



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 85 OF 2014**

**ALFRED OMBUDO K'OMBUDO ..... APPELLANT/ APPLICANT**

**VERSUS**

**JANE W. ODEWALE ..... 1<sup>ST</sup> RESPONDENT**

**NONNY GATHONI ..... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

By a notice of motion dated 14<sup>th</sup> March 2014, the appellant/applicant herein Alfred Ombudo K'Ombudo seeks from this court, orders, among others;

1. Orders of stay of the orders of the Chief Magistrate at Milimani issued on 10<sup>th</sup> March 2014 pending hearing and determination of the application herein; and the appeal as filed.
2. An injunction restraining the respondents by themselves, their servants, agents or those claiming under them from airing, broadcasting and or publishing wedding videos and photos of the appellant/applicant without his consent pending the hearing and determination of the application and the appeal herein.
3. Costs of the application.

The application is based on the grounds that the applicant's constitutional rights to privacy and religion were being violated. Secondly, that the appeal would be rendered nugatory if the respondents continue to air, broadcast and or publish the wedding videos and images of the appellant without his consent; That the injunction sought will not prejudice the respondents in any way; the appellant is likely to suffer irreparable loss and damage if the prayers sought are not granted; and that the applicant had established a prima facie case with a high chance of success at the main suit and an award of damages will not adequately compensate him. The application was also supported by the affidavit of Alfred Ombudo K'Ombudo advocate who is the appellant/applicant herein.

The application is opposed by the respondents who filed their grounds of opposition on 21<sup>st</sup> March 2014 contending that the application lacks substance and does not disclose a cause of action known in law as was observed in the Court of appeal case of **Charles Gichuna Mwangi – Vs – Henry Mukora Mwangi CA NRB 282/99** and that where the event sought to be stayed has occurred there is no purpose to be served by a stay; that as the interim injunction had been vacated by the lower court, the respondents were at liberty to air, broadcast and or publish, indeed as they did, there being no triable issue to be determined on appeal or in this application; that there was no subject matter to be preserved and that orders of this

court are not a bouquet of flowers to be issued in vain as the substratum of the suit ceased to exist.

The parties herein agreed to file written submissions to dispose of the application and made highlights on 30<sup>th</sup> September 2014.

In support of the notice of motion, the applicant's advocate Mr Agwara submitted, relying on the grounds and supporting affidavit in support of the application, their written submissions filed on 30<sup>th</sup> September 2014 and decided cases that the respondents had continued to air, broadcast and publish the applicant's images and videos undeterred yet they did not have his consent which actions violated the applicant's constitutional guaranteed rights to personal privacy and which rights to personal privacy could not be curtailed without a legal process. He cited the case of **Rukia Idris Bari – Vs – Mada Hotels [2013] eKLR** wherein the court considered the issue of personal image and privacy, citing with approval the South African cases **of Angela Wells – Vs – Atoll Media (PTY) Ltd & Another, Western Cape High Court Case No. 11961/2006 and Grutter – Vs – Lombard & Another 2007 (4) SA 89 (SCA).**

The applicant also attached the subject images which were being broadcast and aired and published on facebook, webpages, drum magazine as well as True Love magazine as well as the Nation Television Network featuring him under the Bailey's Wedding Show which continues to run.

He submitted that it was unlawful to air the said images without his consent as the earlier consent granted by the bride was on the understanding that only the bride's party would feature in the show but that they extended showing, broadcasting and airing the bridegroom and the entire party without seeking his consent which has greatly damaged his image and standing as an advocate of the High Court of Kenya. He submitted that his case had met the conditions for granting an interlocutory prohibitory injunction as set out in the **Giella – Vs – Cassman Brown** case. He further submitted that there is no denial by the respondents in their grounds of opposition that indeed the consent of the applicant was never sought before commencing and airing, broadcasting or publishing his images worldwide. He accused the respondents for misrepresenting to him that they would not air his images after he sought clarification but instead acted contrary to the expectations of the appellant hence they must be stopped.

Mr. Lusi advocate for the respondents submitted, relying on their grounds of opposition, written submissions filed on 17<sup>th</sup> June 2014 and authorities cited that the applicant's application before court was ill conceived as there was no genuine claim against the respondents which was being pursued by the applicant/appellant.

In his view, the issues raised should await the hearing of the appeal filed. He submitted that the Bailey's Wedding Show with Noni Gathoni is a protected name sponsored by Kenya Breweries Ltd who have the right to air or continue to show and that they are no longer airing it hence the court should not issue orders restraining nothing from happening. He relied on the authority of **Charles Gichina (Supra)** that whereas the court seeks to fetter the discretion of the lower court from which an appeal lays, it was to look at the practical consequences of that order and that as the activity sought to be stopped had ceased, there is absolutely no risk or activity to be restrained by this court.

He further cited the **Anastacia Agoro** case where **Waweru J** set down the test before the grant of stay of proceedings is whether the applicant will be prejudiced in her case. No prejudice will be suffered in this case, he averred, and that the applicant's case is better served by pursuing damages against the respondents. He also relied on the treatise by **Kuloba J** (as he then was), at page 50 paragraph 5.10.2 that if the court decided whether there is an arguable case it must proceed to assess the practical consequences likely to be faced by the applicant supposing that no temporary protection is extended. According to counsel for respondents, they had the right to air the elements/images as the orders of **Hon. Lorot** had been vacated.

He cited the case of **Murau – vs – First American Bank Ltd (2003)** that the appellate court may only interfere with the lower court's judicial discretion if satisfied of the five prerequisites set out in that case on page 126 thereof. In his view, none of those grounds had been invoked in the application herein hence, this court should not exercise any discretion in his favour or interfere with the lower court's

judicial discretion.

The respondents further submitted that there were variations and inconsistencies in the applicant's application, written submissions and oral submissions. That he had come to court with unclean hands in that albeit he alleges that there was no consent obtained from him, he previously argued that the objection to the airing of the show was that it bore alcoholic content contrary to his religious belief; an illustration of bad faith and lack of clean hands. That the consent to air the show had been granted and that in as much as the applicant has some legal rights which the court can determine, it should be left to the trial court to determine those issues in the dispute.

In response, Mr Agwara submitted that the application before court now is brought pursuant to Order 42 rule 6 (6) of the Civil Procedure Rules and that what is being canvassed is an injunction on appeal which is properly filed, noting that they are not seeking stay of proceedings as was in the case of Charles Gichina Mwangi cited.

I have carefully considered the parties' rival submissions for and against the grant of the orders sought in this application. I have also examined the pleadings in the lower court respecting the dispute between the two parties and the authorities cited.

The issue for my determination is whether the application has made out a sufficient case to have the respondents restrained from airing, broadcasting or using the appellant's images for commercial purposes pending hearing and determination of this appeal. This being an application for an injunction, pending appeal, the other question as was rightly cited in **Equity Bank Ltd – Vs – West Link Mbo Ltd (2013) eKLR CA** is that,

***“The court has to determine whether the judgment (or ruling) appealed from is one which the successful party ought to be free to act despite the pendance of the appeal.”***

In the instant case, it has been submitted that the respondents have continued to air, broadcast and or use images of the appellant for commercial purposes immediately the lower court lifted the interim injunction to his detriment. Further, that unless the injunction is granted, the appeal herein which is said to be arguable, will if successful, be rendered nugatory hence, the need to stop the airing, broadcasting and or publication of the appellant's images by the respondents.

I subscribe to the holding in many decisions that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory. See the Court of Appeal's decision in **Natural Waters of Viti Ltd – Vs – Crystal Clear Mineral Water (Fiji) Ltd CA AB 0011.04S** where this principle was espoused and further that in considering whether or not to grant such stay, whether or not the successful party will be injuriously affected; the bonafides of the applicants as to the prosecution of the appeal, the effect on third parties; the novelty and importance of question involved; the public interest in the proceeding; the overall balance of convenience and the status quo; cited with approval in **Equity Bank Ltd – Vs – West Link Mbo Ltd (Supra)**.

What the appellant/applicant has consistently maintained against the respondents is that he never ever granted them permission and or consent to use his images for publication, broadcasting or airing for commercial purposes. On the other hand, the respondents allege that the appellant/applicant was aware that the shooting of the videos at his wedding were intended to be published, aired or broadcast and therefore he is estopped from complaining and that his belated complaint is an afterthought and raised in bad faith.

My meticulous perusal of the correspondences between the parties hereto have revealed the following:

- i. That the then fiancée to the appellant did invite the respondents to her bridal party at her parents home in Karen and to her wedding which was to take place on Saturday 19<sup>th</sup> October 2013 as shown by email sent on Tuesday October 15<sup>th</sup> 2013 at 7.40 a.m. which was also forwarded by the appellant/applicant herein. The said mail was sent by Grace Levi ([levigrace@yahoo.com](mailto:levigrace@yahoo.com))

to Extra Edge Training and Consultancy to the attention of Jane.

It is not in dispute that the said mail is clear as follows on the last page

***“You are very welcome to Levi Residence and you are very welcome to witness out wedding.”***

In the body of the said mail, the bride to be was extending her gratitude to the consultancy owned by the respondents herein for according her the VIP treatment during the hen party the previous Saturday which involved the bride to be and her bridal party.

The above mail was acknowledged by Jane who also indicated that a different crew would be shooting her wedding.

There is no mention of the groom in that mail and neither was it indicated anywhere that the shooting would be for commercial purposes. The same is applicable to the subsequent mails of 18<sup>th</sup> October 2013 and 17<sup>th</sup> October 2013 as attached.

Come the D-day on 19<sup>th</sup> October 2013 when the wedding was taking place and the applicant herein on noticing that the respondent's team agents were covering the wedding, he timeously sent them a mail at 3.11 pm reminding the respondents that he had seen their staff at his wedding covering the said wedding and that he had not authorized any person to use his images or voice whether by way of still motion picture to be used on any of the shows, including any promotional materials. Regrettably, there was no response to the said mails and on 4<sup>th</sup> December 2013, the applicant herein instructed his advocates who wrote to the respondents after seeing the episodes of the show *“Baileys Weddings”* containing images of the applicant. The respondents' response to a threat for legal action is dated 9<sup>th</sup> December 2013 wherein they dared him to take any threatened legal action as they would counter claim for production costs and costs incurred in hosting Ms Levi to her bachelorette and spruce up parties. They further insisted that the appellant was aware of the consent signed by the appellant's bride and therefore the respondents had a legitimate expectation to incur significant financial expenditure towards hosting and covering the material wedding ceremony and recover the same through commercial broadcasts which they were legitimately entitled to air.

As I have stated earlier, there is no single consent displayed to this court signed by the appellant granting permission to the respondents to use the images or voice of the appellant/applicant as models to be aired on *“Baileys Weddings”* television or other print media programme.

The attached Talent Release forms show that the consents signed by the bride's party were in respect of a shooting or a recording of 12<sup>th</sup> October 2013 while others have no dates but are given by Wahu Kamau, Christine A. Otieno and Alice Yvonne Wako.

Although the respondents insist that they got the consent from the bride to air or broadcast those images, they have not attached any of the consents signed by the bride to that effect.

The appellant herein from his mail of 19<sup>th</sup> October 2013 was clear that having seen the shooting going on, and as he had not authorized the use of his images for Model Release, he would appreciate an opportunity to discuss with the respondents ahead of any promotional showing or airing of any footage. This request was ignored by the respondents who now claim that they had consent to air the same!

The respondents do not deny that the only consent they received for airing was with respect to the Talent Release forms which the appellant has attached, relating to the bride and her bachelorette party, otherwise nothing would have prevented the respondents from attaching such consent to these hotly contested proceedings. Thus, the respondent did not make any feeble pretense to explain their default in seeking consent from the bridegroom to air his images for promotional purposes. Instead, I find that the respondents have exhibited uncommon bravado in the face of serious challenge to the validity of the alleged consent, and my understanding of what they are telling the appellant is that *‘we had no business*

*seeking your consent to air your images for promotional purposes notwithstanding your protests from day one at your wedding; because and after all, your bride to be had allowed us to do so and with your full knowledge.'*

The respondents now tell the court that *“anyway we aired your images because there was no court order stopping us from doing it”*, which I find to be a veritable taunt at the appellant/applicant.

My findings are that the respondents having failed to obtain consent of the appellant/applicant to use his images for promotional purposes, and the appellant having protested from day one – which protest was ignored by the respondents, the use or continued use of the appellant’s images for promotional purpose are not only offensive but is an express and direct invasion of his human dignity and privacy, two fundamental human rights guaranteed under the Constitution.

Article 28 of the Constitution provides that

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

Albeit it is alleged that the appellant is a pretender who alleges to be religious and that since the ‘promotion’ promotes Bailey’s which is an alcoholic drink yet he was captured at the wedding taking alcohol and therefore that he is attempting to paint a holier than thou image which he does not possess, I dismiss such submission as demeaning and scandalous. There is no prohibition for people who are religious to take alcohol. In addition, it has not been proved that the appellant had been contracted to promote Bailey’s alcoholic drink and that he is purporting to renege on his undertaking.

Further, the fact that one allows photographs or videos to be taken of his wedding ceremony does not mean that they have allowed, without express permission or authorization, the said videos or photographs to be published or broadcast to the whole world and for commercial purposes. The Bill of Rights and the national values enshrined in the Article 10 of the Constitution binds all persons without exception. Human dignity and human rights are national values that bind all and must be upheld, respected and promoted whenever any person applies or interprets the Constitution or enacts, applies or interprets any law including the law relating to contracts between parties, (addition, and emphasis added). There being no contract or consent given by the applicant/appellant for the use of his images by the respondents for promotional purposes, they are not entitled to use the same, and it matters not that they had some form of *“consent”* from the bride to be by which time the appellant was not her spouse for all purposes. It is clear from the record that the appellant was not privy to the alleged consent.

In the case of **Dunlop Pneumatic Tyres – Vs – Self Ridge & Co Ltd.**

***“The essence of privity of contract rule is that only the people who actually negotiated a contract are entitled to enforce its terms. Even if a third party is mentioned therein, he cannot enforce any of the terms nor have any burdens from that contract enforced against him.”***

This principle was also upheld in the case of **Aineah Liluyani Njirah – Vs – Anglo Ken Health Services [2013] eKLR.**

Article 31 of the Constitution further guarantees the right to personal privacy including ***“the right to – not to have.***

a) ...

b) ...

c) ***Information relating to a person’s family or private affairs unnecessarily required or revealed.”***

In addition, Article 32 of the Constitution guarantees the freedom of conscience, religion, belief and

opinion. Clause 4 thereof enacts that,

***“A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.”***

In this case, the appellant has cited his religion and belief being at stake by the said publication of the images for promotional purposes. He cannot, without his express consent, be compelled by the respondents to appear on television and in any other media whether print, electronic or social, magazines, facebook, websites or any other place, purporting to promote Bailey’s alcoholic drink, whether or not he drinks alcohol, as his conscience does not allow him to so appear and such use of his images without his consent is tantamount to exploitation for commercial purposes.

I am enjoined to accept the holding in the case of **Rukia Idris Bari – Vs – Mada Hotels Ltd [2013] eKLR** cited by the appellant that

***“The High Court of Kenya, should have no hesitation at all in according protection of human dignity and privacy where they are exploited for commercial purposes without consent.”***

Per Justice H.P.G. Waweru on 22<sup>nd</sup> August 2013. The learned Judge cited with approval two South African cases namely **Grutter – Vs – Lombard & Another 2007 (4) SA 89 (SCA)** where it was noted as follows:-

***“The extent to which the features of a personal identity for example, his or her name or likeness – constitutes interests that are capable of legal protection has received little attention from our courts.***

***In the USA, the appropriation of a person’s name or likeness for the benefit or advantage of another has come to be recognized as an independent tort during the course of the last century. The English Common law seems to have been more reticent in that regard. In his illuminating dissertation on the subject P.P.J. Coetsen observes that in Germany “wide protection has been afforded by the positive law to an individual’s interest in identity” form which has emerged that “it is unlawful to use certain aspects of personality for commercial purposes without consent!” (Emphasis added).***

The learned Judge in the **Rukia Idris Bari** case further referred to the South African case of **Angella Wells – Vs - Atoll media (PTY) Ltd & Another, Western Cape High Court Case No. 11961/2006** where it was held that:-

***“...The appropriation of a person’s image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individuals concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as incase, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the person’s rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”***

In the present application, it is clear that there was no consent sought or obtained from the applicant to use his images for commercial exploitation purposes as a model for “Baileys Weddings” with Nonny Gathoni. This, in my view, is unacceptable as it is an unjustifiable invasion of the applicant’s right to privacy and human dignity guaranteed under the Constitution.

From the above, it is clear that the appellant’s appeal is arguable and further, that this is a good case for grant of an interlocutory prohibitory injunction against the respondents for restraining and prohibiting them, their agents, servants from broadcasting, airing or publishing the appellants images of his wedding held on 19<sup>th</sup> October 2013 pending hearing and determination of the appeal herein.

I do not accept the respondents submission, relying on the **Charles Gichina Mwangi – Vs – Henry Mukora Mwangi CA 282/99** that where the event sought to be stayed has occurred there is nothing to

stay. The reasons are that the case cited can be distinguished from the appeal herein. The appellant is seeking an injunction and stay of the ruling by the trial magistrate dismissing his application for an injunction. The respondents admit that they aired the images on account of some consent granted by appellant's then bride to be, and not the appellant. The appellant herein has sought the intervention of the court after his efforts to stop the airing failed.

The respondent cannot be heard to be telling the court that "*we already aired and that there is nothing you are trying to protect*", when it is clear from their responses that the programme is a continuing one and without indicating to the court when the said airing was to come to an end.

It cannot be denied that unauthorized invasion of a person's privacy and human dignity cannot occasion loss and therefore damages yet the said rights are guaranteed by the Constitution, and whereas it is true that it is only the trial court which can grant the remedy sought, the appellant having been aggrieved by interlocutory orders of the trial court, should not be ousted from the judgment seat simply because he will seek compensation in damages. To my mind, no amount of damages is sufficient enough to redeem an exploited image of a person. It is for that reason that an injunction is necessary to mitigate that loss and damage until the said appeal is heard since as I have indicated above, the appeal as filed is not frivolous, on the material presented to the court. There exists a right which appears to have been infringed by the respondents and which calls for an explanation or rebuttal (see **Mrao Ltd – Vs - First American Bank of Kenya Ltd & 2 Others (CA) [2003] KLR 125.**

On whether the appeal shall be rendered nugatory if the orders sought are not granted, it is clear as I have stated that the respondents have no intention of stopping the airing of the appellant's images because there is no order stopping them from doing so and as they have consent from the then bride to be to so air. It is this contention which the appellant is challenging by the appeal herein. In my view, the appeal herein will be rendered nugatory if the respondents are allowed to continue broadcasting, airing or publishing the appellant's images for commercial purposes unless they are restrained and when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory. (Per Cotton L.J. in **Wilson – Vs – Church (No.2) [1879] 12 ChD a 458** cited in **Equity Bank Ltd – Vs – West Link Mbo Ltd [2013] Eklr.**

For the above reasons, I grant the applicant/appellant the orders sought in his notice of motion application dated 14<sup>th</sup> March, 2014.

I also award costs of this application to the appellant/applicant.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> Day of November, 2014.**

**R.E. ABURILI**

**JUDGE**