

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCCS NO 0298 OF 2012**

SIKUKU AGAITANO}.....PLAINTIFF

VS

UGANDA BAATI}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action against the Defendant for declaratory orders that the Defendant is unfairly benefiting from the use of his images in their advertisements. He seeks a declaratory order that the Defendant is unfairly benefiting from the use of his image in its promotional advertisements on various television stations. Secondly the plaintiff seeks an order for the payment of **Uganda shillings 150,000,000/=** as usage fees from November 2011 to the date of filing this suit. Furthermore the suit is for assessment to be made for payment beyond the date of filing the suit on the ground of continuous breach; General damages for unfair benefit by the Defendant; interest of 27% per annum on the above claims from the time of filing the suit until payment; any other relief that the court may deem fit to grant and for costs of this suit.

The Defendant denied the claims and preliminarily objected to the suit on the ground that the plaint discloses no cause of action. The preliminary objection was overruled on 15 January 2014 and the matter proceeded on the merits. In compliance with Order 12 rule 1 of the Civil Procedure Rules Counsels filed a joint scheduling memorandum. In the joint scheduling memorandum it is agreed that the Plaintiff is an Employee of the Defendant. Secondly the Plaintiff's 'image' was

used by the Defendant to advertise on TV stations namely WBS and NTV and print magazines and calendars until May 2013.

The Plaintiff's case as contained in the joint scheduling memorandum and in the plaint is that between the months of November 2011 to about May 2013 the Defendant used his image in commercial advertisements which were run in several local television stations as agreed above. Secondly the Defendant used the Plaintiff's picture/image on the companies "Contractors Year Planner" calendar which they distributed to their customers. The Defendant did not at any one time seek the consent of the Plaintiff nor was any consideration given to the plaintiff for the use of his "image". Finally the Plaintiff contends that the Defendant's actions amount to infringement of his "constitutional, image and neighbouring rights".

On the other hand the Defendant's case as disclosed in the joint scheduling memorandum is that the Plaintiff is an Employee of the Defendant Company and was one of the many Employees who volunteered to have their 'images' used for its advertisements and no financial consideration was given to any of them. Secondly the Plaintiff consented to the use of his 'image' and never at any time formally objected or expressed any problem with the use of his 'image' for the advertisement. Finally that the Plaintiff is not entitled to the reliefs claimed.

The facts in controversy as agreed for trial are whether the consent of the Plaintiff was obtained to utilise his image in the commercial advertisement of the Defendant? Secondly whether the Plaintiff's rights (image/neighbouring rights) were infringed by the Defendant.

The agreed issues are:

1. Whether the Plaintiff has a cause of action against the Defendant.
2. Whether the Plaintiffs neighbouring rights were infringed?
3. Whether the Plaintiff is entitled to any remedy or relief?

The Plaintiff is represented by Deus Nsengiyunva of Messieurs Ayigihugu and Company Advocates and Solicitors which firm took over from Messieurs Nasuna

and Company Advocates who initially drafted and filed the plaintiff's pleadings. Ayigihugu and Co. Advocates took over the conduct of the Plaintiff's Suit subsequently. The Defendant is represented by Doreen Nanvule and Jamina Apio of Messieurs Shonubi Musoke and Company Advocates.

The Plaintiff testified in person and did not call any other witness while the Defendant called 4 witnesses whereupon the court was addressed in written submissions. The facts are sufficiently dealt with in the written submissions and the factual controversies are resolved in the judgement.

Submissions

The Plaintiff's Counsel submitted that the Plaintiff is an Employee of the Defendant where he works as a machine operator and has been in the employment of the Defendant for 18 years. From about November 2011 to around May 2013 the Plaintiff's images, pictures, still photos and motion pictures were used by the Defendant in its advertisement on several television stations namely NTV, UBC, and WBS. The pictures appeared in the New Vision and Monitor newspapers and the contractor year calendar of the Defendant magazine owned and printed by a company known as SAFAL magazine. The Plaintiff's contention is that the Defendant did not at any one time seek his consent nor was there any consideration given to him for the use of his images. The Plaintiff contends that he did not authorise the use of his images, pictures for the advertisements. Furthermore the Defendant's actions amount to infringement of his constitutional and neighbouring rights. The Plaintiff further contends that the Defendant was taking benefit without consideration by the use of his images for the commercial advertisements. Consequently the Plaintiff has suffered damage as a result of the infringement and is entitled to the usage fees of his images and damages.

In reply the Defendant's Counsel conceded that the Plaintiff has been employed by the Defendant for the past 18 years as a machine operator. Sometime in 2011 the Plaintiff among several other Employees, volunteered to participate in a photo shoot in which his still, audio and visual images would be featured in an

advertisement. In the premises the Plaintiff is not entitled to any of the claims and no right of his was infringed or violated.

Whether the Plaintiff is a cause of action against the Defendant?

The Plaintiff's Counsel submitted that the Plaintiff has a cause of action against the Defendant. The cause of action means a bundle of facts which give rise to a right of action. In **Halsbury's laws of England fourth edition volume 37**, it is defined as the factual situation the existence of which entitles one person to obtain from the court a remedy against the other. Consequently the facts clearly show that the Plaintiff is entitled to obtain the relief from the court. The claim of the Plaintiff originates from the Copyright and Neighbouring Rights Act 2006. The facts of the case are not denied but have been admitted by the Defendant. These are the facts that the Plaintiff is an Employee of the Defendant and his image was used in the advertisements.

Under section 45 (1) of the Copyright and Neighbouring Rights Act 2006, a person whose rights are in imminent danger of being infringed or are being infringed may institute civil proceedings in the commercial court to prohibit the continuation of the infringement. The section is self explanatory and permits an aggrieved person to bring an action in the commercial court. Section 21 of the Copyright and Neighbouring Rights Act provides that neighbouring rights are attached to the auxiliary role played by performers for the fulfilment of literary works and artistic works, the provision of destiny and permanence in works etc. The Plaintiff contends that his images were used without his authorisation or consent. The Plaintiff's Counsel submits that the Plaintiff can be categorised as a performer. And that this was not denied. What is only disputed is the authorisation and his rights as a performer as to whether it is protected by the law. Counsel submitted that there was no authority to take photos or pictures of the Plaintiff and there was no authority to publicise, fix them or broadcast them in infringement of the provisions of the Copyright and Neighbouring Rights Act 2006. On the basis of the facts the Plaintiff is entitled to a remedy in damages as provided for under section 45. With regard to whether the Plaintiff has a cause of action Counsel relied on the case of **Auto Garage versus Motokov [1971] EA 514** that the three essential

elements to support a cause of action are where the Plaintiff enjoyed a right; that the right has been violated; and finally that the Defendant is liable. The Plaintiff's rights are established under the Copyright and Neighbouring Rights Act and consequently the Plaintiff enjoyed a right. The violation and liability of the Defendant are admitted and are not in contention.

In reply on the issue of **whether the Plaintiff has a cause of action?** The Defendant's Counsel does not disagree with the law as summarised in **Auto Garage versus Motokov [1971] EA 514** on the essential ingredients of a cause of action. Secondly the Defendant's Counsel agrees with the law under the Copyright and Neighbouring Rights Act 2006. The Defendant's case is that it is true that the Plaintiff enjoys a right to the use of image but such a right cannot be violated where consent has been obtained. The Plaintiff gave his consent and the photo shoot for the use of the still images in the Defendant's in-house SAFAL magazine, the Contractors Year Planner and the use of its audiovisual images in the national media. The Defendant cannot be held liable where the Plaintiff freely gave his consent/authorisation from the use of his images in the various media. The Plaintiff's submissions that the Defendant admits violation and liability are obscure and presumptuous and it is not anywhere stated in the pleadings or evidence. In the premises the Defendants Counsel prays that the court should find that the Plaintiff has failed to prove a cause of action against the Defendant because he had consented to the use of his image.

In rejoinder the Plaintiff's Counsel submitted that the Defendant seems to agree that the Plaintiff actually has a cause of action in light of the provisions of the Copyright and Neighbouring Rights Act 2006. What is disputed is whether there was consent or authorisation. In the premises the Plaintiff has a cause of action and the issue of whether there was consent or authorisation should be dealt with in the second issue.

Whether the Plaintiff's neighbouring rights were infringed?

The gist of the Plaintiffs case as presented by the Plaintiff's Counsel is that the Plaintiff never consented or authorised the use of his images. The Defendant on

the other hand contends that the Plaintiff consented to the use of his images. Consent under the Contract Act 2010 means agreement of two or more persons obtained freely upon the same thing in the same sense. DW1 Ojambo John when asked whether the Plaintiff authorised the taking of his pictures, testified that he was not aware. Secondly DW2 Mr Wilfred Mayende testified that the Plaintiff consented to it but he did not know to whom he consented. DW3 Mr Varun Sood when asked as to whether the Plaintiff authorised the taking of his photos never answered the question. He testified that a meeting was called to brief everyone about the event. Secondly in re-examination he was of the opinion that there was no objection to the photo and advertisement. Counsel submitted that this was an opinion and was not a fact. As far as DW4 Dennis Tushabe is concerned he does not know whether there was any authority from the Plaintiff. He was not present when the meeting was called and he does not know what was discussed.

Counsel contends that from appearances a meeting was called and the Plaintiff was supposedly present and it was discussed that there was to be a shooting of photos and video recordings at the Defendant's premises and no one objected to it and consequently this amounted to consent and authorisation to use it in commercial advertisements. Counsel contends that this did not amount to an agreement and does not amount to authorisation. He submitted that consent to take pictures was not authorisation to use the pictures in advertisements. Under section 22 (1) (2) (3) of the Copyright and Neighbouring Rights Act 2006 a person has a right to authorise the commercial rent to the public of his or her performance.

In this case there was no authorisation. According to the Oxford Advanced Learners Dictionary the word 'authorisation' means the power or official permission to do something which is related to writing. Authorisation must be in writing. Counsel contends that no single document was presented to show that the Plaintiff authorised the taking of his photos or its use in advertisements. By merely attending a meeting and having new uniforms distributed for the occasion was not sufficient to amount to authorisation or consent. None of the Defendant's witnesses committed themselves to the fact of whether the Plaintiff

authorised the use of his pictures. Furthermore Counsel contended that even if there was consent as alleged, the dealings between the Employees of the Defendant are governed by the agreement signed between the Defendant and the Allied Workers Union. When dealing with Employees the Defendant bargains with Uganda Building Construction Civil Engineering Cement and Allied Workers Union. No meetings were convened by the Union. The union was not involved in dealing with the Plaintiff or other persons whose pictures were taken. None of the union members were present according to the testimonies of the defence witnesses and in effect this would have rendered the agreement reached null and void. Furthermore Counsel for the Plaintiff submitted that the Plaintiff is not a model and it is not part of his terms of reference to be involved in the advertisements of the Defendant's products. The pictures were taken during the course of the Plaintiff's employment. He was on duty going about his daily routine. It was not a special day when he would have exempted himself from the photo shoot. All the defence witnesses confirmed that the Plaintiff was on normal duties and was not required to take special measures for the arrangement. Consequently the Plaintiff's Counsel concludes that the Plaintiff could not have excused himself from work he was carrying normally and it was not aware of what was going on. In the premises there was no consent or authorisation to take and use the Plaintiff's images and this violated his rights.

In reply on the issue of whether the Plaintiff's Neighbouring rights were infringed? The Defendant's Counsel maintained that the Copyright and Neighbouring Rights Act 2006 defines neighbouring rights as rights attached to the auxiliary role played by performers and a performer includes actors, singers, musicians or other persons who perform literary works.

The defence evidence through DW3 Mr Varun Sood is that a week prior to the intended photo shoot, he met with all supervisors of the different departments and briefed them on the upcoming events. He further called a staff meeting at the Defendant's workshop where all Employees were in attendance including the Plaintiff. At the meeting Employee were briefed about the upcoming events in which DW3 explicitly explained that this was a voluntary activity and all

Employees who were interested in participating were free to and in order to do so, were advised to sign for a new uniform. In addition all Employees were informed that the photo shoot would take place while they were performing their duties and the still photos and audiovisual images would appear in the Defendant's in-house magazine; the SAFAL magazine, its Year Planner as well as in the country's national media including television. DW1 Mr Ojambo John also testified that DW3 briefed all staff members and the Plaintiff was in attendance. The briefing informed the members about what would happen and also informed them that it was voluntary and all interested participants were advised to come for new uniforms in order to be part of the photo. The Plaintiff was wearing a new uniform which he had signed for in order to be part of the photo shooting. Evidence was adduced of the Plaintiff wearing a new uniform which was different from his usual uniform in which he was operating the machine. The Plaintiff did not deny this. In addition the Plaintiff stated that he knew that his image has been taken because there was a photographer. He also stated that he did not inform anyone that he was not interested in participating in the event. DW2 Mr Wilfred Mayende testified that the Plaintiff like all other Employees joined the group receiving uniforms so that they could participate in the photo shoot.

The evidence shows that PW1 consented to the use of his image by participating in the event. He was aware that it would appear in various media and he was aware that it was a voluntary participation which required obtaining a new uniform which he did obtain. He participated and clearly indicates that consent and authorisation was given by the Plaintiff and obtained by the Defendant. The Defendant obtained sufficient consent and authority from the Plaintiff and the Plaintiff has failed to prove otherwise. The use of the Plaintiff's image was done after obtaining consent and the Plaintiff is estopped from denying that he gave consent. The Plaintiff is an Employee of the Defendant Company and has a fiduciary duty as it is out of the employment relationship to promote the Employer's business.

The Defendant's Counsel further maintains that the Plaintiff cannot claim to have suffered any infringement as the photos were used for the promotion of the

Employer's business with this consent. The preparations before the photo shooting included face lifting, painting and the Plaintiff never objected to the same. And at the briefing of all Employees it was clearly stated that the photos were for use in the Defendant's in-house SAFAL magazine, the Contractor's Year Planner and use in the national media. Consent that was given by the Plaintiff and the taking of the photo was for the use of the audiovisual materials. The Plaintiff was in attendance when the briefing to the staff was made. Secondly the Plaintiff went and obtained a new uniform which fact was not disputed and the uniform was issued for the photo shoot.

DW4 testified that there was no discrimination as regards the employment in as far as Union workers were concerned and the Union only address the terms of employment and union workers only form a small percentage of the Employees of the Defendant. Consent is individually given and the union could not give the same on the Plaintiff's behalf. The fact that the Plaintiff belongs to the union does not in any way mean that he doesn't audit Defendant in a fiduciary duty yet there is an Employee/Employer relationship. Whereas it is true that the Plaintiff is not a model, he was never asked to pose in any way but was instead asked to continue with his work and not to pay attention to the camera crew. The photos were taken sometime in the year 2011 and the Plaintiff did not raise any complaint about the same until much later. The court ought to find that the Plaintiff freely gave his consent for the use of his images and cannot therefore claim that his neighbouring rights were infringed.

In rejoinder the Plaintiff's Counsel maintains that there was no consent or authorisation. The wearing of a new uniform does not imply consent. Secondly authorisation must be in writing and all defence witnesses failed to prove that there was consent whether implied, constructive or express. There was no authorisation at all of which the law clearly stipulates that the performer has a right to authorise the use of images. There was no authorisation and no written document whatsoever was adduced.

Whether the Plaintiff is entitled to a remedy all relief?

On this issue the Plaintiff's Counsel relies on section 45 (4) of the Copyright and Neighbouring Rights Act 2006 for the claim of damages for infringement of the Plaintiff's rights. Counsel further reiterates submissions that the Plaintiff's pictures were used in the media but the Plaintiff was not given any consideration for the use. The advertisements were for financial gain of the Defendant. Counsel contends that any person who appears on television as a model or actor is the generally expected to have benefited from the use of his image. In this case the advertisement was of a commercial nature from which the Defendant benefited. In the premises he prayed that the Plaintiff is awarded **Uganda shillings 150,000,000/=** as his fees. Secondly the Plaintiff be awarded general damages for infringement of his rights; punitive damages for the unconstitutional manner in which the privacy of the Plaintiff was infringed by the Defendant and costs of the suit.

In reply the Defendant's counsel submitted that the Plaintiff's rights were not infringed at all and therefore he is not entitled to any remedy or relief. It is not in dispute that the Plaintiff's image was used but this was after obtaining consent from him. The Plaintiff like all other Employees who appeared in the photo shoot did not receive any consideration for the same. Consequently the Plaintiff is not entitled to any remedies against the Defendant. Punitive damages as prayed for by the Plaintiff are not awarded in all matters/cases before court. Such damages are meant to punish the Defendants and none of the conditions set by the courts warrants the award of punitive damages in the matter before the court.

Judgment

I have duly considered the controversy as disclosed in the pleadings of the parties, the evidence adduced, the written submissions and applicable law. The first issue was the subject of a preliminary objection and the ruling of the court was delivered on 15 January 2014. As far as the plaint is concerned the decision of the court is that the plaint discloses a cause of action in that the Plaintiff asserts a right to his own images which were been used in certain advertisements by the Defendant. Secondly it is asserted that the Plaintiff's permission was not sought by the Defendant. I also ruled that the question of whether it was necessary to

seek the Plaintiff's permission is an issue fit for trial disclosed by the plaint. Furthermore the Plaintiff further stated that the Defendant's unilateral actions in taking a benefit without consideration would entitle him to claim for usage fees for eight months. Additionally the court ruled that the Plaintiff was seeking declaratory orders and in terms of Order 2 rule 9 of the Civil Procedure Rules, and judicial precedents reviewed, the Plaintiff's action for declaratory relief is not open to objection even if it is not possible to seek consequential relief. In fact even if the Plaintiff cannot establish a legal cause of action, his action may not be liable to be dismissed or struck out merely on account that he seeks a declaratory order. It is therefore strange that both Counsels of the Parties addressed the court on whether the Plaint disclosed a cause of action. I think the issue to be considered is whether the Plaintiff is entitled to the reliefs on the basis of the assertions in the plaint i.e. whether the Plaintiff is entitled to his images and whether his consent was necessary for the use of those images in the Defendant's advertisements on national television and print media on a point of law before dealing with questions of fact.

Furthermore I agree with the Plaintiff's Counsel in his submissions in rejoinder that because the Defendant relied on the question of consent and authorisation to use the Plaintiff's images, issue number one has partially been conceded to. The issue has been determined in as far as the question of whether the Plaintiff's action as disclosed in the pleadings, discloses a cause of action has already been decided. What is left for consideration is whether on a point of law and on the evidence adduced, the Plaintiff's permission was necessary for the Defendant to use the Plaintiff's photos and audiovisual recording on television telecasts and other print media, which fact of use is not denied by the Defendant.

The Plaintiff alleges infringement of his Constitutional rights as well as his rights under the Copyright and Neighbouring Rights Act. I will deal with his alleged constitutional rights after dealing with his rights, if any, under the Copyright and Neighbouring Rights Act.

In paragraph 3 of the plaint the Plaintiff's claim against the Defendant is for declaratory orders that the Defendant is unfairly benefiting from the use of his

images in its advertisements. The facts of the use of the Plaintiffs 'images' are not disputed by the Defendant. However in the submissions the Plaintiff's Counsel relied on the Copyright and Neighbouring Rights Act for the submission that the Plaintiff's neighbouring rights were infringed. The question is whether the Plaintiff according to the evidence or facts proved in the suit had any neighbouring rights.

The term "neighbouring rights" is defined by section 2 of the Copyright and Neighbouring Rights Act to include rights of performing artists in their performances, rights of producers and music publishers and rights of broadcasting companies in the programs and others as is provided under Part IV of the Copyright and Neighbouring Rights Act. The first concern is that the Plaintiff did not specifically allege breach of his neighbouring rights in the plaint. That notwithstanding in the ruling on the preliminary objection on the ground of want of cause of action, I decided that failure to quote the law was not fatal so long as the facts disclosed a cause of action under the law. In the joint scheduling memorandum the Plaintiff's Counsel asserts that the Defendant's actions amount to infringement of the Plaintiff's constitutional, image and neighbouring rights. It is therefore proper to establish whether the Plaintiff had any neighbouring rights in the circumstances even before considering the question of whether his consent was necessary.

Reference to neighbouring rights assumes that the Plaintiff is not the author of the works which is the subject to copyright ownership independently of the Plaintiff's right. Under section 21 of the Copyright and Neighbouring Rights Act and particularly subsection 1 thereof, neighbouring rights are rights attached to the auxiliary role played by performers, producers of sound recording and audiovisual and broadcasting companies. In other words neighbouring rights as the term suggests is auxiliary to the original works. Performance may be of a play to which copyright may belong to another author. The auxiliary role should be for the fulfilment of literary or artistic works; the provision of destiny and permanence in works; and the diminishing of distance in the publication of works. Finally section 21 (1) ends with the words: *"respectively, which auxiliary role is dependent on the work of the author and without which the role cannot begin."*

The performer links the work to the consumer through the performance or auxiliary role. The work of the performer is dependent on the work of the author. This demonstrates that the auxiliary is the intermediary between the original works and the consumer of the works. Neighbouring rights under section 21 (2) of the Copyright and Neighbouring Rights Act are rights attached to the auxiliary role of the performer or a producer or broadcasting company and do not in any way affects the copyright in the literary, scientific or artistic work from which it arises.

The Plaintiff is not an author of any literary, scientific or artistic work. The photographs and the organisation of the advertisement is the work of the Defendant who commissioned or paid some other persons to film and photograph. The Defendant employed professionals to create the work which ended as the advertisements in issue. The assumption is that the Defendant is the author of the works or the Commissioner of the works. Neighbouring rights are dependent on the original works created by an author which works enjoy copyright. Under section 4 of the Copyright and Neighbouring rights Act authors specified in section 5 enjoy copyright where the work is original and is reduced to material form in whatever method irrespective of the quality of the work or the purpose for which it is created. Under this section the work is original if it is the product of the independent efforts of the author. A list of the works affected under section 5 demonstrates that they include dramatic, dramatic – musical and musical works; audiovisual works and sound recording, including cinematographic works and other work of a similar nature. They include works of drawing, painting, photography, typography, mosaic, architecture, sculpture, engraving, lithography and tapestry.

The works could be classified under section 5 (1) (f) and (c) of the Copyright and Neighbouring Rights Act to include photographic, audiovisual works and sound recording. The Plaintiff complains about the use of these photos in a magazine of the Defendant as well as the use in newspapers for purposes of advertisement of the Defendant's products. Secondly the Plaintiff complains about the telecast of audiovisual recording of his person while working. The point to be made is that the facts disclose that the Plaintiff is not the author of the works.

I have additionally considered the definition of "performance" which means presentation of the work by actions such as dancing, acting, playing, reciting, singing, delivering, declaiming or projecting to listeners or spectators". The Plaintiff's Counsel suggested that the Plaintiff is a performer. The evidence demonstrates that the Plaintiff was going about his business when he was filmed and photographed. He was not required to pose for the photograph or for the filming though they had been given new uniforms for the occasion. He was filmed and photographed in the ordinary course of his performance as a worker. If the Plaintiff is an actor then his action must fall within the definition of "performer" under section 2 of the Copyright and Neighbouring Rights Act.

A 'performer' is defined to include an:

"actor or actress, singer, musician, dancer or other person who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."

From the definition under the Copyright and Neighbouring Rights Act the Plaintiff is not an actor because he was filmed and photographed in the ordinary course of his work as an Employee of the Defendant.

Section 8 of the Copyright and Neighbouring Rights Act provides that where a person creates a work in the course of employment by another person or on commission by another person or body, in the absence of a contract to the contrary, the copyright in respect of that work shall vest in the Employer or the person or body that commissioned the work. Had the Plaintiff claimed to be an author, the copyright in the works would have been with the Employer. I also conclude that the Plaintiff is not a performer whose action was deliberate so as to be a necessary ingredient of the works complained about and which ought to be paid in terms of performance fees and I will give the reasons for my conclusion in due course.

After considering all the above provisions I have come to the conclusion that the Plaintiff did not have the rights of an author under the Act. The term "author" as defined by section 2 of the Copyright and Neighbouring Rights Act means:

Decision of Hon. Mr. Justice Christopher Madrama

"... the physical person who created or creates work protected under section 5 and includes the person or authority commissioning work or employing a person making work in the course of employment."

The persons who created and did the video shooting or who employed the person who carried out the work of shooting the photos and video is/are the authors or author of the works. The exact relationship between an author and a person having neighbouring rights has to be clear and not hazy. A photographer who films activity in a market might not require permission of everybody in the market to publish or use the works. Neighbouring rights depend on and arise from original works of an author. Secondly when considering the economic rights of an author under section 9 of the Copyright and Neighbouring Rights Act, they include the right to publish and produce or reproduce the work and to distribute or make available to the public the original copies of the work through the sale or other means of transfer of ownership. The rights include the right to perform the work in public or of broadcasting the work and communicating the work to the public by wire or wireless means or through any other means of making the work available to the public; to commercially rent or sell the original or copies of the work.

It has not been proved to the satisfaction of court other than the fact that it is the Defendant who commissioned or instructed the carrying out of the works as to who the author of the works is. In the premises it cannot be concluded that the Plaintiff has any neighbouring rights associated with the original works presumably owned by the Defendant. The Plaintiff does not qualify to have neighbouring rights as protected by the Copyright and Neighbouring Rights Act 2006.

I will consider the evidence to conclude the issue and in so doing will exclude the issue of neighbouring rights as framed in the second issue. The Plaintiff's neighbouring rights were not infringed because it cannot be concluded that the Plaintiff had any neighbouring rights to the works especially the advertisements that were telecast on television and publications in print media.

The evidence of the Defendant's witnesses is that in 2010 the Defendant Company entered into negotiations with advertising companies to display all the products of the company because previously the company only showcased different products. According to Dennis Tusabe the Defendant Company intended to show the public the high-quality products made by the Defendant Company were produced in Uganda. As to whether the advertisement company required the Plaintiff's consent is not part of the Plaintiff's suit and cannot be considered. As part of the team the Defendants servants organised for a photo shoot at the factory and the Employees were briefed on the expected event. The Defendant's Servants took steps to clean up the factory and distribute new uniforms and protective gears to all Employees and ensure that the machines were working properly. All the Employees were aware of what was happening and according to DW4 they were enthusiastic. Dennis Tusabe testified as DW4. He admitted that the advertisements appeared in NTV and UTV as well as in the Monitor newspaper and the New Vision newspapers. It was also published in the SAFAL Magazine. DW1 Ojambo John testified the Plaintiff works under the colour section which consists of 10 to 12 staff per shift and he works in the day shift. In a meeting of supervisors they were informed by Mr Varun Sood, DW3 and the Works Manager that the event was going to take place to showcase the company's products. The date prior to the event the Plaintiff and other members of staff were briefed about the impending event. The brief was that a team would be visiting the factory to take the visual and audiovisual photographs and films. DW1 was cross examined and testified that the events took place on a working day. The Plaintiff was present. The photo was taken and the filming was done when the Plaintiff was working on his machine and he was not sure whether the Plaintiff was aware and whether he had authorised his picture being taken. He further testified in cross examination that anyone who was not willing to participate should not appear.

I have contrasted this testimony to that of the Plaintiff. The Plaintiff testified that his case against the Defendant is for unlawful use of his pictures and images when the Defendant was advertising its products. Secondly that the Defendant benefits from the use of his images for commercial purposes. The advertisements were

meant to promote products of the advertiser for commercial gain but the Defendant never consulted him about the use of his image. He testified that the use of his image without his consent was illegal and unlawful when the Defendant derives financial gain from the advertisements and marketing. He admitted under cross-examination that a uniform was given by the company. The uniforms are issued by the works manager but were given to him by the quality control or handed over the uniform. The plaintiff's case is that he ought to be paid for the photos and audio visuals of his person used in the Defendant's advertisements.

DW3 Mr Varun Sood the Works Manager and Acting Business Head of the Defendant Company confirmed that the event was intended to show the public the company's high-quality products which were being made in Uganda. He also testified that he briefed all the Employees and informed them that they would be a filming and photography event in which anybody was not willing to participate may not appear. A majority of the Employees had been with the Defendant Company for several years and were proud of their work. The filming was supposed to take place while the Employees were working. None of the staff members were required to pose in anyway but were to continue working normally. During the meeting that was called the Plaintiff never said anything. He was present when the photos were being taken and the Plaintiff was going on with his ordinary work.

Does the evidential material showcase the Plaintiff prominently as part of the advertisement? No television or audiovisual works were adduced in evidence to demonstrate what the film or video clips complained about are like. Secondly the only evidence in terms of exhibits comprises of photos exhibit P1 which is a calendar in which there is a photo having some workers in the background one of which is the Plaintiff. Secondly there is exhibit P2 comprising of an advertisement showing the Plaintiff at work. There are other workers also in view who are at work. It is debatable whether the advertisement prominently portrays the Plaintiff's photo or actually displays the Defendant's products together and incidentally with the workers engaged in the work of production of the products using the machinery. The plaintiff is not at all the major or main feature of the

advertisement. The headline reads “Uganda Baati”. Secondly it is written that it is “a welcome expansion as Uganda Baati takes over Tororo Steel Works Ltd”. Prominent in the photos is the machinery and the product which is purposefully displayed.

The definition of the term "author" includes a person or authority commissioning work or employing a person making work in the course of employment. The Plaintiff's photos were shot in the course of employment. Did the Employer have the duty to ask the Plaintiff to participate in the works? I.e. the works related to the audiovisual and photographic works for purposes of the Defendant's advertisement of the company and products.

Under the UK Copyright, Designs and Patents Act 1988 section 11 (2) as quoted in **Intellectual Property Sixth Edition by David Bainbridge at page 83**; the basic rule is that the author of the work is the first owner of the copyright. This would apply in a good number of cases to persons creating works, independent persons not employed under a contract of employment and even to employed persons if the work in question has not been created in the course of their employment. Where artistic work is made by an Employee in the course of his employment, the Employer is the first owner of the copyright subsisting in the work subject to any agreement to the contrary. This is similar to section 8 of the Ugandan Copyright and Neighbouring Rights Act which provides that where a person creates a work in the course of employment by another person, or on commission by another person or body, in the absence of a contract to the contrary, the copyright in respect of that work shall vest in the Employer.

I have already concluded that the Plaintiff did not enjoy any neighbouring rights since he is not a performer as defined by the Copyright and Neighbouring Rights Act. Finally no terms of employment of the Plaintiff were adduced in evidence so as to consider whether the Employer/Defendant was obliged to ask the Plaintiff to be present at work while filming was going on to advertise the Defendant's products. The Plaintiff is not an artist and he was not bringing special skills so as to properly present the Defendant's products. He was merely going about his business when he was filmed. Subject to any right of privacy which I will consider,

an Employer should have the right to take group photos of Employees for inclusion in a calendar or any other advertisement for purposes of advertisement of its products. Unless the photos or audiovisual works are used in a manner detrimental to the Employee such as the Plaintiff in this case, the Employer should have the right not only to talk about and present its Employees to the public but also to include them in an advertisement of the company's legitimate business. Where an Employee who works to produce products marketed openly does not want his or her photo or motion picture exposed to the public, he or she should make a reservation with the Employer and be able to present it to court to show that he or she had an agreement not to be included in any profiling of the company for purposes of advertisements in any broadcast or publication. Seeking permission is necessary courtesy of the Employer and in this case the Employees were informed about the event that was going to take place. The products could be showcased with other persons in view. In this case the other Employees have not complained and the implications of the Plaintiff's suit on the Defendant's production needs to be considered as well. They would obviously be a floodgate of claims against the Employer. In the premises the rights of the Plaintiff if any have to be considered on other premises.

The last question to be considered in the first issue is the right of privacy. I have considered the constitutional provisions on the right of privacy namely article 27 of the Constitution of the Republic of Uganda. Article 27 provides for the right to privacy of the person, or other property. It stipulates that no person shall be subjected to unlawful search of the person, home or other property of that person; or unlawful entry by others of the premises of that person. Secondly it provides that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property. For the Plaintiff to fit within the prohibitions to invasion of privacy under article 27 of the constitution of the Republic of Uganda, he has to demonstrate that there was unlawful interference with his privacy and with his property.

As an Employee of the Defendant it would be a suggestion that the consent of the Employee would be necessary before any photo can be taken of workers in the

course of their employment. In other words the court should consider whether photos of Employees taken in the course of their employment showing them at work cannot be used by the Employer for purposes of advertisement without consent or payment of consideration. The plaintiff should demonstrate that the filming or photo was taken in a private moment such as when eating or resting. Such a conclusion should be based on the terms of the contract. In the absence of the terms of any contract excluding an Employer from publishing photos and audio visual works of products including members of staff in a factory carrying out their work, the Plaintiff has no case presented before the court. As far as the rights to privacy is concerned, someone who works in a factory as contained in exhibit P1 and P2 cannot claim a right to privacy. The factory is owned by the Defendant and the Defendant can bring in people at any time to inspect the factory thereby excluding the rights to privacy.

In the premises the Plaintiff has not proved his case against the Defendant. It is up to the Defendant to consider the Plaintiff for any benefit on the basis of his participation which matter is between the Employee and Employer. The Plaintiff has not proved a right to claim any usage fees from the Defendant and his action is accordingly dismissed. I am mindful of the fact that the Plaintiff as an Employee was not fully advised about the law and in the premises considering the likely expenditure and cost that he would be subjected to, and his status as an Employee of the Defendant, as well as being a faithful Employee of the Defendant of 18 years standing, the Plaintiff's action stands dismissed with costs of one seventh of the costs to be taxed.

Judgment delivered the 5th of September 2014 in open court

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Doreen Nanvule Counsel for the Defendant

Decision of Hon. Mr. Justice Christopher Madrama

Deus Nsengiyinva Counsel for the Plaintiff

Plaintiff present in person.

Charles Okuni, Court Clerk

Christopher Madrama Izama

Judge

5/09/2014