



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wokabi & another v Microsoft East Africa Ltd & another (Civil Suit  
197 of 2014) [2024] KEHC 819 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 197 OF 2014**

**CW MEOLI, J  
JANUARY 31, 2024**

**BETWEEN**

**SUSAN NJERI WOKABI ..... 1<sup>ST</sup> PLAINTIFF  
MW (MINOR SUING THROUGH HIS MOTHER AND NEXT  
FRIEND) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MICROSOFT EAST AFRICA LTD ..... 1<sup>ST</sup> DEFENDANT  
MUTHONI NJOBA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 03.07.2014 and amended on 20.11.2018, Susan Njeri Wokabi and M.W (a minor), (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiff/Plaintiffs) sued Microsoft East Africa Limited and Muthoni Njoba (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Defendant/Defendants) seeking inter alia the following reliefs :- a permanent injunction to restrain the Defendants whether by themselves or through their agents, employees, servants, workers or otherwise from further publishing or commercially exploiting the subject photographs; a declaration that the Plaintiffs' right to privacy was violated by the Defendants; a declaration that the Plaintiffs' right to property was violated by the Defendants; damages; a comprehensive account by the 1<sup>st</sup> Defendant as particularized in paragraph 32(a-e) of the plaint; and just compensation for the Plaintiffs for use of the subject images.
2. The Plaintiffs aver that the 2<sup>nd</sup> Defendant as a body painter, painted both Plaintiffs during a photo shoot done at the 1<sup>st</sup> Plaintiff's house on or about the 02.08.2010, by one Emmanuel Jambo who took a series of photographs including the photograph in dispute. That on 10.02.2013 the 1<sup>st</sup> Plaintiff noticed that the 1<sup>st</sup> Defendant was advertising itself and its products using a photograph (hereafter the subject



- photograph/image) from a series taken in the said photoshoot, which photograph bore the image and likeness of the Plaintiffs as taken at the 1<sup>st</sup> Plaintiff's house on 02.08.2010.
3. She further avers that the said photographs were being exploited commercially by the 1<sup>st</sup> Defendant through various billboards as part of an advertisement campaign meant to promote itself and its newly launched Windows 8 product. That the said photographs were accompanied by the words "Art Deeper with Windows 8" and the 1<sup>st</sup> Defendant name "Microsoft".
  4. It is further averred that the subject photograph with others in the series of photographs were intended to be used for the Plaintiffs' family private photo album in the 1<sup>st</sup> Plaintiff's custody. That the 1<sup>st</sup> Plaintiff runs an established and internationally renowned business known as Suzie Beauty Limited involved in image consultancy, makeup artistry, the manufacture, and distribution of high-end cosmetics, and that the subject photograph was also displayed in her office. The Plaintiffs aver that the Defendants were in breach of the Plaintiff's copyright because, they had edited and published for commercial purposes the subject photograph without the Plaintiffs' prior knowledge and approval. Moreover, the Defendants deliberately violated the minor's right to privacy by editing and publishing the subject photo without prior approval.
  5. That the unauthorized use of the subject photograph by the 1<sup>st</sup> Defendant misrepresented the Plaintiffs as promoting or endorsing the 1<sup>st</sup> Defendant's products, thereby unfairly benefitting from the goodwill and brand recognition of the 1<sup>st</sup> Plaintiff, with no benefit whatsoever to the Plaintiffs.
  6. On 25.08.2014, the 1<sup>st</sup> Defendant filed a statement of defence denying the key averments in the plaint and averred that it purchased or acquired all images set out in paragraph 8 above from Brand Design Development Limited for valuable consideration. That without prejudice to the denials and averments in its statement of defence, the 1<sup>st</sup> Defendant reasonably and honestly believed that Brand Design Development Limited had acquired all image rights from the owner (s) of the copyright in the subject photograph. Further, that the identity of the person(s) in the image in question was at all material times unknown to the 1<sup>st</sup> Defendant.
  7. On 17.10.2014 the 2<sup>nd</sup> Defendant filed a statement of defence denying the key averments in the plaint and averred, without prejudice to the denials and averments in its statement of defence, that the 1<sup>st</sup> Plaintiff never objected to the image in question appearing in the public domain before they were used by the 1<sup>st</sup> Defendant and that the subject photograph had been on the 2<sup>nd</sup> Defendant's website for almost two (2) years.
  8. In their reply to the respective statements of defence, the Plaintiffs joined issue with the Defendants and reiterated the entirety of their amended plaint.
  9. During the trial, the 1<sup>st</sup> Plaintiff testified as PW1. Identifying herself as an entrepreneur and the founder of Suzie Beauty she adopted her witness statement filed on 04.07.2014 as her evidence-in-chief and produced the bundle of documents filed on even date as PExh.1. It was her testimony that on 02.08.2010 she had taken a photoshoot of body art done on herself and son for fun or personal use in marketing themselves, and not for sale. She confirmed having worked with the 2<sup>nd</sup> Defendant who was equally in the beauty industry and that she did not authorize the use of the subject photo for commercial purposes except with her prior express consent.
  10. It was her further evidence that she displayed the subject image in her home and office and asserted that the photograph used by the 1<sup>st</sup> Defendant was identical with the originals in her possession. She stated that her son was a year old at the time the photo was taken, the main feature being her son's foot cradled in her hands. She went on to testify that the standard rule in the industry regarding a



photoshoot involving a model, was to obtain the consent of the model allowing the artist to use such work for commercial purposes. In that event, a release contract would be executed. That to her surprise the 1<sup>st</sup> Defendant used the subject photograph without her consent.

11. Under cross-examination, she reiterated being in possession of the entire catalogue of photographs in respect of the photoshoot in question but did not tender the entire set as exhibits. She admitted not being paid for the photoshoot and confirmed that the billboard of the 1<sup>st</sup> Defendant bore among other images a baby's foot cradled in the palms of both hands, but no faces were exhibited. That while she was aware of the existence of the 1<sup>st</sup> Defendant, she had never interacted with its representatives.
12. It was her evidence further that it was the 2<sup>nd</sup> Defendant who initiated the idea of the photoshoot and did the make up or art in the subject photographs. She admitted that she did not create the design therein or copyright it. Further admitting awareness of the fact that during a photoshoot such as in dispute, the model did not solely own the image as the 2<sup>nd</sup> Defendant did the make-up while the photograph was taken by another person. She further confirmed that the golden footprint art image had been on 2<sup>nd</sup> Defendant's website since 2013 and she had attended an event in 2010 in which the image was shared. However, she maintained that her consent was necessary before the image could be commercially exploited. In conclusion, she denied that her suit was motivated by the 1<sup>st</sup> Defendant's international repute.
13. In re-examination, she reiterated that she had not authorized the use of the subject photo by the Defendants. It was her evidence that she, the 2<sup>nd</sup> Defendant, and the photographer of the subject photograph worked as equals, and all parties would have to sign an agreement towards commercialization of the subject image since it was jointly owned. That she did not object to the 2<sup>nd</sup> Defendant using the image on her business website, however, commercial use of the same required her consent.
14. On behalf of the 1<sup>st</sup> Defendant, Otilia Phiri testified as DW1. She identified herself as the Principal Corporation counsel for the 1<sup>st</sup> Defendant, in Africa and Pakistan. Adopting her witness statement dated 09.01.2020 as her evidence-in-chief, she proceeded to produce the list of documents dated 25.08.2014 and 13.06.2019 as DExh.1 and DExh.2 respectively.
15. During cross-examination, DW1 confirmed use of the subject photograph by the 1<sup>st</sup> Defendant but added that the identity of the persons in the image was never disclosed. She stated that having obtained the subject photograph from Brand Design Development Ltd (hereafter the agency) at the cost of Kshs. 1.3 million, the agency issued an indemnity regarding the consent and authority of third parties. Hence the 1<sup>st</sup> Defendant did not need to inquire further into the requisite consent regarding the subject image. That there was no attribution for the image because the agency was required to obtain the necessary waiver from the artist. She confirmed that the 1<sup>st</sup> Defendant did not obtain the subject photograph from the 2<sup>nd</sup> Defendant.
16. During re-examination, she stated that the subject image was procured for use in an advertisement campaign at the launch of "Windows 8". That at the time, it was impossible to engage at every level of supply however the agency was required to sign an indemnity indicating that they had necessary approval of the creators of the content.
17. Dennis Kibet testified as DW2. He identified himself as the Creative and Executive Director at the agency. He adopted his witness statement dated 13.06.2019 as his evidence-in-chief. Under cross-examination he stated that the 2<sup>nd</sup> Defendant is a renowned make-up artist, and that the agency obtained a license from the former to use the subject photograph, pursuant to a license agreement



- executed between the 2<sup>nd</sup> Defendant and the agency wherein, the former confirmed ownership rights of the subject image.
18. He further stated that advertising agencies rely on the rights asserted by the owners of content. He went on to state that the identity of the artists or persons in the subject image was not disclosed as it was not necessary. It was his evidence further that the agency did not raise a copyright notice as required in Clause IV or VII in the license agreement having paid a sum of Kshs. 15,000/- to the 2<sup>nd</sup> Defendant for use of the image.
  19. The 2<sup>nd</sup> Defendant testified as DW3. She too adopted her witness statement filed on 17.10.2014 as her evidence-in-chief and produced her list of documents dated 16.10.2014, 30.09.2019 and 08.04.2021 as DExh.3, DExh.4 & DExh.5, respectively. She identified herself as a make-up artist and body painter since 2010. Her evidence was that her interaction with PW1 began in the year 2009 as a mentor/mentee relationship where PW1 acted as the mentor. At invitation, she, and a photographer 02.08.2010 went to PW1's house for a photoshoot, intended for launching PW1's make-up line.
  20. It was her further evidence that the purpose of the photoshoot was to create a portfolio of images to showcase Kenyan artwork that could be used by companies, and therefore, she did not charge the Plaintiffs for the shoot. That she and the photographer shared the subject image with PW1 to use as she pleased, while she used the subject photograph in all her marketing, at PW1's instigation as a mentor. She categorically denied that it had been agreed that the usage of the suit image was limited to PW1's personal and exclusive use, asserting that she had used the subject image on her website for about 3 to 4 years, at public events, and on Facebook without objection from PW1.
  21. That the agreement between herself and PW1 was oral whereas the contract licensing usage by the agency between her and the agency at a cost of Kshs.15,000/-was written. It was her evidence further that she did not share the proceeds she received from the agency because during the photoshoot, she did the artwork for PW1's brand logo for her use including the subject image, at no cost. That PW1 was aware of 1<sup>st</sup> Defendant's use of the suit image for their "Windows 8" campaign.
  22. Under cross-examination, she confirmed that the purpose of the photoshoot was to create a portfolio of stock images which could be licensed to companies for purposes of branding and advertising. However, there was no written agreement between herself and PW1 on the matter. Hence, she did not require the latter's consent to use the subject image especially having painted PW1's logo at no cost, for use in marketing of her brand. That she obtained PW1's verbal consent for the commercial use of the suit image and had displayed the same at numerous places with no objection from PW1.
  23. It was her evidence further that she did notify PW1 concerning her intention to license the subject image to the agency, and which image was like the one displayed in PW1's office. That in any event there was no requirement for reciprocity of consent on usage of the subject image between the PW1 and herself and that the proceeds of the license to the agency were shared between herself and the photographer, because PW1 was at liberty to use the same image and the painting of PW1's logo from the photoshoot.
  24. During re-examination, she confirmed that a stock image could be exploited for commercial purposes and that because of using the subject image on her website she received repeat business for body art-paintwork especially involving mothers and their children.
  25. At the close of the trial, the parties filed written submissions. The Plaintiffs' submissions addressed the twin issues of liability and damages. Counsel anchored his submissions on the provisions of Section 22(1)(c) of the [Copyright Act](#) to posit that the Plaintiffs had the copyright over the photographs derived from their input in the creation of the art and subsequent subject image. That the Plaintiffs together



- with the 2<sup>nd</sup> Defendant, participated and co-authored the Artistic work “Art Deeper”. Further relying on Section 2 of the [Copyright Act](#), counsel contended that the contributions towards creation of the subject image were inseparable, as the Plaintiffs participated both as models and artists. Hence each participant had an inseparable right over the artwork which was intended for private use, because it included a minor.
26. Citing Section 32 of the [Copyright Act](#), counsel argued that the Plaintiffs had a moral right over the subject image and that the 1<sup>st</sup> Defendant’s witness confirmed that neither recognition was given to the artists nor consent obtained from the 1<sup>st</sup> Plaintiff. That the 2<sup>nd</sup> Defendant without the consent and in utter disregard of the Plaintiffs rights unlawfully purported to license the agency regarding the rights over the artwork. It was further submitted that the authority to license and transfer use of any work should be obtained from all authors, a fact admitted by the 2<sup>nd</sup> Defendant. Relying on the Barne Convention, counsel asserted that under Clause IV of the Photograph License Agreement executed between the agency and the 2<sup>nd</sup> Defendant, the latter was aware of the moral rights accruing on account of the input of the Plaintiffs in the creation of the subject image, and which were infringed.
  27. Addressing infringement of the Plaintiffs property rights, counsel relied on Article 11(2) and 40 of [the Constitution](#), the decision in *Rukia Idris Barri v Mada Hotels Ltd [2013] eKLR* and *NWR & Another v Green Sports Africa Ltd & 4 Others [2017] eKLR* to submit that from the license agreement, no warranty was issued by the 2<sup>nd</sup> Defendant to the agency to the effect that indeed the artworks rights or subject image belonged exclusively to the 2<sup>nd</sup> Defendant. That the question of consent is matter of right that cannot be extinguished, and it is irrelevant whether there was consent at the onset to display the subject image on any website. It was further contended that consent in copyright is a process of obtaining express permission to use the author’s creative work, counsel pointing out that there was no proof that consent was granted to either Defendants or the agency.
  28. Counsel contended that the 2<sup>nd</sup> Defendant and the agency gained financially from use of the subject image also displayed in the 1<sup>st</sup> Plaintiff’s office. Hence, despite the absence of the Plaintiffs’ faces, the 1<sup>st</sup> Plaintiff’s clients associated the suit image with her, and the Plaintiffs were entitled to compensation for the use of the subject image by the 1<sup>st</sup> Defendant.
  29. Finally, submitting on the infringement of the Plaintiffs’ right to privacy, counsel relied on the provisions of Article 28 & 31 of [the Constitution](#), the South African decisions of *Grutter v Lombard & Another 2007 (4) SA 89* and *Angella Wells v Atoll Media (PTY) Ltd & Another*, Western Cape High Court, Case No. 11961 of 2006 to maintain that the right to privacy includes identity or likeness. That financial use of the subject image violated the 2<sup>nd</sup> Plaintiffs’ rights under the constitutional and Section 4(2), 13, 18, 19, 22 and 76 of the [Children Act](#). In conclusion, counsel cited the decisions in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR* and *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 Others [2017] eKLR* to submit that the suit ought to be allowed as prayed with costs.
  30. As a preliminary issue, counsel for the 1<sup>st</sup> Defendant relying on the decision in *DT Dobie & Co. (K) Ltd v Muchina [1982] KLR* as cited in *Susan Rokih v Joyce Kandie & 6 Others [2018] eKLR*, submitted that there is no cause of action pleaded or proved against the 1<sup>st</sup> Defendant. That the Plaintiffs’ pleaded complaint against the 1<sup>st</sup> Defendant regarding the matter of consent failed to particularize how the said Defendant’s duty to the Plaintiffs arose. That as pleaded, Plaintiffs’ grievance lies solely against the 2<sup>nd</sup> Defendant, there being no evidence led to controvert the fact that the 1<sup>st</sup> Defendant was not privy to the relationship, discussions and or any transactions between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant in relation to the subject image or transfer of copyright. It was contended that the 1<sup>st</sup> Defendant purchased



- and acquired the subject image for lawful consideration from the agency and there was no reason to inquire further into the agreement between latter and the 2<sup>nd</sup> Defendant.
31. Without prejudice to the foregoing, counsel relied on Section 2 & 31 of the *Copyright Act*, the definition of “authorship” as defined in Copinger and Skone James on Copyright, Ben Sihanya’s, Intellectual Property and Innovation Law in Kenya and Africa Transferring Technology for Sustainable Development, at Pg. 192 and the decision in Wangechi Waweru Mwende v Tecno Mobile Limited; Roger Ouma t/a Ojwok Photography [2020] eKLR to assert that the Plaintiffs did not produce evidence to support the assertion that they own the copyright to the subject image. That the fact of the Plaintiffs being models in the subject image would not ascribe authorship or artist status to them for purposes of assigning copyright. Therefore, a claim for moral right must equally fail.
  32. On whether the 1<sup>st</sup> Defendant violated the Plaintiffs’ right to privacy, counsel calling to aid the decisions in MWK v Another v Attorney General & 3 Others [2017] eKLR, Jessica Clarise Wanjiru v Aesthetics & Reconstruction Center & Others [2017] eKLR and the Ugandan Case of Asege Winnie v Opportunity Bank (U) Ltd & Another [2016] UG CommC 39 concerning the factors to be considered in determining whether there has been violation of privacy or unjustified limitation to this right.
  33. Regarding the factor relating to identifiable image, counsel cited the decision in NWR (supra) and argued that the subject image was artwork that depicted two (2) unidentified open palms and an unidentified foot and was not enough to evoke the Plaintiffs’ identity in the eyes of the public. That the Plaintiffs failed to prove that the public attributed the subject image to them, and the full photograph was only identifiable in the 1<sup>st</sup> Plaintiffs’ office.
  34. As to intention, it was reiterated that the 1<sup>st</sup> Defendant lawfully purchased the subject image for consideration from the agency having relied on the warranties given to it by the latter that they lawfully acquired the image. Hence no inference of malice or bad faith relating to infringement can be drawn against the 1<sup>st</sup> Defendant in using the said image. The provisions of Section 35 (5) of the *Copyright Act* and the decision in Hilton Mwakio Juma v Telkom Orange (K) Ltd & 3 Others [2018] eKLR were called to aid. On privacy of the subject photograph, counsel reiterated the 2<sup>nd</sup> Defendant’s evidence that the images were to be used as stock images to advance both the Plaintiffs’ and 2<sup>nd</sup> Defendant’s exposure for promotional and commercial purposes. Hence the Plaintiffs had no legitimate expectation that the suit image would be protected against third party use and thus cannot claim privacy.
  35. Regarding commercial exploitation, it was posited that there was no reason for the 1<sup>st</sup> Defendant to obtain the Plaintiffs’ consent, having lawfully acquired the subject images; that the palms and feet in the suit image are not a protected attribute given that they do not include unique or identifiable characteristics of the Plaintiffs, so as to be considered their likeness; and that the 1<sup>st</sup> Plaintiff failed to prove her alleged celebrity status. As such a case for commercial exploitation cannot be sustained.
  36. As to whether the 1<sup>st</sup> Defendant violated the Plaintiffs’ right to property, counsel submitted that the right would only attach if the Plaintiff proved that the copyright to the subject image belonged to the Plaintiffs. That the 2<sup>nd</sup> Defendant came up with the concept of decorative artwork in the said image which she then uploaded for use in her public portfolio. In any event the 1<sup>st</sup> Plaintiff has all along acquiesced to use of the suit image until the 1<sup>st</sup> Defendant lawfully acquired the same, and therefore the claim based on intellectual property rights ought to fail. Pointing out that the agency contracted with the 2<sup>nd</sup> Defendant, counsel asserted that the Plaintiffs have failed to demonstrate how their property rights, if any, were infringed upon by the 1<sup>st</sup> Defendant. In conclusion, the court was urged to dismiss the Plaintiffs’ suit with costs.



37. On the part of the 2<sup>nd</sup> Defendant, counsel asserted that there was an oral agreement for use of the subject image and reiterated his client's evidence at the trial that the free exchange of skills and services between the Plaintiffs and the 2<sup>nd</sup> Defendant was mutual. That the 1<sup>st</sup> Plaintiff confirmed during cross examination that the subject image was not restricted to her private use and neither did she pay for the photography or body art. Counsel pointing out that the 1<sup>st</sup> Plaintiff did not object to use or sale of the said image at subsequent events organized by the 2<sup>nd</sup> Defendant. Therefore, based on the oral agreement, such subsequent use and display of the suit image by the parties involved, there was an understanding that the subject image would be used freely for promotional and commercial purposes. Counsel relied on the Canadian decision in *Horton v Tim Donut Ltd* (1997) 75 CPR (3d) 451 at 459-60, to assert that there was implicit consent by the Plaintiffs on use of the image.
38. Regarding whether the 2<sup>nd</sup> Defendant had infringed on the personality rights of the Plaintiffs, counsel relied on the Canadian decisions in *Aubry -vs- Éditions Vice-Versa Inc* ((1998), 78 CPR (3d) 289 (SCC)), *Joseph -vs- Daniels* 4 B.C.L.R. (2d) 239, 11 C.P.R. (3d) 544 (1986) and *Krouse v Chrysler Canada* as cited in *NWR* (supra) to submit that the Plaintiffs are neither recognizable from the subject image nor do they possess a characteristic and or distinctive pose similar to the golden footprint, in the public domain. That from the image it cannot be positively concluded that the Plaintiffs endorsed the 1<sup>st</sup> Defendant's product. Hence it would take an inordinate stretching of the law to hold that a picture taken in circumstances where there is no identifiable characteristic such as a face, represents an unlawful appropriation of the Plaintiffs' personality.
39. Counsel submitted that the claim based on the infringement of the Plaintiffs' right to privacy should fail, in light of the Plaintiffs' admission that the subject image was not restricted to her private use. Reiterating his earlier submissions, counsel asserted that given the 1<sup>st</sup> Plaintiff's conduct post creation of the image, the Plaintiffs are estopped from asserting infringement of privacy as no reasonable expectation thereto existed.
40. Submitting on whether the Defendants infringed the Plaintiffs' copyright, it was argued that the Plaintiff cannot approbate and reprobate, having equally benefited from a painting of her logo that she used on her website for promotional and commercial purposes, without consulting others who participated in its creation. That *stricto sensu* and pursuant to Section 2 of the [Copyright Act](#), the subject photograph would ultimately belong to the photographer who took the still photos. Citing the implicit conduct of the 1<sup>st</sup> Plaintiff on 02.08.2010, counsel asserted that she could not sustain a case of infringement of her moral rights against the 2<sup>nd</sup> Defendant. Besides, the Plaintiffs not being identifiable from the subject images are not prejudiced, whereas the 1<sup>st</sup> Plaintiff failed to demonstrate any damages, embarrassment, humiliation suffered or loss of business as a result of the subject image. In conclusion the court was urged to dismiss the suit with costs.
41. The court has considered the evidence on record and the respective parties' submissions. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced



is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

42. It is undisputed that on 02.08.2010, the subject photograph, or image depicting the 1<sup>st</sup> Plaintiff cradling her son’s (the 2<sup>nd</sup> Plaintiff) foot in the palms of her hands with artwork on both, was taken at the 1<sup>st</sup> Plaintiff’s residence. It is further acknowledged that the photoshoot was a collaborative effort that involved the Plaintiffs as models, the 2<sup>nd</sup> Defendant, as the artist in respect of the artwork, and a third person who was the photographer. There is no dispute that subsequently the 2<sup>nd</sup> Defendant entered into a contract with the 1<sup>st</sup> Defendant granting them a licence resulting in the subject image being used by the 1<sup>st</sup> Defendant to advertise its “Windows 8” software sometime in 2013.
43. The Plaintiffs’ contention is that no consent was obtained by the Defendants for the commercial usage of the image by the 1<sup>st</sup> Defendant who are therefore liable for misrepresenting the Plaintiffs either knowingly or negligently as either endorsing its brand or products. Thereby unfairly benefitting from the reputation and brand recognition of the 1<sup>st</sup> Plaintiff and breaching the Plaintiffs’ right to privacy and property. The broad issues falling for determination are whether the Plaintiffs have proved their case against the Defendant’s on a balance of probabilities and if so, whether they are entitled to the reliefs sought.
44. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. See the decision of the Court of Appeal decision in Mumbi M’Nabea v David M.Wachira [2016] eKLR. The duty of proving the averments contained in the amended plaint lay squarely upon the Plaintiffs. In the case of Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:-

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
45. The Plaintiffs’ claim rests primarily upon the Defendants’ alleged violation of their right to privacy, alongside the violation of their right to property in respect of purported copyright infringement by the Defendants’ use of the subject photograph. Their case is predicated upon a corpus of provisions, including Articles 11(2)(c), 31 & 40 of the Constitution, as read alongside related provisions of the Copyright Act. Article 40 of the Constitution protects the right to property while Article 11(2)(c) provides that; - (2) The State shall— (c) promote the intellectual property rights of the people of Kenya. Article 31 of the Constitution on its part states 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.
46. It is imperative to first consider the question of authorship and ownership of the copyright of the subject image, in respect of which an infringement of the right to privacy may accrue. Section 2 of the Copyright Act, categorizes, among others, photographs not comprised in audio-visual works as “Artistic Work” and defines an “Author” in relation to a photograph to mean the person who is responsible for the composition of the photograph. The Act equally defines “work of joint authorship” to mean a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors.



47. Section 31 of the [Copyright Act](#) on its part proceeds to state that first ownership of copyright by dint of Section 23 and 24 of the [Copyright Act](#) shall vest initially in the “author” provided that where a work – (a) is commissioned by a person who is not the author’s employer under a contract of service; or (b) not having been so commissioned, is made in the course of the author’s employment under a contract of service, the copyright shall be deemed to be transferred to the person who commissioned the work or the author’s employer, subject to any agreement between the parties excluding or limiting the transfer.
48. In addition to the foregoing, the court draws guidance from the dicta in oft-cited decision of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, where the Court held that;
- “A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”.
49. It was PW1’s evidence that on 02.08.2010 the subject image with body art was taken for her personal use to market both herself and the 2<sup>nd</sup> Defendant but not to commercialize the same, and that such use of the image required her express consent. PW1 confirmed that it was the 2<sup>nd</sup> Defendant who came up with idea and concept of the photoshoot and did the make up or art in the image in question and that she, the 2<sup>nd</sup> Defendant, and photographer worked as equals. DW3 who is the 2<sup>nd</sup> Defendant in refuting PW1’s assertions, testified that the intention of the photoshoot was to create a portfolio of stock images to showcase Kenyan artwork for use by companies and that she did not charge PW1 for the photoshoot and the preparation of a logo for PW1’s business. She categorically denied PW1’s asserted restricted usage of the subject image citing her own use of it on her website for about 3 to 4 years, in public events and on Facebook, without objection from PW1.
50. What the court gathers from the foregoing, was that there was a meeting of minds towards creation of the subject image, with each party playing a specific role; the Plaintiffs being the subject and the 2<sup>nd</sup> Defendant as the artist, and a third party being the photographer. PW1 admitted that DW3 came up with the concept in the subject image. Thus, pursuant to Section 2 of the [Copyright Act](#), the question arising at this juncture is who the author of the subject image was and or who had first ownership of copyright.
51. Section 31 of the Copy Right Act is express as to the person in whom first ownership resides. Tugendhat and Christie, *The Law of Privacy and the Media*, 2<sup>nd</sup> Ed. Oxford, at Pg. 399 & 400, in discussing England’s Copyright, Designs and Patents Act, 1988 write that “the first owner of the copyright in a work is generally the person who creates it”. The authors add that one of the key exceptions to the general rule of first ownership applies to works created by employees, the employer being the first owner of the copyright. Moreover that, a person may be the first owner in equity in certain circumstances, such as where he has commissioned creation of the work, and it is appropriate to conclude that the parties intended the commissioner to own the copyright. This is the gist of Section 31 of the [Copyright Act](#).
52. In this case, it is undisputed that neither party was an employee of the other, nor did any party commission the other towards creation of the subject image, as no payment was exchanged between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant in that regard. Indeed, PW1 acknowledges in her evidence that the idea or concept and purpose of the photoshoot was by DW3 who also did the make up or art in the image. The Plaintiffs, other than being subjects (and beneficiaries) in the creation of the suit image, were not the originators of the idea. Therefore, as to which party was responsible for the



composition of the subject image, it is the court's reasoned conclusion that DW3 was the author or creator notwithstanding the Plaintiffs' participation. This was not a work of joint authorship as asserted by the Plaintiffs.

53. As to the related question of moral rights Section 32 (1) provides that: –

“Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to— (a) claim the authorship of the work; and (b) object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation”.

54. This means that a moral right is pegged on authorship. The court, having found that the 2<sup>nd</sup> Defendant was the author of the subject image, must also find that no moral right can accrue to the Plaintiffs in respect of the subject photograph or image.

55. Turning now to the question whether the Plaintiffs have demonstrated breach of privacy, it is apt to note that the cause of action herein arose prior to enactment of the [Data Protection Act, 2019](#). The High Court has in a plethora of decisions, some of which were cited here, addressed itself to the question of the right to privacy. As to what constitutes the right to privacy, this court is inclined to concur with the dicta of Mativo, J. (as he then was) in *Jessica Clarise Wanjiru* (supra) to the effect that: -

“The right to privacy is guaranteed under Article 31 of [the Constitution](#) of Kenya, privacy has been defined as ‘the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information. In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy...

“The right to privacy consists essentially in the right to live one's life with minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information give or received by the individual confidentially.”

56. The right was also addressed by a five (5) judge bench of this court in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others* [2015] eKLR to wit the court observed that:-

“The right to privacy is guaranteed under Article 31 of [the Constitution](#).

.....

The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples' Rights. B. Rössler in his book, *The Value of Privacy* (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are



secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

As to whether there is need to protect privacy, he goes on to write that:

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part.”

57. In this case, it was PW1’s contention that on 10.02.2013 it came to her attention that the 1<sup>st</sup> Defendant was advertising its “Windows” product under the words “Art Deeper with Windows 8” and using the subject image. That the photographs alongside the suit image (PEXh.1), were to be used for a private photo album and therefore the unauthorized use of the suit image by the Defendants for financial gain without the Plaintiffs consent was in breach of her right to privacy.
58. Tugendhat and Christie (supra) at Pg.416 & 417 write that, in English Law, “The statutory right to privacy only applies to person who commissions a photograph or film ‘for private and domestic purpose’, it does not apply to commissions for commercial purpose, however private, nor to consensual photography short of a commission”. They further cite questions of consent and waivers of the right as live issues to which the general principles of contract and estoppel are still applicable.
59. Copinger and Skone James on Copyright, 17<sup>th</sup> Ed., discussing the Right to Privacy of Certain Photographs and Films in the English Law context states at Pg. 931 that the commissioning in the foregoing setting must have been for “private and domestic” purposes: “The words “private and domestic” are conjunctive such that in the English set up a photograph which is commissioned for private but not domestic purposes, for example for purpose relating to a person’s private business affairs,” will not fall within provisos of English Copyright, Designs and Patents Act, 1988”.
60. The gist of DW3’s evidence was that there was implied consent by the Plaintiffs towards creation and subsequent use of the subject image for commercial purposes. That the joint intention of PW1 and herself was to create a portfolio or stock of images to showcase Kenyan Artwork to be used by companies. While PW1 admitted this intention, she claimed that the commercial use of the subject image could only be with her approval, despite the admitted fact that the work was the result of a joint effort. Further, PW1 admitted that she had herself used the said image in her own business and was aware that the 2<sup>nd</sup> Defendant used the subject image on Facebook, at events and on her business website, and without objection from her. A review of DEXh.1 and DEXh.3 reveals that the subject image was posted on the DW3’s website that obviously attracted internet traffic by way of visitors.
61. It appears from the evidence, therefore, that the 2<sup>nd</sup> Defendant was not commissioned by PW1 to create the subject image for PW1’s private, domestic, personal, and exclusive use. Concerning estoppel arising from consent or waiver, an illuminating passage in the judgment of the Court of Appeal in 748 Air Services Limited v Theuri Munyi (2017) eKLR deserves quoting in extenso :-

“Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:



"..we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying 'estoppel is only a rule of evidence. If you go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others."

The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of *Banning vs Wright* (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

"The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".

Closer home in the case of *Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd* [2007] eKLR the Court stated thus:

"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the *Serah Njeri Mwobi* case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury's Laws of England*, 4th Edition, Volume 16. At page 992 waiver has been defined as follows: -

"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be



implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.” (Emphasis added)

62. The proven and admitted conduct of the Plaintiffs points to waiver of their right to privacy by conduct and they are estopped from claiming breach of the said right; they waived the right, given the circumstances surrounding the taking and subsequent use of the subject image by themselves and the 2<sup>nd</sup> Defendant. In these circumstances, the 2<sup>nd</sup> Defendant’s assertions that the Plaintiffs’ suit was only motivated by the entry of a large corporation such as the 1<sup>st</sup> Defendant in the use of the subject image do not appear farfetched.

63. Even if the foregoing findings were wrong, it is doubtful in the circumstances of this case whether the subject image sufficiently exposed the Plaintiffs’ identities to third parties. In other words, that a person observing the image could readily associate them with the Plaintiffs. *Mativo, J. (as he then was) N W R (supra)* stated that; -

“ A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person ’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one ’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.

Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one’s image, likeness or persona include but are not limited to name, face, body or recognizable body part, voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action, costume or personals signature.

Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right of privacy is the right to keep one’s image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market his or her image, likeness, or persona for financial gain.”

64. Undeniably, the image used by the 1<sup>st</sup> Defendant constitutes a random pair of painted open palms in which an infant’s foot is nestled, and no more. The Plaintiffs cited provisions of the *Children Act* in a bid to shore up their case. While the protection of minors from unlawful exposure is an important consideration, only an infant’s foot is evident on the subject image. The entire subject image does not give away any identifiable and recognizable features associated with any of the Plaintiffs, such as faces or names or other clues that would positively identify them. The Plaintiffs did not demonstrate such association through witnesses, despite claiming that a connection could be made between the subject image and the Plaintiffs by anyone who had seen a similar image displayed in PW1’s business office. This puts to question the Plaintiffs’ assertions that the 1<sup>st</sup> Defendant commercialized the said image by riding on her celebrity status, which was equally not demonstrated to the court.

65. Moreover, it was DW1’s evidence that the 1<sup>st</sup> Defendant entered into a licence agreement with the agency (DExh.1) for the purchase of the suit image for valuable consideration in the sum of Kshs. 1,300,000/-. DW2 on his part stated that the agency had in turn obtained a license (DExh.3) in respect of the subject image for valuable consideration in the sum of Kshs. 15,000/- from the 2<sup>nd</sup> Defendant who asserted ownership of the image.



66. The latter fact was confirmed by the court's earlier finding that the 2<sup>nd</sup> Defendant, being the author, was the rightful owner of the copyright to the subject image. Thus, she could pass good title to a "bona fide purchaser", defined in Black's law Dictionary 8<sup>th</sup> Edition as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

See also *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR where the Court of Appeal cited the with approval the Ugandan decision in *Katende v. Haridar & Company Limited* [2008] 2 E.A.173

67. In view of all the foregoing, the court arrives at the inescapable conclusion that the Plaintiffs have failed to establish their case against the Defendants on a balance of probabilities. Pursuant to Section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiffs and if their evidence did not support the facts pleaded, they failed as the party with the burden of proof. See *Wareham t/a A.F. Wareham* (supra) and *Karugi* (supra). Consequently, the Plaintiffs' suit against the Defendants must fail and is hereby dismissed with costs to the Defendants.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiffs: Ms. Koitie

For the 1<sup>st</sup> Defendant: Ms. Omondi

For the 2<sup>nd</sup> Defendant: Mr. Kiptoo

C/A: Carol

