



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO. 16 OF 2014(O.S)

DONNY LANGAT.....APPLICANT

VERSUS

BELYON INVESTMENTS.....1ST RESPONDENT

ELIJAH SANG2ND RESPONDENT

BENNY KOMINGOI3RD RESPONDENT

JOSEPH SANG4TH RESPONDENT

R U L I N G

1. The matter before me was filed by way of Originating Summons dated 2nd December, 2014 and filed on 10th December, 2014. It is supported by an affidavit of the applicant sworn on 2nd December, 2014.

The applicant is seeking two prayers namely:

- i. *The application should be heard ex parte.*
- ii. *An order compelling the Managers of the Respondent to take accounts to ascertain the true financial status of the business Belyon Investment (1st Respondent)*

2. A notice of appointment dated 22nd January, 2015 was filed on 23rd January, 2015 by Gordon Ogola, Kipkoech & Co. Advocates on behalf of the respondents.

On the same date an undated Preliminary Objection was raised by Gordon Ogola & Co. Advocates in terms of the undated grounds of opposition which were also filed.

3. The main Preliminary Objection is that the applicant has no *locus standi* in respect of this matter.

Secondly, that the 1st respondent has no capacity to sue or be sued in its own name as its not a legal entity.

4. **Mr. Langat** for the Applicant raised a Preliminary Objection dated 22nd February, 2015 which was filed on 26th February, 2015. It is to the effect that the respondents' advocates are not properly on record.

Both counsel did file and exchange written submissions on their own volition without any such directions

from the court. This court allowed the counsel appearing to argue their applications simultaneously which they did.

5. Mr. Kipkoech made submissions while relying on the Preliminary Objection, grounds of opposition, written submissions and list of authorities. He submitted that the exhibit (DK1) which is a certificate of registration showed that the 1st respondent is a business registered in the names of three (3) people. Further that the applicant had not shown any nexus between him and the three people.

6. He further submitted that if the applicant was a grandson to one of the deceased partners he could only approach the court through a Succession Cause issuing letters of administration which was not the case.

7. He referred to the case of **Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank - NRB HCCC No.5116 of 1992** and submitted that the 1st respondent should not have been sued in its name. Instead the Partners should have been sued.

He also invited the court to look at the body of the Originating Summons and the supporting affidavit. He asked the court to dismiss and strike out the Originating Summons.

8. Mr. Langat for the applicant submitted that the applicant was suing on his own behalf as a shareholder. Further that there was no need for letters of administration as Elijah Belyon was not a party to this suit. He found the case of **Salim Yusuf Mohamed & Anor. Vs. Nabhan Swaleh Salim & 2 Others (2012) eKlr** referred to by the respondents to be irrelevant to this case.

9. On capacity to sue, he submitted that the 1st respondent was properly sued and he referred to **Order 30 Rules 1 and 2 of the Civil Procedure Rules.**

10. He further submitted that there was a typing error in the supporting affidavit while describing the parties and this would not go to the substance of the case.

11. On the Preliminary Objection dated 22nd February, 2015 he submitted that there was no entry of appearance filed as the respondents' counsel had instead filed a Notice of appointment of advocate. He referred the Court to **Order 6 Rules 1 and 2 of the Civil Procedure Rules and Order 9 Rule 7 of the Civil Procedure Rules.** This to him was irregular and he asked the court to expunge all the documents filed by the firm of Gordon Ogolla, Kipkoech advocates.

12. I have considered the arguments by counsel for both parties in the Preliminary Objection. This is a Preliminary Objection to the Originating Summons filed on 10th December, 2014 by the applicant Donny Langat. There is also another Preliminary Objection to the appearance by Gordon Ogolla, Kipkoech advocates for the respondents filed on 22nd February, 2014.

In my view the issues that fall for determination are as follows:

- 1. Whether the firm of Gordon Ogolla, Kipkoech advocates is properly on record.*
- 2. Whether the 1st Respondent has the capacity to sue and/or be sued.*
- 3. Whether the applicant has the Locus standi to sue.*

Issue No. (i)

13. Whether the firm of Gordon Ogolla, Kipkoech advocates is properly on record.

The record shows that the firm of Gordon Ogolla, Kipkoech advocates filed a Notice of Appointment to act for the respondents on 23rd January, 2015. The notice is dated 22nd January, 2015.

Order 6 Rules (1) and (2) of the Civil Procedure Rules explain how appearance should be entered after summons have been served. Appearance is therefore through filing of a Memorandum of appearance by a party or an advocate on behalf of the party.

14. Order 9 Rule 7 of the Civil Procedure Rules provides as follows:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

This shows that the Memorandum of appearance and Notice of appointment are two different documents and are filed at different times. It follows that the Notice filed by the firm of Gordon Ogolla, Kipkoech advocates is irregular. Mr. Langat submitted that all the documents filed by the said firm should be expunged.

15. There is no doubt that the respondents were served and they gave instructions to the firm of Gordon Ogolla, Kipkoech advocates to represent them in this matter. It is this firm of advocates that filed the wrong papers.

16. Article 159(1) (d) of the Constitution urges the courts not to over dwell on procedural technicalities, while exercising their judicial authority. **Section 1A(1) and (2) and Section 3A of the Civil Procedure Act** give guidance on what the objective of the **Civil Procedure Act** and **Civil Procedure Rules** is. The ends of justice in this matter would demand that this court recognizes the intention of the respondents as being their desire to be represented by counsel and to be heard.

17. It would be unjust to throw them out just because their advocates filed a Notice of Appointment instead of a Memorandum of appearance.

18. Though the two documents are different their main purpose is to bring a party and/or advocate on record. This irregularity is therefore curable vide **Article 159(1)(d)** of the Constitution. The Preliminary Objection on the representation is dismissed.

Issue No. (ii)

19. Whether the 1st respondent has capacity to sue and/or be sued.

The certificate filed herein (DKI) shows that the 1st respondent is a business registered under the Registration of Business Names Act (Cap 499 Laws of Kenya) in the names of;

- i. *Elijah Kipkirui Belyon*
- ii. *Benny Cheruiyot Komingoi*
- iii. *Elijah Kiplangat Sang*

20. Order 30 Rule (1) of the Civil Procedure Rules provides as follows:

“Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.”

There is no provision under the Registration of Business Names Act that deals with the issue at hand.

However for offences under the said Act the firm, individual or corporation, shall be held liable as the case may be.

It is therefore clear that under the **Civil Procedure Rules 2010**, a firm may sue and/or be sued under such a name. The 1st Respondent was therefore properly sued.

Issue No. (iii)

21. **Whether the Applicant has the Locus Standi to sue.** The Applicant described the 1st Respondent as a family business and himself as a stakeholder. He has not provided any proof that indeed he is a stakeholder in the 1st respondent.

In his oral submissions Mr. Langat submitted that Elijah Belyon was not a party to this suit whether dead or alive. However in his written submissions he has clearly indicated that Elijah Belyon one of the registered owners of Belyon investments could not be enjoined in this application as he is deceased.

22. Now that it is clear that Elijah Belyon one of the partners is deceased, the law requires that his estate be represented by a legal representative as provided for under **Section 79 of Law of Succession Act** which provides;

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”

23. The 2nd and 3rd respondents are partners in the 1st respondent but 4th respondent is not a partner nor a legal representative of the late Elijah Belyon.

The Applicant is calling himself a stakeholder. He has not explained in what capacity he is a stakeholder – and or interested party. He is also not a legal representative of the late Elijah Belyon, as he has not obtained letters of administration.

Order 37 Rule (1) of the Civil Procedure Rules explains who may take out Originating Summons. It provides as follows:

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

- a. ***Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust.***
- b. ***The ascertainment of any class of creditors, devisees, legatees, heirs, or others.***
- c. ***The furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts.***
- d. ***The payment into court of any money in the hands of the executors, administrators or trustees.***

- e. *Directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees.*
- f. *The approval of a sale, purchase, compromise or other transaction.”*
- g. *The determination of any question arising directly out of the administration of the estate or trust.*

24. **Order 37 Rule (10)** of the **Civil Procedure Rules** deals with the issue of partnerships and taking of accounts. It provides;

“When the existence of a partnership, or the right to a partnership, or the fact of the dissolution thereof, is not in dispute, any partner in a firm or his representatives may take out an originating summons returnable before the judge sitting in chambers against his partners or former partners or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting)and for the purpose of taking the accounts of and winding up such partnership.”

25. The applicant has failed to show that he has letters of administration to the estate of the late Belyon to enable sue on behalf of the estate. There is also nothing laid before this court to show that he is a shareholder of the 1st Respondent, or an interested party in this matter.

I find that the Applicant has failed to bring himself under the Provisions of **Order 37 rule 1** and **Order 37 rule 10** of the **Civil Procedure Rules** in order to qualify as one of the persons who may file this Originating Summons.

26. I therefore find that the applicant lacks the *locus standi* to file the Originating Summons, for the reasons indicated above.

The result is that the Respondents' Preliminary Objection succeeds and the suit is struck out. Each party to bear his own costs.

Dated,signed and delivered this 21st day of April, 2015

H.I. ONG'UDI

JUDGE

In the presence of

Mr. Kiprono for Applicant – present

Mrs. Kirui for Respondents – present

Lagat – Court Assistant