



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 224 OF 2013 (O.S)

STANLEY MWANDOE RIGHA.....PLAINTIFF

VERSUS

BRAIMOH JOSEPH MBURU.....DEFENDANT

RULING

1. The plaintiff's originating summons frames two broad issues: whether the business and affairs of the law firm of Righa, Mburu & Company should be wound up; and, whether the name *Righa* should be removed from the description of the firm. Contemporaneously with the summons, the plaintiff took out a notice of motion dated 31st May 2013. The interlocutory motion seeks to restrain the defendant from taxing or presenting bills of costs against two insurance companies. There is also a prayer to restrain the defendant from trading in the name and style of Righa, Mburu & Company Advocates.

2. The plaintiff and defendant were law partners trading in the name and style of Righa, Mburu & Company Advocates. The pith of the notice of motion is that the partnership *terminated* in the year 2011. However, the defendant has refused to *dissolve* the firm and continues to use the name of the partnership for gain or profit. The plaintiff asserts that the defendant was not mentally fit to continue in the partnership. The plaintiff thus left the partnership to trade in the name of S.M. Righa & Company Advocates. The plaintiff's case is that the defendant is exposing him to business risk, loss and embarrassment.

3. The motion is contested. There is a detailed replying affidavit sworn on 28th June 2013. There are also grounds of opposition of even date. The gravamen of the objection is that the plaintiff is acting at the behest of third parties; that he lacks *locus standi*; and, that the motion is fatally defective and *mala fides*. Those matters are buttressed by the replying affidavit.

4. The defendant concedes at paragraph 9 that the plaintiff resigned from the firm by a letter dated 3rd October 2011. Mediation efforts through the firm of K. Mosesti have not borne fruit. He blames the plaintiff for the gridlock. The defendant laments that the plaintiff took off with all the partnership files from Occidental Insurance Company Limited and Fidelity Insurance Company Limited. At paragraph 21 of the reply, the defendant contends that the motion before the court is meant to protect those two companies. He concedes there is a complaint against the firm by one Anthony Njoroge pending at the Advocates Complaints Commission. But he states that the complaint is not germane to the matters of taxation.

5. . In a nutshell, the defendant's case is that the motion is meant to prevent him from realizing his legal fees. Those matters are contested and answered blow by blow in the plaintiff's further affidavit sworn on 24th July 2013. In a synopsis, the plaintiff states that the taxation of bill of costs is aimed at annoying the plaintiff's clients; that the true intention is to frustrate his practice. The plaintiff proposes that the defendant should revert to the use of B.N. Mburu & Company; a firm he states is still in operation.

6. The disputants have filed written submissions. Those by the respondents are dated 18th February 2014; those by the defendant were filed on 19th February 2014. I have considered the pleadings, depositions and rival submissions.

7. What is before me is not the *originating summons* dated 31st May 2013 but the annexed interlocutory *notice of motion* also dated 31st May 2013. The true province for the matters pleaded in the originating summons is the trial court. They call for detailed evidence and mature consideration. Directions on the originating summons have not been taken. I would thus embarrass the trial court by making findings whether the defendant is mentally sound to practice in a partnership; or, whether the firm should be formally dissolved; or, whether the defendant is entitled to the use of the partnership name; or, the merits of the contest between the two advocates for the former clients of the partnership. I would permeate the boundaries of an interlocutory decision.

8. A partnership is a relationship between persons carrying on a business in common with a view to profit. See section 3 of the Partnership Act, *Shah v Patel & 2 others* [1986] KLR 676, *Mworia & another v Kiambati* [1988] KLR 665. The relationship between the partners, their rights and duties are generally governed by agreements between the parties, the common law and statute; in this case, the Partnership Act and the Registration of Business Names Act are relevant. The bankruptcy, resignation, retirement or death of a partner does not *ipso facto* extinguish the rights of the remaining partner(s) or third parties. See generally, *Molu & another v Kenya Railways & another* [2002] 2 KLR 551, *Official Receiver v Aggarwal* [1968] E.A 468. It leaves the remaining partner(s) with the option of winding up the business or approaching the court for a decree of dissolution of the partnership.

9. It is common ground that the plaintiff and defendant incorporated the partnership on 28th September 2001. That is well over 13 years ago. They did *not* execute a partnership deed or any other *agreement*. At paragraph 4 of the supporting affidavit, the plaintiff states that the bedrock of the partnership was *mutual trust*. This was thus a partnership at will that could be determined by notice.

10. It is common ground that the defendant was primarily dealing with litigation in the firm. The plaintiff alleges that due to failing mental health of the defendant, the partnership became untenable. The plaintiff thus registered *his* firm under the name of S.M. Righa & Company Advocates on 21st March 2011. But that notwithstanding, he continued to trade in the old partnership name until 2nd November 2011 when his perseverance worn off. On that same day he swore an affidavit *resigning* from the partnership.

11. From that evidence there is no doubt that the plaintiff left the partnership as early as March 2011. I say that with great precaution because those matters are best left to the trial court. But I have seen a certificate of registration of a business name in the style of S.M. Righa & Company dated 21st March 2011. Assuming then that the defendant *remained* in the firm, I would add *obiter* that in law and practice, the defendant was entitled to the use of the *name* of the retiring or former partner. Since there were two partners, the resignation of the plaintiff meant there was *no* longer a *partnership*. That is however *different* from the right of the remaining partner to use the *name* of the old partnership.

12. I have no clear evidence to show that the remaining partner has been trading under his former business name, B.N. Mburu & Company. Again, the available evidence suggests that he has continued to trade as Righa, Mburu & Company Advocates. I am fortified in that analysis because that is the reason the plaintiff has come to court: to restrain the defendant from continued use of the partnership name.

13. What is not in doubt is that there is a *contest* over clients of the partnership. For example, the letter at page 116 of the motion is addressed by the plaintiff to Occidental Insurance Company. It requests the

client to *transfer* its briefs in the partnership to S.M. Righa & Company. A similar letter at page 118 is addressed to another client Fidelity Insurance Company. S.M. Righa & Company has filed notice of change of advocates. It is not clear whether accounts were taken at the point the partnership was determined. An attempt to appoint an auditor for that purpose has come a cropper. It is important to distinguish between *dissolution* of a partnership (which takes effect on the withdrawal or death of a partner) and the use of the partnership *name* (to which the remaining partner may be entitled). I have said there is no clear evidence that the defendant has been using or has reverted to the use of his old business name of B.N. Mburu & Company Advocates.

14. It is unfortunate that mediation, which would be ideal to resolve the dispute, has been unsuccessful. On at least two occasions, I have adjourned this matter to allow the parties to mediate the dispute. In doing so, I have been alive to the provisions of article 159(2)(c) of the Constitution and section 59A of the Civil Procedure Act. That window of mediation remains open to determine the originating summons.

15. Granted all those facts, I cannot say that the plaintiff has established a *prima facie* case to restrain the defendant from trading in the *name* and style of Righa, Mburu & Company. *Giella Vs. Cassman Brown & Company Ltd* [1973] E.A. 358. The use of the name might embarrass the plaintiff in a social or business sense; but not in the *legal* sense. In a word, I am unable to exercise my discretion to restrain the defendant from the use of the partnership name. I would add *obiter* that the Registration of Business Names Act affords some level of protection to a retiring partner: the filing of form BN/4 under section 8 of the Act and rule 6 of the Rules notifying the Registrar of change of particulars of the proprietors.

16. I would then turn to the taxation of bill of costs by the defendant. The advocate–client bills of cost against Occidental Insurance Company and Fidelity Insurance Company are before the taxing master of this Court. The taxing master exercises a special and primary jurisdiction. The High Court only gets seized of jurisdiction over taxation by an appeal or reference from the taxation. *Sharma Vs. Uhuru Highway Development Company* [2001] 2 E.A 530, *Donholm Rahisi Stores Vs. East African Portland Cement Limited* [2005] e KLR.

17. The objections to taxation taken by the named insurance companies can be made before the taxing master. The taxing master will, on the evidence, determine whether there was a retainer to the firm of Righa, Mburu & Company Advocates or more importantly, whether that firm or the defendant conducted any business for the insurance companies or any other client. The value, if any, of such services is well within the jurisdiction of the taxing master. Outside an appeal or reference to such a decision, I decline the invitation to stay the taxation. For the same reasons, I find no merit in restraining the defendant from filing any advocate-client bills of costs. I would clearly be overreaching the exercise of my discretion.

18. In the result, the plaintiff’s interlocutory notice of motion dated 31st May 2013 is devoid of merit. I dismiss it. The costs of the motion shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of March 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. E. A. Ng’ani for the plaintiff instructed by Ng’ani & Oluoch Advocates.

Mr. K. Mosei for the defendant instructed by K. Mosei & Company Advocates.

Mr. C. Odhiambo, Court clerk.

