



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 1801 OF 1998

**RAGATI TEA FACTORY COMPANY LIMITED-
SHAREHOLDERS.....PLAINTIFFS**

**VERSUS
JOHNSON K.**

**GICHURU.....1ST
DEFENDANT**

PETER K.

**MATHENGE.....2ND
DEFENDANT**

DUNSTAN M.

**NGUMO.....3RD
DEFENDANT**

BONIFACE G.

**MUHAMI.....4TH
DEFENDANT**

JOSEPH M.

**NJOGU.....5TH
DEFENDANT**

RULING

The Notice of Motion dated 18th August 2010, in which this Ruling is delivered, is said to have been brought under **Section 3A** and **Order L Rules 1 and 3** of the **Civil Procedure Rules**. It seeks an order condemning the firm of J. A. B. Orengo to pay the applicants Kshs. 385,326/= being costs taxed in favour of the applicants in **H.C.C.C. No. 1801 of 1998**, which was dismissed for want of prosecution on 30th November, 2007.

The application is based on the grounds set out in the face of the same and is supported by the affidavit of the 1st Defendant as follows; Curiously, the application is brought by the Defendants in the suit but is said to have been drawn and filed by Riunga Raiji & Co. as advocates for the Plaintiffs! The applicants contend that whereas they were directors of Ragati Tea Factory Company and were sued as such; there is no known entity by the name Ragati Tea Factory Limited-Shareholders which purportedly filed suit against the Defendants, which leaves the defendants with no-one to follow for the payment of the costs incurred in defending the suit. They hold the said Plaintiff's Advocates personally liable for the said costs, on the basis that he filed a suit on behalf of the said Plaintiff notwithstanding the fact that it was non existent in law.

I have seen, on the record, a Ruling delivered by the Hon. Lady Justice Kasango on 29th June 2000, by which the defendant's application to have the Plaintiff struck out on the same grounds as are urged herein, was dismissed with costs. The learned Judge held, *inter alia*, that the Defendants had failed to prove that the Plaintiff was non existent. It strikes me as strange, that the defendants who were all along represented by counsel would complain about the non-suitability of a party to a suit 12 years after the same filed. They ought to have taken up the issue at the very beginning since capacity of litigants is an issue that goes to jurisdiction.

I have not been able, upon perusal of the record, to see the defence filed but I must assume that the Defendants admitted the description of the Plaintiff as stated in paragraph 1 of the Plaintiff and were satisfied to proceed with the suit on that basis. The court has not been told under what provision of the law the orders sought can be made. The exercise of Courts' inherent power can only be exercised where there is a well founded legal claim against the party as against whom the orders sought are to be enforced. J. A. B. Orengo & Company Advocates are not parties to the suit herein and the subject costs were not taxed as against them.

The circumstances under which a court can order an advocate to bear costs of a suit personally are set out in the East African Court of Appeal decision in **J. B. KOHLI & OTHERS vs. BACHULAL POPATLAL [1964] E.A. 219**. In the present case I see no duty owed to the Defendants by the firm of J. A. B. Orengo and Company. Perhaps the applicants should find out from their able advocates why the matter was not struck out earlier for want of capacity or have the position regularized.

In view of the above I am not inclined to allow this application and I hereby dismiss the same with no

order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of DECEMBER, 2010

M. G. MUGO

JUDGE

In the presence of:

Mr. Kiura

For the Applicant

No appearance

For the Respondents