

**IN THE COURT OF APPEAL  
ABUJA JUDICIAL DIVISION**

On Wednesday, the 3<sup>rd</sup> day of February 2021

Suit No: CA/A/345/2017

Before Their Lordship

<b>PETER OLABISI IGE</b>	<b>Justice of the Court of Appeal</b>
<b>YARGATA BYENCHIT NIMPAR</b>	<b>Justice of the Court of Appeal</b>
<b>MOHAMMED BABA IDRIS</b>	<b>Justice of the Court of Appeal</b>

Between

<b>OLUWADAMILOLA BANIRE</b>	<b>APPELLANT(S)</b>
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And

<b>NTA-STAR TV NETWORK LIMITED</b>	<b>RESPONDENT(S)</b>
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**INTRODUCTION:**

This appeal borders on Intellectual Property Law.

**FACTS:**

This appeal is against the decision of the Federal High Court, Abuja in Suit No. FHC/ABJ/CS/140/14 delivered on the 22nd day of December 2016 by Honorable Justice A. R. Mohammed.

The Appellant who was the plaintiff in the trial Court via a writ of summons dated 24th February 2014 sought the following reliefs against the Respondents:

- i. A DECLARATION that the use of her images/photographs by the Defendant on its billboards along the streets of Akure and Abeokuta without the express authorization of the plaintiff amounts to a violation or infringement of her image/intellectual property rights.
- ii. The sum of N50 Million as compensation for the infringement of her image right.
- iii. The cost of this suit.

The Appellant sued because she alleged that the Respondent used her pictures on billboards in Abeokuta and Akure for promotional purposes without her consent while the Respondent maintained that the pictures were supplied to it by Virtual Media Network Limited in pursuance of a Channel License Agreement.

In proof of her case, the Appellant testified on her own behalf as PW1 and tendered Exhibits A, A1, A2, A3, A4, A5, B and C while the Respondent as the Defendant also had one witness who is its legal Officer and who tendered Exhibit D and E.

In its decision, the trial Court held that the Respondent's use of the Appellant's image was not a violation of the Plaintiffs right under the Copyright Act or the tort of passing off and dismissed the suit.

Aggrieved by the decision of the trial Court, the Appellant appealed to the Court of Appeal.

### **ISSUES:**

The appeal was determined on the following issues:

- i. Whether from the facts and totality of the processes filed in this matter, the learned trial judge was right in holding that the Appellant had sued a wrong party and that the Respondent was exonerated from liability for wrongful use of the Appellant's images because of the Channel License Agreement (Exhibit E).
- ii. Whether from the pleadings and evidence adduced before the trial Court, the issue of copyright is applicable in this case and if yes, whether the learned trial judge was right to have held that the ownership of the copyright in the Appellant's photographs belong to Virtual Media Network Limited and not the Appellant.

### **DECISION/HELD:**

On the whole, the Court of Appeal dismissed the appeal.

### **RATIO DECIDENDI**

**APPEAL - GROUND(S) OF APPEAL** - When a ground of appeal will be held to have arisen from the ratio decidendi of the judgment appealed against and same competent, "The Respondent on its part has alleged that the Appellant's grounds 1, 2, 3, 6, 7, 8 and 9 are based on the trial Court's obiter dictum "I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant" written at the end of the judgment by the trial judge. While the Appellant argued that the grounds were based on complaints against errors forming part and parcel of the ratio of the judgment of the Court below. It is settled law that a ground of appeal must emanate from the ratio of the decision. This essentially means that the ground of appeal must arise from the judgment of the Court. The law is trite that where a ground of appeal is based on an obiter it is deemed invalid or incompetent. Additionally, it must be stated that the grounds of appeal and its particulars must be read together as the body of the ground of appeal is not considered in isolation. The meaning of obiter dictum has been given in *MOBIL PRODUCING (NIG) UNLTD VS. JOHNSON & ORS (2018) LPELR - 44359 (SC)* thus: "An obiter dictum is an expression of opinion made in the process of writing a judgment by a Judge which is not necessary or relevant to the decision and as such cannot form part of the ratio decidendi of the judgment. An obiter dictum does not have the status of a ratio decidendi in a judgment of a Court. It does not decide the live issues in the matter. Put differently, an obiter dictum is a statement made in passing which does not reflect the ratio decidendi, that is, the

reasoning or ground upon which the case is decided." The meaning of ratio decidendi according to the Black's Law Dictionary is simply "reason for deciding".

It is essentially the principle or rule of law on which the Court's decision is founded and it also means the rule of law on which a later Court thinks that a previous Court's judgment was founded. See OGBOLOSINGHA & ANOR VS. BAYELSA STATE IEC & ORS (2015) LPELR - 24353 (SC). On page 115 - 116 of the record of appeal the trial judge in resolving issue one held that: "...This is more, so when the Plaintiff, even after knowing about the use of the photographs and images did not bother to sue Virtual Media Network but chose to drag only the Defendant to Court. If as contended by the Plaintiff that Virtual Media Network had no authority to use the photographs and images, one would have expected the Plaintiff to also sue them along with the Defendant for unauthorized use of her photographs and images." The trial judge at the end of his entire judgment after the final issue (issue two) on page 117 of the record of appeal held that: "I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant." Looking at the trial Court's judgment in its entirety and the reproduced sections above, I agree with the Appellant that decision of the trial judge above forms part of the ratio decidendi of the Court. It is not enough to say that because the words "I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant" were uttered at the end of the judgment that it amounts to obiter. From the trial Court's findings in issue one reproduced above, it can be clearly seen that it formed part of the ratio of the trial Court which was regurgitated by trial Court at the end of the decision. I am therefore of the opinion that the grounds of appeal and by association the issues for determination are competent before this Court as they are based on the ratio of the trial Court."

**ACTION - JOINDER OF PARTY(IES)** - Instance(s) where failure of a claimant to join/sue a party will make its case fail, "The summary of the Appellant's argument is that the trial Court was in error to have exonerated the wrongful act of the Respondent based on Exhibit E to which the Appellant is not privy and which does not contain any clause empowering the Respondent or Virtual Media Network Limited to use the Appellant's images. The Appellant argued that by the doctrine of privity of contract it will be unjust to make the Appellant responsible and subject to Exhibit E. I agree that a third party cannot be liable to a contract it was not part of. This is because the privity of contract doctrine states that a party who is not privy to a contract cannot be made liable to nor benefit from it. However, in this case, the trial judge did not make the Appellant liable to the contract or subject to the contract but simply held that the Virtual Media Network had authorship and ownership of the photographs and as such the Appellant had no claim against either the Respondent or Virtual Media Network. In essence, the trial Court after evaluating all the evidence before it held that there was no infringement of the Appellant's right since Virtual Media Network owned the copyright in the photograph. The trial judge in page 115 of the record of appeal went further and held that: "If the Plaintiff contended that Virtual Media Network had no authority to use the photographs and images, one would have expected the Plaintiff to sue them along with the Defendant for unauthorized use of her photographs and images." The above is not making the Appellant subject to the agreement between the parties but stating that the Appellant must sue both parties if she believes she has a claim. The Court's reasoning in the instant case is that the Appellant sued the Respondent, the Respondent raised a defense and the Court held that the Appellant should have joined Virtual Media Network given the defense put up by the Appellant. More importantly, the Court held that given the defense put up by the Respondent and upon review of the evidence, Virtual Media Network had copyright of the photograph. The Appellant also argued that the contract was for 18 months starting 10th October 2011 expiring in April 2013 but the instant case happened on June 2013 after the expiration of the contract and there was no evidence it was renewed. Again, my answer to this

argument is that the trial judge held that Virtual Media Network owned the copyright to the photograph which means that Virtual Media Network can use its photograph at any time. The Appellant further contended that assuming both the Respondent and Virtual Media Network colluded in the act of using the Appellant's images for promotional purpose without her consent then the Appellant can sue either or both the Respondent for the wrongful act and the trial Court was wrong to have said that the Appellant sued the wrong party. Indeed, the Appellant can sue any of the parties however where the party sued raises a defense the Court would look to this defense to see if it exonerated them of liability as it has done in the instant case. I would like to further explain what a party seeking declaratory reliefs must do. The law as it relates to declaratory reliefs was stated in MOHAMMED VS. WAMMAKO & ORS (2017) LPELR - 42667 thus: "The plaintiff who sought for such relief must prove and succeed on the strength of his case and not rely on the weakness of the defense. See the case of Emenike v. P.D.P. (2012) 50 NSCQR 94 at 130 per Fabiyi, JSC where it was held that:- the burden of proof on the plaintiff in establishing declaratory relief to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the defendant where the plaintiff fails to establish his entitlement to the declaration by his own evidence." This means that the onus is on the Appellant to join or sue the party whose liability purportedly falls on in order to establish the claim. As it relates to exonerating the Respondent on the basis Channel License Agreement, I have looked at the pleadings and evidence in this case and what is clear is that: i. The Appellant had a photo session with Virtual Media Network Limited. ii. The Respondent used the Appellant's picture on the Billboards in Akure and Abeokuta. iii. A Channel License Agreement existed between the Respondent and Virtual Media Network Limited. What is also evident to me after looking at the Channel License Agreement is that the Respondent has agreed to broadcast Virtual Media Network Limited's Nigezie and Orisun Television Channels on its platform. Additionally, apart from the clauses stated by the trial judge (3.1.4, 3.1.7, 2.1 and 2.2) by clause 11.1 and 11.2, Virtual Media Network was to provide certain materials for promotion of the channel. The Section provides thus: 11.1 In order to promote the channel, Licensor shall provide to the Licensee the Channels Development plan, programs updating plan, promotional films, Video clips and other promotional materials within six (6) weeks from receiving the request of the Licensee. 11.2 The Licensee undertakes to include the channel's corporate branding in promotional print material and cross-channel promotions. It a settled principle of law that a contract must be read as a whole to interpret the intentions of the parties. As such when all the clauses are read together it can be seen that Virtual Media Network in fact undertook that its own all copyrights to materials supplied to the Respondents. By the Respondent's evidence Virtual Media also gave them all the materials they used to promote Orisun Tv on Startimes. Coming to the conclusion above, I find that though the Appellant has the right to sue the Respondent, their failure to join or sue the Virtual Media Network made their claim liable to fail. More importantly, though the trial judge mentioned the Appellant suing the wrong party, his findings were also rested on the Virtual Media Network owning the copyright to the photograph. Therefore, the trial Court was right to have exonerated the Respondent on the basis that Virtual Media Limited had ownership and authorship of the images which the Respondent used by virtue of the Channel License Agreement."

**INTELLECTUAL PROPERTY - PASSING OFF** - Ingredients needed to prove the tort of passing off, "... I have looked at the judgment of the trial Court together with the evidence adduced before it and I find that the Appellant's argument is of no moment. Indeed, the tort of passing off is a claim that exists in common law which was mainly restricted to goods and services. However, in the English cases of IRVINE VS. TALKSPORT LTD (2002) F.S.R. 60 and ROBYN RIHANNA FENTY VS. ARACADIA GROUP BRANDS LTD (T/A TOPSHOP) & ANOR (2012) EWHC 2310 (CH), the plaintiffs who are celebrities brought actions against the defendants under the tort of passing off for unauthorized use of their images. The cases above

have created what is known as image rights which when infringed can be sued under the tort of passing off. Image rights or publicity right refers to a person's right against misappropriation of his name, likeness, physical appearances, nicknames, pictures, personal slogans etc. Put simply, it is the right of a person to control the public's commercial exploitation of a person's identity. In Nigeria, there are no specific laws governing image rights and the closest law that can be considered is that enshrined in Section 37 of the 1999 Constitution known as the right to privacy. Image rights are also equivalent to property rights and image rights in most cases are pursued by celebrities as they are persons that in most cases can establish the elements needed to succeed in the tort of passing off as it relates to image rights. This however does not preclude a normal person from suing under this right. Now in order to prove the tort of passing off the individual must establish that his/her image has acquired sufficient goodwill such as quantifiable goodwill which can be leveraged on in consideration for money. Secondly, he/she must prove that the third party has misrepresented to the public by using the image and lastly it must be proved that this misrepresentation caused or is capable of causing damages such as reduction in the value attached to their goodwill. Essentially the ingredients needed to prove the tort of passing off are goodwill or reputation, misrepresentation by the defendant to the public and a damage suffered or likely to be suffered. Applying the above essential ingredients of the tort of passing off mentioned above, the Appellant must prove that: she is entitled to goodwill, the acts of misrepresentation by the Respondent and the damage to her goodwill suffered or likely to be suffered."

**INTELLECTUAL PROPERTY - COPYRIGHT** - Position of the law as regards the rights of a holder of copyright of photographs, "At this juncture, I would like to state that image rights must be looked at against the copyright of a photograph. In Nigeria, the law on intellectual property as it relates to photographs is found under the Copyright Act. The Copyright Act provides that the copyright of photographs vests with the author. Photographs by virtue of Section 51 of the Copyrights Act are considered as artistic work. The Section states that: "artistic work" includes, irrespective of artistic quality, any of the following work or works similar thereto - (a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; (b) maps, plans and diagrams; (c) works of sculpture; (d) photographs not comprised in a cinematograph film; (e) works of architecture in the form of buildings models; and (f) works of artistic craftsmanship and also (subject to Subsection (3) of Section 1 of this Act) pictorial woven tissues and articles of applied handicraft and industrial art." While Section 10 of the Copyright Act which confers copyright of a photograph to the author provides that: "10. (1) Copyright conferred by Sections 2 and 3 of this Act, shall vest initially in the author. (2) Notwithstanding Subsection (6) of Section 11 of this Act where a work- (a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or (b) not having been so commissioned, is made in the course of the author's employment, the copyright shall belong in the first instance to the author, unless otherwise stipulated in writing under the contract. (3) Where a literary, artistic or musical work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship as is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical; or to the reproduction of the work for the purpose of its being so published; but in all other respects, the author shall be the first owner of the copyright in the work." The Section above essentially means that the copyright to any photograph vests with the photographer known as the author except there is a written agreement which states otherwise. Who the author of a photograph is can be found in Section 51 of the Copyright Act which provides thus: "author in the case of a photographic work, means the person who took the photograph." Referring back to the evidence in the case, the Appellant in her witness statement

on oath contained on page 10 of the record of appeal stated: "That sometime in March 2012, I had a photo session with Orisun Tv, owned by Virtual Media Network showy before I was engaged by the company as a presenter." This was confirmed in her testimony on page 91 of the record of appeal where she stated that: "in paragraph 3 of my witness statement, I stated that I had a photo session with Orisun Tv, and it was for celebrity profiling. Celebrity profiling is the picture data base that all TV stations have for artists for contents." While under cross-examination on page 92 of the record of appeal the Appellant said: "...The photos taken by Virtual Media Network Ltd with my permission were in the custody of the same Virtual Media Network and I requested for my copy." The trial judge after evaluating all evidence came to the conclusion on page 114 of the records of appeal that: "...by allowing Virtual Media Network to be using her photographs and images, ownership and authorship of the copyright automatically in the photographs and images resides/and belongs to Virtual Media Network. See Section 10(1)(2) and (3) of the Copyright Act, 2004..." I am not in total agreement with the trial judge's ratio here although I also agree that Section 10 of the Copyright Act applies to this case. It was the act of the Appellant allowing Virtual Media Network to use the images that gave the ownership of the copyright. It is the act of Virtual Media Network being the ones who took the photographs that makes it the author of the photographs. By taking the photographs they automatically have rights except there is an agreement otherwise. What is evident from the above provision is that the person who is a muse or the person in the photograph is not in fact the author and therefore he/she does not own copyright in the photograph. Rather it is the person who took the photograph that is the author. The Appellant by her own evidence has stated that she had a photo session with Virtual Media Network the owners of Orisun Tv and as such since Virtual Media Network took the photographs then they have authorship and as a result they have copyright of the photograph not the Appellant."

**MOHAMMED BABA IDRIS, J.C.A. (Delivering the Leading Judgment):** The Appellant herein appealed against the decision of the Federal High Court, Abuja in Suit No. FHC/ABJ/CS/140/14 delivered on the 22nd day of December, 2016 by Honorable Justice A. R. Mohammed wherein the Court held that the Respondent's use of the Appellant's image was not a violation of the Plaintiffs right under the Copyright Act or the tort of passing off and dismissed the suit. The facts of the case leading to this appeal as adduced from the pleadings at the trial Court are to the effect that the Appellant who was the plaintiff in the trial Court via a writ of summons dated 24th February 2014 sought the following reliefs against the Respondents:

- i. **A DECLARATION** that the use of her images/photographs by the Defendant on its billboards along the streets of Akure and Abeokuta without the express authorization of the plaintiff amounts to a violation or infringement of her image/intellectual property rights.
- ii. **The sum of N50 Million** as compensation for the infringement of her image rights.
- iii. **The cost of this suit.**

The Appellant sued because she alleged that the Respondent used her pictures on billboards in Abeokuta and Akure for promotional purposes without her consent while the Respondent maintained that the pictures were supplied to it by Virtual Media Network Limited in pursuance of a Channel License Agreement. In proof of her case, the Appellant testified on her own behalf as PW1 and tendered Exhibits A, A1, A2, A3, A4, A5, B and C while the Respondent as the Defendant also had one witness who is its legal Officer and who tendered Exhibit D and E. The Appellant being dissatisfied with the ruling of the trial Court filed this appeal. The parties to the appeal before this Court filed and exchanged their respective briefs of argument. In the Appellant's brief of argument as settled by his counsel

Christian C. Okoye Esq., dated 3rd July 2017, the following issues for determination were distilled from the grounds of appeal thus:

- i. ***Whether from the facts and totality of the processes filed in this matter, the learned trial judge was right in holding that the Appellant had sued a wrong party and that the Respondent was exonerated from liability for wrongful use of the Appellant's images because of the Channel License Agreement (Exhibit E). (Grounds 1, 2, 3, 6, 7,8and9)***
- ii. ***Whether from the pleadings and evidence adduced before the trial Court, the issue of copyright is applicable in this case and if yes, whether the learned trial judge was right to have held that the ownership of the copyright in the Appellant's photographs belong to Virtual Media Network Limited and not the Appellant. (From Grounds 4 and 5)***

Counsel for the Appellant while arguing issue one submitted that by paragraphs 13 and 15 of the statement of defense and the cross-examination of DW1, it is clear that the Respondent admitted using the Appellant's image on its billboards and same was found by the trial judge. However, the trial judge relied on Clauses 3.1.4, 3.1.7, 2.1 and 2.2 of Exhibit E to hold that the Respondent is exonerated from all blame of using the Appellant's image for commercial purposes without her consent. The Appellant's counsel argued that it is trite law that only parties to a contract can benefit or suffer from the contract as such a party that is not privy to a contract cannot be made liable to the contract neither can he benefit from it. Reference was made to **OGUNDARE & ANOR VS. OGUNLOWO & ORS (1997) LPELR - 2326 (SC) and C.A.P. PLC VS. VITAL INV. LTD (2006) 6 NWLR (PT. 976) 220** and relied on. Counsel submitted that in the light of the principle of privity of contract stated above, it will be harsh and unjust to make the Appellant responsible and subject to Exhibit E which she is not privy to and she was unaware of until during the trial.

It was argued that since the Appellant is not entitled to any benefit under Exhibit E she can also not be made to suffer therefrom. Counsel further argued that assuming the doctrine of privity of contract does not apply, it is imperative to examine the true import of Exhibit E especially the four clauses (3.1.4, 3, 1.7, and 2.2) relied on by the trial judge. Reproducing clauses 3.1.4 and 3.1.7, Counsel submitted that from the wordings of the warranty in the clauses, it is clear that it relates to programs not images as images or pictures cannot by any stretch of imagination become programs. It was also argued that there is nowhere in Exhibit E where the name of the Appellant is mentioned or where the Respondent is authorized to use images for promotional purposes and that there is no provision that Virtual Media Network Limited shall supply any form of pictures for advertorial purposes.

Clauses 3.1.4 and 3.1.7 are reproduced below as follows:  
*3.1.4 Licensor undertakes that it owns the copyright, branding and Trademarks of PROGRAMS and shall not infringe any right or intellectual property right of any third party, Licensor shall take all liabilities and indemnify all the damages to Licensee if it fails to abide by the warranty.*  
*3.1.7 The Licensee shall bear any liability whatsoever as a result of claims of copyright infringement by the licensor from a third party.*

Clauses 2.1 and 2.2 were also reproduced by the Appellant thus:

*2.1 Both parties agree that the Licensee has the Exclusive right (for the first 18 months of this Agreement) to carry and broadcast Licensor's channel (namely Nigezie and Orisun Television),*

herein referred to as 'the Channels' on the Licensee's digital television system with NBC permission serving Nigeria ("the System")

2.2 Licensee agrees to broadcast the channels in its Bouquet of television programming on the system; Licensor agrees that the TV signal of channels shall be broadcasted by licensee on any of its Bouquet of television in the Licensee's system. Counsel then argued that from the clauses reproduced above, there is nothing indicative of any right or authorization to use 3rd party images. It was argued that the license granted was for 18 months from 10th October, 2011 to 9th April, 2013 but the wrong committed was in June, 2013 which was after the expiration of the exclusive right. It was also argued that images were used without the consent of the Appellant or that of Mr. Femi Aderibigbe, the MD/CEO of Virtual Media Network Ltd and the images were used when she had left their services as she was just a freelancer. Counsel also argued that if the Respondent believes that it acted bonafide based on its agreement with Virtual Media Network Limited then the Respondent should have brought 3rd party proceedings to join Virtual Media Network Limited as its own defendant. Reference was made to the case of **TOTAL (NIGERIA) PLC VS. DELMAR PETROLEUM COMPANY LIMITED (2002) LPELR - 7170 (CA)** by the Appellant. Additionally, counsel submitted that Virtual Media Network Limited did not use the Appellant's photographs as such it is the place of the Respondent to join Virtual Media Network Limited having not done so, the Respondent is solely liable. Furthermore, counsel submitted that if both the Respondent and Virtual Media Network Limited colluded to use the Appellant's image then they are both jointly and severally liable for the wrongful act as such the Appellant can sue either of them or both of them, and that neither of them could be called a wrong party.

In concluding the issue, counsel submitted that every human person has autonomy over his/her images and how they can be used and by case law a person's exclusive right to his own image has been established. It was then argued that given this principle and the fact that the Respondent through DW1 has admitted that the Appellant's image was used without her consent then the Respondent has violated the image rights of the Appellant. Counsel then urged the Court to re-evaluate Exhibit E and hold the Respondent liable. In arguing issue two, counsel for the Appellant submitted that there is no evidence that the Appellant allowed/permitted Virtual Media Network Limited to use or be using her images as decided by the trial judge on page 114 of the records of appeal. It was argued that by paragraph 9 of the statement of claim and paragraph 8 of the witness deposition of PW1, the Appellant expressly stated she did not sign any contract agreeing for her image to be used for commercial purposes. Counsel further submitted that the trial judge relied on Section 10(1), (2) and (3) of the Copyright Act, 2004 to hold that *"the ownership and authorship of the copyright in the Appellant's photographs and images resides/and belong to Virtual Media Network"*, but that the provisions of the Copyright Act are not applicable in this case because the claims before the Court are not about copyright, and that the claims relate to passing off and image right also known as publicity right. It was then argued that the crux of the Appellant's claims was that her image right was violated by the Respondent when they used her images for commercial publicity and wooing of customers by insinuating that the Appellant endorsed its services without her consent, and that this is a claim of passing off rooted in tort.

Counsel further submitted that image/personality rights are judge-made laws in many countries including Nigeria to some extent as seen by Kalgo, JSC in the case of **AYMAN ENTERPRISES LTD VS. AKUMA IND. LTD & ORS (2003) LPELR - 683 (SC)** wherein the Supreme Court affirmed that: *"From the wordings of the proviso to Section 3 read together with Section 7 (1)(c)(ii) of Act No. 13 of 1973, a statutory right of action on passing off is provided. What is involved, at least as it relates to Trademarks is not the Common Law action of passing-off, but a statutorily guaranteed right of action."* It was then argued that in a publicity rights case, the



issue to decide is whether a significant section of the public would be misled into believing (incorrectly) that the plaintiff has endorsed the goods and services of the Defendant. Counsel then submitted that by leaving claims and issues submitted to it for resolution to find on issues of copyright which is not applicable to this case the trial judge brought about a miscarriage of justice. The Appellant's counsel also argued that assuming the trial judge was even right to have imported the issue of copyright, the image of the Appellant in Exhibit A1 - A5 was taken before the Appellant joined Virtual Media Network Limited (paragraph 4 of the statement of claim) and was used months after the Appellant had left the services of Virtual Media Network Limited. Counsel then submitted that going by the above and looking at Section 10 (1), (2) and (3) of the Copyrights Act, it is the ownership of copyright done during the course of employment for the purpose of furthering the employment that vests in the employer but only to the extent that the work is used for that particular purpose which is not the case in this matter as such the trial judge was in error to hold that the Appellant's photographs resides with Virtual Media Network Limited. Counsel for the Appellant while relying on **LAWAL VS. MAGAJI & ORS (2009) LPELR - 4427 (CA) and IROLO VS UKA (2002) 7 SCNJ 137 AT 164, 168** argued that the trial Court is bound to make pronouncements one way or the other on all issues submitted to it for determination but that the trial Court failed to answer the issue of passing off which was formulated in the Appellant's final written address. It was then argued that when the failure of the trial judge to resolve all issues results in a miscarriage of justice then the issue will be set aside. The Court was also invited by the Appellant to re-evaluate the evidence of the Court for the purpose of determining whether or not the image rights of the Appellant were breached. In conclusion, counsel for the Appellant submitted that the trial judge was wrong to have held that the ownership of copyright in the Appellant's photograph belongs to Virtual Media Network Limited and that the issue of copyright is not applicable in this case.

From the Respondent's brief of argument dated 14th August, 2017 and settled by Christopher E. Okonkwo Esq., the following issues for determination were formulated:

***i. Whether from the facts and totality of the processes filed in this matter, the learned trial judge was right in holding that the Appellant had sued a wrong party and that the Respondent was exonerated from liability for wrongful use of the Appellant's images of the Channel License Agreement?***

***ii. Whether from the pleadings and evidence adduced before the trial Court, the issue of copyright is applicable in the case and if yes whether the learned trial judge was right to have held that ownership of the copyright in the Appellant's photographs belongs to Virtual Media Network Limited and not the Appellant?***

Counsel for the Respondent argued that the exoneration of the Respondent by the trial Court was because the Appellant sued the wrong party but because the Respondent proved that it had a Channel Service Agreement with Virtual Media Network Ltd who had a photo session with the Respondent and owns the copyright over them. Counsel then submitted that even if the trial Court held so, the Court was right given that the duty of the Court is to ensure that every action before it is properly constituted and non-joinder of parties can defeat the action. The cases of **MOHAMMED VS. CAR LINK NIG. LTD (2013) ALL FWLR (PT. 784) 66 at 185; OTUBU VS. GUOBADIA (1984) 10 SC 130 AT 132 and BALOGUN VS. THE PERMANENT SECRETARY, MINISTRY OF WORKS, KWARA STATE (1975) 1 ALL NLR 254** were relied on by counsel.

It was further submitted that in the instant case, the Appellant stated clearly in paragraph 1, 2, 3, 4 and 5 of the statement of claim that:

(iii) She was a presenter and now freelance journalist with Virtual Media Network Limited, the owners of Orisun TV/Nigezie/ Prime TV.

(ii) That the Defendant has a subsisting channel license agreement with Virtual Media Network Limited that supplied her images to the Defendant to be used on the Defendant's billboards in Akure and Abeokuta.

(iii) That sometime in March 2012, she had a photo session with Virtual Media Network Limited before she was also engaged as a presenter. Additionally, that during cross-examination when asked:

***Why did you avoid joining Virtual Media Network Limited as defendant in this suit having admitted that it has a subsisting channel license agreement with the Defendant and why did you file this suit knowing that Virtual Media Network Limited that supplied your photo to defendant has license to do so?***

She answered: *I didn't file suit against Virtual Media Network Limited because I did not have an agreement with them and I am not on their payroll. The photos were taken by Virtual Media Network Limited with my permission were in the custody of the same Virtual Media Network Limited and I requested for my copy. Virtual Media Network Limited are in the business of TV Channels, The Orisun TV/Nigezie TV and Prime Tv. The pictures that I said are my images were advertised for use by StarTimes Cable Network.*

Furthermore, it was submitted that when the Appellant was shown Exhibit A4 (the photograph) and asked to read the TV Station billboard which bears the picture she said *"the picture have Orisun Tv, Odua Tv and NTA.* Counsel then submitted that from the statement of claim and question and answer during cross-examination and Exhibit D or E, it is clear that Virtual Media Network Limited took the purported pictures of the Appellant and owns them (including the copyright in the pictures) all to the knowledge of the Appellant, yet she refused, failed and neglected to sue. Additionally, that the above shows that Virtual Media Network Limited used the photos to advertise its station: Orisun Tv and Odua Tv on Respondent's pay-tv platform and the Respondent's name was not even on the billboard according to the Appellant's testimony. It was then argued that the Appellant's failure or refusal to sue Virtual Media Network Limited or make it a party to the suit, renders the suit incompetent. The case of **COTECNA INTERNATIONAL LTD VS. CHURCH GATE NIG. LTD & ANOR (2010) 18 NWLR (PT. 1225) 346 SC** was relied on. Furthermore, it was argued that the Respondent is a third party to the contract governing photo sessions between the Appellant and Virtual Media Network Limited and as such if Virtual Media Network Limited breached the agreement between it and the Appellant then the recourse should be against Virtual Media Network Limited and not the Respondent who was exercising its rights under an existing valid contract. Counsel for the Respondent also submitted that the Appellant's contention in paragraph 4.1.12 of their brief of argument that Virtual Media Network Limited did not use the Appellant's photographs as such the Appellant cannot proceed against it is wrong as the Appellant had averred in her statement of claim and that Virtual Media Network Limited owners of Orisun Tv, Nigezie and Prime Tv took her photos. It was then submitted that Virtual Media Network Limited who have a channel license agreement with the Respondent supplied these photographs to the Respondent for promotion of Orisun Tv channel-StarTimes. In conclusion, counsel for the Respondent submitted that the Appellant had her photos taken by Virtual Media Network Limited for the promotion of Orisun Tv, Nigezie Tv on the Respondent's platform.

As it relates to issue two, counsel for the Respondent submitted that the Appellant failed woefully to state which category of intellectual property right her photographs belong to under our laws as there is nothing known as "image right". It was submitted that under Nigerian Law, an intellectual property (IP) refers to Copyright, Patent, Trademarks and industrial design that none of the above mentioned category of intellectual property (IP) was stated by the Appellant. Counsel for the Respondent then submitted that it is the duty of the Appellant to

place specific facts before the trial Court and prove same with credible evidence before she is entitled to a declaratory judgment and that the Court cannot speculate or go on a voyage of discovery. The cases of **OGUEJIOFOR VS. SIEMENS LTD (2008) ALL FWLR (PT. 398) 378** and **AKANINWO VS. NSIRIM (2008) ALL FWLR (PT. 410) 566** were relied on to show that the failure of the Appellant to state the exact right she owns in those purported pictures rendered her case liable to fail and be dismissed. Furthermore, counsel submitted that the trial Court was right to have reasoned and found that copyright applied to this case and also right in finding that ownership of the copyright of the photographs belonged to Virtual Media Network Limited. It was submitted that by Section 10(1) (2) of the Copyright Act and the admissions of the Appellant in her statement of claim, Virtual Media Network Limited having taken the Appellant's photos for business purposes with her permission, then Virtual Media Network Limited is the author and owner of the image/intellectual property right. In addition, it was argued that the authorship and ownership of the copyright in those photos vests in Virtual Media Network Limited who has a Channel License Agreement with the Respondent. More so counsel submitted that advertising the photographs of the Appellant on the billboard was part of the business activities for Virtual Media Network Limited marketing of its channels - Orisun Tv and Nigezie TV. Counsel for the Appellant submitted that assuming it was the Respondent that advertised Virtual Media Network Limited, Orisun Tv and other channels, the Copyright Act by Section 11(1) (3) and (7) allows for assignment or lease of existing work, future work or existing work in which copyright does not subsist yet.

To this end it was submitted that since Virtual Media Network Limited who is the author of her photograph has a subsisting license agreement with the Respondent, it was Virtual Media Network Limited that supplied the Appellants images to be used on the Billboards. Clause 11.1 and 3.14 of the Channel License Agreement was reproduced by the Respondent which state: *"provide the Defendant promotional films, video clips and other promotional materials" and "it owns the copyright, branding etc. of all materials and programs"* respectively to argue that Virtual Media Network Limited assigned the copyright to the Respondent. It was also argued that the Respondent's averments in paragraphs 12, 13, 14 and 15 in its statement of defense were unchallenged as such by virtue of Section 122(2) of the Evidence Act and the case of **BIEZAN EXCLUSIVE GUEST HOUSE LTD VS. UNION HOMES SAVINGS LOANS LTD (2011) 7 NWLR (PT. 1246) 246** and **MOBIL (NIG) VS. NATIONAL OIL & CHEMICAL MKT. COMPANY LTD (2009) 9 NWLR (PT. 671) 44** unchallenged evidence is deemed established. Finally, it was submitted that the cases of **OGUNDARE & ANOR VS. OGUNLOWO & ORS (1997) LPELR - 2326 (SC)** and **C.A.P. PLC VS. VITAL INV. LTD (2006) 6 NWLR (PT. 976) 220** cited by the Appellant's counsel cannot help her case. Also, it was submitted that the argument of the Appellant that the trial Court did not deal with its issue for determination is not correct.

The Respondent in this appeal also filed a preliminary objection dated 5th October, 2020 and filed on the same day on the grounds that:

1. Grounds, 1, 2, 3, 6, 7, 8 and 9 the Appellant's Grounds and Notice of Appeal were not based on any ratio of the Court.
2. The Grounds were on mere obiter dictum of the trial Court.
3. The issues for determination in the brief of Argument arising from the grounds are incompetent.

In arguing the preliminary objection contained in its brief counsel for the Respondent submitted that the trial Court in resolving issue two stated obiter that:

*"I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant."* It was argued that this ground of appeal must be culled from the ratio decidendi of

the decision appealed against otherwise it would be considered as being incompetent.

The meaning of both ratio decidendi and obiter were given by Counsel to the Respondent with several cases relied on. Counsel then submitted that in the instant case, the trial judge's ratio in entering the judgment in favour of the Appellant was the principal of copyright belonging to Virtual Media Network Limited who had a photo session with the Appellant and had a Channel License Agreement with the Respondent for broadcast of its channels.

Additionally, it was submitted that the issue above was resolved in issue one and that the reasoning in issue one was used to determine issue two against the Appellant. Thus, the trial judge in his closing remark made obiter to the effect that: *"I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant."* Counsel then urged the Court to strike out grounds 1, 2, 3, 6, 7, 8 and 9 of the Appellant's notice of Appeal.

The Appellant's counsel on its own part replied to the preliminary objection and argued that grounds 1, 2, 3, 6, 7, 8 and 9 of the Notice of Appeal are not based on any obiter dictum but are complaints against errors forming part and parcel of the ratio decidendi. Counsel relied on **MOBIL PRODUCING (NIG) UNLTD VS. JOHNSON & ORS (2018) LPELR - 44359 (SC)** to state the meaning of obiter dictum. Additionally, counsel submitted that the holding of the Court in the words: *"I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant"* did not fall from heaven but was emanated from series of misdirection which form part of the ratio decidendi as pointed out in the Notice of Appeal.

The Appellant's counsel further argued that the grounds of appeal have nothing to do with the holding of the Court relied on by the Respondent especially grounds 6, 7 and 8 which were reproduced. Based on the arguments above, counsel submitted that the Respondent's preliminary objection is frivolous, erroneous and unwarranted and misleading. Counsel urged the Court to strike out the Notice of Preliminary Objection.

### **PRELIMINARY OBJECTION**

I have formulated a sole issue for the determination of this preliminary objection thus: ***Whether grounds 1, 2, 3, 6, 7, 8 and 9 were based on mere obiter dictum and not the ratio decidendi of the Court as such the issues of determination arising from them are incompetent.***

The Respondent on its part has alleged that the Appellant's grounds 1, 2, 3, 6, 7, 8 and 9 are based on the trial Court's obiter dictum *"I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant"* written at the end of the judgment by the trial judge. While the Appellant argued that the grounds were based on complaints against errors forming part and parcel of the ratio of the judgment of the Court below.

It is settled law that a ground of appeal must emanate from the ratio of the decision. This essentially means that the ground of appeal must arise from the judgment of the Court. The law is trite that where a ground of appeal is based on an obiter it is deemed invalid or incompetent.

Additionally, it must be stated that the grounds of appeal and its particulars must be read together as the body of the ground of appeal is not considered in isolation.

The meaning of obiter dictum has been given in **MOBIL PRODUCING (NIG) UNLTD VS. JOHNSON & ORS(2018) LPELR - 44359 (SC)** thus:

*"An obiter dictum is an expression of opinion made in the process of writing a judgment by a Judge which is not necessary or relevant to the decision and as such cannot form part of the ratio decidendi of the judgment. An obiter dictum does not have the status of a ratio decidendi in*

a judgment of a Court. It does not decide the live issues in the matter. Put differently, an obiter dictum is a statement made in passing which does not reflect the ratio decidendi, that is, the reasoning or ground upon which the case is decided.

The meaning of ratio decidendi according to the Black's Law Dictionary is simply "reason for deciding. It is essentially the principle or rule of law on which the Court's decision is founded and it also means the rule of law on which a later Court thinks that a previous Court's judgment was founded. See **OGBOLOSINGHA & ANOR VS. BAYELSA STATE IEC & ORS (2015) LPELR - 24353 (SC)**.

On page 115 - 116 of the record of appeal the trial judge in resolving issue one held that: *This is more, so when the Plaintiff, even after knowing about the use of the photographs and images did not bother to sue Virtual Media Network, but chose to drag only the Defendant to Court. If as contended by the Plaintiff that Virtual Media Network had no authority to use the photographs and images, one would have expected the Plaintiff to also sue them along with the Defendant for unauthorized use of her photographs and images.*

The trial judge at the end of his entire judgment after the final issue (issue two) on page 117 of the record of appeal held that:

*"I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant."*

Looking at the trial Court's judgment in its entirety and the reproduced sections above, I agree with the Appellant that decision of the trial judge above forms part of the ratio decidendi of the Court. It is not enough to say that because the words " *I am of the humble view that the Plaintiff had sued the wrong party in the person of the Defendant* " were uttered at the end of the judgment that it amounts to obiter. From the trial Court's findings in issue one reproduced above, it can be clearly seen that it formed part of the ratio of the trial Court which was regurgitated by trial Court at the end of the decision.

I am therefore of the opinion that the grounds of appeal and by association the issues for determination are competent before this Court as they are based on the ratio of the trial Court. The preliminary objection is hereby dismissed.

## **MAIN JUDGMENT**

After dismissing the preliminary objection, I will now determine the substantive appeal. I have adopted the issues formulated by the Appellant in the determination of this appeal thus:

- i. Whether from the facts and totality of the processes filed in this matter, the learned trial judge was right in holding that the Appellant had sued a wrong party and that the Respondent was exonerated from liability for wrongful use of the Appellant's images because of the Channel License Agreement (Exhibit E). (Grounds 1, 2, 3, 6, 7, 8 and 9)***
- ii. Whether from the pleadings and evidence adduced before the trial Court, the issue of copyright is applicable in this case and if yes, whether the learned trial judge was right to have held that the ownership of the copyright in the Appellant's photographs belong to Virtual Media Network Limited and not the Appellant (From Grounds 4 and 5)***

## **ISSUE ONE**

The summary of the Appellant's argument is that the trial Court was in error to have exonerated the wrongful act of the Respondent based on Exhibit E to which the Appellant is not privy and which does not contain any clause empowering the Respondent or Virtual Media Network Limited to use the Appellant's images.

The Appellant argued that by the doctrine of privity of contract it will be unjust to make the Appellant responsible and subject to Exhibit E. I agree that a third party cannot be liable to a contract it was not part of. This is because the privity of contract doctrine states that a party who

is not privy to a contract cannot be made liable to nor benefit from it.

However in this case, the trial judge did not make the Appellant liable to the contract or subject to the contract but simply held that the Virtual Media Network had authorship and ownership of the photographs and as such the Appellant had no claim against either the Respondent or Virtual Media Network. In essence, the trial Court after evaluating all the evidence before it held that there was no infringement of the Appellant's right since Virtual Media Network owned the copyright in the photograph. The trial judge in page 115 of the record of Appeal went further and held that:

*If the Plaintiff contended that Virtual Media Network had no authority to use the photographs and images, one would have expected the Plaintiff to sue them along with the Defendant for unauthorized use of her photographs and images.*

The above is not making the Appellant subject to the agreement between the parties but stating that the Appellant must sue both parties if she believes she has a claim. The Court's reasoning in the instant case is that the Appellant sued the Respondent, the Respondent raised a defense and the Court held that the Appellant should have joined Virtual Media Network given the defense put up by the Appellant. More importantly, the Court held that given the defense put up by the Respondent and upon review of the evidence, Virtual Media Network had copyright of the photograph.

The Appellant also argued that the contract was for 18 months starting 10th October, 2011 expiring in April 2013 but the instant case happened on June 2013 after the expiration of the contract and there was no evidence it was renewed. Again, my answer to this argument is that the trial judge held that Virtual Media Network owned the copyright to the photograph which means that Virtual Media Network can use its photograph at any time.

The Appellant further contended that assuming both the Respondent and Virtual Media Network colluded in the act of using the Appellant's images for promotional purpose without her consent then the Appellant can sue either or both the Respondent for the wrongful act and the trial Court was wrong to have said that the Appellant sued the wrong party.

Indeed, the Appellant can sue any of the parties however where the party sued raises a defense the Court will look to this defense to see if it exonerated them of liability as it has done in the instant case. I will like to further explain what a party seeking declaratory reliefs must do. The law as it relates to declaratory reliefs was stated in **MOHAMMED VS. WAMMAKO & ORS (2017) LPELR - 42667** thus:

*"The plaintiff who sought for such relief must prove and succeed on the strength of his case and not rely on the weakness of the defense. See the case of **Emenike v. P.D.P. (2012) 50 NSCQR 94 at 130 per Fabiyi, JSC** where it was held that:- the burden of proof on the plaintiff in establishing declaratory relief to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the defendant where the plaintiff fails to establish his entitlement to the declaration by his own evidence."*

This means that the onus is on the Appellant to join or sue the party who liability purportedly falls on in order to establish the claim. As it relates to exonerating the Respondent on the basis Channel License Agreement, I have looked at the pleadings and evidence in this case and what is clear is that:

- i. The Appellant had a photo session with Virtual Media Network Limited.
- ii. The Respondent used the Appellant's picture on the Billboards in Akure and Abeokuta.
- iii. A Channel License Agreement existed between the Respondent and Virtual Media Network Limited.

What is also evident to me after looking at the Channel License Agreement is that the Respondent has agreed to broadcast Virtual Media Network Limited's Nigezie and Orisun Television Channels on its platform. Additionally, apart from the clauses stated by the trial judge

(3.1.4, 3.1.7, 2.1 and 2.2) by clause 11.1 and 11.2, Virtual Media Network was to provide certain materials for promotion of the channel. The Section provides thus:

*11.1 In order to promote the channel, Licensor shall provide to the Licensee the Channels Development plan, programs updating plan, promotional films, Video clips and other promotional materials within six (6) weeks from receiving the request of the Licensee.*

*11.2 The Licensee undertakes to include the channel's corporate branding in promotional print material and cross-channel promotions.*

It is a settled principle of law that a contract must be read as a whole to interpret the intentions of the parties. As such when all the clauses are read together it can be seen that Virtual Media Network in fact undertook that it own all copyrights to materials supplied to the Respondents. By the Respondent's evidence Virtual Media also gave them all the materials they used to promote Orisun Tv on StarTimes.

Coming to the conclusion above, I find that though the Appellant has the right to sue the Respondent, their failure to join or sue the Virtual Media Network made their claim liable to fail. More importantly, though the trial judge mentioned the Appellant suing the wrong party, his findings were also rested on the Virtual Media Network owning the copyright to the photograph. Therefore, the trial Court was right to have exonerated the Respondent on the basis that Virtual Media Limited had ownership and authorship of the images which the Respondent used by virtue of the Channel License Agreement.

This issue is resolved against the Appellant.

## **ISSUE TWO**

Under this issue, the Appellant contended that the trial judge was wrong in holding that the ownership and authorship of the copyright in the Appellant's photograph belongs to Virtual Media Network Limited relying on Section 10(1) (2) and (3) of the Copyright Act Cap 28 LFN 2004.

The above assertion was made by the Appellant's Counsel because he alleges that the claims before the Court are not for copyright but for passing off and image right also known as publicity right. Additionally, it was argued that leaving the claims and issues submitted to it for resolution and finding on issues of copyright which was not applicable to this case ultimately brought a miscarriage of justice.

I have looked at the judgment of the trial Court together with the evidence adduced before it and I find that the Appellant's argument is of no moment. Indeed, the tort of passing off is a claim that exists in common law which was mainly restricted to goods and services. However, in the English cases of **IRVINE VS. TALKSPORT LTD (2002) F.S.R. 60** and **ROBYN RIHANNA FENTY VS. ARACADIA GROUP BRANDS LTD (T/A TOPSHOP) & ANOR (2012) EWHC 2310 (CH)**, the plaintiffs who are celebrities brought actions against the defendants under the tort of passing off for unauthorized use of their images. The cases above have created what is known as image rights which when infringed can be sued under the tort of passing off. Image rights or publicity right refers to a person's right against misappropriation of his name, likeness, physical appearances, nicknames, pictures, personal slogans etc. Put simply, it is the right of a person to control the public's commercial exploitation of a person's identity. In Nigeria, there are no specific laws governing image rights and the closest law that can be considered is that enshrined in Section 37 of the 1999 Constitution known as the right to privacy.

Image rights are also equivalent to property rights and image rights in most cases are pursued by celebrities as they are persons that in most cases can establish the elements needed to succeed in the tort of passing off as it relates to image rights. This however does not preclude a

normal person from suing under this right.

Now in order to prove the tort of passing off the individual must establish that his/her image has acquired sufficient goodwill such as quantifiable goodwill which can be leveraged on in consideration for money. Secondly, he/she must prove that the third party has misrepresented to the public by using the image and lastly it must be proved that this misrepresentation caused or is capable of causing damages such as reduction in the value attached to their goodwill. Essentially the ingredients needed to prove the tort of passing off are: goodwill or reputation, misrepresentation by the defendant to the public and a damage suffered or likely to be suffered.

Applying the above essential ingredients of the tort of passing off mentioned above, the Appellant must prove that: she is entitled to goodwill, the acts of misrepresentation by the Respondent and the damage to her goodwill suffered or likely to be suffered. The question then to ask is even if the Appellant's claim is under the tort of passing off and not copyright has she established the three elements of the tort of passing off as it relates to image rights? The answer is a resounding NO!

At this juncture, I would like to state that image rights must be looked at against the copyright of a photograph. In Nigeria, the law on intellectual property as it relates to photographs is found under the Copyright Act. The Copyright Act provides that the copyright of photographs vests with the author. Photographs by virtue of Section 51 of the Copyrights Act are considered as artistic work. The Section states that:

*"artistic work" includes, irrespective of artistic quality, any of the following work or works similar thereto -*

- (a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints;*
- (b) maps, plans and diagrams;*
- (c) works of sculpture;*
- (d) photographs not comprised in a cinematograph film;*
- (e) works of architecture in the form of buildings models; and*
- (f) works of artistic craftsmanship and also (subject to Subsection (3) of Section 1 of this Act ) pictorial woven tissues and articles of applied handicraft and industrial art.*

While Section 10 of the Copyright Act which confers copyright of a photograph to the author provides that:

**10. (1) Copyright conferred by Sections 2 and 3 of this Act, shall vest initially in the author.**

**(2) Notwithstanding Subsection (6) of Section 11 of this Act where a work-**

**(a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or**

**(b) not having been so commissioned, is made in the course of the author's employment, the copyright shall belong in the first instance to the author, unless otherwise stipulated in writing under the contract.**

**(3) Where a literary, artistic or musical work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship as is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical; or to the reproduction of the work for the purpose of its being so published; but in all other respects, the author shall be the first owner of the copyright in the work."**

The Section above essentially means that the copyright to any photograph vests with the



photographer known as the author except there is a written agreement which states otherwise. Who the author of a photograph is can be found in Section 51 of the Copyright Act which provides thus:

*"author in the case of a photographic work, means the person who took the photograph."*

Referring back to the evidence in the case, the Appellant in her witness statement on oath contained on page 10 of the record of appeal stated:

*"That sometime in March 2012, I had a photo session with Orisun Tv, owned by Virtual Media Network showy before I was engaged by the company as a presenter.*

This was confirmed in her testimony on page 91 of the record of appeal where she stated that: *"in paragraph 3 of my witness statement, I stated that I had a photo session with Orisun Tv, and it was for celebrity profiling. Celebrity profiling is the picture data base that all TV stations have for artists for contents."*

While under cross-examination on page 92 of the record of appeal the Appellant said:

*The photos taken by Virtual Media Network Ltd with my permission were in the custody of the same Virtual Media Network and I requested for my copy.*

The trial judge after evaluating all evidence came to the conclusion on page 114 of the records of appeal that:

*"...by allowing Virtual Media Network to be using her photographs and images, ownership and authorship of the copyright automatically in the photographs and images resides/and belongs to Virtual Media Network. See Section 10(1) (2) and (3) of the Copyright Act, 2004 ..."*

I am not in total agreement with the trial judge's ratio here although I also agree that Section 10 of the Copyright Act applies to this case. It was the act of the Appellant allowing Virtual Media Network to use the images that gave the ownership of the copyright. It is the act of Virtual Media Network being the ones who took the photographs that makes it the author of the photographs. By taking the photographs they automatically have rights except there is an agreement otherwise.

What is evident from the above provision is that the person who is a muse or the person in the photograph is not in fact the author and therefore he/she does not own copyright in the photograph. Rather it is the person who took the photograph that is the author. The Appellant by her own evidence has stated that she had a photo session with Virtual Media Network the owners of Orisun Tv and as such since Virtual Media Network took the photographs then they have authorship and as a result they have copyright of the photograph not the Appellant .

The Appellant also made heavy weather about the trial judge not making a pronouncement on issue one in their final written address as it relates to the tort of passing off but dwelled on copyright. The issue formulated by the Appellant and adopted by the trial Court is reproduced thus: ***Whether the Defendant's use of the Plaintiff's photograph in its billboards in Akure and Abeokuta for promotional purposes without the consent and authorization of the Plaintiff amounts to a violation of the Plaintiff's image/publicity rights and the tort of passing off.***

As I have stated above, image rights and the tort of passing off are new rights that have been established through case laws even in the United Kingdom where the tort has been successfully advanced. In Nigeria however our law does not make provision for image rights neither are there many cases on the tort of passing off as it relates to image rights. Intellectual property as it relates to photographs is protected by the Copyright Act, aside from that all the evidence and pleadings of this case show that the case is one under copyright. The alternative would have been for the trial judge to say that the claim did not disclose a cause of action.

In conclusion, I find that from the pleadings and evidence before the trial Court, the issue of copyright is applicable. The claim under image rights and the tort of passing off does not apply and the ownership of the copyright in the Appellant's photograph belongs to Virtual Media Network Limited.

This issue is resolved against the Appellant,

In the circumstance, the appeal is therefore hereby dismissed. No orders as to cost.

**PETER OLABISI IGE, J.C.A.:** I agree.

**YARGATA BYENCHIT NIMPAR, J.C.A.:** I had the privilege of reading in advance the Judgment just delivered by my learned brother, MOHAMMED BABA IDRIS, JCA and I am in agreement with his reasoning and conclusion arrived at therein.

**Appearances:**

C. OKOYE, ESQ. For Appellant(s)

E. NWAGU, ESQ., with him, C. OKONKWO, ESQ. For Respondent(s)