



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 67 OF 2009

EDWARD ODUMBE..... PLAINTIFF

JOSEPH AWINO..... PLAINTIFF

(Both trading under the style and name of VIC FALLS RESTAURANT& PUB, together with the Second Defendant)

VERSUS

VIC FALLS RESTAURANT KENYA LIMITED.....1ST DEFENDANT

**LYSANIASH OTIENO ONJWAYO.....
.....2ND DEFENDANT**

RULING

The plaintiffs filed suit against defendants seeking judgment in form of declaratory orders regarding the partnership and business name known as Vic Falls Restaurant and Pub. The plaintiffs averred in their plaint that the 2nd defendant had converted the name of the partnership and used it in the incorporation of a limited liability company (the 1st defendant) without the plaintiffs’ permission or authority and had done so with a view to depriving the plaintiffs of income and profits from the partnership. Contemporaneous with filing suit, the plaintiffs filed an application pursuant to the provision of **Order XXXIX Rules 1,2 & 9** of the **Civil Procedure Rules** seeking interlocutory orders of injunction to restrain the defendants, by themselves or through their agents from managing, withdrawing, receiving, collecting or otherwise handling any payments from the partnership customers, including *inter alia*, Telkom Kenya Limited pending the hearing and determination of the suit. The plaintiffs further prayed for an order of the court appointing William Omondi as the receiver manager of the partnership pending further orders of the court. The plaintiffs prayed that the 2nd defendant be restrained from using the motor vehicles belonging to the partnership. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Joseph Owino and Edward Odumbe. The plaintiffs filed affidavits in further support of the application.

The defendants opposed the application. Upon being served with summons to enter appearance, the defendants filed separate defences to the plaintiffs’ claim. The 1st defendant further filed a counterclaim

against the plaintiffs. The 2nd defendant, Lysaniash Otieno Onjwayo and Benson Otieno Ochieng, a director of the 1st defendant swore replying affidavits in opposition to the plaintiffs application. Before the hearing of the application, the parties herein agreed by consent to file written submissions in support of their respective opposing cases. At the hearing of the application, I heard oral arguments made by Mr. Owuor counsel for the plaintiffs and by Mr. Kandere counsel for the defendants. I have read the pleadings filed by the parties herein. I have also carefully considered the submissions presented to the court by the parties in this application. The issue for determination by this court is whether the plaintiffs have established a case as to entitle this court grant them the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of injunction are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

Before giving reasons for my decision, I wish to make a general comment in regard to the pleadings filed on behalf of the plaintiffs. The said pleadings could have been better drafted. The issues in dispute were not presented with clarity that is deserving of the case. Be it as it may, this court was able, but with difficulty, to discern the gravamen of the plaintiffs case.

Having evaluated the facts of this case, the following is my assessment of what I understood to be the facts of this case. The 2nd defendant, Lysaniash Otieno Onjwayo registered the business name Vic Falls Restaurant & Pub on 13th June 2006. The 2nd defendant was engaged in the business of food catering. The 2nd defendant conducted the said food catering and restaurant business at the 2nd floor of Surgilink building along Mombasa road. From the documents annexed as annexures to the affidavits sworn in this application, it was evident that along the way, the 2nd defendant fell into financial difficulty and was unable to operate the business on his own. The 2nd defendant entered into a partnership agreement with the plaintiffs i.e. Edward Odumbe and Joseph Owino with a view to reviving the fortunes of the business. It appears that at the material time, the plaintiffs had obtained or were in a position to secure a tender to offer catering services to Telkom Kenya Limited. The business previously owned by the 2nd defendant i.e. Vic Falls Restaurant & Pub was used as a vehicle to enable the plaintiffs fulfill their obligation in the tender. Subsequent to the execution of partnership agreement, the 2nd defendant notified the registrar of business names of the change of particulars of the partnership in regard to the business name. The certificate of registration of change of particulars of business name was issued by the said registrar on 25th April 2008. In the said certificate, the partners in the business name Vic Falls Restaurant & Pub were listed as Lysaniash Otieno Onjwayo, Joseph Mboya Awino and Edward Odumbe. Although the 2nd defendant claimed that the plaintiffs had forged his signature to secure the change of particulars of the business name, upon evaluation of the facts of this case, it was clear to the court that the 2nd defendant willingly incorporated the plaintiffs into the partnership in the business with a view to reviving the fortunes of the business, especially upon securing the tender to offer catering services to the employees of Telkom Kenya Limited.

From affidavit evidence, it was apparent that the 2nd defendant was the one who was mandated to be in charge of day-to-day management of the business. Along the way, with a view to easing the plaintiffs out of the business, the 2nd defendant incorporated the 1st defendant. It was clear from affidavit evidence that the 2nd defendant nominated two of the employees at the said business to be directors of the 1st defendant company. The name adopted by the 2nd defendant for the company, i.e. Vic Falls Restaurant Kenya Limited, was in my view deliberate. The 2nd defendant desired to pass off to the customers of the partnership business known as Vic Falls Restaurant & Pub. The two names are similar and the incorporation of the 1st plaintiff under a name similar to the partnership was desired to achieve the

objective of convincing the customers of the partnership business that the business operated by the 1st defendant was similar if not the same as the business which was previously owned by the partnership. As stated earlier in this ruling, it was clear that the 2nd defendant incorporated the 1st defendant with a view to surreptitiously and stealthily taking over the partnership business without involving the plaintiffs. It was evident from the facts deponed to in the affidavits filed in this application, that the 2nd defendant made the move to exclude the plaintiffs from the business after the income of the business had improved on account of the tender that had been procured by the plaintiffs from Telkom Kenya Limited. From the evidence on record, it was apparent that the partnership between the plaintiffs and 2nd defendant was basically entered into after the catering business had been secured from Telkom Kenya Limited. It was not clear from the partnership deed whether the plaintiffs paid any consideration to be included in the partnership. There was no evidence on record to suggest that the plaintiffs had paid any such purchase consideration to the 2nd defendant. May be that will be an issue that will be resolved during trial. However, what is apparent is that the 2nd defendant has been involved in the catering business since 2006. The equipment and assets of the business appear to belong to the 2nd plaintiff. Apart from paying some of the employees of the partnership and purchasing some food items, there was no evidence to suggest that the plaintiffs purchased any assets of the partnership.

Have the plaintiffs established a *prima facie* case to entitle this court grant the orders sort in the application? The plaintiffs have established that they were unlawfully removed from the partnership when the 2nd defendant incorporated the 1st defendant. I hold that the 2nd defendant, with others, incorporated the 1st defendant with a view to unlawfully easing out the plaintiffs from the catering business which was operated in the partnership name and style of Vic Falls Restaurant & Pub. This court cannot however grant the orders sought by the plaintiffs in view of the paucity of information regarding the actual financial input by the plaintiffs into the partnership. The court cannot restrain the defendants from conducting the restaurant business in the name Vic Falls Restaurant Kenya Limited.

However, this court will invoke its inherent jurisdiction with a view to doing justice to the parties in this suit. As stated earlier, in view of the confused nature of the pleadings filed by the plaintiffs, this court had to forensically examine the documents annexed to the affidavits sworn by the parties to this suit in order to reach the conclusion that it has now reached. What emerged from the facts of this case is that there existed a partnership between the plaintiffs and the 2nd defendant which resulted from the catering tender secured by the partnership from Telkom Kenya Limited. That partnership appears to have been dissolved when the 2nd defendant incorporated the 1st defendant. To resolve the dispute between the plaintiffs and the 2nd defendant, I direct that the plaintiffs and the 2nd defendant appoint an arbitrator in terms of **clause 9** of the **Partnership Deed** entered on 8th December 2008 with a view to determining what is due to each partner in the partnership that now appears to have been dissolved by the incorporation of the 1st defendant.

The plaintiffs and the 2nd defendant shall be at liberty to set out the issues in dispute for resolution by the said arbitrator. The said arbitrator shall be appointed within fourteen (14) days of today's date, or in the event that there shall be a disagreement, either party shall be at liberty to apply. The arbitrator shall be required to hear and determine the dispute and file his final award in court within forty-five (45) days of his appointment. The costs of arbitration shall be shared equally between the plaintiffs and the 2nd defendant.

Meanwhile, pending the filing of the final award by the arbitrator, the defendants are restrained from adversely dealing with the assets of the partnership business and that of the 1st defendant i.e. by disposing them. Since this matter is yet to be resolved, I shall make no orders as to costs.

DATED at NAIROBI this 10TH day of JUNE 2009.

L. KIMARU

JUDGE