

TANZANIA / JUDGMENT

# VITALIS SAFARI GEMBA

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (ARUSHA SUB-REGISTRY) AT  
ARUSHA CIVIL CASE NO 6 OF 2023 VITALIS SAFARI  
GEMBA..... PLAINTIFF VERSUS BOUGAINVILLEA SAFARIES  
LODGE LIMITED..... 1st DEFENDANT REGINALD  
BAYO..... 2nd DEFENDANT ALFRED JACOB OMBAY (SUED AS  
ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB OMBAY)..... 3rd  
DEFENDANT NICODEMUS JACOB OMBAY (SUED AS ADMINISTRATOR OF THE ESTATE OF THE  
LATE JACOB OMBAY)..... 4th DEFENDANT VICTORIA JACOB OMBAY (SUED AS  
ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB OMBAY)..... 5th  
DEFENDANT

## JUDGMENT

09/09/2024 & 01/11/2024 MWENDA, J.: On 7th February 2023 the plaintiff herein filed a suit against the defendants. Nevertheless, pursuant to the order of this court dated 9th March 2023 the plaintiff was permitted by this court to file an amended plaint. According to the amended plaint, the plaintiff is described as a natural person, resident of Karatu and a chef by profession who was employed 1 | Page by the defendants as a chef cookery until 2020 when his employment was terminated. The 1st defendant on the other hand is described as a limited liability company, owned by the 2nd, 3rd, 4th and 5th and is engaged in providing tourism services. The plaintiff further gave a description of Bougainvillea Group of Lodges which despite being not among the parties to this suit but for the purpose of this judgment I find it apposite to have it described as a non-juristic name branding collection of ten camps and lodges owned by the 2nd defendant and the late Jacob Ombay. The ten camps and lodges are named as Bougainvillea Safari Lodge, Country Lodge Karatu, Lake Eyasi Safari Lodge, Thorn Tree Camp Serengeti, Sangaiwe tented Lodge Tarangire, Marera Valley Lodge, Ngorongoro Coffee, Baghayo Garden Suits and HIPPO Camp Serengeti. The plaintiff in this suit charges the defendants for common law tort of infringing personality right in favour of the defendants' unjust enrichment. A summary of the claim as gleaned in the plaint is as follows; In the year 2013, the plaintiff was employed by the 2nd defendant and the late Jacob Ombay as a chef for Country Lodge Karatu Hotel and Bougainvillea Safari Lodge. The plaintiff contended that, the tourists and visitors liked his food as they expressed their satisfactory through the questioner and the tip box. It was further claimed by the 2 | Page plaintiff that the 2nd defendant and the late Mr. Jacob Ombay without the consent of the

plaintiff publicized the plaintiff's image and likeness on the advert commercially branding the Country Lodge Karatu Hotel, Baghayo garden and other hotels. Even after his termination, the plaintiff lamented that the defendants are still using his image to attract their business and to date, the defendants have managed to launch nine other tourists' hotels under the branding name of Bougainvillea Group of Lodges Alternatively Bougainvillea Group. The plaintiff added that, the act of the defendants using his image in their business has denied him employment in other tourist companies on reasons that his image is advertising their competitors. The plaintiff thus prayed for judgment and decree against the defendants jointly on the following orders;

1. Defendants jointly and severally to pay the plaintiff One Billion Tanzania Shillings (Tshs. 1,000,000,000/=) as general damages for continuing misappropriating his image and likeness for ten years now.
2. Defendants jointly and severally to pay Six Hundred Million (Tshs. 600,000,000/=) as specific damages for loss of 2% compensation 3 | P a ge payable to him for use of his image and likeness for commercial super profiting.
3. Defendants jointly and severally to pay Tshs. Eleven Million Two Hundred Thousand (Tshs. 11,200,000/=) for loss of salaries payable to him had his image appearing in a different employer were expunged on time to secure his employment with KIRURUMU TENTED LODGE.
4. Defendants jointly and severally to pay interest at commercial rate of 21% annually out of the total sum prayed in number 1-3 above.
5. Costs.
6. Any other remedies that this honorable court deem just to grant. Upon being served with the copy of both the plaint and the amended plaint, the defendants jointly opposed the plaintiff's claims through their joint written statement of defence. In their defence, the 2nd defendant denied to have any legal relation or interest with the 1st defendant. The 2nd defendant also contended to have never involved himself with the business of the 1st defendant and that the plaintiff has never been an employee of neither the 1st defendant, 2nd defendant nor the late Mr. Jacob Ombay. The defendants further disputed to have publicize the plaintiff's image or the like and the further claimed that the 2nd 3rd, 4th 4 | P a ge and 5th defendants were wrongly sued in their individual capacity. As to the allegation on loss of employment from other employers, the defendants averred that there was no proof on the genuineness of the letter from KIRURUMU TENTED LODGE denying the plaintiff employment. The defendants maintained that they have never engaged the plaintiff in any business nor do they have any employment relationship. Therefore, it was their stand that the plaintiff has no any legal claims against the defendants and that this suit be dismissed with costs. Having consulted the parties' advocates, the following issues were framed for determination of this dispute;

1. Whether the plaintiff was an employee of the defendants.

2. Whether the defendants used the plaintiff's image to advertise their business/hotels located within Karatu District in Arusha Region.
3. If the 2nd issue above is answered in affirmatively, the 3rd issue is, whether the defendants achieved any financial gains through the alleged unpermitted advertisement.
4. Whether the plaintiff suffered special damages in event when the 2nd issue is determined in affirmative. 5 | P a g e
5. To what extent of reliefs the parties are entitled to. In proving his case, the plaintiff summoned a total of three (3) witnesses namely; The plaintiff, Vitalis Safari Gamba as (PW1), Thomas Shauri testified as (PW2) and Emmanuel Muhando as (PW3). The plaintiff was the first to kick the ball, in his testimony he informed this court that in the years 2013 he was employed by the 1st defendant as a chef. He worked at Country Lodge Karatu as a chef. To prove his employment relationship with the defendants, PW1 tendered three ID cards from Country Lodge Karatu and Bougainvillea Safari Lodge & Tours. They were admitted in court and marked as exhibits P1, P2 and P3 respectively. PW1 went further to testify that he was working with the Country Lodge and that his photo was used to advertise the business of Ngorongoro Coffee Lodge, Bougainvillea Safari Lodge, Marera Valley Lodge and Eyasi Lodge. According to him his photo was used in brochures which were circulated within the country and some were sent abroad. PW1 tendered two brochures from Country Lodge and Baghayo garden Suites, the same were admitted and marked as exhibit P4. PW1 went further to testify that according to exhibit P4 his photo is on the right part and it shows that he was carrying Ngorongoro basket and 6 | P a g e he is wearing kitchen coat as a chef. This exhibit was advertising Baghayo Company as their chef. The second brochure is of Country Lodge Karatu and his photo is on the right part advertising him as a chef of Country Lodge. All these brochures are posted in social media and since 2013 to date the defendants have not removed the photos. PW1 maintained that he never entered into any agreement with either Country Lodge or Bougainvillea for them to use his phot to advertise their business. As a result of the defendants using his photos, PW1 lamented cannot get another job from other tourist companies on the reason that his image is used by the defendants. PW1 tendered a letter from KIRURUMO Tented Lodge proving that he was denied employment due to his images being used by other companies. The letter was received in court and marked as exhibit P5. PW1 also contended that due to financial difficulties, he was forced to shift his child who was in a private school namely; Costigan English Medium School to a Government School. The letter from Costigan English Medium School was admitted as exhibit P6. PW1 went on to testify that, as he noted the use of his photos by the defendants, he wrote a letter claiming for 4% or 10% of the profit for 7 I Page using his photos. The defendants then replied to him that they would offer him 1% or 2% of the profit for using his photos. PW1 prayed for the letters to be admitted in court and the same were received and marked as exhibit 7 and 8 respectively. The plaintiff thus prayed this court to grant all the claims he has against the defendants. On cross examination by Mr. Emmanuel Safari, PW1 stated that the brochures he tendered were from Country lodge and that he did not bring brochures used

by the 1st defendant. Still under cross examination by Mr. Safari, PW1 stated that Country Lodge has not been sued in this suit and that he has never worked with the 1st defendant. Moreover, he also stated that the said photos did not bear his name he identified them by his facial appearance. With regard to variation of names of the plaintiff and those appearing in his ID cards (exhibits P1 P2 and P3) PW1 stated that the names are different but they are the names of the same person. PW1 also stated that he has sued the 2nd defendant on the reason that he used his photos to advertise his hotel Bhagayo Garden Suites Lodge as part of the Bougainvillea Group which he also stated that he never sued Bougainvillea Group of Lodges. During reexamination, PW1 stated that the owner of Ngorongoro Coffee, Lake Eyasi Lodge and Country Lodge is the 1st defendants and that these hotels are branches of the 1st defendant. 8 | P a g e The testimony of PW1 was supported by that of PW2 and PW3 whereas PW2 testified to have known PW1 as an employee of Bougainvillea Safari Lodge and Country Lodge. He is also among the witnesses who witnessed the photos of PW1 on social media being used by Country Lodge Karatu, Bougainvillea lodge, Lake Eyasi Lake, Marera lodge and Baghayo lodge. He tendered the print outs of the plaintiff's photos from the social media and the same were admitted and marked as exhibit P9 collectively. He also tendered e mail print outs of the 1st defendant stating that she is the owner of the hotels. The print outs were admitted in court as exhibit PIO. On cross examination by advocate Samwel Weiwei, PW2 stated that it is Country Lodge which posted the plaintiff's photos. PW3 on the other hand testified to have seen the plaintiff's photos through his sister's phone. According to him, the photos were used by Bougainvillea to advertise their business. The defendants on the other hand entered their defence through DW1 Jacob Stephen Laizer, DW2 Englibert Barnabas Rwabuhingi, DW3 Nicodemus Jacob Ombay and DW4 Reginald Bagayo Bayo. For the purposes of this judgment, I shall have the testimony of each witness summarized briefly hereunder; 9 | P a g e I shall begin with the testimony of DW1, he testified to be employed by HOOPE Adventure Tours Tanzania Ltd which also services to KIRURUMO Tarangire Lodge, KIRURUMO Mobile Camp Serengeti and KIRURUMO Mobile Camp Ngorongoro. His working position was an internal auditor and a human resource officer. His testimony basically established that as a human resource officer he has never came across the plaintiff seeking for employment opportunity in their company. He also faulted the letter that was tendered by the plaintiff stating that in their company letters must bear a logo, a picture of the bird company address, website, email, telephone number and location at the bottom. He went further to state that the letter must be a headed letter and must bear the name of the author, his title and a stamp of HOOPE Adventure. According to him exhibit P5 is not a letter from their office as it does not meet the qualities identified above. DW2 on the other hand introduced himself as a Senior Registration Officer of BRELA. The testimony of DW2 was mainly to demonstrate whether there was a relationship between Bougainvillea Safari Lodge and Country Lodge Karatu. DW2 stated that Bougainvillea Safari Lodge was registered in the year 2005 with 5 shareholders while Country Lodge Karatu was registered in 2010 with 3 shareholders. Moreover, DW2 testified that Bougainvillea Safari Lodge has no shares with 10 | P a g e Country Lodge Karatu likewise Country Lodge Karatu and that each company has her own independent directors. DW2 went further to state that even Marera Valley, Lake Eyasi,

Baghayo Garden Suite, Ngorongoro Coffee Lodge are not related to Bougainvillea Safari Lodge, neither are they shareholders nor directors. On the part of Bougainvillea Group of Lodges, DW2 stated that this name is not found/registered in BRELA website. DW3 testified as the director of the 1st defendant. According to his testimony he does not dispute to know the plaintiff and that he was employed at Country Lodge Karatu. He tendered the employment letter and the same was marked as exhibit D2. Nevertheless, DW3 contended to have known the plaintiff by the name of Vitalis Crisent Gemba unlike the name he has used in this suit. DW3 maintained that the plaintiff's claims are unfounded on the reason that the late Jacob Ombay and Reginald Bayo are shareholders and directors of the Country Lodge Karatu and therefore since the company is a legal entity it was improper to sue them in their names. DW3 also challenged the genuineness of the plaintiff's ID bearing the name of Bougainvillea Safari Lodge and Tours. According to him this ID is fake because it was not issued by the named companies. As a director he has reported to the Police on the fake documents through RB No. KRT/CID/PE/37/2024. 11 | P a g e On cross examination by Mr. Basila, DW3 maintained that Bougainvillea Safari Lodge does not own any other company. It is an independent Company. According to him, the late Jacob Ombay owned Sangaiwe Tented Lodge, Lake Eyasi Safari Lodge, Ngorongoro Coffee Lodge and Thorn Tree Camp. DW4 was the last witness to testify on behalf of the defendants. He testified to be in partnership with the late Jacob Ombay in respect to Country Lodge Karatu. However, he stated that he also owns Marera Valley View and Garden suites. DW4 identifies the plaintiff as his nephew and also he worked with him at Country Lodge Karatu when he was the head Chef. He maintained that the plaintiff has no any claim against him and if at all there are claims, the same ought to have been brought against the company. DW4 also insisted that Country Lodge Karatu has not been impleaded in this suit. The plaintiff in this suit is under the legal representation of advocate Patrick Maligana, Sabato Ngogo and Moses Basila. On the other hand, the defendants were represented by the learned counsel Mr. Emmanuel Safari, Samwel Weiwei and Geoffrey Mollel. At the end of the trial, the parties through their learned counsels addressed the court as to whether this suit is meritorious through their closing submissions which I will 12 | P a g e dully consider while determining the issues raised as to be discussed shortly; On the first issue, whether the plaintiff was an employee of the defendants. The answer to this question takes me back to the testimony of PW1, the plaintiff in this suit. In his testimony the plaintiff stated that he was employed by the 1st defendant Bougainvillea Safari Lodge Limited. However, he went further to state that he worked with Country Lodge Karatu as a chef cook. PW1 tendered the ID cards to substantiate his employment. I have keenly gone through the ID's tendered by PW1. In the first place the two ID cards appears to have been issued by COUNTRY LODGE - KARATU and BOUGAINVILLEA SAFARI LODGE & TOURS. The plaintiff also issued a badge as P3, likewise, this badge also appears to have been issued the COUNTRY LODGE - KARATU. It should be remembered that in this suit neither the COUNTRY LODGE - KARATU nor BOUGAINVILLEA SAFARI LODGE was impleaded as defendants. I have noted that the plaintiff in his testimony maintained that the COUNTRY LODGE - KARATU is a branch of the 1st defendant, nevertheless, this evidence was countered by that of DW2 an officer of BRELA who clearly

testified that Country Lodge Karatu and the 1st defendant are two independent legal companies having different 13 | P a g e shareholders and directors. The evidence of DW2 to me is very credential as it also gets support from that of DW4 Mr. Reginald Bagayo Bayo who in this suit appears as the 2nd defendant. In his testimony he stated that there is no business that was registered by his name. He went further to state that he was in partnership with the late Mr. Jacob Ombay in respect of Country Lodge Karatu which is an independent legal entity capable of suing and being sued and therefore the plaintiff's claims have nothing to do with him. I have also taken into consideration the employment contract of the plaintiff that was tendered by DW3. In this exhibit(D2), the employment contract was between the plaintiff and Country Lodge Karatu where he was employed as a Chef. There is nowhere the employment contract mentioned either of the defendants or all the defendants as the employers of the plaintiff. At this juncture it is worth noting that it is elementary that an incorporated company Is a legal person with rights and liabilities. The same can sue and be sued and it is separate from its members. See the decision in an old case of Solomon vs Solomon [1897] AC 22. In the matter at hand the plaintiff, despite his efforts to show the relationship between the 1st defendant, 2nd defendant, 3rd defendant, 4th 14 | P a g e defendant, 5th defendant and Country Lodge Karatu as his employers, but it is unavoidable fact that the plaintiff has not sufficiently established that he was employed by the defendants. From the facts gathered in the evidence of both the plaintiff's case and the defendants' case, despite the non-joinder of the alleged Country Lodge Karatu which to me is a necessary party, yet, the plaintiff sued the 2nd defendant 3rd defendant 4th defendant and 5th defendant in their personal capacities. Pursuant to the principal derived from the above cited case of Solomon vs Solomon the liability of the company should be distinguished from its members. If at all the plaintiff wished to sue the 2nd, 3rd 4th 5th defendants in their personal capacities certain procedures ought to have been followed including the lifting of the corporate vail. See the decision of the Court of Appeal of Tanzania in the case of Yusufu Manji vs Edward Masanja & Abdallah Juma [2006] TLR 128. Moreover, it is my observation that the plaintiff in suit is referred to as VITALIS SAFARI GEMBA whereas in his employment contract and employment IDs he is referred to as VITALIS CRISENT GEMBA, VITALIS CRISENT and VITALIS C. GEMBA respectively. In his testimony he admitted the fact that the two names are different but maintained that the names refer to the same person. With due respect, I find this statement wanting for it lacks support of an affidavit to support that the 15 | P a g e two names refer to the same person. In the absence of an affidavit in that regard, it remains that they refer to two different persons. Further to that, this court has also given a quick glance of the signatures of the plaintiff in the IDs. From their outlook the signature of the plaintiff in the ID issued by Country lodge karatu is different from his signature in the ID issued by Bougainvillea Safari Lodge & Tours. With the above observation, it suffices to say that the plaintiff insufficiently proved his employment with the defendants and therefore this issue is answered in negative. I now turn to the second issue, Whether the defendants used the plaintiff's image to advertise their business/hotels located within Karatu District in Arusha Region. This issue does not need to detain me much. This issue is sufficiently answered through exhibit P4 and P9 collectively. According to exhibit P4 the plaintiff alleged

that the defendants used his image in the brochures which were used to advertise their business both within the country and outside the country. I have had time to go through Exhibit P4, the first brochure belongs to Baghayo Garden Suites which is not party to this suit, and pursuant to the evidence of DW2, it is an independent legal company having no relationship with the 1st defendant as contended by 16 | P a g e the plaintiff. Likewise, the second brochure belongs to Country Lodge Karatu which is also not party to this suit. Therefore, according to exhibits P4 the plaintiff has not given sufficient proof that the defendants in this case are directly involved in using his image to advertise their business. Exhibit P9 collectively also suffer the same as in exhibit P4 above on the reason that looking at the photos they all derived from Country Lodge Karatu Google account. The law places a burden of proof upon a person who desires a court to give judgment and such a person who asserts the existence of facts, to prove that those facts exist (Section 110 (1) and

- (2) of the Evidence Act, Cap.6 R.E 2019. Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability. In this issue, it is my firm view that the plaintiff has not sufficiently discharged his evidential burden to prove that the defendants herein used his images to advertise their business. Again, this issue is also not answered in affirmative. Having resolved the first and second issues in the affirmative, I find no compelling reasons to delve on determining the rest of the issues since the first two issues have dissolve the suit. 17 | P a g e The above said and discussed, I find no merit in this suit and I consequently proceed to dismiss it with costs. It is so ordered. DATED at ARUSHA this 1st day of November, 2024. 18 | P a g e

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