

TANZANIA / JUDGMENT

CIVIL CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT PAR ES SALAAM CIVIL CASE NO. 118 OF 2022 JOHN RAPHAEL
BOKO PLAINTIFF VERSUS PRINCESS LEISURE (T) L T
D DEFENDANT

JUDGMENT

25th & 31st August, 2023 I.C. MUGETA, J. This is an ex parte judgment. The defendant was excluded from the proceedings on account of failure to file her written statement of defence on time. The same was, consequently, expunged from the court record. The plaintiff's claim is based on unauthorized use of his images by the defendant on her instagram page for business purposes. The publications were made on 18/11/2021 and 1/12/2021 inviting people in the betting business of the defendant. Those images were tendered in evidence as exhibits P3 and P4. According to the plaintiff, he is a famous footballer for Simba Sports Club and the National Team. His contract with the club was tendered as exhibit P2. Paragraphs 10 of the contract provides: Page | 1 "Persona/ publicity activities of the player are permitted in exceptional cases, necessitating prior written permission from the employer". The plaintiff testified that the use of his image by the defendant jeopardized his career because it implied he breached the contract for use of the images without consent of the team and his team was about to take disciplinary measures against him. As a result, the plaintiff prays for:

- i) A declaration that the defendant used the plaintiff's images without authority. ii) Payment of shillings one billion (Tshs. 1,000,000,000/=) as damages. iii) Payment of 25% Royalty for the use of the images from 18/11/2021 to the date of judgment which would attract 20% per annum. iv) Interest at court rate on the decretal sum from the date of the judgment to the date of full settlement of the claim.
- v) Costs of the case. The issues for my determination are:-
- i) Whether there was unauthorized use of image of the plaintiff by the defendant. Page | 2 ii) If the first issue is answered in the affirmative, whether such use violated the image and plaintiff's rights to privacy. iii) To what reliefs are the parties entitled. The first and second issues shall be determined jointly as they are interrelated. For an action for unauthorized use of image to succeed, the plaintiff must prove several issues. These are firstly, use of

protected attribute, secondly, for exploitative purpose and thirdly, without consent. Further, the use should amount to a misrepresentation by portraying to the public that the plaintiff and the defendant were engaged in some commercial arrangements or that the plaintiff has endorsed the defendant's products. In this case the plaintiff testified that he never authorized the defendant to use his images and he had no commercial arrangements with her. Therefore, there is no dispute that the defendant used the plaintiff's images without authority. The plaintiff testified further that his team was about to take disciplinary action against him for such publication of the images. This act, I hold, as stated by the plaintiff in his evidence, indeed, jeopardized the plaintiff's career considering the terms of his contract on Page | 3 publicity and commercial activities of the player above stated. It is my view that the intention of the team to take disciplinary measures against the plaintiff inconvenienced him. Further, such use of his images was against his privacy, thus, as rightly argued by his counsel in his final submissions, the use violated Article 16 of the Constitution of the United Republic of Tanzania, 1977. The learned counsel cited a Kenyan case of *T.O.S v Maseno University and 3 others* [2016] eKLR where the court declared that the use of one's image for commercial purposes by a third party is actionable in tort. I agree with the holding of the court in this persuasive decision. The defendant used the images on her Instagram page to promote betting. Under the image in exhibit P3 it is advertised: "Uhondo wa Higi ya NBC unaende/ea /eo kwa mechi 3. Kubwa zaidi ni Simba watakuwa wageni wa Ruvu Shooting huko Mwanza kwenye dimba la CCM Kirumba. Siku za pesa zimerejea" The above message insinuates that the plaintiff and the defendant have a commercial arrangement and the plaintiff has endorsed the defendant's betting business. This amounts to a misrepresentation where the plaintiff Page | 4 had not authorized the use of his images. It follows that, the defendant took advantage of the plaintiff's image and got gains from the post consisting of the image of the plaintiff without benefits to the plaintiff. The plaintiff believes, and I agree with him, it was for his fame the defendant used his image instead of images of other footballers. He is, therefore, entitled to damages. For the foregoing, I am satisfied that the defendant used the plaintiff's images without authority. I am further satisfied that the plaintiff was inconvenienced by the publication. In his evidence he said upon publication of his images several people in his circle phoned him to drop a congratulation message hoping that he had struck a new deal. The foregoing answers the 1st and 2nd issues for determination in the affirmative. On reliefs, I declare that the defendant used the plaintiff's image without authority and it is my view that the plaintiff is entitled to damages. The award of damages is judicial discretion which is exercisable on sound reasons and principles. The plaintiff has proved that his images were used Page | 5 for exploitative purposes without his consent and his career was jeopardized. Damages shall be assessed in the strength of those facts. His claim for shillings one billion, however, is on the high side. The plaintiff's counsel urged the court to grant the amount pleaded considering first, the endorsement fee had the plaintiff consented to the use of his image, second, the loss he would have suffered had his contract been terminated, third, his social status and lastly, the nature of the defendant's business. To support his prayer, the learned counsel cited the case of *Deogras John Marando v Managing Director, Tanzania Beijing Huayuan Security Guard Services Co. Ltd*, Civil

Appeal No. 101 of 2018, High Court of Tanzania - Dar es Salaam (unreported) where the court awarded the plaintiff Tshs. 50,000,000 as general damages for unauthorized use of his image. Considering his fame as a footballer who according to his evidence is the Simba Sports Club Captain, the team's best scorer and footballer for several seasons which he proved by presenting several medals in evidence and the inconvenience endured, I assess it at two hundred million (Tshs. 200,000,000/=). The prayer for payment of royalty is unrealistic as no evidence has been tendered on the actual income the defendant got out of Page | 6 the use of the images. The decretal sum would attract interest at court's rate from the date of judgment to the date of full payment. Costs of the case shall be paid by the defendant. The prayer for commercial interest is rejected as no specific damage has been proved as suffered by the plaintiff. \ 1 I.e. Vlugeta JUDGE ~ 31/08/2023 COURT: Judgment delivered in chambers in the presence of Innocent Michael and Gadi S. Kabele, Advocates for the plaintiff and Jerome Msemwa, advocate for the defendant. Sgd: I.C. Mugeta JUDGE 31/08/2023

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