Miss World Rules require that a person should not have posed for the kind of photographs in this suit.

9. The 3rd Respondent referred to the management contract between the Petitioner and 1st and 2nd Respondents whose clause 3.11 provides for no unauthorised photographs, and presented the dispute between the parties as a commercial, defamation, personal dispute claim clothed as a constitutional petition. Referring to the decision of *East African Portland Cement v. AG*, Pet. No. 9 of 2012, the Court was urged to guard against manipulation of every day disputes into constitutional issues. It was urged that the petitioner had waived her right to privacy by taking the subject photographs by a communication gadget as selfies and voluntarily sending them to the 3rd Respondent using a communication gadget. The important nature of the global Miss World event and the danger of bringing to the dishonour to the petitioner and the Country by the alleged breach of the rules by the Petitioner as emphasized. It was contended that as an alcoholic and drug abuser, the petitioner was not a role model fit to represent the Country in the Miss World pageantry.

The Issue

10. The central complaints against the organizers of the Miss World Kenya is that the Petitioner was not given a hearing before her dethronement and that her right to privacy had been violated by the leakage of her private photographs. There was a place of suing issue of the jurisdiction of the Constitutional Division of the Court in what the 1st 2nd and 3rd respondents submitted to be a commercial dispute.

Determination

The Facts of the Case

11. The facts were not seriously disputed. The Petitioner was selected winner of the national Miss World Kenya crown from among contestants at a beauty pageant at Pata Pata Beach Club, Malindi on 31st December 2015. In that capacity, the petitioner would represent Kenya during the 66th Miss World Competition 2016. The terms of contract between the petitioner and the 1st Respondent were set out in a Contestant Management Agreement dated 22nd January 2016. By an email of 28th July 2016, the 2nd respondent received from the 3rd respondent attachments of nude photographs of the petitioner. On 29th July 2016, the 2nd Respondent as CEO of the 1st Respondent issued a Press Release that –

“Effective immediately, Roshanara Ebrahim will not be representing the country both domestically and internationally as Miss World Kenya.

A grave situation has come to our attention that is in breach of our code of Conduct and our contract with the reigning Miss World Kenya 2016 Roshanara. We uphold a strict code of conduct that expects Beauty Queens to manage their public and private life.

The decision has been communicated to Roshanara....”

The media release further said that the Miss World Kenya holder had accepted the decision and that a replacement would be named in due course. The 4th Respondent was subsequently named as Miss World Kenya.

12. The petitioner protested that she was not given a hearing before the decision to dethrone her was reached and that her alleged acceptance of the decision to dethrone her was false. She consequently sued for breach of her rights to fair administrative action, fair hearing, property, dignity and privacy, and sought various reliefs as set out in the Petition.

Jurisdiction of the Court

13. The High Court has jurisdiction as a whole as is set out in Article 165 of the Constitution. The various administrative divisions of the High Court have the same powers of the Court under Article 165 of the Constitution. Despite the various divisions of the High Court and the general competence of the divisions in all matters that the High may hear and determine, the Constitutional Division may only address other civil and criminal claims where “parties so invoke these areas of law.” See Lenaola, J. as he then was in *Issac Aluoch Polo Aluochier v. Kenya National Commission on Human Rights & 4 Ors.* (2016) eKLR. However, the constitutional Court will defer to the other divisions of the Court where the matters raised fall under the branches of private law and may effectively be resolved by use of the mechanism and court procedures prescribed under the respective substantive law.

Whether the petition raises constitutional issues

14. The Court of Appeal in *Gabriel Mutava & 2 Ors. v. Managing Director Kenya Ports Authority & Anor.* (2016) eKLR has underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:

“Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue:-

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

.....

In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

15. The three judge High Court bench in ***Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others*** [2014] eKLR while accepting that the Bill of Rights had horizontal application to bind private individuals as well as state actors, took the same view as follows:

*“In this regard, we must hasten to place a caveat that horizontal application of fundamental rights and freedoms is not an open cheque and whether and to what extent the Court will exercise jurisdiction will be informed by the circumstances of each individual case. For instance, **if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction.** In the case of *Isaac Ngugi v Nairobi Hospital & 3 Others (supra)* the court held as follows regarding the application of the Constitution to private relationships;*

*[22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See *Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013]eKLR*). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case....*

[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly. [Emphasis added]

16. The question, therefore, arises whether the petitioner’s constitutional rights have been violated by the Respondents. Or put another way, is there a genuine constitutional petition before the Court or is it, as submitted by the respondents, a commercial dispute, a defamation claim and private personal disagreements between the parties clothed as a constitutional petition?

17. There is no evidence that the mechanisms for the enforcement of the petitioner’s rights under the contract are inadequate or ineffectual. As there is no dispute that there exists a contract between the 1st and 2nd respondent a suit for damages for wrongful termination, which would also address the issue of want of fair hearing in accordance with the right to fair administrative action is an effective remedy. The petitioner’s right is to a procedurally fair process of selection as Miss World Kenya and, where it arises, termination of such nomination in accordance with contract. So the petitioner cannot claim to be entitled to represent Kenya at the Global Miss World if her crown is lawfully terminated in accordance to relevant contract.

Contractual Provisions

18. Indeed, Clause 3.11 of the Mr. & Miss World Kenya 2016 Contestant Management Agreement (the management contract) entered between the petitioner and the 1st Respondent dated 22nd January 2016 provides that -

“3.11 The Contestant will not engage in any photographic sessions with any third party without the prior consent of the Principal and will take all such steps as are reasonably necessary to ensure

that her image rights are protected.”

19. Clause 6 of the Management Contract gave the 1st Respondent authority to terminate the contract and to disqualify a contestants as follows:

“6. The Principal at its sole discretion shall be entitled to disqualify the contestant from participating in the competition and the Event and to terminate any contractual arrangement that the contestant may have with the Principal at any time and without compensation, should the Contestant, any time-

(iv) conduct herself in a way in which the Principal upon advice by the judges appointed for auditioning for the competition and the Event, consider inappropriate in furtherance of the Competition and the Event’s objectives.”

20. Clause 11 of the Management Agreement provides for the settlement of disputes under the Contract through arbitration as follows:

“Any dispute arising from or in connection with this agreement shall be finally settled through Arbitration in accordance with the Arbitration Act of 1995 or any Acts amending or replacing the same. Both parties herein shall agree upon the Arbitrator failing agreement to be chosen by the Chairman for the time being of the Chartered Institute of Arbitrators.”

21. Furthermore, entry rules for the national contestants as shown in the Entry Agreement for the global Miss World event 2016 stipulate that the winner must warrant under Schedule D (o) (ii) to Miss World Limited –

“that she has never permitted any offensive, indecent, immoral or nude or semi-nude photographs of her to be taken.”

This provision would appear to disqualify the petitioner irrespective of who took the nude photographs.

22. I find that the 1st respondent was empowered under the Management Contract to terminate the contract and to disqualify the petitioner for breach of the terms of the contract, if it so found that she had breached the said contract. Accordingly, no constitutional issue arises in the matter of termination of the petitioner’s selection as Miss World Kenya 2016. It is purely a matter of contract between the parties, which furthermore has an arbitration clause for the resolution of disputes between the parties through the mechanism of Arbitration.

Breach of the right to privacy

23. The petitioner has however, a clear right to approach the Court for the determination of the question of breach of her right to privacy. Publication of a person’s private photographs by unauthorised person without the owner’s consent is a violation of the person’s right to privacy. Article 31 of the Constitution provides as follows:

“31. 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.”

24. The Article in similar provisions as with section 14 of the Constitution of South Africa. In a threshold

decision of **Bernstein v. Bester NO**, 1996 (2) SA 75 the Constitutional Court of South Africa dealt with the meaning of the right to privacy and Ackermann J. for the majority wrote that-

*“The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the **inner sanctum** of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the **truly personal realm**, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”*

25. The **Bernstein** decision was cited with approval by Lenaola, J. (as he then was) in **JWI** case, supra. Discussing subsequent developments in South Africa, the learned authors of **The Bill Of Rights Handbook, 2005** by Iain Currie and John de Waal wrote as follows:

*“We can summarise these developments as follows. **Bernstein** tells us that privacy is not a value in itself but is valued for instrumental reasons, for the contribution that it makes to the project of ‘autonomous identity’. **Hyundai** [Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd. 2001 (1 SA 545 CC)] then substitutes the more conventional constitutional value of human dignity for that of ‘autonomous identity’. **Jordan** [S v. Jordan 2002(6) SA 642 CC] then seeks to give meaning to the formidably abstract concept of human dignity by means of a lower level of conception of one of the implications of human dignity – privacy is dignity reinforcing to the extent that it contributes to the establishment and nurturing of human relationships and not when a normally private space is used to perform an ‘indiscriminate and loveless’ act of commercial sex.*

***Jordan** also makes clear that the spatial metaphors encountered in Bernstein and other cases (‘inner sanctum’ ‘personal sphere’) are misleading to the extent that they suggest that privacy is a space or place. The fact that conduct takes place in some one’s home is not decisive of the question whether it merits the protection of the privacy right. Equally, the fact that conduct takes place outside the inner sanctum (at work, or in the street) should not deprive it of protection. What is decisive is whether that conduct is dignity-affirming, and that it therefore conforms to the principal purpose of the privacy right.”*

26. In dealing with informational privacy, an aspect also protected under our Article 31 (c) of the Constitution of Kenya, the learned authors of the **Handbook** consider the decision of **Mistry v. Interim National Medical and Dental Council of South Africa** 1998 (4) SA 1127 (CC), and write as follows:

*“[T]his is an interest in restricting the collection, use and disclosure of private information. It also encompasses a related interest in having access to personal information that has been collected by others in order to ascertain its content and to check its accuracy. These interests can readily be accommodated under the value of dignity since publication of embarrassing information, or information which places a person in false light, is most often damaging to the dignity of the person. But the right to privacy guarantees control over all private information and it does not matter whether the information is potentially damaging to a person’s dignity or not. **The publication of private photographs, however flattering, will for example constitute a violation of the right to privacy of in this sense. So would be the use of a person’s name or identity without his or her consent. But as with the other two elements of the right to privacy, there must be a reasonable expectation of privacy.** For example, a person does not have the right to refuse to provide identification to a police official when so requested.*

*In **Mistry** the Constitutional Court considered the following factors to be important when considering the informational aspect of the right to privacy: whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicant’s*

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 to the general public or persons from whom the applicant could reasonably expect such private information would be withheld. In *Mistry*, information about a possible violation of the law by the applicant was provided by a member of the public to the Medical Council. This information was communicated by the Council to an official who had a statutory responsibility for carrying out regulatory inspections for purposes of protecting the public health. Moreover, all the officials that dealt with the information were subject to the requirements of confidentiality. Needless to say, the Court found no violation of the applicant's right to privacy."

27. I would agree and add that the protection of privacy must serve a lawful purpose the preservation of the applicant's dignity in conduct that accords with the law. I do not consider that the right to privacy may properly be invoked to protect private photographs the taking of which constitutes a criminal offence or which capture illegal acts, or which depict reasonably objectionable conduct. This would agree with Ackermann's formulation of reasonably private - that a person's privacy extends to those aspects in which a legitimate expectation of privacy can be harboured, as "a subjective expectation of privacy ... that is reasonably recognized as objectively reasonable."

28. However, one does not waive their right to protection of privacy by taking nude photographs. I would only agree that taking or consenting to having taken nude pictures of oneself and **disseminating** them to third parties cannot be protected privacy. But this was not so in this case.

29. It was clear from the photographs that she had posed for the taking of the photographs and in some she had taken 'selfies' of her nude self. But she did not publish them or given consent for their publication. The access to this information by the 3rd Respondent with whom she had a personal relationship as boy-girl friend does not remove the matter of privacy from the inner sanctum of the petitioner's personal life. Although the photographs were not obtained in an intrusive manner, the purpose of the access by the by the friend did not include the publication thereof to third parties, and publication of the private photographs to the organizers of the Miss World Kenya was publication to persons that "**the applicant could reasonably expect such private information would be withheld**". Her expectation that private photographs would remain the private matter of the boyfriend and herself was not unreasonable.

30. There was no evidence that the petitioner ever disseminated the photographs. It was only suggested that the photographs could have leaked when the petitioner's mobile phone was stolen in Italy in April 2015. While the stolen mobile phone may have contained the photographs TM a-d, which the 3rd Respondent said were taken in 2013 – 2015, it would not explain the photographs TM e-f which he said were taken in March 2016. On a balance of probabilities having regard to the email communication attached in the replying affidavit of the 1st and 2nd Respondent indicating that the photographs were forwarded to the 2nd respondent by the 3rd respondent, I find that it is the 3rd respondent who published the private photographs of petitioner to the 2nd respondent.

31. Indeed, in the Counsel's submissions dated the 3rd Respondent attempts to justify the publication of the photographs on grounds of public interest as follows:

"YOUR LORDSHIP,

5.21 *The 3rd Respondent's submits that one can have no expectation of privacy if (one) has consented explicitly or implicitly to have one's privacy invaded.*

5.22 *The 3rd respondent further submits that the Constitution of Kenya by virtue of Article 2(1) binds all persons including the Petitioner and the Respondents. The 3rd Respondent was thus acting only in public interest and in conformity with the constitution. **That as a law abiding citizen, the 3rd Respondent had an obligation to report an illegality by informing the 2nd Respondent of the conduct of the Petitioner as the holder of the title Miss world Kenya, 2016 and***

a prospective Miss World.

5.23 *That being aware of the responsibilities and moral standards expected of a holder of the title Miss world Kenya; and being aware that the Petitioner was conducting herself in a manner that breached the strict code of conduct applicable to models participating in the Miss world pageant, **the 3rd Respondent was compelled to inform the 1st and 2nd Respondents of the gross misconduct of the Petitioner.***

5. 24 *The Petitioner was conducting herself in a manner that was disparaging of the title she held and of her person as a future legal professional and that here actions were likely to demean the Miss World Kenya crown, the Country and the 1st and 2nd Respondents.*

5.25 *From the foregoing, it is the 3rd Respondent's submission that the petitioner having become a public figure by virtue of the Miss World Kenya title, her behavior and character is open to public scrutiny. In ***J.W I & Another v Standard Group Limited & another {2015}*** (supra) the Court stated as follows:*

“ ...it follows that the publication of information will be protected if it supports the public interest in informing and educating the public about issues of public importance. Public interest as a defence for the violation of right to privacy is therefore designed to ensure that the individual's right to privacy does not trump important social or collective considerations... it is also clear to me that intrusion upon the right to privacy will usually be justified in the public interest where it is intended to expose an individual's illegality or misconduct...”

32. If true that the petitioner was handling narcotics, however, as depicted in the two photographs TM e-f, it would be evidence of illegality and misconduct on the part of the petitioner. They would also go against the moral rectitude of the Miss World event whose participants and winners, as pointed out by the 1st and 2nd respondents, are required to be national and global ambassadors and role models in society. They would also be evidence of criminal activity of being in possession and or partaking of narcotics.

33. However, the 3rd respondent did not send the photographs to the criminal investigation agencies, but to the organizers of the Miss World Kenya pageant supporting the allegations if malice on the part of the 3rd respondent following his break up with the petitioner former girlfriend. The Court is not able to find that the photographs evidenced handling or preparation of narcotics as asserted by the 3rd respondent, only an investigation can establish that fact. The Court can only treat the photographs as evidence of nudity of the petitioner which may offend the provisions of the Management Contract between the petitioner and the 1st respondent.

Alleged Commission of criminal offence of drug taking

34. The Court agrees with Counsel for the Petitioner that it is not possible to determine from the photographs whether the petitioner is taking drugs substance. Only a proper criminal investigation may reveal the truth. However, as the nature of the matter is such that the court in recommending investigations into the matter would further open the petitioner to exposure and ridicule in view of the nude photographs, the Court does not make any further orders in the matter of the allegation of drug abuse by the petitioner.

Conclusion

35. The Petitioner's claim against the 1st and 2nd Respondents can only lie in Contract for any breach of contract by wrongful termination of the Management Contract between her and the 1st Respondent dated 22nd January 2016 and or for defamation under the Defamation Act. This Contract has an arbitration Clause which binds the parties to resolve any disputes therein by Arbitration. Defamation is a civil wrong the remedy for which should be sought in a civil suit in

that behalf.

36. Accordingly, the issue of dethronement of the petitioner from Miss World Kenya title and disqualification from contesting for the 2016 Global Miss World title is not a constitutional issue for the determination by the Constitutional and Human Rights Division of the High Court. It is a commercial matter for the hearing and disposal by the Commercial Division of the Court, noting that the Arbitration Act, 1995 requires that the dispute which is governed by an arbitration clause be referred in the first instance to arbitration in accordance with the Contract.

37. The petitioner's case against the 3rd respondent is properly a human rights issue of breach of the right to privacy under Article 31 (c) of the Constitution. The 3rd Respondent though a private citizen is bound by Article 20 (1) of the Constitution in equal measure as a state organ to observe the rights and fundamental freedoms of the Bill of Rights which includes the right to privacy. The Bill of Rights' protection to privacy is an obligation of both state and non-state actors in terms of Article 20 of the Constitution which provides that –

“20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”

See also the decision in *Rose Wangui Mambo*, supra.

38. Article 31 (c) of the Constitution provides for the right to informational privacy which includes privacy of private photographs of a person. In taking selfie nude pictures using a mobile phone or other communication gadget, a person does not thereby waive her right to privacy, she only exposes herself to the risk and danger of the photographs being transmitted to and viewed by other persons through the communication networks by unauthorised access and publication, or by authorised access but unauthorised publication.

39. The 3rd Respondent had by his close relationship as a boy-friend of the petitioner accessed the petitioner's photographs, and may indeed have taken some of them, but he had no authority to publish the private photographs. In forwarding the private photographs of the petitioner to the 2nd respondent, the 3rd petitioner had violated the petitioner's right to privacy of information under Article 31 (c) of the Constitution, and the petitioner is entitled to compensation in damages.

40. The petitioner did not adduce evidence sufficient for the court to assess the damages for the breach of the petitioner's right to privacy. Accordingly, the Court will award modest damages for the breach of the right to privacy in the sum of Ksh.1,000,000/- against the 3rd respondent.

41. The Petitioner has no case against the 4th Respondent.

Orders

42. Accordingly, the petitioner's suit against the 1st, 2nd and 4th Respondents is dismissed with costs.

43. The petitioner's suit against the 3rd Respondent for violation of right to privacy is allowed with costs. A declaration will, therefore, issue that the 3rd Respondent by his sending of private photographs of the petitioner to the second respondent, without her consent and authority violated her right to privacy under Article 31 (c) of the Constitution.

44. The 3rd respondent will pay to the petitioner damages for violation of her rights to privacy in the sum of Ksh.1,000,000/- (Kenya Shillings One Million).

45. There was no evidence that the 1st, 2nd and 3rd Respondents intended to publish the photographs. However, as these photographs are in their possession, the court for the protection of the petitioner's privacy directs that no publication of the said photographs shall be made by the said respondents, their agents or employees or persons under their control. For the same reason, the copies of photographs attached as exhibit TM 4 a-f in the Replying Affidavit of the 2nd Respondent shall be expunged from the record.

46. The costs adjudged between the parties will be agreed by the parties or, in default, taxed by the taxing officer of the Court.

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER 2016.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S MMA Advocates for the Petitioners.

M/S Omwancha Mukiri & Onyango Advocates for the 1st, 2nd and 4th Respondents.

M/S Apollo & Co. Advocates for the 3rd Respondent.