

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-
REGISTRY AT DAR ES SALAAM CIVIL CASE NO. 192 OF 2023 JONAS GERALD MKUDE PLAINTIFF
VERSUS MOHAMMED ENTERPRISES(TANZANIA) LIMITED DEFENDANT

JUDGMENT

Date of last Order: 7-8-2024 Date of Judgment: 30-10-2024 B.K. PHILLIP, J The plaintiff is a professional footballer, whereas the defendant is a Limited Company incorporated in Tanzania under the Companies Act. It is the plaintiff's case that the defendant has been using his images / pictures to advertise and promote its services, and products through social media platforms, to wit, Instagram, Facebook, and Twitter, without his consent. The aforementioned social media platforms have comprehensive coverage throughout Tanzania and the world. On 12th July 2023, while preparing for an upcoming football match, he came across commercial posts with his picture/image on Instagram, Facebook, and Twitter. Those advertisements were in the official Instagram, Twitter, and Facebook accounts of Mohammed Enterprises Tanzania Limited ("METL"), the defendant herein. He screenshotted and saved them and later printed them for more inquiry. By 12th July 2023, he had signed an employment contract with Young African Sports Club (Hereinafter referred to as "Yanga"). The plaintiff further alleged that, on the same date, he received several calls and messages concerning the advertisements / commercial posts he saw on social media from his relatives, fans, and employer, some of which were congratulating him for being lucky for that Particular commercial endorsements while others asked for clarifications regarding those commercial advertisements/posts. The advertisements were made without his prior consent, involvement of whatsoever kind, authorization, or any lawful compensation to him. The defendant generated profit by using his images to advertise its products and attracted customers worldwide, which was tantamount to exploiting his rights over his images/ pictures. Furthermore, the plaintiff averred that formerly, he played as a midfielder for Simba Sports Club (Hereinafter referred to as "Simba") for almost eleven (11) years. He is a midfielder for the Yanga and the Tanzania National Team. He is a renowned and successful player. He has played in international, regional, and domestic leagues and earned numerous accolades as one of the most successful player. Moreover, the plaintiff averred that the Defendant's acts violated his privacy and unlawfully interfered with his economic interests over his pictures/images. Thus, Defendant's actions amounted to unjust enrichment, deprivation of property rights without lawful compensation, misappropriation and infringement of personality

and image rights, breach of the right to privacy and dignity, misrepresentation, false endorsement, and passing off. The defendant has unjustifiably enriched herself by unfairly exploiting his images/ pictures by receiving benefits from the advertisement of its products and business without his authorization and/or consent. Consequently, he was affected socially, economically, and psychologically. The defendant's use of his images to promote its products endangered his employment with Yanga. The plaintiff's prayers in this case are reproduced verbatim hereunder;

- a) Declaration that the Defendant is in breach of the Plaintiff's rights to privacy, economic rights and dignity and she has unjustly enriched herself by unlawful interfering with the Plaintiffs economic interests, personality and image rights, deprived the Plaintiffs property rights over his images without lawful compensation, misrepresentation, false endorsement and passing off the Plaintiffs property with no authority and/or consent for commercial gains.
- b) An order for payment of the sum of TZS 1,000,000,000/= (Tanzania Shillings one billion) as damages for unauthorized use of the Plaintiff's images in commercial advertisements for marketing and promoting the Defendant's products.
- c) Permanent injunction restraining the Defendant from use of the Plaintiff likeness/picture and the like.
- d) An order against Defendant for payment of 25% of royalties arising out of the benefits gained as a result of publishing the commercial advertisement which infringes the Plaintiff's rights as to the date of judgment with interest of 20% per annum from the date of cause of action to the date of full payment.
- e) Aggravating damages.
- f) Interests on the decretal amount in (b) and (c) (sid) above at the court's rate of 7% per annum from the date of judgment to the date of final payment and satisfaction in full.
- g) Costs of this suit.
- h) Any other relief this Honorable Court may deem fit and just to grant. In its defense, Defendant alleged that it has the right to use Plaintiff's images/pictures when he is wearing a Simba Jersey to advertise its products under the Sponsorship and Marketing Agreement(Hereinafter to be referred to as "S & M Agreement") between Defendant's sister company, A-One Product and Bottlers Limited, and Simba. Further, the defendant stated that it is not liable to pay the Plaintiff any sum claimed as damages or royalties as alleged in the plaint and prayed for the dismissal of the plaintiff's case with costs. The learned Advocates Fredrick Masawe August, Amri Ditto and Gadi Silas Kabela appeared for the plaintiff, whereas the learned Advocate Neema Mahunga appeared for the defendant. During the final Pre-Trial Conference, the following issues for determination by the court were framed.

- i) Who is the lawful owner of the plaintiff's image? ii) Whether or not the Defendant had a right to use Plaintiff's image for commercial purpose? iii) Whether the Plaintiff has suffered damage to the tune of Tshs. 1,000,000,000/= . iv) To what relief(s) parties are entitled to? In proving his case, the plaintiff testified as PW1 and was the sole witness. On the other hand, the defendant paraded two witnesses, Michael George Mhina (DW1) and Himanshu Saxena (DW2). I will deal with the and 2nd issues conjointly since they are intertwined. PW1's testimony was to the effect that he is a professional footballer. He started playing football as a professional footballer in 2011. From 2011 up to 2023, he was employed by Simba. On July 2023, he signed an employment contract (exhibit P1) with Yanga. His employment contract with Yanga (exhibit P1) was effective from the 1st of July 2023. The terms of his contract with Yanga barred him from doing any advertisement, engaging in any transaction with any other institution, or working with any other football team without informing Yanga and obtaining its consent. If any other football team wants to work with him, it must pay Yanga a sum of USD 100,000/=. PW1 testified further that the defendant posted his images on social media, to wit; Instagram, Twitter, and Facebook for advertisement of its products without his consent. When he saw his images- (exhibit P2 collectively) on social media, he screenshotted them using his cellphone and sent them to his advocates. His advocates sent a demand notice (exhibit P3) to the defendant for compensation for using his images/pictures without his consent, and he is currently working with another institution (Yanga). Being a professional footballer, his images were used by the defendant to generate income, which is why he is claiming compensation to the tune of Tshs. 1,000,000,000/=. Within two days from the date he saw his images/pictures on social media, the defendant managed to get 490,000 viewers. So, she generated a lot of money, and to date, she still uses his images/pictures to advertise her products, thus generating more income. He deserves to be compensated. He was affected psychologically by his images/pictures being used to generate money without his consent, and he was not paid. To date, he cannot perform his work well as he is still undergoing psychological torture due to the defendant's aforesaid act. Consequently, he is not being given opportunities to play in his team. Through his work as a professional footballer, he has managed to build a house. He has been among the players in the National Football Team. He is famous in and outside Tanzania and has obtained several trophies. In response to questions posed to him during cross-examination, the plaintiff told this court the following: He obtained trophies when he was working with Simba and when he joined Yanga. He got many trophies when he was working with Simba. Since he started working with Yanga, he has only obtained one trophy. He was often invited to join the National Football Team while working with Simba. The coach has his criteria for choosing the players for each match. There are performance cards for each footballer to record his performance. He did not produce any document in court to show that his performance was affected negatively by the defendant's use of his images/pictures in the advertisement. He had been selected to play in some football matches, including the Champions League. In all images used by the defendant, he was wearing a Jersey with a Simba logo. The defendant's use of his images/pictures has not affected his salary and allowances. On the other hand, DW1 testified that He is an advocate working with Deogratias Lyimo & Company (Advocates). Formerly,

from 2018 to 2022, he was the Company secretary and Advocate for Simba. His duties were to manage the legal department in which he handled regulatory and compliance matters, such as preparing employment contracts for Simba players. He prepared the employment contract between Simba and Plaintiff and attested it (Exhibit D1). Clause 1.1 of exhibit D1 provided for the duration of the contract and consideration. The contract was for two years, from of August 2021 up to 30th July 2023. The related services the plaintiff agreed to offer Simba as stipulated in the contract (exhibit D1) included participation in publicity and commercial activities. Clause 1.5 of the contract covers the league duration the player would be engaged in the club. League duration is when the league commences and ends. Clause 8 of exhibit D1 provided for the player's requirement to participate in commercial activities for the club (Simba) and allied club members to use his images/pictures. The image rights in the contract (exhibit D1) referred to the player's consent for his images/pictures to be used by Simba and allied members of Simba. The words "player's image" in exhibit D1 meant the player's still pictures, videos, and the like. The player's images agreed to be used are the ones in which the player is dressed in Simba Jersey. Simba used the player's images/pictures through its sponsors. The one who was gaining from using the plaintiff's image was Simba because the sponsors paid Simba, and in return, Simba could pay the players their monthly salary. The owner of the image, when the player is dressed in Simba Jersey, is Simba. All three images of the plaintiff (Exhibit P2 collectively) were published on 12th July. Images in Exhibit P2 do not show the year they were published. Assuming that the pictures were published within the contract period between Simba and the plaintiff. The pictures belong to Simba. Further, DW1 testified that the relationship between Simba and the defendant is that the defendant is Simba's Sponsor to date. The sponsorship relationship was established by signing a contract with Simba. He prepared exhibit D2, the S & M Agreement. By the consideration agreed upon in the contract, Simba consented to the Sponsor to use the images/pictures of its players while dressed in Simba Jersey for four years from 2021. As per clause 4 of the contract (Exhibit D2), the Sponsor was given the right to take pictures of Simba players while dressed in Simba Jersey. As per clause 4.1.4.2 of Exhibit D2, Simba gave the Sponsor the right to take images and videos of its players for promotion purposes in consideration of Tshs. 250,000,000/= without further payments. The sponsor is defined in Exhibit D1 as a group of the sponsor's companies, including subsidiaries, associates, and sister companies. The relationship between A one Products and Bottlers Limited (Hereinafter referred to as "A one Ltd"), a party to exhibit D2, and Mohamed Enterprises (Tanzania) Limited ("METL") is that they are subsidiaries and sister companies. The S & M Agreement (exhibit D2) shows the Sponsor's mark and logo to be used in commercial advertisements and publicity in the implementation of the agreement; the same includes "mo-XTRA," "mo-Chungwa," "mo- 10 TANGAWIZL" The pictures in Exhibit P2 collectively were used by the Sponsor when exercising its rights under clause 4 of the S & M Agreement. The sponsor paid consideration to Simba for the sponsorship and marketing agreement Simba. No payment was required to be made to the individual player. The players benefit from the advertisement by being paid the signing fees when joining Simba. In response to questions posed to him during cross-examination, DW1 told this court the following: the

defendant has been mentioned in clause 1(Y) of the S & M Agreement(Exhibit D2) since it talks of Sponsor companies, subsidiaries and sister companies. The defendant is an associate of the METL Group of companies. An employment contract shows the player's time in a club. Exhibit PI was effective from July 2023 when the plaintiff joined Yanga. Clause 1.5 of exhibit D1 is about playing football/the football league season. It is not correct that the two league seasons ended on 30th June 2023. Clause 8 of the contract(Exhibit D1) shows that the plaintiff agreed to his pictures to be used by Simba for commercial purposes. METL Group published the plaintiff's images/ pictures(Exhibit P2 collectively) pictures. A One Ltd is not the one who published the plaintiff's pictures. In its defence, the defendant admitted using the plaintiff's pictures. Clause 8 (2) of the contract provides that 11 sponsors can use the plaintiff's pictures. The S & M Agreement shows the relationship between the defendant and A one Ltd The defendant and A One Ltd are sister and subsidiary companies.The contract between Mkude and Simba expired on 30th July 2023. Exhibit D1 does not mention the associate companies. The contract allows the player's pictures to be used by associates and subsidiary companies. The effective date of the sponsorship agreement was 3rd November 2021, as per clause 2.1 of the contract. The plaintiff was an employee of Simba. Clause 8.2 does not provide for broadcasting only. The consent given by the plaintiff was for his image to be used in any form and any nature. The contract duration of exhibit D1 provided in clause 1.1 was 2 years, from 1st August 2021 to 30th July 2023. The plaintiff agreed to play for Simba and give other services. DW2 testified as follows: He is employed by the defendant as a strategy planning manager. His duties include reviewing the existing business policies, framing new policies for the promotion and adverts of several products of METL-Group, and perusing documents and agreements on the adverts, and promotion of products. His work starts when there is a new product to be lodged. He works on how a new product can be brought into the general public's knowledge and ensure that it maintains its appearance in the market. The defendant in this case is the sister company of METL Group. A-One Ltd signed S & M Agreement with Simba (exhibit D2), a Sponsor in consideration of Tshs.250,000,000/=, and in return, Simba agreed to promote A one Ltd products. In clause 1 (y) of exhibit D1, the definition of a sponsor included its subsidiaries, associates, and sister companies. Clause 4 of exhibit D1 provides for Simba's obligation and the rights of A one Ltd. Simba agreed to advertise the Sponsor's products with the following marks: " mo -EXTRA," "mo- Chungwa," and " Apple pop." Which are indicated on page 21 of exhibit D2. The defendant has a social media presence. Thus, it controls social media advertisements for its subsidiary and sister Companies. In exhibit P2, collectively, there are advertisements made by the defendant for the promotion of A one Ltd products (mo- EXTRA and mo- Chungwa), indicated in exhibit D2 on page 21. The duration of exhibit D2 is four years, from 3rd November 2021 to 2nd November 2025. The plaintiff, indeed, has no contract with A-One Ltd. It is also true that A-one Ltd has the right to use Simba's players' images for the promotion and advertisement of its products, and that is what A-one Ltd did in exhibit P2 collectively. The image rights to promote products extend to all sister and 13 associate companies of METL Group. Thus, the plaintiff's claims have no merit. Having analyzed the evidence adduced by the parties, I have noted that it is common ground that the plaintiff's

images in exhibit P2 collectively were obtained by the defendant when the plaintiff was working with Simba under the employment contract(exhibit D1), which was for two years effective from August 2021. The Plaintiff's images/pictures in controversy used by the defendant in the advertisement of A one Ltd products (mo-Chungwa and mo-EXTRA) reveal the plaintiff was dressed in Simba's Jersey. In her final submission, Ms. Mahunga contended that since the images in controversy show that the plaintiff was dressed in Simba Jersey, then the image's rightful owner is Simba, and the defendant, being Simba's Sponsor, had the right to use those images/pictures. Ms. Mahunga's argument aligns with DW1's and DW2's testimonies. On the other hand, the final submission by the plaintiff's advocates was that the rightful owner of the plaintiff's image is the plaintiff himself. They contended that an image or picture belongs to the footballer and is connected with the right to privacy as stipulated in Article 16 of the Constitution of the United Republic of Tanzania, which provides the right 14 to privacy, and Article 12 of the Universal Declaration to Human Rights,

1948. They were emphatic that the footballer has the right over his images/pictures, which includes the ability to decide when, how, and by whom his physically recognizable features (image, voice, and name) can be captured, reproduced, or published. To cement their arguments, they cited the case of Pro-Line Sccor Academy Limited versus MTN Uganda Limited & 2 Others, Civil Suit No.0317 of 2011 (unreported). Moreover, on Whether or not the Defendant had a right to use Plaintiff's image for commercial purpose?, the plaintiffs' advocates contended that defendant had no right to use the plaintiff's images/pictures without his consent. To cement their arguments they cited the case of Multichoice (T) Ltd versus Aiphonce Felix Simbu & 2 Others, Commercial Appeal No. 01 of 2023 and Deogras John Marando versus Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd Civil Appeal 110 of 2018(Both unreported). Before going further, I think it is opportune to state that in their closing submissions, the plaintiff's advocates pointed out the general rule on the right to privacy, which can be extended to protecting one's images/ pictures. However, it is worth noting that there are many variables 15 and exceptions depending on the facts and circumstances under which the picture/image in question was taken/made. For instance, when an individual signs an agreement for his image/picture to be used for some specific purposes, the ownership of his/her images will abide by the terms of the contract. In this case, there is no dispute that the plaintiff was employed by Simba effective from August 2021.(exhibit D1) in which the plaintiff agreed to his images to be used in Simba's Commercial activities. Simba signed a S & M Agreement(exhibit D2) with A one Ltd, the Sponsor in which Simba was paid consideration by the Sponsor, and agreed the images of his players be used in the promotion and advertisement of the Sponsor's products and services. Article 1(y) of the S & M Agreement defines a Sponsor as a " Group of Companies of Sponsor and includes its subsidiaries, associate companies, and Sister concerns. The Sponsorship and Marketing agreement is valid for four years effective from 29th October 2021 to 2025. The plaintiff's image/ picture was used for advertising "mo-Chungwa" and "mo-EXTRA," products produced by A one Ltd and listed in Schedule 2 to exhibit D2 as Sponsor's Mark and Logo. 16 The pleadings reveal that the plaintiff's claim is

based on the allegations that by 12 July 2023, when he saw his images in the defendant's Twitter, Instagram, and Facebook accounts, he was no longer working with Simba as his contract with Simba had expired. He had signed an employment contract with Yanga. The plaintiff's testimony is in line with the allegation in the plaint that his employment contract with Simba, (exhibit D1) expired on 30th of June 2023, whereas DW1 maintained that the employment contract was for two years from 1st August 2021 to 30th July

2021. However, before going further with the analysis of the evidence adduced, I think it is apposite to point out here that the contents of the plaint, together with the plaintiff's testimony show that the plaintiff would not have raised any complaint if his images/pictures would have been used by the defendant before the 30th of June 2023, which according to his stance was the expiry date of his employment contract with Simba. This implies two crucial things as far as the plaintiff's image rights are concerned. One, the plaintiff was aware that by signing the employment contract with Simba (exhibit D1), he gave Simba rights to use his images/pictures for commercial purposes as per the terms stipulated in the employment contract. Two, the plaintiff is aware of the S & M Agreement (exhibit D2) between Simba and A one Ltd, the defendant's Sister Company, through which the defendant obtained the right to use 17 his images to advertise "mo-Chungwa" and "mo-EXTRA". Thus, the expiration date of the employment contract between the plaintiff and Simba becomes of the essence. Clause 1.1 of the exhibit D1 provides as follows; "That a consideration of Tanzania Shiiiings (TZS) One Hundred and Sixty Miiiion ((160,000,000) oniy, the piayer has agreed to sign, piay and offer other related services to the employer for period of TWO(2)years effective from August2021". (Emphasis is added) The above-quoted clause from exhibit D1 has no ambiguity. It states expressly that the employment contract between the plaintiff and Simba was for two years, effective from 1st August 2021. I agree with Ms. Mahunga that the employment contract between the plaintiff and Simba expired on July 30, 2023, as testified by DW1, not 30th June 2023, as alleged by the plaintiff. (PW1) I have taken notice that clause 2 of the contract between the plaintiff and Yanga, provides as follows; " This Contractshaii take effectfrom the 1st July2023and its term thus being at the end ofthe season 2023/2024 unless agreed otherwise by both parties. It is understood and agreed that the validity ofthis agreement is subject to the condition that the piayer is registered with the dub before the iast day of TFF 2023/2024 registration period."
- 18 The above-quoted clause shows that the employment contract between the plaintiff and Yanga was signed before the expiry of exhibit D1, and it was conditional. Its validity depended on the player's registration with the club before the last day of the TFF 2023/2024 registration period, which was not disclosed in the contract. However, since the plaintiff testified that Yanga currently employs him, I believe he complied with the condition stipulated in the agreement (exhibit PI). However, no evidence was adduced by the plaintiff to the effect that he terminated his contract with Simba before the expiry of two years, as stipulated in Article 1.1 of the agreement (exhibit D1). Simba had the right to implement the terms and conditions stipulated in exhibit D1 up to the end of July 2023, which was the expiry date of exhibit D1. From the foregoing, it is the finding of this court that the rightful

owner of the plaintiff's images/pictures that were used in advertisements in exhibit P2 collectively is Simba since the same were taken when the plaintiff was dressed in Simba Jersey during the subsistence of his employment contract with Simba in which he consented his image to be used by his employer (Simba) as per clause 8 of the contract(exhibit D1). His employer had entered into a S & M Agreement for commercial 19 purposes with the defendant's sister company(A one Limited). For clarity, let me reproduce Clause 8 of exhibit D1 hereunder; "8. PARTICIPA TION OFPLA YER IN PUBLICITY AND COMMERCIAL ACTIVITIES OF THE EMPLOYER/RIGHT TO IMAGE 8.1; The player commits himselfto support all publicity and commercialactivities as may be required by the employer In whatever form they may be. 8.2. The piayer consents to the broadcasting by the employer ofhis image, in any nature whether aione or with the team being undertaken by the employer in the context ofprofessional activity ofthe piayer." (emphasis added) As alluded to earlier in this judgment, after signing the employment contract with the plaintiff, Simba signed S & M Agreement with the defendant's sister company to exercise its rights under clause

8. Therefore, under the S & M Agreement, the defendant had the right to use the plaintiff's image for commercial purposes on the 12th of July 2023 because he consented to his images/pictures being used by Simba for commercial purposes. Once there is consent, there cannot be a claim for unlawful use of an image/picture. In the case of Multichoice(T) Ltd (supra), this court(Hon. Agatho J) held as follows; Itis noteworthy to state that consent or authorization is an exception to vioiation ofprivacy. Once there is consent, one can neither ciam 20 violation ofprivacy nor infringement ofherimage right Butsince in the case at hand, there was no consent, itgoes withoutsaying that there was vioiation ofprivacy and image rights. (emphasis added) From the foregoing, the answer to the first issue is that the defendant, being Simba's Sponsor with a mandate to take and use images/pictures of Simba's player as per exhibit D2, is the lawful owner of the plaintiff's images/pictures in exhibit P2.The second issue is answered in the affirmative, that the defendant had the right to use the plaintiff's image. Concerning the 3rd issue. Whether the Plaintiff has suffered damages to the tune ofTshs. 1,000,000,000/=. Having answered the 2nd issue in the affirmative, I am of the settled view that the plaintiff's claims for damages to the tune of Tshs. 1,000,000,000/= are unfounded. No evidence was adduced by the plaintiff to show that the defendant exceeded what is provided in the S & M Agreement. As alluded to earlier in this judgment, the plaintiff's case was pegged on an argument that his images were used after the expiry of his employment contract with Simba. But I have already resolved that. In short, the plaintiff's claims for damages are unfounded because he consented to his employer's use of his image for commercial purposes without any limitation. Thus, he cannot claim damages from the defendant for using his images within the duration of his employment 21 contract with Simba. It is also noteworthy that apart from the alleged commercial advertisement made on 12th July 2023, no evidence was adduced by the plaintiff to prove that the defendant used the plaintiff's images/pictures after the expiry of exhibit D1. Hence, this issue is answered in the negative. Coming to the last issue on the reliefs the parties are

entitled to, according to section 110 of the Law of Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In this case, the plaintiff alleged that his images/pictures were used by the defendant for commercial purposes without his consent after the expiry of his employment contract with Simba. The evidence adduced by the parties as elaborated in this judgment and my findings show that the plaintiff failed to prove his case to the standard required by the law. In the upshot, this case is hereby dismissed with costs. Dated at Dar es Salaam this 30th day of October 2024. ^ JUDGE. 22

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