



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI HIGH COURT**

**CIVIL CASE NO 266 OF 2015**

LANDOR LLC.....1<sup>ST</sup> PLAINTIFF

WPP LUXEMBOURG GAMMA SARL.....2<sup>ND</sup> PLAINTIFF

VERSUS

WAGUDE LUI T/A LANDOR

& ASSOCIATES.....1<sup>ST</sup> DEFENDANT

LANDOR AND ASSOCIATES LIMIMITED.....2<sup>ND</sup> DEFENDANT

LUI O. WAGUDE.....3<sup>RD</sup> DEFENDANT

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**RULING**

1. Before the Court was the application by the 1<sup>st</sup> Defendant dated 7<sup>th</sup> July 2015, brought pursuant to the provisions of Order 1 Rule 14 of the Civil Procedure Rules, as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The 1<sup>st</sup> Defendant sought the following orders *inter alia*;

- 1. THAT the suit against the Defendant be struck out;***
- 2. THAT the costs of this application be borne by the Plaintiffs.***

The application was predicated upon the grounds that the 1<sup>st</sup> Defendant Landor & Associates was a non-existent entity, and thus the claim therefore against it was unfounded and bad in law, and that therefore the same should be struck out as its presence in the suit was unjustifiable.

2. The application was further supported by the affidavit of Lui O. Wagude sworn on even date. Therein, it was deposed to that the 1<sup>st</sup> Defendant business which was registered as such on 28<sup>th</sup> November 2009 was incorporated into a limited liability company on 23<sup>rd</sup> January 2014. It was the deponent's contention that by incorporating the business into a company, the latter became a non-existent entity.

3. The Plaintiffs opposed the application through Grounds of Opposition and the Replying Affidavit of Anne Ehrismann both filed on 14<sup>th</sup> September 2015. It contended that the registration and incorporation

of the company Landor & Associates Ltd did not extinguish the existence of the business name Landor & Associates. Further, it was averred that the 1<sup>st</sup> Defendant was still a registered entity and a separate legal person from the 2<sup>nd</sup> Defendant. It was the deponent's averment that the registration of the 2<sup>nd</sup> Defendant did not extinguish the cause of action that lay against the 1<sup>st</sup> Defendant, which was in respect of infringement and passing off of the Plaintiffs' trademarks.

4. The 1<sup>st</sup> Defendant's contention is primarily based on the proposition that the incorporation of the 2<sup>nd</sup> Defendant, Landor & Associates Ltd, tentatively extinguished its existence, and that as such, no claim would or could be brought against it as it was a non-existent entity. In support of its contention of its contention, it was further stated that it was the practice at the companies registry that once a duly registered business was incorporated into a limited liability company of similar name thereof, then the business automatically ceased to be in existence. It was therefore, the 1<sup>st</sup> Defendant's assertion, that by its non-existence, no claim or cause of action could be instituted against it, and as such it should be struck off as a party to the suit. Reliance was placed on the provisions of Order 2 Rule 15(1), as well as Order 1 Rule 10(2) both of the Civil Procedure Rules. Pursuant to Order 2 Rule 15(1), the Court may be inclined to strike out pleadings that may be vexatious, frivolous, scandalous or discloses no reasonable cause of action.

5. However, by its application, the 1<sup>st</sup> Defendant does not seek to have any pleadings struck out, but for its name to be removed as a party to the suit. The main issue is whether the 1<sup>st</sup> Defendant was still duly registered as a business or not, and whether therefore, its name was properly or erroneously added as a party to a suit. Order 1 Rule 10(2) is instructive in this regard. It is provided that;

***'The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added'.***

6. On the other hand, the Plaintiffs contended that the incorporation of the 2<sup>nd</sup> Defendant did not, as claimed by the 1<sup>st</sup> Defendant, extinguish its existence as a legal entity. It was its submission that the 1<sup>st</sup> Defendant was still duly registered under the Registration of Business Names Act, and pursuant to the provisions of the Act, was still an existent entity. Their assertion was that the incorporation of the 1<sup>st</sup> Defendant into the 2<sup>nd</sup> Defendant did not extinguish its existence, as its purported de-registration did not comply with the provisions of Section 15(5) of the Act.

7. Under the aforementioned Section 15(5), it is provided that;

***'If, in the case of any firm, individual or corporation registered under this Act, there occurs after the registration an event in consequence of which the continuance of the business under the business name under which such firm, individual or corporation has been carrying on business no longer entails registration under this Act, the firm, individual or corporation so continuing the business shall send by registered post or deliver to the Registrar notice of the happening of such event, and the Registrar may, on being so notified or on being notified under section 9 of the happening of such event, cancel the entry in the register relating to such firm, individual or corporation'.***

8. The said Section 15(5), as read together with Section 9(1) and 15(1) thereof, makes it a requirement for the firm, individual or corporation, as the case may be, to inform the Registrar, in the prescribed form, of any changes that may have occurred subsequent to the registration of the business.

9. The 1<sup>st</sup> Defendant had not shown that any notice was sent to the Registrar that the business was incorporated into a company of the same name, and that it was therefore not carrying out its business

under the said name. Further, it has not shown that they complied with the obligations as provided under Section 9(1) and 15(1) of the Act, and that it had duly notified the Registrar of the changes that it had effected. It is therefore not enough to state that it was a practice as the companies registry that once a business is incorporated into a company of similar name thereof that it ceased to exist. The law provides otherwise, and the existence of provisions of law overrides any practice that the 1<sup>st</sup> Defendant may have claimed to have existed.

10. In a similar application filed before Njagi, J (as he then was) in **Andrew Muriuki v Equity Building Society (2005) eKLR**, he dismissed the application for striking out by the Defendant on the grounds that it still existed as a legal entity, at least in theory. He held that;

***“Bearing these developments in mind, I note that the main issue is whether the Defendant on record, Equity Building Society, still exists as a legal entity or it does not. If it still exists, even though it has transferred all its rights and liabilities, at least in legal theory, it can still be sued. But if it does not exist as a legal entity, no suit can be sustained against it.”***

Similarly in **Kisii Hardware v Kisii Farmers Co-operative Union Ltd (2007) eKLR**, Nambuye, J (as she was then), relied on the case of **HCCC No 5944 of 2003 V Shah T/A Kiambu Services Ltd v Barua Esates Ltd & Samuel Gicheru Mbugua** with regards to the existence of a legal entity. In her determination on the application to strike out the Defence, the learned Judge stated that;

***“That no requirement under the said rules which were satisfied by the Plaintiff was that the firm be in existence as at the time the cause of action accrues. The firm herein was in existence as at the time the cause of action accrued. That is no requirement that the action abates or lapses upon the firm ceasing to carry on business as such. In fact the provision of Rule 3 states clearly that the proceedings commenced in the name of the firm have to be continued in the name of the firm until finalized. The notice of cessation of business relied upon by the Applicant stipulates clearly that the firm was to exist for the purposes of winding up. There is nothing to show that the said firm has been wound up. Had that been the case the documentation from the registration department would have indicated so. As long as it had not been wound up it is still alive and is entitled to pursue its accrued rights in law.”***

11. According to the above citations, and in considering the provisions of Sections 9(1), 15(1) and 15(5) of the Registration of Business Names Act, the 1<sup>st</sup> Defendant was still in existence at the time of the filing of the suit against it and the other Defendants by the Plaintiffs. It had not ceased to exist, as there is no notice from the Registrar that it ceased to be an entity after it was incorporated. What the 1<sup>st</sup> Defendant had failed to appreciate was that the law placed an obligation upon it pursuant to the provisions of Section 9(1), as read together with Section 15(5) of the Act, of giving notice to the Registrar of any changes that may have occurred subsequent to the registration of the business, Such changes included the incorporation of the business into a limited liability company. The assumption that it was the practice for the business to automatically cease should the same be incorporated is not founded in law, and as such, the Court would not rely upon it as a customary practice.

12. For all intents and purposes, the 1<sup>st</sup> Defendant is an existent entity under the law, with the capacity to sue and be sued in its own name. It has not be shown that the 1<sup>st</sup> Defendant ceased to exist as a business, and that it had failed in fulfilling such obligations as would have clearly shown such non-existence.

13. In consideration of the foregoing, the application by the 1<sup>st</sup> Defendant is unmeritorious, and the same is hereby dismissed with costs to the Plaintiffs.

**Dated, signed and delivered in court at Nairobi this 29<sup>th</sup> day of January, 2016.**

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**C. KARIUKI**

**JUDGE**