



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 286 of 2008**

**LEDAMA OLE KINA .....PLAINTIFF**

**VERSUS**

**NDUNGU NJOROGE & KWACH ADVOCATES .....DEFENDANTS**

**RULING**

1. The Plaintiff herein commenced suit by way of a plaint dated 3/06/2008 and filed in court on 2/07/2008 praying for judgment to be entered against the Defendant for:-

- (i) *A declaration that the Defendant holds the sum of Kshs.9,000,000/= in trust for the Plaintiff*
- (ii) *The sum of Kshs.9,000,000/=*
- (iii) *Costs of this suit*
- (iv) *Interest on (ii) and (iii) above.*

2. Upon filing of the defence, the Plaintiff filed a Chamber Summons application dated 8/09/2008. The application is brought under Section 3A of the Civil Procedure Rules and Order VI Rule 13(b) (c) and (d) of the Civil Procedure Rules seeking orders THAT:-

- (1) *The Defendant's defence filed herein be struck out*
- (2) *Judgment be entered for the Plaintiff as prayed in the plaint*
- (3) *Costs of this application be borne by the Defendant.*

3. The application is based on grounds that the defence herein is a mere denial; that the defence admits receipt of the suit money by the Defendant; that the defence does not specifically deny the Applicant's ownership of the suit money; that the defence as filed is in the circumstances scandalous, frivolous and vexatious; that the defence as filed is intended to prejudice, embarrass and delay the fair trial of the suit herein and that the Defendant's defence is indeed an abuse of the process of court. The application is supported by an affidavit sworn by Tukero Ole Kina, advocate for the Plaintiff who is also the Plaintiff's duly constituted attorney. The application is also supported by a Supplementary affidavit sworn by the same Tukero Ole Kina.

4. The application is opposed through the Replying Affidavit sworn by Raphael Kamau Ngethe, a partner with the Defendant firm of advocates. The Defendants also filed a Notice of Preliminary

Objection dated 24/10/2008. The gist of the Preliminary Objection is that the application and the entire suit are fatally defective for the reason that since the Defendant is a partnership, it is not a legal entity capable of suing or being sued. Further that no liability can attach to an entity possessed of no personality natural or legal. It is further contended that any orders made against the Defendant as named are unenforceable and therefore that the court should not make orders in vain. That the only alternative left for the court is to dismiss the entire suit.

5. Regarding the application *per se*, Mr. Raphael Kamau Ngethe says that the sum of Kshs.5,500,000/= was due to the Plaintiff; that the Plaintiff was paid some Kshs.3,500,000/= by one Kiplagat of Hamden Place Limited on the purchaser's instructions. The deponent also admits that on 14/07/2008, he drew two cheques as instructed by the Purchaser's advocates and forwarded the same to the Purchaser's advocates. The letter under reference indicated that a cheque for Kshs.5,500,000/= (Kenya Shillings Five Million Five Hundred Thousand) was in favour of Ledama Ole Kina, the Plaintiff herein while the other cheque for Kshs.3,500,000/= (Three Million Five Hundred Thousand) was in favour of Hamden Place Limited. The deponent also avers that the purchaser's advocates later returned the two cheques on a without prejudice basis and that since then, the Applicant/Plaintiff and his advocates have declined all attempts by the Defendant/Respondent to bring all the parties together to resolve this matter amicably. The deponent says that by leaving out other parties to the transaction in the proceedings, the Plaintiff/Applicant is acting maliciously with the intention of subverting the course of justice. The deponent also says that the Plaintiff is a stranger in the whole transaction giving rise to these proceedings.

6. The parties filed written submissions. The Plaintiff/Applicants submissions were filed by Mbugua Mureithi & Co. Advocates while those of the Defendants were filed by M/s Ndungu Njoroge & Kwach Advocates who are the Defendants in this matter. Counsel for the Plaintiff centered the Defendants allegations that partnerships have no capacity of being sued in their names, in referring to Order XXIX of the Civil Procedure Rules and said that unless such partnerships are carrying on business in their own names, they are capable of suing and being sued. Rule 1 of Order XXIX provides as follows:-

*“Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such a firm, to be furnished and verified in such a manner as the court may direct.”*

7. The Plaintiff further submitted that the circumstances of this case do not relate to any particular or individual partners of the Defendant but to the Defendant as a partnership; and that for these two reasons above given, the Defendant's Preliminary Objection must fail.

8. As regards the application itself learned counsel for the Plaintiff submit that the Defendant has expressly admitted holding the sum of Kshs.5,500,000/= for which the Defendant has already drawn a banker's cheque. The Plaintiff submits that the only issue that the court is to determine in whether the Defendant's defence as filed raises any triable issue with regard to the sum of Kshs.3,500,000/=. It is the Plaintiff's case that the Defendant clearly admits that the total sum of Kshs.9,000,000/= was deposited in its account as stakeholder, being 10% deposit of the purchase price of LR No.209/5807 Nairobi (as per paragraph 3 of the defence). The Plaintiff also says that apart from the Defendants who received the sum of Kshs.9,000,000/= as stakeholders and the firm of Muli & Ole Kina Advocates who forwarded the Kshs.9,000,000/= to the Defendants, no other firm of advocates received or handled the said suit deposit sum of Kshs.9,000,000/=. The Plaintiff also contends that the sum of Kshs.3,500,000/= which would seem to be in dispute is part of the suit deposit sum of Kshs.9,000,000/= deposited into the Defendant's accounts by Muli & Ole Kina Advocates. The Plaintiff also says that the correspondence on record clearly shows that the sum of Kshs.3,500,000/= belongs to the Plaintiff and in particular the Defendant's letter dated 14/07/2008 and another letter dated 11/07/2008 from Houghton & Associates. The Plaintiff contends further that in light of this overwhelming evidence that the Defendants are in receipt of Kshs.9,000,000/= on behalf of the Plaintiff herein, the same should be released to the Plaintiff without any further delay; that in fact the Defendant's contention that the payment of Kshs.3,500,000/= to the Applicant was made an alleged and unknown third party is an afterthought on the part of the Defendant as

the allegation appears only in the Replying Affidavit and not in the defence as filed. The Plaintiff asks the court to ignore the Defendant's allegation since there is no evidence put forth by the Defendant to support the same.

9. The Defendants on their part contend first and foremost that the Plaintiff's suit together with the application must be struck out for being fatally defective, namely that the Plaintiff has sued a partnership which has no capacity to sue or be sued. The Defendants also argue that the Plaintiff's allegation that the Defendant's defence is scandalous, frivolous or vexatious does not fall in line with the definition of what amounts to a scandalous, frivolous or vexatious pleading as given by Ringera J (as he then was) in Kenya Airports Authority –vs- Queens Insurances Agency [2001] KLR 441 as follows:-

*“The category of what may be described as scandalous includes either indecent, offensive improper or a denial of a well known fact. A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expense ... A pleading tending to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligent or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and delay and it will prejudice the fair trial of the action and so is the pleading which contains the unnecessary or irrelevant allegations.”*

10. The Defendants also contend that while they admit receiving into their account the sum of Kshs.9,000,000/=, they say that they are questioning the identity of the person who deposited the said amount into the court, namely M/s Muli & Ole Kina Advocates who are a different entity from the Plaintiff. The Defendants contend that this defence is not indecent; that it is not offensive or a denial of a well known fact, and that the said defence cannot be said to be groundless, without substance or untruthful in any way.

11. The Defendants also contend that Tokero Ole Kina has acted contrary to the rules by deponing to contentious matters despite the advocate's claims that he was acting for the Plaintiff in the transaction; that the matters deponed to are matters disclosed to the said advocate in an advocate-client relationship and that as such the affidavit should not be allowed to stand. The Defendants argument is premised on Order XVIII Rule 3 of the Civil Procedure Rules which provides that affidavits shall be confined to such fact as the deponent is able of his own knowledge to prove. The Defendants are of the view that the whole of Tokero Ole Kina's supporting affidavit should be struck out altogether. Closely related to the above issue, the Defendants say that since they were dealing with M/s Houghton & Associates as advocates for the purchaser, Tokero Ole Kina advocate who they say purports to act for the Plaintiff has not adduced any documentary proof of the circumstances surrounding the relationship between himself and the Plaintiff herein.

12. The Defendants also contend that the persons referred to in paragraph 6 of the Supporting Affidavit ought to be enjoined as parties to this suit and that in their absence, this matter must go to full trial so that the court can determine who is who herein before even contemplating the release of the refunded purchase price. Basing their argument on the holdings in Intercountries Importers & Exporters Limited –vs- Nairobi City Council [2003] 1 KLR 209, the Defendants content that since their defence does not offend any rules of pleadings, it cannot be said to be an abuse of the process of the court. In this regard, the courts have held that a reasonable cause of action is one with some chance of success when the allegations in the plaint (read defence) only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimed prayer (read defence). See DT Dobie & Company (Kenya) Limited –vs- Muchina) [1982] KLR 1. The Defendant's position is that the Replying Affidavit by Raphael Kamau Ngethe fully explains why the money in their custody should not be released, namely that it is not clear as to who should be paid the moneys in question; and that unless and until all the parties who are mentioned in connection with this transaction are brought into the suit, it would be prejudicial to the Defendants to release the entire Kshs.9,000,000/= to the Plaintiff.

13. As to whether or not the defence raises any triable issues, the Defendants contend that the following pertinent issues have been raised by the defence:-

(a) *Who negotiated the purchase price. The Plaintiff alleges at paragraph 10 of the Supporting Affidavit that it was the Respondent and Counie Houghton. However this has been denied at paragraph 8 of the Replying Affidavit and evidence produced showing that it was another entity which negotiated the purchase price. (see RKN 1, 2 and 3)*

(b) *Who deposited the disputed money in the account of the Respondent. Whereas the Plaintiff alleges at paragraph 3 of the plaint he did it, he has produced evidence showing the money was deposited by an entity known as Muli Ole Kina & Co. (see exhibit TOK 5).*

(c) *Was there a trust relationship constructive or otherwise between the Plaintiff and the Defendant. The Plaintiff has not produced any document to show direct dealing with the Defendant either by himself or through his Advocate Muli Ole Kina & Co. Advocates.*

(d) *Who is entitled to claim the deposit in the hands of the Defendant; the Plaintiff, the firm of Muli Ole Kina & Co. who deposited the money, Ngong Heights Limited the Initial Purchaser or Houghton & Associates the advocates for the Purchaser?*

(e) *Did the Defendant owe the Plaintiff any duty professional or otherwise considering the Defendant was acting for the Vendor whereas the Plaintiff was allegedly a shareholder of the unsuccessful purchaser?*

(f) *Has the Plaintiff established a valid claim against the Defendant in the absence of the many parties mentioned in the Supporting Affidavit, the many agreements between the Plaintiff and parties named in the Supporting Affidavit. This is to be considered in light of the fact that the Defendant has stated that it is a stranger to those agreements and all the parties named have not been given a chance to respond to those allegations. (see paragraphs 4,5,6,7,8,12,13,14 and 15 of the Supporting Affidavit).*

14. Finally, the Defendants contend that the Plaintiff's allegation that there is an admission by the Defendant in respect of Kshs.5,500,000/= is self defecting because the application as drawn is not brought under Order XII rule 6 which provides for entry of judgment on admission. In P&T Housing Co-operative Society Ltd. –vs- Divisional Integrated Development Programmes Company Ltd. – [2005]e KLR, Visram J (as he then was) reiterated the well known principle that “*Judgment on admission can be granted only in clear and unequivocal circumstances and not where one has to resort to interpretation of documents to reach a decision.*” The Defendants deny that they have admitted owing Kshs.5,500,000/= in a clear and unequivocal way. They argue that without the firms of Muli & Ole Kina Advocates and Houghton & Associates being enjoined in these proceedings, the question still remains as to who is the real advocate for the Plaintiff, and who of all the parties mentioned in the pleadings is entitled to the Kshs.9,000,000/=.

15. Based on the above arguments, the Defendants urge this court to exercise its power to strike out with circumspection and to guard against going into the merits of the case at this interlocutory stage. In particular, the Defendants state that the payment of the sum of Kshs.3,500,000/= to the Plaintiff and who by, if the payment was made, remains a lightly contested issue and should not be glossed over by simply assuming that the said sum is part of the Kshs.9,000,000/= in the custody of the Defendant and which sum is said to be due to the Plaintiff. In the Defendant's view, the proper person to seek a refund for the failed transaction is Ngong Heights Limited and not the Plaintiff who was a mere shareholder in the said company.

16. After considering all the above, the issues that arise for determination are the following:- (a) whether the Preliminary Objection raised by the Defendants is sustainable, (b) whether the supporting affidavit sworn by Tokero Ole Kina should be struck out for non-compliance with the rules; (c) whether the Defendants' defence raises triable issues warranting the case to proceed to full trial.

17. Regarding the first issue, I do not think that the arguments put forth by the Defendants in support of the Preliminary Objection are valid. I have already referred to Order XXIX Rule 1 of the Civil Procedure Rules which clearly allows legal persons such as the Defendant to sue and be sued in the name of the

firm. Further, in HALISBURY'S LAWS OF ENGLAND, Fourth Edition Vol 35, a partnership and firm are defined in the following terms:-

*“Partnership is the relation which subsists between persons carrying on a business in common with a view of profit. The word ‘firm’ denotes the persons who constitute the partners.”*

and that under English Law, the firm may sue in the firm name. At paragraph 73 of the same volume, the authors say the following:-

*“As a matter of procedure, partners carrying on business within the jurisdiction may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued.”*

and Paragraph 78 says the following:-

*“Two or more persons carrying on business in partnership within the jurisdiction may be sued, in respect of their partnership liabilities, in the name of the firm in which they were partners when the cause of action accrued.”*

In my view therefore and on the basis of the legal position stated above, the Defendant's preliminary objection lacks merit. The same is hereby dismissed.

18. The second issue is whether the supporting affidavit sworn by Tokero Ole Kina contravenes the provisions of Order XVIII of the Civil Procedure Rules and in particular rule 3 thereof. I have read that affidavit in its entirety and it is clear to me that the deponent has sworn to highly contentious matters which only the Plaintiff could depone to. There is no doubt that the learned counsel has descended into an arena which would of necessity require him to take off the hat of counsel and get into the witness box for cross examination. It is my finding that learned counsel has committed a serious procedural flaw which cannot be cured by the fact that he also holds a power of attorney to swear the affidavit on behalf of the Plaintiff. The authorities cited to me by the parties show that an advocate should not be allowed to depone to contentious matters in his affidavit. In the circumstances, I agree with the Defendants that the supporting affidavit, sworn by Tokero Ole Kina should be struck out and I accordingly strike it out.

19. Having resolved issues (a) and (b) I now turn to the final issue: whether the Defendants defence raises any triable issue that warrants this suit going to full trial. I have read the defence and the submissions both by the Plaintiff and the Defendants. A number of issues are apparent from a reading of these documents. To my mind, there are many grey areas that need to be cleared first before considering whether or not summary judgment can be entered in favour of the Plaintiff as against the Defendant for the Kshs.9,000,000/=. As rightly pointed out by the Defendants, there is need to establish at the full hearing of this case the identity of the person(s) who negotiated the purchase price, the identity of the person who deposited the amount in question and for whose benefit it was deposited. Though the Defendants admit to having received the said sum into their account, there are questions regarding the role of Muli & Ole Kina Advocates and that of Houghton & Associates. At different times, each of these two firms issued their instructions regarding either the whole or part of the Kshs.9,000,000/=. The question that arises is: which is the rightful firm of advocates with whom the Defendants are to deal? There is also the issue of whether it is the Plaintiff as an individual or the original purchaser who should demand a refund of the purchase price in respect of the rescinded sale.

21. It is my view therefore that the above issues cannot simply be wished away by the Plaintiff. To bring life into the Plaintiff's application, the Plaintiff would have to amend the plaint and bring in all parties involved in the transaction herein so that as each party is described properly and given an opportunity to answer to the claim. Such a step would enable the court to put a thread through the whole transaction and to say, *“yes, this is the beginning and this is the end of it. This is the person to whom this 5,500,000/= or 3,550,000/= belongs.”* Without such details, the court finds itself in a straight jacket and is thus forced to find and to hold that the Defendant's defence raises substantial triable issues which can only be resolved at a full trial. I would therefore decline to grant the orders sought and accordingly dismiss the Plaintiff's application dated 8/09/2008.

22. On the question of costs, I order that each party shall bear their own costs as I think that the Defendants are not completely blameless for the state in which the parties find themselves.

23. It is so ordered.

Dated and delivered at Nairobi this 10<sup>th</sup> day of July 2009.

**R. N. SITATI**

**JUDGE**

Delivered in the presence of:

..... for the Plaintiff

..... for the Defendants

..... Court clerk