

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 231 OF 2010**

MAUDA ATUZARIRWE}..... PLAINTIFF

VERSUS

- 1. THE PEPPER PUBLICATIONS LTD
(Publishers RED PEPPER)**
- 2. RICHARD TUSIIME (MANAGING EDITOR/
EDITOR IN CHIEF
THE RED PEPPER }..... DEFENDANTS**

RULING:

On the 3rd of November 2011 when the plaintiff's suit was mentioned for scheduling/pre-trial hearing, the court required Counsels for both parties to address it on its jurisdiction in the matter under rule 4 of the Practice Direction setting up the court as the plaint on the face of it appeared to be an action for the tort of libel, negligence etc.

At the hearing the plaintiff was represented by Counsel Jimmy Muyanja while the Defendant was represented by Counsel Maxim Mutabingwa.

In his address to court, Counsel Jimmy Muyanja submitted that at the time the suit was filed at the commercial court it was accompanied by a letter from the plaintiff's advocates indicating that one of the issues for trial was breach of copyright. The letter directed the registrars mind to section 45 of the Copyright and Neighbouring Rights Act 2006. Section 45 specifically vests jurisdiction in the commercial court whenever an issue in civil proceedings related to the breach and infringement of copyright arises.

The copyright issue arises from annex B to the plaint dated 13th June 2010 being the Sunday Red Pepper at page 25. Under paragraph 13 of the plaint, the plaintiff shows that the photo is an edition of a family portrait and that family portrait appears at annexure D top left. The photo of the plaintiff was cropped out of a Facebook page and pasted on the Defendant's Sunday paper. Counsel contended that there an issue arises as to infringement of a copyright. It is a photo not taken by the defendant through its investigative journalists.

A photo is work covered under section 5 (1) (f) of the Copyright and Neighbouring Rights Act 2006. Counsel submitted that section 45 of the said statute vests jurisdiction in the commercial court and consequently the plaintiff's case was properly lodged or filed at the commercial court. He further referred to section 33 of the Judicature Act which requires the court to finally determine any matter with a view to avoiding multiplicity of legal proceedings. He contended that the fact that other issues not falling within the mandate of the court are raised in the plaint is not something to be visited on the plaintiff.

Counsel Mutabingwa sought leave to reply at a later date as he had not read the Copyright and Neighbouring Rights Act 2006. He made his submissions in reply when the matter resumed today the 24th of November 2011.

The defendants contention is that the suit should not have been filed in the commercial court. As far as infringement of a copyright is concerned, Counsel contended that there is nothing in the plaint about such infringement of a copyright of the plaintiff. He referred to paragraph 5 of the plaint which refers to causes of action. Apart from this it is not stated anywhere. The question of copyright is pleaded again in the prayers. He contended that the plaint does not disclose a cause of action for infringement of copyright. Counsel maintained that the law protects authors of work. The plaint does not show that the plaintiff is an author of any work. He referred to section 4 of the Copyright and Neighbouring Rights Act 2006. The plaint does not talk about Copyright and infringement of that right. He contended that the plaint is about libel. In the premises he prayed that the suit be transferred to the court where it belongs.

In rejoinder counsel Jimmy Muyanja retorted that counsel had undertaken to make a written reply which he did not. Secondly he submitted with reference to paragraphs 11 (ii), 12 and 13 of the plaint that the paragraphs elaborate on the infringement. Consequently he contended that there is no truth in the assertion that infringement had not been pleaded in the plaint. Secondly he submitted that his learned colleague had not contested the statutory jurisdiction vested in the commercial court whenever any matter relating to infringement of copyright is alleged. Lastly he maintained that the issue of authorship is premature because it requires it is a matter of evidence.

I have considered the submissions of learned counsel and I agree with the plaintiff's counsel that the defendant's counsel has not contested the fact that matters of infringement of copyright fall within the jurisdiction of this court under section 45 (1) of the Copyright and Neighbouring Rights Act 2006 (Hereinafter referred to as the Act). Section 45 (1) of the Act provides as follows:

“45. Civil remedies

(1) Any person whose rights under this Act are in imminent danger of being infringed or are being infringed may institute civil proceedings in the Commercial Court for an injunction to prevent the infringement or to prohibit the continuation of the infringement.”

The section gives jurisdiction to the commercial court to grant injunctions to prevent infringement or prohibit the continuation of infringement of any person's rights under the Act which rights are in imminent danger of being infringed or continuing to be infringed.

Rule 4 of the Constitution (Commercial Court) (Practice) Directions 1996 which sets the Commercial Court Division provides that “The business of the commercial court shall comprise all actions arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, and include, but not be limited to:

- “(a) the supply or exchange of goods and services;
- (b) banking, negotiable instruments, international credit and similar financial services;

- (c) insurance, reinsurance;
- (d) the operation of stock and foreign exchange markets;
- (e) the carriage of goods (by water, land and air); and
- (f) foreign judgments and commercial arbitration questions. “

Rule 4 (2) further provides that in the event of any doubt as to whether a matter is commercial or not, the registrar at the outset or the commercial judge during the course of the action will have power to resolve differences of opinion.

The preamble to the Copyright and Neighbouring Rights Act, 2006 provides that it is an Act to repeal and replace the Copyright Act, and to provide for the protection of literary, scientific and artistic intellectual works and their neighbouring rights; and to provide for other related matters. Section 3 of the Act which deals with the application of the Act applies the Act to any work, including work, created or published before the commencement of the Act, which has not yet fallen into the public domain where the work is, “(a) created by a citizen of Uganda or a person resident in Uganda; (b) first published in Uganda, irrespective of the nationality or residence of the author; (c) created by a person who is a national of or resident in a country referred to in section 81 or; (d) first published in a country referred to in section 81.”

There are two major elements to consider in establishing whether the commercial court has jurisdiction under rule 4 of the Practice Direction creating the court. These are whether the created works are works envisaged under the Act and secondly whether the plaint discloses a cause of action of breach of a copyright as pleaded in paragraph 5 of the plaintiff’s amended plaint.

As far as the issue of whether the plaint discloses a cause of action envisaged by the Copyright and Neighbouring Rights Act for protection, I have considered the salient provisions of the Act referred to by Counsel for the parties and read some additional provisions that I found relevant in this matter. As stated above the mischief which Parliament intended to deal with in the Copyright and Neighbouring Rights Act can be discerned in the preamble of the Act which states that it is for the protection of literary, scientific and artistic intellectual works and

their neighbouring rights by prohibiting violations of those rights spelt out and protected by the Act.

Infringement of copyright right is defined by section 46 of the Act which reads as follows:

“46. Infringements of copyright

(1) Infringement of copyright or neighbouring right occurs where, without a valid transfer, licence, assignment or other authorisation under this Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to—

(a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;

(b) distribute in Uganda by way of sale, hire, rental or like manner; or

(c) exhibit to the public for commercial purposes by way of broadcast, public performance or otherwise.

(2) The use of a piece of work in a manner prejudicial to the honour or reputation of the author shall be deemed an infringement of the right of the owner of the right.”

One key element in the above definition is the use of the words “author” and “works”. Authors of works under the Act enjoy protection and therefore under the above provision dealing in their works without authorisation is an infringement. The word “author” is defined under section 2 of the Act to mean:

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

The definition implies that a plaintiff is either an author who has created a work or works enjoying protection or is an authorised person enjoying rights protected by the Act. The above provisions have to be read in conjunction with section 4 and 5 of the Act. Section 4 defines an author entitled to copyright protection.

Because the section speaks for itself I will reproduce it for ease of reference. It provides:

“4. Author entitled to copyright protection.

(1) The author of any work specified in section 5 shall have a right of protection of the work, where work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created.

(2) The protection of the author’s work under subsection (1) shall not be subject to any formality.

(3) For the purpose of this section, a work is original if it is the product of the independent efforts of the author. “

Section 5 on the other hand deals with works eligible for a copyright and includes photographs. Section 9 defines the economic rights of the copyright proprietor while section 10 of the Act defines the moral rights of the author. The rights against mutilation and the right to prohibit use of created works without permission are moral rights. Section 10 is instructive and it provides:

10. Moral rights of author

(1) The author of any work protected by copyright shall have a moral right—

(a) to claim authorship of that work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means;

(b) to have the author’s name or pseudonym mentioned or acknowledged each time the work is used or whenever any of the acts under section 9 is done in relation to that work, except where its not practicable to do so; and

(c) to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work.

(2) The author of a work has a right to withdraw the work from circulation if it no longer reflects the author's convictions or intellectual concepts; and if the author does so, shall indemnify any authorised user of that work who might, in any material way, be affected by the withdrawal.

(3) The moral right under subsection (1) is not assignable to any person, except for purposes of its enforcement.

It is therefore plausible that the plaintiff may sue for infringement of a copyright provided that the plaint discloses a cause of action under the Act. It should be noted that section 45 of the Act which confers specific jurisdiction on the Commercial Court Division of the High Court is restricted to actions for injunction and prohibition without prejudice to the right to claim for damages. It envisages an action to stop the continuation of the infringing act and provides as follows:

“45. Civil remedies

(1) Any person whose rights under this Act are in imminent danger of being infringed or are being infringed may institute civil proceedings in the Commercial Court for an injunction to prevent the infringement or to prohibit the continuation of the infringement.

(2) Upon an ex-parte application by a right owner, the court may in chambers make an order for the inspection of or removal from the infringing person's premises, of the copyright infringing materials which constitute evidence of infringement by that person.

(3) The grant of an injunction under subsection (1) shall not affect the author's claim for damages in respect of loss sustained by him or her as a result of the infringement of the rights under this Act.”

Apart from the right to seek injunctions, owner of a copyright may claim damages for loss sustained as a result of the infringement. It is therefore necessary to peruse the plaint.

I have considered paragraphs 5, 10, 11, 12 and 13 of the amended plaint. The amended plaint of the plaintiff at paragraph 5 thereof avers as follows:

“The plaintiffs claim against the defendants jointly and severally is for general and exemplary damages for libel, negligence, invasion of privacy, breach of copyright,, conversion, passing off and costs of the suit.

Ordinary at the beginning of a plaint, a plaintiff ordinarily declares the cause of action and in paragraph 5 of the plaint in this case plaintiff pleads that one of the causes of action is breach of copyright. Paragraphs 6, 7, 8, 9 and 10 inter alia deal with libel. Paragraph 11 pleads the particulars of negligence as follows:

- I. The defendants failed to exercise any due diligence by expressing their thoughts as an investigative piece of journalism meriting public disclosure as evidenced by annexes B and C
- II. The defendants after hacking into the plaintiffs Facebook used her cherished family photograph (redacted version is attached hereto as annex D) and proceeded to published, for commercial gain and purpose, the mutilated version without acknowledging the source of either the original photo or derivative material used in the mutilated photograph and in total disregard of the plaintiffs moral rights, the laws and the constitution of the Republic of Uganda.

In roman (ii) above the plaintiff avers that the defendants hacked into her Facebook page an account, to unlawfully extract the plaintiffs cherished family photograph for commercial publication thereby violating her rights to privacy. In paragraph 13 of the plaint she avers:

“the plaintiff shall aver that the defendant converted the plaintiffs image on her cherished family photograph, proceeded to edit, mutilate, publish and widely distribute the same to the public by purporting that it was an independently sourced photograph by the defendant’s staff without any due regard to the laws and the constitution of the Republic of Uganda”.

Among the prayers at paragraph 16 of the plaint is a claim for general damages for:

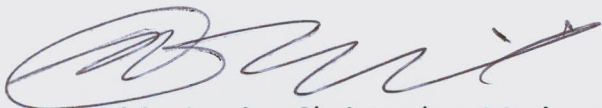
- (a) A libel;
- (b) Negligence;

- (c) Invasion of privacy;
- (d) Conversion; and
- (e) Breach of copyright.

Having considered the plaint in its entirety, the plaintiffs claim is for breach of copy right, negligence and invasion of privacy. Without considering the merits of the cause of action for breach or infringement of copyright, which consideration should be left for the trial court with jurisdiction, the cause of action falls partially within the divisional jurisdiction of the commercial court but also in the Civil Division of the High Court. Counsel Maxim Mutabingwa informed court that he had raised the matter before the registrar by way of an objection to the hearing of the suit in this court. It is possible for the Civil Division of the High Court to try the matter since it has unlimited original jurisdiction. I have had due consideration of the submission of Counsel Jimmy Muyanja who clearly preferred to have this suit tried by the Commercial Division of the High Court. The suit was filed on the 24th of June 2010. This is now the 24th of December 2011. The Commercial Court was established inter alia for the speedy and expeditious disposal of commercial disputes as defined in rule 4 of the Practice Direction.

Rule 2 (2) of the Constitution (Commercial Court) (Practice) Directions 1996 was intended to create a Commercial Division which can deliver to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life of Uganda. With the objective of the Court in mind, and the provisions of section 33 of the Judicature Act to which I have been referred by Counsel Jimmy Muyanja my opinion under rule 4 (2) of the Constitution (Commercial Court) (Practice Direction) 1996 is that my duty is to resolve a difference in opinion as to whether the matter before court is a commercial dispute falling under rule 4 of the rules establishing the division. My conclusion under rule 4 (2) is that the plaintiffs suit has causes of action in tort, in constitutional law as invasion of privacy which is an infringement of a fundamental right and a cause of action (without delving into the merits of the cause of action) of copyright infringement under the specific jurisdiction of the Commercial Court under the relevant Act. The resolution of any difference in

opinion between counsel for the parties as to which division of the High Court should try the suit can be determined as to which forum is most suited and not purely on the basis of jurisdiction. If the registrar deems it fit she may retain the suit for trial of the one cause of action together with other causes of action under the unlimited jurisdiction of a High Court Judge. Where she considers that it would be appropriately tried in the Civil Division she should forward the same to the court for further action. The decision requested for above will take into account the mandate of this court. The matter is accordingly sent to the Registrar for action. The parties are not entitled to address the Registrar as to which course of action to take.



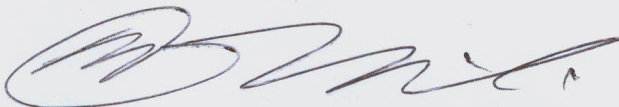
Hon. Mr. Justice Christopher Madrama

Ruling delivered this 24th day of November 2011 in the presence of

Jimmy Muyanja for the plaintiff

Maxim Mutabingwa for the defendant,

Ojambo Makoha court clerk.



Hon. Mr. Justice Christopher Madrama

24th November 2011