



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 601 OF 2010

RUTH WINNIE OKOTH.....PLAINTIFF/
APPLICANT

VERSUS

HELLEN ADHIAMBO OLUOCHDEFENDANT/
RESPONDENT

RULING

This application is brought by way of a Chamber Summons dated 7th September, 2010, and taken out under **Section 7(1)** of the **Arbitration Act, 1995**; **Rule 2** of the **Arbitration Rules 1997**; and **Section 3A** of the **Civil Procedure Act**. The applicant seeks from the court an injunction restraining the Defendant whether by herself, her agents, associates, employees, representatives, assigns or anybody acting on her behalf or otherwise from removing from the place of business of the partnership known as Dirtless Services or transferring in any manner computers, equipment, resources records or clients belonging to the said partnership to a different entity or otherwise pending the determination of this suit. She also prays the court to grant any other order it may deem fit to meet the ends of justice.

The application is supported by the annexed affidavit sworn by Ruth Winnie Okoth, the Plaintiff in person, on 17th September, 2010 and is based on the grounds that –

- 1) **On or about the 8th of February 2008, the parties herein entered into a Partnership Agreement (“the Agreement”) under which they agreed to carry on the business of *inter alia* general procurement and supply of goods and services under the name and style of Dirtless Services.**
- 2) **That, the Defendant/Respondent is in breach of the Agreement and of her fiduciary duty by incorporating another business to compete with the initial partnership.**
- 3) **That the Defendant/Respondent has failed, refused, ignored and or neglected to render books of account of the partnership to the Plaintiff/Applicant and to declare the profits earned from the partnership.**
- 4) **That the Defendant/Respondent has failed, refused and or ignored to share the proceeds of the business with the Plaintiff/Applicant.**
- 5) **That the Defendant/Respondent has diverted and misused partnership resources to a different**

business and continues to do so.

- 6) That the Defendant/Respondent has not given a full and truthful explanation of all matters relating to the affairs of the partnership.**
- 7) That the Plaintiff/Applicant has a strong case with good chances of success herein.**
- 8) That the balance of convenience favours the granting of the orders sought in the Plaintiff/Applicant's favour.**
- 9) That it is just and equitable to grant the relief.**

The Respondent herein does not seem to have filed either a replying affidavit or grounds of opposition. Technically, therefore, the application is unopposed. However, during the oral hearing of the application, Mr Oluga appeared for the Applicant while Ms Otieno appeared for the Respondent.

According to Mr Oluga, the parties entered into a partnership agreement on 20th February, 2008, by which they agreed to carry on business as partners. They operated smoothly until July, 2010, when the Plaintiff discovered that the Defendant was running the Partnership in breach of both the Agreement and her fiduciary duties. Moreover, the Defendant had gone ahead to incorporate a company by the name of "Dirtless Services Ltd." and to transfer the clientele of the Partnership to the newly registered Company. Furthermore, she had gone on to use the name of the firm to outsource for business the proceeds of which she claims to be her own and not those of the partnership. In her response Ms Otieno for the Respondent argued that the parties had agreed to carry out business as Dirtless Services and not as Dirtless Enterprises. She submitted that the Defendant was not a party to Dirtless Enterprises and that she denies signing the partnership Agreement which is not even dated. She further submitted that there was nothing in the agreement pointing at Dirtless Enterprises and that the Respondent was not a director in the company. She also submitted that the Partnership was not registered and could not therefore be implemented.

It was her further contention that there was no evidence that there was a company or partnership by the name of "Dirtless Services". She argued that the Plaintiff was doing all the things that she was accusing the Defendant of doing, including the keeping of everything including the books of accounts, all cheque books, and writing only single leaves.

Ms Otieno also submitted that the applicant is the one interfering with the running of the business as a result of which the Plaintiff was always absent, took away all the documents in July, 2010, after which no tendering could be done; yet she now comes to claim that she was not being shown accounts. Counsel finally submitted that he applicant is the one who has been interfering with the business. There is no valid Deed of Partnership and therefore the parties can part ways. Consequently,, the application is not merited and she urged the court to dissolve the partnership as the parties can not work together.

In a short reply, Mr Oluga submitted that the Defendant does not deny that there was a business agreement between the parties and it is now surprising that the Defendant can deny the existence of that business relationship.

After considering these pleadings and the submissions of the respective counsel, I find that the three main issues for determination are whether there was a partnership agreement between the parties; whether there was a breach of that agreement; and if so, what the consequences of that breach should be.

According to the Plaintiff, the parties signed a partnership agreement on or about the 8th day of February, 2008, a copy of which is attached to the application. Ms Otieno for the Respondent says that the said agreement is not registered and cannot be implemented. It is an elementary principle of partnership Law that a partnership need not be registered. It need not even be in writing and it can be made orally between the parties. Provided that the other ingredients of partnership are accommodated in a relationship between the parties in partnership, the existence of a written agreement is not necessary. By seeking to obtain a

business name, which they duly registered, I find that the parties had indeed agreed to carry on business together in the form of a partnership and that there was a partnership between the parties.

The second issue is whether there was a breach of that partnership agreement. The answer to this question is in the affirmative. By incorporating a company by the name of Dirtless Services Ltd, which is very similar to Dirtless Services by which the partners had been carrying on business, the partnership customers are likely to deal with the company in the belief that it is one and the same enterprise as the partnership, and thereby diverting the Partnership's customers to the Company. For this reason alone, I find that there was very serious breach of a partnership.

One of the cornerstone principles of a partnership is that the parties therein have to repose mutual trust and confidence in one another. The consequences of the alleged breaches in this matter include the loss of that trust and confidence between the parties which loss rocks the very foundation upon which the partnership stands. From the submissions by learned counsel for the Defendant, I am left in no doubt that this partnership is on the rocks. Since both parties had entered partnership, before they can dissolve it, it is imperative that they sort themselves out in such a way as to share the spoils in a rational manner. Talking for myself, I don't share the view that the arbitration of the matter between the parties herein will be of any advantage. It seems to me that the matter has gone beyond the stage at which an arbitration would work out to salvage the partnership. In my view, it would have been better if the parties moved straight to dissolve the partnership. Since however, they have opted to go to arbitration, I am constrained to observe that it is necessary to maintain the status quo while the matter pends before the arbitrator.

For these reasons, I direct that an injunction do issue restraining the Defendant whether by herself, her agents, associates, employees, representatives, assigns or anybody acting on her behalf or otherwise from removing from the place of business of the partnership known as Dirtless Services or transferring in any manner computers, equipments, resources records or clients belonging to the said partnership to a different entity or otherwise pending the determination of this suit.
It is so ordered.

Costs in the Cause.

DATED and DELIVERED at NAIROBI this 18th ay of November 2010

L NJAGI

JUDGE