



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 591 2010**

**JAMES OKETE MWAKHA & ANOR..... PLAINTIFFS**

**VERSUS**

**KENYA LITERATURE BUREAU..... DEFENDANT**

Coram: Mwera J  
Odawa for plaintiff  
Omogeni for defendant  
Njoroge court clerk

**RULING**

The plaintiffs in their chamber summons of 3.12.10 brought under the now repealed Order XXXIX Rules 1,2, 9 and Sections 1A, 1B, 3A of the Civil Procedure Act prayed:

i) that the defendant be restrained from infringing on their copyright by using their picture appearing in a publication titled ***Primary Social Studies Standard Six Pupils Book*** until the determination of the suit herein.

It was contended that in 2009, the respondent publishing house approached the applicants and offered to compensate them if the pictures it took of them, were used in its publication. So various poses of the applicants were taken in Nairobi South B estate. The respondents' agents left promising to communicate with the applicant - a thing that did not take place until sometime later when the applicants were surprised to see that their pictures had actually appeared in the above publication. That the applicants never consented to the use of their picture portraying them as deaf people. Neither did they get any payment for it. The picture had falsely portrayed the applicants as having hearing disability which the defendant knew was not true. Therefore it should be restrained from further publishing such a picture or pictures. The supporting affidavit repeated more or less what was stated in the grounds.

The defendant seemingly did not file a replying affidavit to the application as none was traced on the file but both sides submitted.

The plaintiffs maintained that defendant's agents approached them and made an offer to them to the effect that if their pictures were taken in various poses and the same were used in its publication, they would enter discussions ending in an agreement for compensation/payment. Such would only follow communication in the event the defendant decided to use the pictures - no such thing took place, no payment was made to the plaintiffs and yet their photograph appeared in the defendant's publication. So that publication including future ones ought to be restrained.

Appearing to allude to the use of the pictures without authority, contract or payment, the plaintiffs also put up a claim apparently in defamation – that their reputation or reputations were trampled upon when the defendant published pictures portraying the plaintiffs as dumb and deaf people, which was false. The publication ought to be enjoined. The offending page 165 in the publication of the defendant was exhibited.

The defendant countered the above terming the application frivolous and without merit. That there was no contract between the plaintiffs and the defendant to use the said picture and the alleged agents of the defendant had been undisclosed/concealed. The defendant got the photograph in issue from one Nixon Chabala, an independent photographer contracted to supply such pictures. The plaintiffs voluntarily gave their picture to the said Chabala who was paid when he supplied it. The published picture did not defame the plaintiffs. The plaintiffs only posed as deaf and dumb people. There was no infringement of the plaintiffs' copyright because it had not been demonstrated that the plaintiffs enjoyed a set of exclusive rights as authors or creators of original work. That the plaintiffs were not originators of any written works, pictures, books, thesis or movies which the defendant was copying or infringing on without permission. The subject picture was taken by somebody with whom the plaintiffs voluntarily agreed that it should be taken ie while posing as deaf and dumb people. That cannot constitute defamation at all.

So an injunction was not deserved in the circumstances. The plaintiffs volunteered to have their picture taken and it appears in books used by thousands of class six children it would be inconvenient to stop its use. However, if the suit succeeds damages will compensate the plaintiffs adequately. Some authorities were cited by either side.

In this court's view the plaintiffs voluntarily posed as the deaf and dumb, to a person they did not know who took their photograph. The defendant admits that that person called Nixon Chabala, said to have passed on, was a free lance and independent photographer it had contracted to supply such pictures. Well, if one publishes what another has passed to him, yet that publication is proved to be defamatory, he will be liable. But the plaintiff's case appears not specific since they state that there was no contract concluded to take and use their photographs, or that they were not given any payment. Then the claim of defamation pops up.

If the court takes course to entertain these 2 claims together, it is inclined to refuse an injunction first on the claim of contract. It has not been demonstrated here that the plaintiffs entered an agreement with the defendant or its agent to pose for photographs which, on being accepted by the defendant, it could formally conclude an agreement to pay the plaintiffs. So, as of now there is no contract between the two parties which is about to be breached and this court is being asked to save/preserve. The plaintiffs do not disclose with whom they entered their alleged agreement and/or whether he/she was the defendant's agent in order to bind it. It states that it got the picture in issue from an independent free lance photographer, one Nixon Chabala whom it had contracted in that regard.

Coming to the claim of defamation, first the plaintiffs volunteered to a photographer to pose as a pair of deaf and dumb persons so that their photograph could be taken for whatever reason. That cannot constitute defamation. Second, the photograph in question has a caption:

**“ Fig. 7.2 Sign Language Speakers.”**

Sign languages speakers cannot be read to mean that those photographed are indeed ones who need sign language, because they are dumb and deaf. And in any case what would be defamatory about having any or both of those disabilities if truly they are there? Or being taken to be a victim when for sure one is not?

Well. The court need not get into that now. Probably at the trial.

Lastly in the interest of the many pupils now using the publication in question it would be inconvenient to “ban” the offending picture. If the plaintiffs are successful in the trial of the suit herein may they press for fair compensation by way of damages.

This application is dismissed with costs.

Delivered on 1.3.11

**J. W. MWERA**  
**JUDGE**