



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT 125 OF 2008

KAREN NYAMOITA MAGARA PLAINTIFF/APPLICANT

VERSUS

DANIEL OMBASA APEPO 1ST DEFENDANT/RESPONDENT

PETER OSITU OUMA 2ND DEFENDANT/RESPONDENT

RULING.

This is an application by the plaintiff seeking, inter alia, an order of injunction to restrain the defendants from withdrawing money from a partnership account in the name of Kisii Soapstone Art and Craft held at Barclays Bank of Kenya Limited, Kisii Branch, Account No. 1220018 pending hearing and determination of a suit filed by the plaintiff against the defendants. The plaintiff also seeks an order of closure and sealing of the business premises of the said partnership at Nyabigege market along Kisii-Migori road pending valuation of the stock therein. She also seeks an order directing the defendants to produce all books of accounts and bank statements for the said partnership.

In her affidavit in support of the said application, the plaintiff deposed that sometimes in the year 2003, she entered into the said partnership with the defendants and together with the first defendant contributed capital amounting to Kshs. 800,000/= . The second defendant brought in capital in form of stock proportionate to the other partners' contribution. The plaintiff further deposed that differences arose between her and the defendants and the second defendant resigned from the partnership and withdrew his share contribution and opened a rival business within the same locality as that of the partnership by the name **Kinstone**. Thereafter the defendants withdrew substantial amount of money from the said account without the plaintiff's knowledge, it was alleged. The plaintiff added that she had approached their bank and requested it to freeze the partnership account but the bank turned down her request.

The defendants filed a joint replying affidavit and stated that when differences between them and the plaintiff arose, it is the plaintiff who moved out of the premises and withdrew large sums of money from the partnership account and went at large. As a result, they decided to suspend her from the partnership until she refunds the money. They denied having withdrawn huge amounts of money as alleged by the plaintiff.

The principles for grant of an interlocutory injunction are well settled. The court must first determine

whether the applicant has established a *prima facie* case with a likelihood of success. Secondly, the court must consider whether the applicant is likely to suffer irreparable loss unless the orders sought are granted. If the court is in doubt, it will determine the matter on a balance of convenience.

The plaintiff's case seeks dissolution of the partnership business and/or in the alternative, payment of equal share of profits. She also seeks an order to restrain the defendants from operating the partnership account. A suit of such a nature ought to be commenced by way of originating summons and not by way of a plaint as in this case, see **Order XXVI rule 4** of the **Civil Procedure Rules**. That notwithstanding, it is not clear what has caused the stalemate in the relationship of the parties herein. The plaintiff alleges that it is the defendants who have secretly withdrawn huge amounts of money from the partnership account whereas the defendants allege that it is the plaintiff who did so and went at large. It is doubtful whether the plaintiff has a *prima facie* case against the defendants.

Secondly and of greater significance, the plaintiff has not demonstrated that she stands to suffer irreparable loss unless the orders sought are granted. Whatever loss that the plaintiff may suffer can easily be quantified and compensated in monetary terms if the plaintiff succeeds in her case against the defendants. The partners instructed their bank that any two of them could sign cheques for withdrawal of money from the partnership account and it would be inappropriate for the court to make any orders to the contrary in the absence of compelling reasons necessitating such an order.

At this stage there is nothing that warrants an order requiring the defendants to produce books of accounts and bank statements for the said partnership business. That may be necessary during the main hearing when the trial court will be considering the issue of dissolution of the partnership.

For the aforesaid reasons, I find no merits in the plaintiff's application and dismiss the same with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

19/5/2009

Before D. Musinga, J

Mobisa – cc

N/A

Mr. Minda for the plaintiff

Court: Ruling delivered in open court.

D. MUSINGA

JUDGE.