

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 15 OF 2019 (OS)

FIA.....PLAINTIFF

VERSUS

GAA.....DEFENDANT

RULING

1. Am called upon to determine a preliminary objection, stated in a notice dated 19th March 2020. It is argued that the Originating Summons dated 15th November 2019., did not accord with the provisions of Order 37 rule 10 of the Civil Procedure Rules, as the question of the existence of a partnership between the parties was a matter of law and fact which required evidential proof, the alleged misconduct of the defendant in the alleged partnership also required evidential proof, the originating summons was supported by a detailed affidavit indicative of a dispute requiring evidential proof, and the said originating summons raised complex issues requiring evidential proof.
2. The originating summons on record invites the court to determine whether there was a partnership between the parties, whether there was misconduct by the defendant which affected the conduct of the business, whether the business of the alleged partnership was carried out at a loss, whether the said partnership should be dissolved whether upon dissolution of the alleged partnership accounts ought to be taken, among others. The application is supported by a 38 paragraph affidavit, with a bundle of 11 documents annexed to it.
3. The defendant, upon being served, did not file an affidavit in response to the case set out in the supporting affidavit, instead he filed the notice of preliminary objection that I am now called upon to decide.
4. The parties agreed to canvass the application by way of written submissions. They have both complied, by filing their respective written submissions. I have read through them and noted the arguments made therein.
5. I agree with the defendant. The issues raised in the originating summons cannot be disposed of summarily. They are of a nature that would require an oral hearing. The alleged partnership was not incorporated by deed, and has to be inferred from the conduct and relationship between the parties. Such conduct or relationship has to be assessed from oral evidence from both sides. It is alleged that the defendant conducted himself in a manner that was either inconsistent with the partnership arrangement or to the detriment of the partnership. The conduct or misconduct of the defendant, which is said to be detrimental to the partnership or in breach of the partnership agreement, can only be brought out through oral evidence presented by the parties. It is alleged that the partnership always operated at a loss. Whether a business operated at a loss or not is usually subject to documentary evidence, and where there is no agreement on the fact, the person presenting the accounts would have to be subjected to cross-examination. That would require an oral hearing. Clearly, a suit of this nature should ideally be commenced by way of a plaint. That would be the most effective way of handling highly contested matters of this nature. The plaintiff ought, therefore, to have initiated the cause by way of plaint.
6. However, all is not lost. There is nothing to prevent disposal of an originating summons by way of oral or *viva voce* evidence. It is common with suits for division of matrimonial property, especially those founded on the now repealed Married Women's Property Act of 1882. The instant suit should, therefore, not be struck out to pave way for the filing of a suit by way of plaint.
7. The way forward should be for the defendant to file a detailed affidavit, in response to the affidavit that the plaintiff swore on 11th November 2019, in support of the originating summons, complete with any documents that he may wish to rely on. Let the affidavit be filed within fourteen days of date of this ruling. The plaintiff shall have another fourteen days after service to file a further affidavit, if need be, limited to any new issues that may raise in the reply. Thereafter, the matter may be disposed of by way of *viva voce* evidence. The notice of preliminary objection dated 19th March 2020 is hereby disposed of in those terms. Let the parties take a date for mention, at the registry, for compliance and further directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF MARCH 2021

W MUSYOKA

JUDGE