



NO.3061

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO.390 OF 2011

GEOFFREY SILA MUTUNG'I PLAINTIFF

VERSUS

NAHASHON WAMBUA MWANGANGI 1ST DEFENDANT

MONICA WACHUKA WAITHAKA2ND DEFENDANT

RULING

On 30th December, 2011, **Geoffrey Sila Mutungi** hereinafter “*the plaintiff*” mounted this suit jointly and severally against **Nahashon Wambua Mwangangi** and **Monica Wachuka Waithaka** hereinafter “*the defendants*” for a permanent injunction restraining them from removing him from the partnership, management and or running of the partnership business, a declaration that the partnership deed between him and the defendants is valid in law and costs of the suit.

His claim to the above prayers was anchored on his assertion that the defendants and himself were business partners trading under the name and style of **Kingsent Enterprises**. The partnership was entered into on or about 10th June, 2010. They were involved in the business of operating a Petrol Station at Matiliku market. In terms of the partnership deed, the plaintiff was to manage and run the Petrol Station. The defendants on the other hand were to be managing partners, and financial controllers. The foregoing notwithstanding the defendants had however, without the consent of the Plaintiff or under the terms of the partnership deed threatened to remove the plaintiff from the partnership after realizing that the business was doing well following the opening of a second Petrol Station at Masimba Market. The defendants had forged a parallel partnership deed in which the plaintiff is indicated as a mere employee of the defendant as a manager and had started harassing him, hence the suit.

Contemporaneously with the filing of the suit, the plaintiff took out a temporary injunction seeking to restrain the defendants from denying him access to the management and running of the business at Matiliku until the hearing and determination of the application inter partes and or until the hearing and final determination of the suit. On the same day the said application came before **Odunga J.** and he granted the interim order of injunction against the defendants pending the hearing of the application inter partes.

The application was fixed for inter partes hearing on 12th January, 2012. But before then, the defendants filed a statement of defence and a replying affidavit. The defendants simultaneously with the filing of the defence also took out their own application in which they sought several orders against the

plaintiff, inter alia, that he be restrained from running, managing or in any other way interfering with the Petrol Stations, the subject of the suit. They also sought that one, **Jane Mueke Mumo**, hitherto working as the acting manager of the Petrol Station at Matiliku market be appointed on the interim basis as manager of the station responsible for day to day running and operations until the hearing and final determination of the application and or the main suit.

In their joint statement of defence, the defendant denied that the Plaintiff was their business partner. That they were the only partners in **Kingsent Enterprises**. The plaintiff was a mere salaried manager at the Petrol Station in Matiliku market and not otherwise. There was no forged and parallel partnership deed. Indeed theirs was the genuine partnership deed. In the genuine partnership deed, the plaintiff is described as an employee in the partnership business of the defendants whereas the partnership deed he contends to be genuine and in his possession and which described him as a partner was a forged version. They further pleaded that the desired declaration and injunction should not issue for reasons that issuing them would effectively paralyze the business and the defendants would be enjoined against running what is their lawful business.

The replying affidavit merely reiterated and expounded on the above averments. There was also an affidavit by one, **Victoria M. Muthu**, learned counsel, who drew the partnership deed. According to her the partnership deed annexed to the supporting affidavit of the plaintiff was as a result of the creative mind of the plaintiff in trying to forge the original version in the possession of the defendants.

On 12th January, 2012 when the application was to come up for inter partes hearing, parties appeared and directions were given that both applications be mentioned on 16th January, 2012 on which date **Waweru J.** directed that both applications be referred back to Machakos high court for hearing and final determination. He set a mention date for the same on 18th January, 2012. On that date the defendants' counsel appeared before me but not so for the plaintiffs. Accordingly, the exparte order of interim injunction issued in favour of the plaintiff lapsed on this date as it was not extended. On the same date, I directed that the application filed by the defendant dated 6th January, 2012 be heard inter partes on 30th January, 2012.

On 30th January, 2012 **Mr. Muithya** and **Mr. Mutinda**, learned counsel for the defendants and plaintiff respectively appeared before me and agreed that the said application be canvassed by way of written submission. Subsequently they all filed and exchanged written submissions which I have carefully read and considered.

It is instructive that though served with the defendants' application, the plaintiff did not see the need to file a replying affidavit. What he ended up doing was to file grounds of opposition in which he stated that the application was bad in law, that his application be heard first and on priority basis, the defendants' application was an abuse of the law and calculated to delay his case, the orders made on 30th December, 2011 were interim in nature, that the plaintiff and defendant were joint partners trading under the name and style of **Kingsent Enterprises** which was registered under the Registration of Business Names Act.

I do not see how these grounds of opposition can counter the depositions in the affidavits by the defendants and the lawyer, who prepared the partnership deed. In the absence of any depositions to the contrary by the plaintiff, this court can only take the contents of affidavits by the defendants and the lawyer on the application as representing the truth for now. They reflect the truth regarding what transpired between the parties. Those detailed affidavits raised issues of fact which could only be countered by the plaintiff vide his own affidavit. Grounds of opposition filed simply put cannot do.

Of course, I am aware that the plaintiff indicated that he would wholly rely on his affidavit in support of his application dated 30th December, 2011. By choosing to rely on such an affidavit, the plaintiff effectively left facts deposed to by the defendants and the lawyer uncontroverted. That includes the contents of the partnership deed annexed to their affidavit which describes the plaintiff as a salaried manager as opposed to a partner in the partnership deed exhibited by the plaintiff. The assertion by the

defendants and the lawyer that the said partnership deed was a forgery remained unrebutted. With regard to forgery claims, the defendants again swore a replying affidavit contradicting the version given by the plaintiff in his affidavit and went at length to show how the partnership deed by the plaintiff was a forgery. The plaintiff however, failed to do so when served with affidavit of the defendants in support of their application. Failure by the plaintiff to swear and file a replying affidavit to the defendants' application even when confronted with such serious allegations of fact, can only be interpreted to mean that he had nothing to say about them and in response.

Given that the orders of injunction issued to the plaintiff are no more, the same having lapsed by operation of law, there is nothing left for this court to review with regard to the temporary injunction issued to the plaintiff as aforesaid.

Given again that the main issue is whether the plaintiff and defendants are partners in **Kingsent Enterprises** which issue will have to be resolved at the plenary hearing of the suit and on evidence, and so that no vacuum is left with regard to the management of the business, the order that best commends itself to me in the circumstances is to have the operations of the business managed by **Jane Mueke Mumo** in the interim. In other words, I will grant prayer 4 of the application pending the hearing and determination of the suit, with a rider that though **Jane Mueke Mumo** will be the manager of the Petrol Station at Plot No. 40 Matiliku Market, the income generated therefrom shall not be disbursed to any of the parties to this suit. Rather it will be banked as previously done but neither the defendants nor the plaintiff will be permitted to access that amount. **Jane Mueke Mumo** is also expected to keep proper books of account in regard to the running of the business for the period she will be in situ. I make no order as to costs of the application.

Ruling dated, signed and delivered in Machakos this 15th day of March, 2012.

ASIKE-MAKHANDIA
JUDGE