

5 **GENZA THOMAS** **PLAINTIFF**

ENTEPRENUER FINANCIAL CENTER (U) LTD ::::::::::::::::::::::::::::::::::: DEFENDANT

(Before: Hon Justice Patricia Mutesi)

JUDGEMENT

Introduction

The plaintiff filed this suit against the defendant for alleged breach of his constitutional right to privacy, passing off, and breach of confidence, and sought compensation for the unauthorized use of his image, general damages, aggravated damages, interest and costs of the suit.

The brief facts of the above suit are that the plaintiff was a customer of the defendant and the holder of Account No. 00100003442 in the Ndeeba branch of the said micro finance institution. The plaintiff claims that sometime in July 2021 the defendant published his image and information on the defendant's website in order to secure a loan of Euros 300,000 from Lendahand, a Netherlands Organisation. The plaintiff further contends that the defendant in inducing Lendahand to advance the said loan, fraudulently misrepresented that the plaintiff is the founder of Zigoti Millers Association which was to receive Euros 300,000 to be utilized for agricultural purposes, whereas not. The plaintiff claims that based on this use of his image, Lendahand advanced the defendant a loan of Euros 300,000. He contends that the defendant's acts of illegally using his image for purposes of obtaining financial capital without his consent, amounted to passing off and constitutes an infringement of his privacy rights for which he is entitled to damages, compensation and royalties.

In reply the defendant averred that whereas it has a business relationship with Lendahand, it has never intentionally or otherwise used the plaintiff's image in any transaction with Lendahand as alleged. The defendant denied that it had ever
5 infringed on the plaintiff's privacy rights or unlawfully used the plaintiff's image to secure any loan from any institution. The defendant further averred that it has never gained financial capital by using the plaintiff's image, names and financial records without his consent as alleged. The defendant therefore contended that it is not liable to pay any damages, compensation or royalty as claimed by the
10 Plaintiff.

Representation and hearing

The plaintiff was represented by Mr. Musa Nsimbe and Mr. Kibuuka Gideon of M/s Kavuma Kabenge & Co. Advocates, while the defendant was represented by Mr.
15 Muhammed Ali Kajubi of M/s Ortus Advocates. The Plaintiff adduced evidence through his witness statement and he produced another witness namely Bogere Adolf who also filed a witness statement. The defendant adduced its evidence through a one Umar Juuko whose witness statement was also filed on record. The witnesses confirmed their witness statements on oath and were cross examined on
20 the same. Both Counsel filed written submissions which I have considered.

Issues

The following four issues were framed for consideration in the determination by court;

1. Whether the plaintiff's image rights were infringed upon by the Defendant.
- 25 2. Whether the defendant is liable for breach of confidence, privacy and or is liable for passing off, fraudulent misrepresentation and false endorsement.
3. Whether the defendant is liable for breach of Banker-Customer relationship by sharing and publishing the plaintiff's information without his consent.
4. What remedies are available to the parties.

Determination by Court.

Issue No. 1: Whether the Plaintiff's image rights were infringed upon by the Defendant?

An image is a physical likeness or representation of a person, animal or thing that has been photographed, painted, sculpted or made visible. Image rights refer to the use, appropriation and/or exploitation of a person's image, and include the expression of a personality in the public domain. They incorporate the right to use a person's personality and prevent other parties from exploiting or using that person's image or likeness without his or her permission, and encompass the commercialization of such rights. (See **Onang Christopher & Others v Roofings Limited and Another Civil Suit No. 139 of 2018.**)

Image rights in Uganda are protected under Common Law, and it has been held that an individual's identity is infringed where a person's image is used or appropriated without his or her permission for advertising purposes, creating the false impression that such person has consented to such conduct or supports the advertised product, service or business. In the case of **Asege Winnie vs. Opportunity Bank Ltd & MAAD Ltd (3rd party); HCCS No. 756 of 2013** Hon. Justice Dr. Henry Peter Adonyo held as follows;

"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 commercialized by third parties who intend to help propel their sales or visibility of own product or service."

As submitted by Counsel for the Plaintiff, in the **Asege Winnie case** (*supra*) it was held that for one to succeed in an action for infringement of image rights such person has to prove the following basic elements;

- i) The Plaintiff must be identifiable.
- 5 ii) The Defendant's action was intentional.
- iii) The Defendant must have acted for purposes of commercial gain.

I take note that in the above cited case, the fact of the defendant having used or published the plaintiffs image was not in dispute. However in the present case the defendant categorically denies having used the plaintiffs image as alleged.
10 Therefore before I consider whether the plaintiff proved the above elements to establish infringement of his image rights, it is necessary for me to first determine the fact of whether the defendant actually used or published the plaintiffs image on its website as alleged.

It is a settled principle of law that in civil matters, the plaintiff has the burden to
15 prove his case on a balance of probabilities. Where the plaintiff fails to prove and discharge this burden of proof their claim will be dismissed (See **Section 101, 102, 103 of the Evidence Act Cap 6**; See also **A. Nsubuga V P. N. Kavuma (1978) HCB 307**).

The plaintiff claims that his image was published on the defendant's website
20 without his consent for the purpose of the defendant securing a loan of Euros 300,000 from Lendahand, Netherlands. (*See paragraphs 4(c), and (5) of the **plaint***). In order to prove this claim the plaintiff adduced evidence through two witnesses i.e. himself (PW1) and Mr. Bogere Adolf (PW2). who both relied on a printout alleged to be from the website which had published the plaintiff's image.

25 **The evidence**

PW1 testified that he is a businessman dealing in maize milling who holds an account with the defendant's Ndeeba branch, and he had previously obtained two business loans from the defendant which had been repaid. That during the acquisition of the first loan, the defendant's officials had visited his milling business
30 and took pictures of him there. In 2021 he learnt from his close friends that the

defendant published and used his image to solicit and secure a sum of Euros 300,000 from Lendahand Netherlands. That when he logged onto the defendant's website he saw his photo image captured besides a maize mill, with information falsely stating that he was the founder of Zigotti Millers Association which was the recipient of a loan of Euros 300,000 to buy agricultural inputs and equipment. He adduced a copy of what he stated to be a printout from the website publication which had showed his image and information as **Exhibits P3 & P4**. The plaintiff further stated that as the defendant's customer he had never consented to the use or publication of his image with the defendant for purposes of accessing a loan from Lendahand, and he had never applied for nor received the said loan. He asserted his view that the defendant used his image, names and milling business to access the said loan. *(See paragraphs 6, 7, 10, 11 and 19 of the witness statement).*

However it is notable that during cross examination PW1 stated that he does not remember the website on which his image and information had been published.

PW2 Adolf Bogere testified that he was formerly employed as a Management Information Systems officer in the defendant. That the plaintiffs photograph and information were used in the 'Zigotti Millers Association project' one of the projects created by the defendant, which attracted funding of Euros 300,000 from Lendahand. *(See paragraph 5 of his witness statement.)*

However PW2 gave contradictory testimony as to the website on which the plaintiff's image was uploaded. He stated in paragraph 7 of his witness statement that ***'This project was uploaded on the website of Lendahand Netherlands and waited for external funders...'*** In paragraph 8 he stated that *'I can confirm to this court that I had the benefit of monitoring the progress of this project on the website until it was fully funded.'* However he later stated in paragraph 10 that *'I can also confirm that **the information on the defendants website** further stated that the loan was fully funded in 14 days on February 10th, 2021 for the sum of Euros 300,000 with maturity period of 24 months at an annual interest rate of 4%.'*

From the foregoing PW2 gave contradicting testimony that the project which had plaintiff's image was uploaded on the Lendahand website and also that it was on the defendant's website.

Furthermore during **cross examination**, **PW2** stated that it is the Lendahand website which published the plaintiff's information. He confirmed that **EX P4** is the publication he saw when he visited the Lendahand website. However he failed to identify the said website address. When asked the specific website of Lendahand, he stated that *'You go to google and type in Lendahand. On the website it's image was there.'* During re-examination he stated that Lendahand would get information from the defendant's platform and put it on their website. He also stated that currently the plaintiff's picture is no longer on the Lendahand website although his information is still there.

For the defendant, **DW1** Umar Juuko a Senior Management Information Systems Officer testified that the defendant operates <https://www.efcug.com/> and it has never published the plaintiff's image on this web portal or any other web portal (See paragraph 3 of his witness statement). This evidence was not challenged or controverted by the plaintiff. DW1 further testified that the defendant's relationship with the Plaintiff who is their customer is professional and the defendant never used his image for any commercial gain.

Analysis of the evidence

The plaintiff claims that the defendant used his image and information which was uploaded onto the defendant's website. He contends that the defendant's actions of publishing his image and information as to his identity and personality for purposes obtaining Euros 300,000 without his consent amounted to infringement of his image publicity rights. The plaintiff relied on **EX P3** and **P4** which was said to be a printout from the defendant's website which had published the plaintiff's image and information.

Section 8 of The Electronic Transactions Act, 2011 provides for admissibility and evidential weight of a data message or an electronic record. Section 8(2) of the Act states that: *'A person seeking to introduce a data message or an electronic record in legal proceedings has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.'*

As was submitted by the defendant, I do take judicial notice that websites have unique addresses which help people locate or identify them. On the internet, these addresses are called **URLs** (Uniform Resource Locators) which incorporates the domain name, along with other detailed information, to create a web address for a website.

However PW1 and PW2 did not adduce any evidence to show that EX P3 & P4 were actually downloaded from the defendant's website which was clearly stated by DW1 to be <https://www.efcug.com/>. The said document does not have any website name or link (URL) indicated either at the top or bottom of the printed pages. Instead at the top of the page is the following: **IMG-20210802-WA0002.jpg** while the bottom of the page shows the following link: <https://mail.google.com/mail/u/0/#inbox?projector=1>. This suggests that the document was not downloaded from a website, but rather from a google mail account.

I also take note that **EX P3 & P4** prominently boldly features the name or logo of 'Lendahand' at the top of every page, even though there is reference made to the defendant in the content of the document. Furthermore PW1 and PW2 stated in their testimony and cross examination that the plaintiff's image was *on the Lendahand website*. However this testimony is a departure from the plaint which pleaded that the plaintiffs image was uploaded to the defendant's website. Furthermore Lendahand is not a party to the suit and thus was not given the opportunity to respond to any allegations made about it. Therefore this evidence in respect to the Lendahand website cannot be given any weight by this court. However it has the effect of contradicting and discrediting the plaintiffs claim that the defendant used his image.

Finally **PW1** and **PW2** both failed to identify the defendant's website from which EX P3 & P4 were allegedly downloaded and printed. During cross examination the witnesses could not state the defendant's website name or address. Instead PW2 testified that he had seen the plaintiffs image on the Lendahand website while PW1 remarkably admitted that he had never visited the website which used his information. Some of PW1 s responses to cross examination are reproduced below;

Q. Which website did your image information appear on?

- I can't remember.

Q. Look at ExP3 – Is there any website?

- It has google at bottom of page.

5 *Q. So you visited google?*

- I've forgotten the website. It's not stated in my witness statement.

Q. EX P4 – Who published it?

- I got it on website (doesn't state which one)

(.....)

10 *Q. Have you ever visited Lendahand website?*

- No.

Q. How do you know the content?

- My friends called me and told me "give us money". One friend is Luyima Faisal.

15 (.....)

Q. Where did you see information that EFC got a loan?

- On the website.

Q. Which one?

- I've forgotten its name.

20 *Q. How did you get this information if you don't know the website?*

- I have friends who could help me. One of them was Luyima Faisal.

(.....)

Q. In your demand notice to defendant you copied in Lendahand, did it get copy of letter? Are you in touch with them?

- No.

Q. *Why not sue Lendahand?*

- No. I sued the person who sent my image.

Q. *Which evidence do you have that EFC sent your image to Lendahand?*

5 - None.

(.....)

Q. *So you don't know which website published this information? Did you inquire from Lendahand where they got this information?*

- No.

10 It is clear from the above that PW1 has no knowledge as to which website EXP3 & P4, which had his image and information, were uploaded to.

Section 101 of the Evidence Act Cap 6 provides that; *"Whoever desires any court to give judgment as to any legal right to liability dependent on the existence of facts which he or she asserts must prove that those facts exist"*. Thus in order to prove
15 infringement of his image rights, the plaintiff was required to adduce credible evidence to prove on a balance of probabilities the fact that his image was downloaded onto the defendant's website <https://www.efcug.com/>.


Furthermore in order to decide in favour of the plaintiff, the trial court has to be
20 satisfied that they had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by them, might hold that the more probable conclusion is that for which the respondents contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (See *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*).
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I find that the plaintiff failed to adduce any credible evidence to prove on a balance of probabilities that the defendant had used or published his image and information on the defendant's website as alleged. In conclusion on this issue I find

that there was no infringement of the Plaintiff's image rights by the defendant. Since Issue 1 is resolved in the negative, this determines the suit and there is no need to consider the other issues.

- 5 The suit is dismissed with costs to the defendant.

Delivered via E-mail this4th..... of May 2023


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10 **Patricia Mutesi**

JUDGE