

ASEGE WINNIE V OPPORTUNITY BANK AND MAAD LIMITED

The High Court of Uganda has broken new ground in a judgment on personal and image rights, violation of right to privacy, passing off, false endorsement and unjust enrichment.

Background

The Plaintiff, a successful farmer saw her image posted on various media advertising the Defendant's product. The image showed a woman holding a basket of oranges laughing heartily. The Plaintiff sued for breach of her image rights, breach of right to privacy, passing off, misrepresentation and false endorsement, breach of confidence and unjust enrichment in the unauthorized use of her image.

The advertising agency contracted by the Defendant was added as a third party to the suit. The agency claimed it had lawfully acquired the image used from a media house as the copyright owner and need not have sought permission from the Plaintiff. The agency also stated that the final image used by the Bank was a combination of three separate pictures, comprising a background, a head and a torso. Only the torso belonged to the Plaintiff.

Image used

Plaintiff's image

Judgment

The Court held that the Plaintiff's image rights in common law had been violated. It stated that image rights allow an individual to control the commercial use of his or her name and they entail the liberty to keep one's image or likeness from being exploited without permission and the right to be left alone.

The Court also held that, the publication of the Plaintiff's image without her consent was an infringement of her right to privacy guaranteed under the Constitution, the Universal Declaration of Human rights and International Covenant on Civil and Political Rights.

The Court further found the Defendants liable for passing off, misrepresentation and false endorsement, and unjust enrichment in the unauthorized use of the Plaintiff's image since the Plaintiff had an existing reputation as a leading farmer. The Court appointed the official receiver to ascertain the profits made by the Bank from the promotion and remit 5% as royalty to the Plaintiff, with interest. Court ordered the Defendants to pay the Plaintiff Ug. Shs.80,000,000 (Uganda Shillings Eighty Million only) for the breach of her privacy, Ug. Shs. 50,000,000 (Uganda Shillings Fifty Million only) as general damages and Ug. Shs.20,000,000 (Uganda Shillings Twenty Million Only) as aggravated damages, all the above sums carrying interest from the date of the judgment and costs.

Areas of concern

Image rights: a major concern is the Court's finding that there was breach of the Plaintiff's image rights.

Image rights are proprietary rights that an individual has in his or her image, and other unique characteristics associated with their personality. They entail the right to keep one's image from being commercially exploited without permission or contractual compensation and the right to anonymity. For a claim of breach of image rights under personality rights to stand, the plaintiff must demonstrate that he/she was identifiable, that the defendant's act was intentional and for a commercial purpose. The plaintiff will be held to be identifiable by use of his/her persona.

A claim for breach of image rights would fail where the torso is the only trait of the plaintiff's image depicted in a photograph and the plaintiff could not be identified as the person in the picture. The photograph must be associated with the individual's likeness, name and reputation for the claim to succeed. In this case, the image published was a combination of the Plaintiff's torso and another person's face. It is highly unlikely that the torso in the image, would be uniquely attributed to the Plaintiff's likeness and therefore breach image/personality rights would not have arisen.

Copyright vs image rights: it is of concern that the Court discounted the copyright vested in the original picture. An author of a photograph is guaranteed copyright protection under the law. Such author can license or assign the economic rights in the photograph to another person. It was disclosed by the agency that it paid for the image copyright. What remained for the Court to assess was the relationship between copyright and image rights.

In Uganda, copyright is enshrined in the Copyright and Neighboring Rights Act 2006 while image rights are common law rights. The rule of thumb is that statutory rights precede common law rights as written law is applied before common law. The Court overlooked the distinction and/or relationship between copyright and image rights and erred in finding that the Plaintiff's image rights were violated without considering the license granted by the media house.

False endorsement: another concern is the Court's finding that the Bank and the advertising agency were liable for false endorsement and misrepresentation. For one to be held liable for false endorsement, the victim's identity (a being popular person) must be connected with the product in such a way that consumers are likely to be misled about the person's sponsorship and approval. In this case, although the Plaintiff was alleged to be a popular farmer in her area, only her torso was used in the image. She was not identifiable from the image used and endorsement of any sort would not arise.

Unjust enrichment: it is also of great concern that the Court found the Defendants liable for unjust enrichment. For a defendant to be liable for unjust enrichment, he/she must have received a benefit conferred upon him/her by the plaintiff, and the defendant must have appreciated the benefit and retained the full benefits. It presupposes a strict requirement that the benefit must be attributable to the plaintiff. Where there is no causal relationship between the infringement and revenue, a claim of unjust enrichment will fail. Similarly, in this case, the Plaintiff did not demonstrate the existence of benefits to the Bank nor did she particularly illustrate how the use of her image contributed to promoting the Bank. Again, this would be a tall claim to make for the Plaintiff's torso.

Passing off: it is also of concern that Court held the Defendants liable for passing off due to the Plaintiff's reputation. The tort of passing off is an actionable wrong for the defendant to represent, for trading

purposes, that his goods or services are or that his business is that of the plaintiff. The necessary elements for an action in passing off are; that the claimant's goods or services have acquired a good will or reputation in the market and are known by some distinguishing feature; that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the claimant; and that the claimant has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation. Before elements of goodwill, misrepresentation and damage are considered, the plaintiff must have a good or service or product that is capable of being passed off. In this case, the Plaintiff had no goods, services or product that she claimed to have been passed off by the Bank or advertising agency. A claim in passing off for the Plaintiff's torso or person was farfetched and untenable in the circumstances.

Conclusion

This case is likely to open the flood gates in as far as image rights are concerned. Should the Bank appeal this decision, it will be interesting to see how the higher courts will deal with image rights viz a viz copyright, false endorsement, passing off and unjust enrichment.