

THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 298 OF 2012

SIKUKU AGAITANO}.....PLAINTIFF

VS

UGANDA BAATI LTD}.....DEFENDANT

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

**RULING**

This ruling arises from a preliminary objection to the plaintiff's suit to the effect the plaintiff does not disclose a cause of action against the defendant and that it should be rejected or struck out with costs. The defendant is represented by Messieurs Shonubi, Musoke and Company Advocates while the plaintiff is represented by Messieurs Aiguhugu and Company Advocates.

The defendant's counsel submitted that Order 6 rule 1 of the Civil Procedure Rules requires all pleadings generally to contain a brief statement of the material facts on which the party pleading relies for claim or defence. Under Order 7 rule 1 (e) of the Civil Procedure Rules the term "facts" under the rule has been held to mean material facts that entitled the claimant to succeed in his or her claim and every fact which the defendant would have a right to traverse. It can also mean every necessary fact. Counsel relied on the case of **Sullivan versus Mohammed Osman [1959] EA 239** where Windham JA of the East African Court of Appeal held that the plaintiff must allege all facts necessary to establish the cause of action. The consequences of failure to plead necessary facts as provided by Order 7 rule 11 (a) of the Civil Procedure Rules is the rejection of the plaintiff for disclosing no cause of action. A cause of action means the fact or a combination of facts which give rise to a right of action. The defendant's counsel relies on **Halsbury's laws of England fourth edition volume 37 at page 27** for the definition of a cause of action as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Secondly counsel relied on the case of **Auto Garage and Others versus Motokov (No 3) (1971) EA 514 at 519** where Spry VP summarised the applicable tests in determining whether a plaintiff discloses a cause of action. It is essential for the plaintiff to disclose that the plaintiff enjoyed a right; that the right has been violated and the defendant is liable. Thirdly according to the case of **Attorney General versus Oluoch [1972] EA 392** at 394, the question of whether a plaintiff discloses a cause of action is determined upon perusal of the plaintiff alone, together with any attachments forming part of it. Furthermore the defendant's counsel asserts that the stipulation that the plaintiff shall be rejected for disclosing no cause of action under Order 7 rule 11 of the Civil Procedure Rules is mandatory.

The defendants counsel submits that upon perusal of the plaint in paragraph 3 thereof, it is averred that the defendant is unlawfully benefiting from the use of the plaintiffs image. Counsel contended that there is no right asserted by the plaint and enjoyed by the plaintiff. All that is averred is that the plaintiff's image was used in the adverts on the defendant's year planner 2012. Secondly, the second ingredient as to whether a right was violated is missing. The defendants counsel contends that the plaint indicates that the plaintiff's claim against the defendant is for declaratory orders that the defendant is unfairly benefiting from the use of his image in their advertisements. The plaint further illustrates various means through which the plaintiff's image was used and that the defendant never paid the plaintiff for the use. On the third ingredient as to whether the plaint discloses that the defendant is liable, the defendants counsel contends that if the court were to assume that the plaintiff had a right, then the defendant would be liable. The paragraphs do not show that the plaintiff enjoyed a right, and therefore no right/s can be violated by the defendant.

In reply the plaintiff's counsel agrees with the law and authorities cited by the defendants counsel. The plaintiff's counsel submits that the plaintiff is employed by the defendant and his legal rights were violated when the defendant caused his image/pictures to be used in commercial advertisements in motion, images/footages and pictures which were run several times in local television stations. Furthermore the defendant used the plaintiffs image/picture on the defendants "contractors year planner" which they distributed to their clients. The plaintiff's image was also used in the Billboard at the entrance of the defendant with the words "Quality and Choice".

With reference to the facts averred in paragraph 4 of the plaint, the plaintiff's counsel maintains that the plaint clearly discloses a cause of action for unlawful or unauthorised use of images and pictures of the plaintiff. The plaintiff's image rights are protected under the Copyright and Neighbouring Rights Act, 2005. Section 21 (1) thereof provides that neighbouring rights to write attached to the auxiliary role played by performance, producers of sound recording and audiovisual and broadcasting images, among others in fulfilment of literary or artistic works. Section 2 of the Copyright and Neighbouring Rights Act, interprets a "performance" to mean the presentation of a work through actions such as dancing, acting, playing, reciting, delivering, declaiming or projecting to listeners or spectators. Furthermore a performer is interpreted to include an actor or actress, singer, musician, dancer or other person who act, sing, deliver among others or artistic works. Under section 22 (1) the rights of the performer include the right to authorise the fixation of his or her live performance not previously fixed on a physical medium and the direct or indirect production of the fixation of his or her performance in a manner or form. Section 22 (2) further provides that the performer has a right to execute the contract on terms and condition that the performer may wish for the use of the performance or fixation by another person.

Consequently the plaintiff's rights are protected and the plaintiff has a cause of action. In this case the plaintiff never authorised the defendant to use his image or performance. In conclusion the plaintiff's counsel submits that the preliminary objection is misconceived. It does not distinguish between a plaint not disclosing a cause of action because clearly the plaint discloses a cause of action and the plaintiff having a cause of action. In summary the plaintiff contends that the use of these images without his

consent violated his rights. The defendant used the images without authority thereby violating his rights. Thirdly the defendant does not deny it and is therefore clearly liable.

### **Ruling**

I have duly considered the written submissions of counsels on the preliminary point as to whether the plaintiff's plaint discloses a cause of action; I have further perused the plaint and attachments thereto and considered the authorities relied upon in support of the objection.

The principles upon which the court determines whether a plaint discloses a cause of action are not in dispute. The plaintiff's counsel agrees with the defendant's counsel on these principles. In the case of **Auto Garage versus Motokov (No 3) (1971) EA 514 at 519** Spry VP of the East African Court of Appeal summarised the essential ingredients which should be present for a plaint to disclose a cause of action. These are that the plaintiff enjoyed a right; that the right has been violated and thirdly that the defendant is liable. Furthermore the provision that a plaint which discloses no cause of action shall be rejected is mandatory under Order 7 rule 11 of the Civil Procedure Rules. A plaint which discloses no cause of action is a nullity and cannot be amended. Secondly the question as to whether a plaint discloses a cause of action is determined upon perusal of the plaint alone and any attachments to it and on the assumption that the averments in the plaint are true (see **Attorney General versus Oluoch (1972) EA 392**). Thirdly all necessary facts to establish the cause of action have to be alleged in the plaint for it to disclose a cause or causes of action (See **Sullivan versus Mohammed Osman [1959] EA 239**).

Paragraph 3 of the plaint avers that the plaintiffs claim against the defendant is for declaratory orders that the defendant is unfairly benefiting from the use of his images in its advertisements. The facts in support of the cause of action are averred in paragraph 4. Thereafter the plaintiff prays for declaratory orders that the defendant is unfairly benefiting from the use of his image in its promotional advertisements on various television stations. The plaintiff further seeks consequential payment of **Uganda shillings 150,000,000/=** for use of his images from November 2011 to the date of filing the suit. Furthermore the plaintiff seeks for assessment of payments beyond the date of filing the suit pursuant to alleged continuous breach. The plaintiff also seeks general damages for unfair benefit by the defendant, interests, and any other relief as the court may deem fit and costs of the suit.

Declaratory judgments are provided for under Order 2 rule 9 of the Civil Procedure Rules which provides as follows:

#### "9. Declaratory judgment

No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

A literal reading of the rule provides that a suit shall not be open to objection because a declaratory judgement or order is sought by the suit and the court may make binding declarations of right whether consequential relief has been claimed or could be claimed or not. The rule has been considered through

*Decision of Hon. Mr. Justice Christopher Madrama*

interpretation to be being very wide and as giving the court unfettered discretion to make binding declarations of right. It has been held that the rule can be invoked to bring an action merely to declare rights.

In the case of **Ellis vs. Duke of Bedford (1899) 1 Ch 494**, Lindley MR at pages 514-515 held that an action can be brought merely to declare rights under a rule in *pari materia* with our Order 2 rule 9 of the Civil Procedure Rules. He said:

"Moreover now, under the judicature act, actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to Order XXV rule 5 which says "*No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.*" Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf himself and all other growers of fruit and vegetables, to assert preferential rights to which he says the whole class of growers are entitled." (Emphasis added)

In the case of **Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536**, Pickford LJ held at page 562 that the rule imposed no limitations once it is established that a declaration can be made where no consequential relief can be given.

*"The effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration.* It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions. (Emphasis added)

Furthermore, Bankes L.J. at page 572 held that a suit for declaratory orders should not be defeated merely because the plaintiff has no legal cause of action:

"In every action there must be a plaintiff who is the person seeking relief (Judicature Statute Act, 1873, s. 100), or to use the language of order XVI, r. 1, *a person in whom a right of relief is alleged to exist, whose application to the Court is not to be defeated because he applies merely for a judgment or order, and whose application for declaration of his right is not to be refused merely because, he cannot establish a legal cause of action.* It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that a relief is not confined to a relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There, is, however one limitation which must always be attached to it, that is to say, the relief claimed must not be something unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which it exercises jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to the general business convenience and the

importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.” (Emphasis added)

In this action the plaintiff claims to be entitled to certain images which the defendant is allegedly using to its own benefit. The action for declaratory orders cannot be defeated on the ground that the plaintiff allegedly does not have a legal cause of action. In paragraph 3 the plaintiff is seeking declaratory orders that the defendant is unfairly benefiting from the use of his images in their advertisements.

Without prejudice to the above assertion I do not agree with the defendant's submissions on the following grounds. The plaintiff has asserted a right to his own images which are being used in certain advertisements by the defendant. Paragraph 4 gives the facts of this assertion that the images of the plaintiff are being used by the defendant. Secondly it is asserted in paragraph 4 (b) of the plaint that the plaintiff's permission was not sought by the defendant. The question of whether it was necessary to seek the plaintiff's permission is a triable issue disclosed by the plaint. In paragraph 4 (e) the plaint asserts that the defendant's unilateral actions in taking benefit without consideration would entitle him to claim for the would-be usage fees for eight months. It is therefore apparent from the plaint that the plaintiff claims that he is entitled to certain images which had been used by the defendant without seeking his permission and which would entitle him to usage fees. Additionally the plaintiff seeks declaratory orders as well as consequential relief for payment of usage fees and for assessment by the court. As to whether the plaintiff is entitled to such relief is a triable issue on the merits. The annexure attached to the plaint show the plaintiff's images as alleged in the plaint. Secondly the plaintiff sought compensation for the use of his images in the letter annexure "B".

Though the law under which the plaintiff claims to be entitled is not cited, the plaintiff indeed claims to be entitled to the extent that he asserts a right for the defendant to seek his permission before using the images in dispute. Failure to quote any relevant laws under which the plaintiff asserts a right is not fatal. If that were so, the defendant could have submitted that the law grants the plaintiff no rights and that the defendant is entitled to use the images of the plaintiff without permission.

In those circumstances, the plaintiff asserts a right and the plaint clearly indicates that the plaintiff asserts that that right has been violated and that the defendant is liable.

In the premises the defendant's preliminary objection seeking to have the plaint rejected under Order 7 rule 11 (a) of the Civil Procedure Rules is overruled without prejudice to submissions on the merits as to whether the plaintiff is possessed of such rights as asserted in the plaint. The preliminary objection is overruled with costs.

Ruling delivered this 15<sup>th</sup> of January 2014 in open court.

**Christopher Madrama Izama**

**Judge**

*Decision of Hon. Mr. Justice Christopher Madrama*

Ruling/Judgment delivered in the presence of:

Deus Nsengiyunva for the plaintiff

Doreen Nanvule for the defendant

Plaintiff is in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**15/January/2014**