

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HIGH COURT CIVIL SUIT NO. 756 OF 2013

ASEGE WINNIE.....PLAINTIFF

VERSUS

OPPORTUNITY BANK (U) LIMITED.....DEFENDANT

AND

MAAD LIMITED.....THIRD PARTY

BEFORE HON. JUSTICE DR. HENRY PETER ADONYO:

JUDGMENT:

1. Background:

Asege Winnie the plaintiff in this matter who is stated to be a successful commercial farmer based in Soroti District. She brought this suit through her legal counsel against Opportunity Bank (U) Limited which is the defendant in this matter for breach of her constitutional right to privacy, passing off, misrepresentation and false endorsement, breach of confidence and unjust

enrichment in the unauthorized use of her image in which she sought to recover 10% royalty fees for the use of her image at an interest rate of 22% from the date of cause of action until payment in full, general damages, aggravated damages, punitive damages and costs of the suit. Maad Limited, an advertising company, was added as a third party in these matters after it was stated that it was an agent of the defendant.

2. Brief Facts:

The brief facts leading to the above cause of action are that the plaintiff is a commercial farmer who is based in Soroti district and she operates under the name of Dakabela Rural Women Development Association which she was chairperson and that in 2013 she did see her image pasted on huge bill boards run by the defendant in which she was shown to be heartily laughing and holding a bountiful harvest of oranges in her hands and that with a caption “***Save for your success with the Agro Save Account***”. In addition to those huge billboards, the defendant is stated to have produced advertising flyers, brochures and calendars bearing similar images of the plaintiff as those depicted in the huge billboards which the defendant liberally distributed to its branches country wide. The plaintiff states that these productions were never commissioned, assigned, licensed or prior consent granted to the defendant to take her photograph and put her image on the said bill boards and such other publications thus the defendant obtained the same without authority and a grossly misused and unjustifiably published her private information and therefore invaded her constitutional right to privacy with the result that owing to the defendant’s unauthorized use of her image, the plaintiff suffered substantial damages for which she now seeks through this court damages from the defendant who she believes did make substantial profits from the unauthorized use of her image for the illegal adverts certainly attracted customers to open accounts with the defendant.

The defendant on the other hand denies the plaintiff's claim stating that in the year 2011 it engaged the services of the Maad Limited which is an advertising company and third party to these proceedings to develop an advertising concept for its new product known as **Agro Save** with the third party developing the concept after advising it that the third party had lawfully purchased all the photographs used in the advertisement materials from an internet based website known Shutter Stock Inc and from the New Vision Printing and Publishing Company Limited and thus consequently the photograph which was used was lawfully acquired meaning that the plaintiff had no cause of action and therefore her suit should be dismissed with costs accordingly.

During the course of the proceedings, the defendant did file a third party notice seeking to be indemnified by the third party against any liability brought against it by the plaintiff. When the third party came on board it filed a written statement of defence in which it denied any liability over the alleged infringements of the rights of the plaintiff stating that the plaintiff did not and had no copy right over the photographs used by it for those photographs which it used were legally obtained from other entities not the plaintiff and that in any case the person in the alleged photographs was not the plaintiff in any event and thus the plaintiff's claim should be dismissed with the contempt it deserves.

3. Issues for Court's determination:

During the hearing of this matter both parties to this dispute called witnesses and tendered in several documents. They also did file a joint scheduling memorandum in which four agreed issues were identified and proposed for the consideration of this court in its effort to resolve the disputes between themselves.

The issues are;

- i) Whether the plaintiff's image rights have been infringed upon by the defendant and or the third party.
- ii) Whether the defendant and 3rd party are liable in breach of confidence, privacy and or are liable for passing off, misrepresentation and false endorsement.
- iii) Whether the defendant and 3rd party unjustly enriched themselves by use of the plaintiff's image.
- iv) What remedies are available to the parties.

I have carefully considered the issues and find that they are sufficient in resolving the dispute before me and therefore I have adopted them accordingly. The resolutions of the issues are set below.

4. Whether the plaintiff's image rights have been infringed upon by the defendant and or the third party:

In a civil matter, it is the duty of a plaintiff to prove to a court on a balance of probability that a right has been interfered with and thus seek court's intervention. In consonance with this legal principle, the plaintiff in a bid to prove her case against the defendant and the third party the plaintiff called a total of five (5) witnesses including her.

The first plaintiff's witness was one Alaso Rose who testified as PW1. This witness in her testimony informed to the court that the plaintiff was a successful commercial farmer in the Teso sub-region of Eastern Uganda with the plaintiff heading of a number of local groups who were engaged in commercial farming under the auspices of the NAADS. That this fact being so had enabled the plaintiff to become very popular in the region, a fact which was manifestly true for it culminated into her being visited by none other than the President of the Republic of

Uganda who paid a visit to her farm at Amotot village in Dakabela in 2008 leading her to be known widely and that arising from the witness was not surprised when sometime in 2013 she, while returning to Soroti from Kampala, saw the portrait of the plaintiff on a bill board in Jinja Town as shown in Exhibit P1 which fact excited her so much that she thus concluded that indeed the plaintiff's popularity had finally paid off for now she was even on an advertising billboard. The witness in her excitement took this message of good discovery to the plaintiff but to she was surprised that the plaintiff denied ever being contacted or even posing for her portrait to be put on a billboard and instead the plaintiff went on to complain to her that she had similarly seen her image on other bill boards in Mbale town with all these billboards belonging to the defendant and not NAADS which she was part of. This witness then stated that the plaintiff told her that those portraits of hers had been used illegally by defendant without her consent yet she, the plaintiff, was not at all affiliated to the defendant with this infringement angering her absolutely.

Mr. Odaret Joseph, the husband of the plaintiff confirmed the above position for when he testified as Pw3 he informed this court that around 2012-2013 he was bombarded calls from several of his friends who informed him of their seeing the image of his wife on bill boards belonging to the defendant both in Jinja and Mbale towns and that he was forced to go to those towns to prove for himself whether what he was being told was true and alas it was so for while on his way to Tororo saw the bill boards in Mbale bearing the images of his wife and to make matters worse even later some ladies who pray together with him came to his home with flyers in the likeness of Exhibit P2 and calendars in the likeness of Exhibit P5 which all belonged to the defendant and similarly bearing the image of his wife. PW3 narrate to the court that this turn of events worried him and his tremendously for they came to conclude that such publicity on

billboards, flyers and calendars could attract wrong elements to attack and harm them in the belief that his had made a lot of money arising from such publicity yet that was not true.

Another witness Muwanga Daniel who testified as Pw4 informed this court that indeed while at his business premises in Jinja he saw the picture of the plaintiff pasted on a glass door of the defendant's premises which was adjacent to his business premises along Muloki Road and even similarly two days later saw a bill board with the plaintiff's image at Amber Court roundabout still in Jinja and this finding provoked him to call the plaintiff who told him that though she had not yet seen those billboards and flyers in Jinja she had not concurred with anyone to have her pictures placed either on billboards or on flyers with this witness further confirming that while on his way to Soroti at around the same time he saw a similar billboard like the one which he saw at Jinja but that when he again brought it to the attention of the plaintiff, the plaintiff denied any act of commission or omission regarding the placing of her pictures on those bill boards and that arising from her telling her so the plaintiff together with proceeded to the defendant's bank premises in Soroti and did pick leaflets and calendars which bore the plaintiff's image and since the billboards and calendars had been in circulation for a period of nearly two years it made him that the plaintiff had made a lot of money from the defendant but was only keeping this fact to herself away from the public.

The plaintiff herself testified as Pw5 and in her testimony she informed the court that she is a commercial farmer based in Soroti as well as being a member of the Board of Directors at NAADS and that through successful farming she had attracted to her farm high level and important personalities who included the former Vice President of Uganda Dr. Specioza Kazibwe and that in 2008 even the President of the Republic of Uganda visited her farm and was

highly impressed with farming and even made a number of pledges to help her boost her agricultural production. That even later the Vice President of Uganda Dr. Gilbert Bukenya visited her farm with a delegation of investors from South Korea who interested citrus fruits in the region.

In relations to her claim against the defendant, she testified that in 2013 the defendant rolled out massive bill boards, flyers and calendars campaign bearing her image in the towns of Mbale, Jinja, Soroti and Iganga in its bid to promote and market its product called **Agro Save Account** with specifically the bill boards being placed in very strategic locations such as roundabout bearing her image in which she holding oranges with a caption **Save for your success with the Agro Save Account** and that similarly she came to know through information given to her by several of her friends like PW4 that flyers and calendars which had the same images had been distributed by the defendant throughout its branches country wide with Pw4 and those several of her friends in NAADS seeking to know how much she had been reaped from the adverts. The plaintiff informed the court that this situation embarrassed her for she had never consented to her images being used by the defendant for any purpose at all and in her view it was apparent that the defendant riding on her success as a farmer to popularize its product to attract customers including farmers to open bank accounts with it by using her images which action invaded her constitutional right to privacy for resulting bout of her images appearing on the billboards most of her friends insinuated to her having received a lot of money from the defendant which made her to fear for her good name and life for she was sure that arising from her appearing in such adverts ill-intentioned individuals could attempt to harm, rob or steal from her and therefore she was forced to take legal action against the defendant to remedy the situation thus this case.

The defendant on the other hand denied the plaintiff's claim and through its witness Rogers Kakeeto who testified as Dw1 informed the court that in 2011 it introduced a new account opening product called **Agro Save** and in order to promote that product it engaged the third party in this suit to give it the necessary publicity with the third party developing the necessary publicity concepts and procuring the required materials for the advertisement. That when the artwork for the publicity stunt was completed and the same presented to the defendant , it was accepted and commissioned for production since the final product produced featured the image of a woman in an orchard of oranges . That as a result the image was placed by the third Party onto bill boards, fliers and brochures which were printed and circulated to the defendant's clients but that at the time when the work was presented the woman who was featured in the artwork and subsequently in the adverts was not known to the defendant only for the defendant to later receive a notice of intention to sue from the plaintiff claiming that the image used in the **Agro Save** advertisement was hers which claim the defendant considered strange and upon receipt of the said notice the defendant sought to know from the third party on whether it had such legal rights to the photograph in the adverts and that the third party informed the defendant that the photographs and images appearing in the adverts had been obtained from the New Vision newspaper as seen from Exhibit D9(1) and another from a company known as Shutter Stock as seen from Exhibit D6 which company the third party was subscribed to to gain access to photographs which it had used in the adverts for the product of the defendant. To prove this position , the witness tendered receipts from the New Vision newspaper Exhibit D4 and another from Shutter Stock Exhibit D5 as proof of purchase and subscription respectively. This witness stated that this information was given to the defendant by the third party which enabled the

defendant to agree that the images be used in the adverts they had been created by putting together the two photographs legally obtained.

Defence witness number 2 (Dw2) Denis Kajura was the graphic designer of the third party who was sent to the New Vision offices to collect photographs which was used in creating the defendant's **Agro Save Account** product. He confirmed that in the process of doing so he signed a consent form with the New Vision dated the 5th of December 2012 which enabled him to select the particular photograph which he delivered to Dw3 Edris Kimuli who is the creative Director of the third party who also labored at length to inform the court on how he came up with the final product which was based on some designs which were requested by the defendant who insisted on the use local images which would give a representation of the country and that following several consultative meetings of the managers of the third party and visits the New Vision, a picture of a woman in an orange orchard was zeroed upon as representing what the defendant wanted for its product and once that was done the third party then purchased another photo from Shutter Stock that had a perfect smile as seen from Exhibit D6 and the two images were merged using a software called Photoshop that created a hybrid that then eventually appeared on the flyers (Exhibit D9(iii)) upon approval by the Marketing Manager of the defendant subsequently the final work was handed over to the defendant for its own use. That was the case of the defendant.

The legal regime as regards image rights in Uganda has not been largely explored as there is little jurisprudence from our jurisdiction both statutory and or by way of precedent. The same has however been a subject of actions in other common law jurisdictions which have to a large extent described the same as personality rights.

Under the **common law** jurisprudence a **personality right** is the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. This right to personality is classified into two categories;

- a. The right of publicity or to keep one's image and likeness from being commercially exploited without permission or contractual compensation and the right to privacy, and;
- b. The right to be left alone and not have one's personality represented publicly without permission.

Basically under common law jurisprudence publicity rights fall in the realm of the tort of **“passing off”** which idea was developed on the notion of natural rights that every individual should have a right to control how, if at all, his or her **"persona"** is commercialised by third parties who intend to help propel their sales or visibility of own product or service.

This means that where there is a publicity rights contention then the issue for the court to deal with and decide upon is whether a significant section of the public would be misled into believing (**correctly or incorrectly**) that a commercial arrangement had been concluded between a plaintiff and a defendant under which a plaintiff agreed to an advert involving the image or reputation of a famous person. The actionable cause, therefore, under misrepresentation would then bring the suggestion that a plaintiff did in fact endorse or license a defendant's product or somehow has control over those products. Arising from this seemingly clear common law jurisprudence, it is my humble view that for one to succeed in an action for infringement of image rights such a person has to prove the following basic elements:

- The plaintiff must be identifiable.

- The defendant's action was intentional.
- The defendant must have acted for the purpose of commercial gain.

The Canadian courts have examined this position and in the case of **Krouse v Chrysler Canada Ltd (1973) 13 CPR (2d) 28** it was noted that where a person has marketable value in their likeness and it has been used in such a manner that suggests an endorsement of a product then there is ground for an action in appropriation of such a person's personality with the case of **Athans v Canadian Adventure Camps (1977) CAN H1 1255**, having the view that personality right included both image and name.

Referencing the above position of the common law to the instant matter, from the evidence of the defendant as stated by Dw1 the defendant herein engaged the services of the instant third party to develop and brand communication materials including fliers, posters, billboards and brochures for purposes of promoting a product which the defendant had developed through concerted advertising consequently the third party developed a concept, procured the right materials and upon completing the necessary art work which was agreeable to the defendant, the same was rolled out to promote the defendant's new product called '**Agro Save**' which featured among others the image of a woman in an orchard of oranges which was placed on billboards, flyers and brochures. The third party states that this is the essence of Exhibits D3 and D7 procured from the New Vision. However, a closure scrutiny shows that it is indeed Exhibit D9 being referred to with the third party developing the final image Exhibit D9(3) after merging Exhibit D9(1) and D9(2) and coming up with the final product which was accepted by the defendant. The third party states that at the time of doing the art work it had no knowledge of the existence of the plaintiff making the plaintiff and her witnesses to be liars in court for all of them insisted that the

picture in Exhibit D9 (1), D9 (2) and D (3) were of the same person who was the plaintiff yet the final product had the body of the picture of the plaintiff and a background bought from New Vision newspaper while the face on the final product was of a totally different person for while the right to own property in Uganda is enshrined under **Article 26 of the Constitution** with the modalities of how to acquire such title in it and own proprietary interests in various kinds of property provided for under various statutes including the Registration of Titles Act, Sale of Goods Act, Chattels Transfer Act, Trade Marks Act, The Patents Act and the Copy Rights and Neighboring Rights Act among others that under the Ugandan law, particularly under the Copy Right and Neighboring Rights Act, the proprietary rights over photographs or artistic works were those of the photographer or artist or the person who commissioned such work and not otherwise with this position clearly pronounced upon by the courts in the case of **Sikuuku Agaitano v Uganda Baati HCCS No. 298 of 2012** which was a case where a plaintiff claimed that a defendant unfairly benefited from the use of his images in its advertisements with the court utilising the provisions of the Copy Right and Neighboring Rights Act resolving that case in the negative which case is at four with the instant matter.

This arises from the argument of the defendant that even from the plaintiffs' own testimony the author and owner of her photographs is the New Vision Printing and Publishing Corporation Ltd who in the view of the defendant has the economic rights to such authorship which among others is the right to sell the original or copies thereof to the public for when the plaintiff posed for a photograph that was printed by the New Vision newspaper the same became a public document as it was taken with her consent by an agent of the New Vision which inevitably became the owner of the image as was illustrated in the case of **Sikuuku** (Supra) for indeed the third party sought from the New Vision its permission before using the photograph and as such the third

parties actions did not violate the plaintiffs' image rights for her picture had become a public document.

The plaintiff, however, was of a different view for she states that the New Vision did not own any copy right in her image even if it used her image for a news feature under the law that use is regarded as one of fair use and not for profit meaning that the New Vision did not take any economic rights in the image as alluded by the defendant and third party and as such could not transfer any such rights to a third party for in accordance to what was viewable from Exhibit D10 the third party had only a right to use the image in single usage only and not otherwise but when the same was reproduced over and over it limit of tfair usage exceeded the purposes for which the picture was requested, that is, for use of the materials as originally produced and therefore , clearly infringed on her private proprietary rights.

From the arguments above, it is apparently clear to me that the issue to be resolved here is whether the plaintiff's image rights have been infringed upon by the defendant and third party.

The plaintiff's evidence is that that she is a successful commercial farmer and a board Director in NAADS and that her a commercial farming did actually make her famous resulting into not only her being visited by the high and mighty but that she even featured in the New Vision newspaper and Etop newspapers as can be seen from Exhibits P7 and P4 were the features of the plaintiff which is not disputed by the defendant.

On the other hand the also agrees that when it wanted to promote its new product known as **'Agro Save Account'** it engaged the services of the third party herein to develop a concept which would promote the product with the third party proceeding to develop the same using

photos acquired from the New Vision Printing and Publishing Corporation where it purchased the plaintiffs' image which it felt suitable to execute the defendant's engagement and merging it through Photoshop computer application with another. The third party did in fact sought and got consent of the New Vision as Exhibit D10 shows and upon acquiring the plaintiffs' image which it agrees was the most applicable merged it with another from Shutter Stock Inc. Exhibit D9 (2) and came up with the final product Exhibit D9(3). Exhibits P4, P7 and D9 (1) all bear the image of the plaintiff. A casual look at Exhibits P5 and D9 (3) show that they bore features similar to those in the background of Exhibits P4, P7 and D9 (1). Even the attire (clothing) is similar in all the above exhibits. The third party agrees that it obtained the image of the plaintiff from the New Vision Newspaper which it manipulated and came up with final product Exhibit D9 (3) and contends that it obtained the said photographs lawfully and with the consent of the author which is the New Vision newspaper. This is a similar position of the defendant with further arguments that image was that in which the New Vision Newspaper had the economic rights as provided for under the Copy Right and Neighboring Rights Act and as was upheld in the **Agaitano Sikuuku v Uganda Baati (Supra)** meaning that no property rights of the plaintiff was infringed upon since she had no copy right protection in her Image.

After considering all these arguments, I would respectively disagree with the defendant and the third party that the plaintiff had no copy right in her image which instead they state was with the New vision Printing and Publishing Corporation for I have had the benefit of perusing **Sikuku's case** and I find that the same is distinguishable to the instant matter for in that case the plaintiff sought to recover damages under the **Copy Right and Neighboring Rights Act** which is not the case herein as the plaintiff here is seeking the common law remedy resulting from the unlawful

use of her image as can be seen from the plaint thus making the citing and application of the Sikuuku case to be out of context.

The defendant further went ahead to cite the Patents Act as one of the Laws governing property Rights in Uganda unfortunately **the Patents Act** was repealed by **The Industrial Property Act No.3 of 2014** under **section 109 (1) and (10)** thereof. That notwithstanding from the testimony of Adris Kamuli (Dw3) stated it is clear that the third party obtained the plaintiffs' image from the New Vision by virtue of a consent Exhibit D10 which has clear conditions among others stating that the picture was for single use only and restricted the purposes for which it was acquired to the request made by the third party for use of the materials as originally produced. Indeed when cross examined DW3 stated clearly that use of the image got by the third party was for agricultural purposes leaving the court to believe that if that was so then any subsequent usage for promotion of a bank account as is the case here would go at length to prove that the third party did not use the image in line with the purpose for which it was procured for using the plaintiffs' image to promote the defendants' **Agro Save Account** which is more in the a banking field than for agriculture tilted the use permanently towards another dimension which is that of commercial promotion.

Indeed from the evidence on record it is clear that no effort was at all made by the defendant or the third party to find out who the plaintiff was before using her image for commercial purposes yet they all agree that the partly the plaintiff's image was used in the commercial advert yet the defendant and third party had not sought her consent for as testified to ,they believed that it was the New Vision not the plaintiff whom they had to seek consent yet it is not in dispute that the New Vision ran the features bearing the plaintiffs' image in its various newspaper whose

intention from the reading of the news bites clearly show that they were intended for acknowledging accomplishments of the plaintiff and not for commercial purposes.

In my humble view and my reading of the various legal provisions in regards to the instant matter, it is my understanding that every individual has a right to his /her personality which extends to the name of the individual and image and has a right to control the use of either. The defendant and third party apparently without any iota of authority took it upon themselves to use the plaintiff's' image for a commercial benefit without caring to find out as to who the plaintiff was. The motive of using the plaintiffs' image in my view was clearly commercial aimed at promoting the defendant's product called **Agro Save Account** which was geared towards soliciting for more customers. While it is debatable that the final product was not that of the plaintiff, it is evident that features and attributes of the plaintiff are visible in the final product with this fact being related to by the testimonies of the various witnesses who instantly related the advert to the plaintiff for since the plaintiff had featured in the newspapers before and then some aspects of hers featured in Exhibit D9 (3) obviously any ordinary person on the street would associate and conclude that it is the plaintiff on the adverts and no other person with only a person with special skills and training in the field of art would then be able to identify the minutest in difference with the final product between Exhibits D9 (3) and Exhibits D9 (1), P4 and P7.

Resulting from this conclusion, I would find that indeed the defendant and third party did illegally infringed upon the image rights of the plaintiff and consequently, the first issue is answered in the affirmative even if the mere lack of a legal regime in our jurisdiction that

address the question image rights cannot be taken to mean that persons who suffer wrongs cannot seek redress from courts of law when in actual fact they are aggrieved.

5. **Whether the defendant and 3rd party are liable in breach of confidence, privacy and or are liable for passing off, misrepresentation and false endorsement.**

I will resolve this issue under the specific headings as framed in the issue.

a) **Breach of confidence**

The word confidence has been defined under the **Black's Law Dictionary 8th Edition page 317** to mean a communication made with a certain protected relationship and legally protected from disclosure. In order for one to succeed with this kind of action a plaintiff ought to show that:

- i) There exists a relationship of confidentiality between the plaintiff and the defendant i.e. it must be limited to certain people or be something which is not public property or public knowledge.
- ii) Must have economic value.

In the case of **PA Thomas v Mold [1968] QB 923** the position of the court was that it is essential that a claimant must make it absolutely clear and certain what he alleges to be confidential information with the rationale for this requirement being that a defendant is able to know the precise allegation against him for the principal of breach of confidence arises where parties are in a relationship or in discussions which will subsequently give rise to a relationship with information exchanged between the parties. Where parties are in such a relationship then the law imposes an obligation of confidence on the recipient restraining him from disclosure or unauthorized use of such information a breach of confidence thus would arise where a defendant

without consent or authorisation from the plaintiff discloses or otherwise appropriates the information received in confidence from the plaintiff.

Relating the above principles to the instant matter, it is the finding of this court that the plaintiff was not known to the defendant and the third party until she served the defendant with a notice of intention to sue and therefore she was in any sort of relationship with the defendant or third party. This would mean that no confidence was breached for no relationship existed between the parties.

b) Breach of right to privacy

The right to privacy of the individual has been briefly addressed in the **Constitution of the Republic of Uganda 1995 as amended** under **Article 27(2)**. In that article it is provided that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property. Though the constitution does not exhaustively address the fundamental right of privacy of the individual, Uganda is a signatory to international Treaties and Instruments which it is bound to observe and which international instruments address the right to privacy of the individual. Such treaties and instruments include **The Universal Declaration of Human Rights** provides the right to privacy of the person which provides under **Article 12** that

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Uganda is also a signatory to the **International Covenant on Civil and Political Rights** whose **Article 17 (1)** provides that;

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and (2) everyone has the right to the protection of the law against such interference or attacks”

Relating the provisions of these international legal norms to the instant matter, it is plaintiff's contention that the defendant and the third party interfered with her right to privacy when they placed her image on bill boards, flyers, calendars and brochures without her consent. The defendant and third party denies doing so for they opine that no interference with the privacy of the plaintiff was occasioned since the photograph in Exhibit D9(1) was not hers but belonged to the New Vision Newspaper which had the rights under the Copy Right Law to publish the photograph to the public and to rent or sell the original photograph or copies of the same with even the person who appeared eventually in the advert of the defendant being a different person other than the plaintiff as that person was a creation of the third party who transformed the image of the plaintiff Exhibit D9 (1) by creative works and replaced it with the one of the model in Exhibit D9(2) and came up with the final image in ED9(3).

While this could be so , when the testimony of the plaintiff is taken as a whole, it is clear that while she at first was not knowledgeable about the billboards bearing her images until she was informed so by Pw4 and several of her friends in NAADS groups who were asking her as to how much she had been paid for the adverts, she eventually came into contact with the images and was struck by the fact that she was indeed in those images yet she never consented to her images as portrayed by the defendant's adverts to be used for any purpose with the fact remaining that the defendant was trying to ride on her success as a farmer to popularize their product and attract farmers to itself for commercial purposes and thus by using her images the defendant invaded

her constitutional right to privacy as most of her friends kept insinuating that she had received a lot of money from the defendant resulting from the use of her image on the bill boards, flyers and calendars with this fact creating clear and founded fear in her for ill-intentioned individuals could attempt to rob or steal from her.

From the evidence on record, it is not denied by the defendant and third party that that the plaintiff's image or some her features did in fact feature in the final defendant's product as indeed Mr. Kimuli (Dw3) in his testimony described how the plaintiff's image in Exhibit D9 (1) was manipulated to come up with the final product in Exhibit D9 (3). However, when the intended use for which the image was secured from the New Vision is taken into account, it would appear to me that while the newspaper publication was educate and inform that which was manipulated was for a different purpose being commercial. This means that the publication which eventually found its way onto the bill board was different from the original purpose for which it was published by the New Vision newspaper which need no special permission and therefore, since no permission was sought from the plaintiff for such commercial publication with the fact that the plaintiff subsequently got bombarded with calls from different people who saw the billboards as having her image, I am convinced that obviously the advert had a huge impact on the plaintiff who had to live in fear for there is evident that there grew a belief that she had reaped big from her image appearing on the billboards.

Therefore, where an individual does not give any consent to the use of one's image yet is confronted with the same on billboards in different parts of the country, there will arise grave concern resulting from such infringement of one's privacy and therefore, I am convinced that arising from the action of the defendant and the third party the privacy of the plaintiff was indeed

breached for they never sought in the first place her permission to put her images on the alleged publications. I would so find accordingly.

Passing off, misrepresentation and false endorsement

Passing off is basically a tort of deceit which is an act of intentionally giving a false impression or representation of one's product as that of another.

For one to succeed in an action in a tort of passing off, he/she has to prove three basic elements to wit:

- i) Existence of good will and another person is trying to take advantage of that good will to cash in on to the detriment of the claimant.
- ii) A misrepresentation
- iii) Damage or likelihood of damage

The above principles were laid down by the High Court in the case of **Britannia Allied Industries Ltd v Aya Biscuits (u) Ltd HCCS No.24 of 2009**.

When related to the instant matter, it is evident that the plaintiff being a commercial farmer had established good will in her area of origin with the majority of persons in that region wanting or wishing to associate with her or her names for through farming she had attracted very important personalities who including the former Vice Presidents such as Specioza Kazibwe with the President of Uganda visiting her farm and was clearly impressed with the work that he made several pledges to her to help her agricultural boost production. This good gesture was even followed later by a delegation led by another former Vice President of Uganda Dr. Gilbert

Bukenya who took a team of investors from South Korea to the plaintiff's going on to prove that the plaintiff was indeed a successful commercial farmer in her region who was even tasked with added responsibilities of heading a number of groups engaged in commercial farming under auspices of the NAADS programme. Was popular and influential such that seeing her on a billboard promoting any product such as that of the defendant would influence numerous persons to do so including things like the consumption of the defendant's product of **Agro Save Account**.

Therefore since the plaintiffs' had acquired such good reputation it is the plaintiff ceased to be any ordinary person in society, who had gained such good will which the defendant sought to exploit to sell their product owing to the category of persons they were targeting. On the whole therefore, I find that the plaintiff had gained good will in her personality which the defendant and third party unjustifiably tapped.

False endorsement

False endorsement occurs when a person's identity (typically a celebrity's identity) is connected with a product or service in such a way that consumers are likely to be misled about that person's sponsorship or approval of the product or service.

In **Nanoomal Lissas Motiwala (u) Ltd v Sophie Natongo & Others, HCCS No.430 of 2006** court noted among others that the likelihood of confusion is the probability that reasonable consumers will be confused or deceived and will believe the infringing goods or services come from or are sponsored or endorsed by a complainant or that the two are affiliated thus from the resolution of the earlier issues above it is evident that the plaintiff did not endorse the promotion of the defendant's new product **Agro Save Account** as she had no previous dealings

the defendant and so in the circumstances I find that the defendant had misrepresented the plaintiff to have endorsed their product.

Misrepresentation

The **Blacks' Law Dictionary 8th Edition** at **page 1022** defines the term misrepresentation as the act of making a false or misleading assertion about something usually with the intention to deceive. It denotes not just written or spoken words but also any other conduct that denotes a false assertion. In the case of **Britannia Allied Industries Ltd v Aya Biscuits (U) Ltd (Supra)**, Kiryabwire J (as he then was) defined misrepresentation as a false description made consciously or unconsciously by the defendant. In the instant matter it is evident that the defendant and third party did not know the defendant but sought and got the image of the plaintiff to create the **Agro Save Account product** from the New Vision newspaper which they manipulated and eventually was rolled out as the defendant's product on bill boards, Flyers, calendars and brochures with messages such as:

“Save for your Success with the Agro Save Account, Save More, Spend Less. Opportunity Bank, for your success”.

Which if viewed without critical observation would make it hard for any ordinary observer for all purposes and intent to conclude that the person appearing in that images presented was the plaintiff who had endorsed the defendant's product which since the plaintiff denies leads to the conclusion that this was a misrepresentation by the defendant that the plaintiff had endorsed its product. I would that find and conclude accordingly.

6. Whether the defendant and third party unjustly enriched themselves by use of the plaintiff's image.

The term unjust enrichment, also known as a quasi-contract or an implied contract, is meant to apply where there is no contract between parties, but one party is unfairly benefiting from the efforts of the other without providing compensation. In the case of **Cloth Link (U) Ltd v African Trade Investment Fund Ltd & Another HCCS No.234 of 2010**, this court quoting the case of **Moses v Macfarlane (1760) 2 BURR at page 10** held that the principle of unjust enrichment requires that a defendant has been enriched by the receipt of a benefit, that this enrichment, at the expense of a plaintiff and that the retention of the enrichment is unjust.

In the instant case, it is the testimony of the plaintiff, which is not contradicted, that the defendant was trying to ride on her success as a farmer among the grassroots population to popularise its product and to attract farmers to it though the defendant argues otherwise by insisting that the plaintiff was not the one depicted in the images yet it agrees that her picture was carefully manipulated transformed to the final product which was eventually used which I have found to be clearly a misrepresentation. That being the case it would mean that the defendant did benefit from the illicit use of the plaintiff's images for indeed any business entity has to advertise its products to attract customers and when the customers come obviously it earns more owing to such advert and it was practically impossible for the plaintiff to know exactly the number of customers the defendant received after the advert as she was not part of the defendant's business and therefore could not and cannot be required to prove the number of persons who opened the **Agro Save Accounts** but it can be assumed by derivation that the defendant by using the plaintiffs' image attracted sufficient number of customers to its bank and earned substantially yet it did not pay anything to the plaintiff for the use of her image thus I would find that the defendant unjustifiably enriched itself at the expense of the plaintiff.

7. What remedies are available to the parties in the circumstances?

The plaintiff in her action sought to recover 10% royalty fees arising out of the opening of all the **Agro Save Accounts** at the commercial interest of 22% from the date of cause of action until payment in full, an inquiry as to damages for the invasion of the right to privacy, an appointment of a receiver to collect all profits made by the defendant from the opening of the Agro Save Accounts, general damages, aggravated damages, punitive damages and costs of the suit.

The defendant in its submissions used the **Oxford Law Dictionary 6th Edition at page 427** to define the word royalty as a sum payable for the right to use someone else's property for the purpose of gain which I entirely agree with. The defendant further submitted that before grant of royalty fees, there should be evidence adduced proving entitlement thereto by the claimant showing that there was gain by the defendant that in the instant matter there is no property to which the plaintiff would claim in the picture as Exhibit D9 (1) belonged to the New Vision, with Exhibit D9 (2) belonging to Shutter Stock and Exhibit D9(3) and D8 to the third party who created them and passed them to it. That notwithstanding, it is true that the plaintiff did not adduce any evidence that defendant made any flow of royalty in the **Agro Save Account**. However, as earlier found, it is clear that the plaintiff's action was never brought under the Copy Right law but rather under common law seeking a common law remedy as a result of the defendant using her image in its advert which was manipulated by the third party. As the owner of the image in D9(1), I find that the plaintiff had interest in the same and as such the defendant and third party ought to have sought her consent before using the same but since no such consent was ever sought then the conclusion is that the defendant did earn a profits from an illegal act and it would be legally untenable to let the defendant to enjoy those profits alone without the plaintiff partaking to the same , therefore the justice of this case would demand that the defendant share with the plaintiff at least 5% of such royalties royalty accruing upon disclosure

of all accounts opened from the date when the adverts went live till the presentations of these matters in court which I believe is fair in the circumstances with the same attract an interest rate of 20% per annum from the date of cause of action until payment in full.

In that respect I do appoint the Official Receiver of government to establish and ensure the royalty gained by defendant is shared accordingly by the percentage decreed with and delivered to the plaintiff.

The defendant shall meet the award of royalty fees single-handedly to the plaintiff as the profits that may have been made owing to the opening of the Agro Save Account went to the defendant alone.

Secondly, the plaintiff also sought to be awarded Shs. 100,000,000/-(One hundred million shillings) as damages for the invasion to her privacy.

Black's Law Dictionary 8th Edition at page 1350 defines a right to privacy to mean a right to personal autonomy. The same term is further defined in the same book at the same page to mean the right of a person and the person's property to be free from unwarranted public scrutiny and exposure. Furthermore, the same book at the same page defines the word right of publicity to mean the right to control the use of one owns name, picture or likeness and to prevent another from using it for commercial benefit without that others consent.

From the instant matter, it is not in dispute that the defendant and third party never sought the consent of the plaintiff before using her image in the advert as they confirmed so in their evidence that they never knew the plaintiff before until she brought up her claim. By transforming the plaintiff's image and putting the same in the different parts of the country on

bill boards surely amounted to invasion of the plaintiffs' right to privacy. The plaintiff testified that several persons called her asking as to how much she had cashed in from the advert and yet she was never paid a penny by the defendant or third party. The plaintiff is not an ordinary farmer as per the evidence on record. She has to be compensated for the invasion of her privacy by the defendant and third party and The defendant and the third party will jointly compensate the plaintiff for the invasion of her privacy with a sum of Ug.Shs.80,000,000/-(Eighty Million Shillings) with each meeting 50% of this amount in my assessment is sufficient in the circumstances.

The plaintiff also prayed for general damages in her claim. Regarding general damages, the position of the law is settled that the award of general damages is at the discretion of court, and always as the law will presume to be the natural consequence of the defendant's act or omission.

See: ***James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993.***

In the assessment of the quantum of damages, courts are mainly guided, *inter alia*, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach. See: ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305.***

And a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong. This principal was reinstated in the case of ***Kibimba Rice Ltd. v Umar Salim, S.C. Civil. Appeal No. 17 of 1992.***

The plaintiff has in the instant matter shown that she is not a person of ordinary standing. She is a commercial farmer who commands huge respect from the people of Teso and Karamoja sub region of Uganda with her farm being visited by important personalities including the Head of State who promised to help her boost production. She indeed testified that when the defendant put her image on the bill boards, several persons called her asking as to how much she had been

paid by the defendant with this inquiries leading her to live in fear for she believed wrong elements in society could attempt to rob her thinking that she had been paid handsomely by the defendant.

For the torment and suffering that the plaintiff and her family went through and considering her stature in society, the plaintiff is awarded Ug. Shs.50,000,000/- (Uganda shillings Fifty Million) as general damages against the both the defendant and the third party who are directed to meet the same in equal amounts.

The plaintiff further sought to recover aggravated damages in addition to general damages. Aggravated damages are extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted. In **Rookes versus Barnard [1964] All ER 367**, a distinction between aggravated and exemplary damages was made by Lord Devlin in the following words.

“ English law recognised the awarding of exemplary damages that is, damages whose object was to punish or deter and which were distinct from aggravating damages (where by the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages)... The fact that the injury to the plaintiff has been aggravated by the malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied, is not justification for an award of exemplary damages, aggravated damages can do in this type of case what otherwise could be done by exemplary damages”.

In all circumstances, aggravated damages should not be used to enrich the plaintiff but to punish the defendant and deter him from repeating his conduct. From the evidence on record, it is

evident that the defendant's and third party's action was uncalled for. They acted without thought and remained adamant throughout these proceedings and showed no sign of remorse for their actions. The defendant and third party ought to be punished for this conduct and this can be done by an award of Ug. shs.20, 000,000/- (Twenty Million Shillings) to the plaintiff as aggravated damages.

As to the sums awarded in respect of the invasion to the right of privacy, general damages and aggravated damages, the same shall be met jointly by the defendant and third party at the ratio of 60% and 40% respectively.

As to costs, its trite law that costs follow the event. See Section 27(2) of the Civil Procedure Act and *Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999 (UR)*. The plaintiff being the successful is awarded the costs of the suit

8. Orders:

- a. The defendant is hereby ordered to share with the plaintiff 5% of such royalties as accruing upon disclosure of all accounts opened from the date when the infringing adverts went live till the presentations of these matters in court with the same attracting an interest rate of 20% per annum from the date of cause of action till payment in full with the Official Receiver appointed to establish and ensure the royalty gained by defendant in this respect is collected and forwarded to the plaintiff in accordance to this order and for avoidance of doubt the defendant shall meet the award of royalty fees single-handedly to the plaintiff since the profits owing to the opening of the Agro Save Account went to the defendant alone.

- b. The defendant and the third party will jointly compensate the plaintiff for the invasion of her privacy with a sum of Ug.Shs.80,000,000/-(Eighty Million Shillings) with each meeting 50% of this amount.
- c. The plaintiff is awarded Ug. Shs. 50, 000,000/- (Uganda shillings Fifty Million) as general damages against the both the defendant and the third party who are directed to meet the same in equal amounts.
- d. The plaintiff is awarded the sum of Ug. shs.20, 000,000/- (Twenty Million Shillings) to the plaintiff as aggravated damages as against the defendant and third party to be paid in equal amounts
- e. The sums awarded in respect of the invasion to the right of privacy, general damages and aggravated damages carry interest at the rate of 6% per annum from the date of this judgment
- f. The plaintiff being the successful is awarded the costs of the suit.

All these orders are made at the High Court of Uganda Commercial Division this 22nd day of April, 2016.

HENRY PETER ADONYO

JUDGE

