



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL CASE NO. 7 OF 2016 (O.S)

THE COUNTY ASSEMBLY OF KWALE.....PLAINTIFF/APPLICANT

VERSUS

APOLLO MUINDE DANIEL NGONZE trading as APOLLO MUINDE

& NGONZE ADVOCATES.....DEFENDANT/RESPONDENT

RULING

1. Through an application by way of Notice of Motion dated 4th May, 2017 brought under the provisions of Order 1 rule 10(2), (4), Order 8 rule 3(1), (2), (3) and Order 31 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, the applicant seeks the following orders:-

(i) That this Honourable court be pleased to grant leave to have the name of Apollo Muinde and Daniel Ngonze trading as Apollo Muinde & Ngonze Advocates substituted with the name of Apollo Muinde trading as Apollo Muinde & Partners as the new defendant herein; and

(ii) That the costs of the application be costs in the cause.

The application is supported by the affidavit of Apollo Muinde sworn on 4th May, 2017.

2. On 10th May, 2017, the respondent filed its grounds of opposition raising the following grounds, that:-

(i) At all material times hereto the instructions was (sic) issued to the firm of Apollo Muinde and Ngonze (sic) Advocates and the suit herein was filed when the instructed firm was a partnership and section 17 of the partnerships Act (No. 16 of 2012, Laws of Kenya) expressly provides that *“every partner is jointly liable with his co-partners for actions, omissions done by a partner in course of ordinary business that may result in the loss or injury of a third party or for the misapplication of money or property received for or in the custody of the firm.”*;

(ii) The application herein is bad in law, misconceived and devoid of merit in as far as it purports to introduce the firm of Apollo Muinde & Partners, as the respondent and yet there was no privity of contract between the County Assembly of Kwale and the said firm of Apollo Muinde & Partners contrary to the basis (sic) tenets of the law of contract;

(iii) In view of the foregoing, the application is scandalous, frivolous and an abuse of the Honorable Court and ought to be dismissed with costs; and

(iv) Such other, further and/or incidental grounds as may emerge or be canvassed at the hearing of the application.

3. Mr. Tindika, Learned Counsel for the applicant submitted that they were seeking leave to substitute the defendant/applicant from Apollo Muinde & Daniel Ngonze trading as Apollo Muinde & Ngonze Advocates with Apollo Muinde t/a Apollo Muinde & Partners. He explained that Mr. Ngonze left the law firm in issue on 3rd April, 2017. Counsel referred to a copy of a change of particulars marked as AM1 attached to the supporting affidavit. The court's attention was drawn to the provisions of Order 1 rule 10(2) and (4), Order 8 rule 3(1), 2, and (3) of the Civil Procedure Rules which give the court powers to allow a party to be joined in proceedings or to be struck out from proceedings. He stated that rule 4 allows for amendments to be done to reflect the changes.

4. Mr. Tindika further stated that Order 8 rule 3 (1), (2) and (3) of the Civil Procedure Rules allow a party to amend its pleadings at any stage before final Judgment. He added that the application has been prompted by the fact that the applicant wants to have the proper party defend the suit and that the respondent will not be prejudiced. He referred to the annexures marked as DMM-3e, DMM-3f, DMM-3g, DMM-3h, and DMM-4 attached to the affidavit in support of the Originating Summons which comprise correspondence from the respondent to show that the brief was being handled by Apollo Muinde Advocate personally. Counsel prayed for the application to be allowed with costs.

5. Mr. Masore, Learned Counsel for the respondent relied on his grounds of opposition in submitting that the provisions of section 17(1) of the Partnerships Act provides that a partner is bound by an act done by a partner who is carrying on the business of a partnership for work done in the ordinary course of business.

6. He espoused the provisions of Section 22(1) of the said Act that state that a partner who has unlimited liability is personally liable for the whole amount of any obligation incurred by the partnership. Counsel referred to the provisions of section 31(2) of the Partnerships Act which provides that a person who ceases to be a partner does not cease to be personally liable under section 22(1) of the said Act for partnership obligation incurred while a partner. He stated that in accordance with section 36(2) of the Partnerships Act, the authority of as partner subsists.

7. Counsel referred to the annexure marked DMM 3(a) attached to the affidavit in support of the Originating Summons in submitting that his client instructed the applicant to act for him when the partnership name was Ms/ Apollo Muinde & Ngonze Advocates. In reference to annexure DMM- 3b to the said affidavit, Counsel said that the law firm undertook due diligence of some properties as instructed in a conveyancing. He argued that in accordance with the provisions of Section 2 of the interpretation part of the Partnerships Act, a partnership document includes a business letter. He stated that the business letter dated 10th June, 2015 shows that his client gave instructions to the applicant's law firm. In the Counsel's view, the present application is aimed at delaying the hearing of the main suit. He added that the application was an abuse of the court process and sought its dismissal with costs.

8. In response to the foregoing, Mr. Tindika stated that Counsel for the respondent had not shown if it would suffer any prejudice if substitution of the parties was done. He submitted that the Partnerships Act is supplementary to the provisions of the Civil Procedure Rules. In making reference to the provisions of Sections 21 and 22 of the Partnerships Act, he submitted that there is no Judgment, order or arbitral award that has been made in this case. Counsel further submitted that in the event that Judgment is made in favour of the plaintiff/respondent in the Originating Summons, the substituted party will be liable and the respondent will not suffer any loss.

ANALYSIS AND DETERMINATION

9. The annexures marked DMM-2a, DMM-2b attached to the affidavit in support of the originating summons show that the amount of Kshs. 21,600,000/= was made to the law firm of Apollo Muinde & Ngonze. Further annexures attached to the said affidavit, marked as DMM-3(a), DMM-3(b), DMM-3(c), DMM-3(d), DMM-3(e), DMM-3(f), DMM-3(g), DMM-3(h), DMM-3(i) and DMM-3(j) being

correspondence between the applicant and the respondent show that the letters addressed to the applicant and those written by it, bore the name M/s Apollo Muinde & Ngonze Advocates. The payment that forms the subject of the Originating Summons was made on 30th June, 2015 to the firm of Apollo Muinde & Ngonze. Although the name “Advocates” was not included in the name of the beneficiary in the funds transfer form marked as DMM-2a, it is clear that the applicant was by then trading in the name and style of M/s Apollo Muinde & Ngonze Advocates.

10. The applicant attached a certificate of registration of particulars to its supporting affidavit, in support of the present application. The said certificate shows that the business name of Apollo Mutisya Associates changed to Apollo Muinde & Partners on 3rd April, 2017. The proprietor of the said firm is indicated to be Apollo Mutisya Muinde. It therefore follows that when the respondent gave instructions to the applicant to act for it in the purchase of land in issue, the business going by the name M/s Apollo Muinde & Partners was not in existence. When instructions were given to the applicants by the respondent, the partners in the said law firm were Apollo Muinde and Daniel Ngonze, they traded in the name and style of Apollo Muinde & Ngonze Advocates.

11. Halsbury’s Laws of England, 4th Edition Volume 35 states as follows at paragraph 2:-

“Partnership involves a contract between parties to engage in a business with a view to profit. As a rule, each partner contributes either property, skill or labour but this is not essential. A person who contributes property without labour has the rights of a partner is usually termed as a sleeping or dormant partner. A sleeping partner may have contributed nothing. The question whether there is a partnership is one of mixed law and fact.”

12. Section 17 of the Partnerships Act is relevant to the current application. The said section provides as follows:-

“(1) A partnership is bound by an act done by a partner who is carrying on the business of the partnership.

(2) A partnership is not bound by an act or omission of a partner under subsection (1) if –

(a) The partner has no authority to act on behalf of the partnership; and

(b) The person with whom the partner is dealing –

(i) Has notice that the partner does not have authority to act on behalf of the partnership; or

(ii) Does not know that the partner is a partner in the partnership or does not believe that the partner is a partner in the partnership or does not believe that the partner is a partner in the partnership.”

13. The relationship between the partners, their rights and duties are generally governed by agreements between the parties, the common law, statutes and their conduct. The Partnerships Act and the Registration of Business Names Act are applicable in the present circumstances. In paragraph 5 of the supporting affidavit, Mr. Apollo Muinde Advocate deposes that by mutual consent, the partners as part of the dissolution of the partnership arrangement and/or settlement have agreed that the responsibility and/or any liability touching on this transaction and/or suit shall be borne by the proposed new defendant, to wit, Apollo Muinde trading as Apollo Muinde & Partners. In support of the said deposition the deponent exhibited a copy of the certificate of change of particulars to show the new proprietorship. The said certificate however only shows that Mr. Muinde is now the sole proprietor of the law firm of Apollo Muinde and Partners. No partnership deed was exhibited to show how liabilities incurred while trading in the name and style of Apollo Muinde & Ngonze Advocates would be shared.

14. It is therefore apparent that the applicant has failed to persuade this court of the need to grant the

orders sought. As it stands now, it matters not that Mr. Daniel Ngonze Advocate has left the law firm of Apollo Muinde & Ngonze Advocates, the fact remains that any acts of omission or commission done when he was a partner in the applicant law firm would be binding on him, if at the hearing of the Originating Summons the plaintiff/respondent proves its case to the required standard or unless the said Advocate proves to the court that he was exempt from liability in the said transaction. All this can only be established after hearing the parties cited in the Originating Summons.

15. I am persuaded by the submissions of Counsel for the respondent that the provisions of Sections 7(1) and 21 and 22(1), 31(2) and 36 of the Partnerships Act are relevant to the present application. I therefore hold that the present application is without merit and is an abuse of the court process. I hereby dismiss it with costs to the plaintiff/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Masore for the plaintiff/respondent

Ms. Mwaka holding brief for Mr. Tindika for the defendant/applicant

Mr. Oliver Musundi - Court Assistant