



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

Civil Case 3747 of 1991

KISII HARDWARE.....PLAINTIFF

VERSUS

KISII FARMERS CO-OPERATIVE UNION LTD.....DEFENDANT

RULING

The background information to this application is that the Respondent/Plaintiff filed proceedings herein vide plaint dated 18th July 1991. In paragraph 3 thereof it is averred that, for several years past the plaintiff, has been supplying goods to the defendant at Kisii, and there has been a running account, between the plaintiff and the defendant, for several years, on account of which the plaintiff claimed from the defendant the sum of Kshs 11,461,935/25 being the balance still due and payable by the defendant to the plaintiff, in respect of goods sold and delivered by the Plaintiff, to the defendant, from time to time at Kisii at its request and including interest at prevailing rates calculated upto 30th June 1991 which the defendant, expressly agreed to pay and/or alternatively which the defendant has impliedly agreed to pay and has on occasions paid during the course of the dealings between the parties, and by continuing to deal with the plaintiff on the terms stated in the plaintiffs invoices and statements that the accounts are net and strictly payable monthly and that interest will be charged on all over due accounts taken as correct unless queried in writing before 15th of the month following the statement and in the further alternative as by way of damages for loss of use of money which according to the course of dealings between the parties was payable monthly.

The applicant defendant filed a defence to that claim dated 5th August, 1991. A summary of the allegations in the defence are that the defendant/applicant denied owing the plaintiff the sum of Kshs 11,461,935/25, that even if the said amount was owed it denied paying interest in respect of the same at the rate of 19%, denied existence of a running account between the plaintiff and defendant but admitted that only between 1988/89 and 1990/97 did the defendant purchase goods from the plaintiff to the tune of Kshs 629,790/= and has so far paid to the plaintiff the sum of Kshs 559,215/50 leaving a balance of Kshs 70,574/50.

The plaintiff then moved to file an application by way of chamber summons under order VI rule 13 seeking to strike out the defence and to have judgment entered in its favour as prayed. The record is not clear as to what happened to the application. But hearing started on 14.2.2002. Only the plaintiff gave evidence. Judgment was given in favour of the plaintiff for the reduced sum of Kshs 2,541,806/85 which amount had remained unpaid as at that time. It was also ruled that the plaintiffs were entitled to costs and interest on the principal amount from the date of filing to date at court rates. Interest on costs was awarded from the date of filing until date of judgment at court rates. Interest on the decretal amount was also awarded at court rates from the date of judgment until payment in full. The judgment was entered o

14th February, 2002.

A perusal of the record reveals that the defendant moved to court and filed an application dated 14th May 2002 by way of chamber summons brought under Order IXB rule 8 Civil Procedure Rules seeking orders that the judgment entered herein against the defendant be set aside *ex-debito justitiae* together with all consequential orders. That the suit be set down for hearing *denovo*. The application was heard on 18th July 2002. A ruling was given dated 6th day of August, 2003 dismissing the said application.

On 8.12.2006 the bill of costs in favour of the plaintiff was taxed by consent at Kshs 72,079/=.

The defendant has come back to this court vide a notice of motion dated 4th day of May 2007 brought under Section 3A and 63(e) of the civil procedure Act Cap.21 Laws of Kenya

Order XL VIII rule 3 and order 50 rule 1 and 17 of the Civil Procedure Rules and all other enabling provisions and enactment of the law. The application seeks orders for:-

- (1) The warrants for attachment and sale of the defendants property issued by the Honourable Deputy Registrar Mr. Muiruri on the 26th April, 2007 be stayed pending the hearing of this application.
- (2) This application for objection to the execution proceedings be placed before and heard by a judge of this court.
- (3) The Plaintiff is non-legal person thus has no capacity to sue, be sued or execute any decree.
- (4) That costs of the application be in the cause.

The said application which is subject of this ruling was heard inter parties on 26.6.2007. the major grounds put forward by applicant are that.

- (1) The court has power under Section 34 Civil Procedure Act to grant relief sought namely setting aside the warrants of attachment issued herein.
- (2) Records held at the Registrar of companies reveal that the plaintiff did not exist as a company as at the time evidence was given in 2002 as notice of cessation of business had been given by the year 2002.
- (3) The plaint filed herein on 18.7.91 shows that the plaintiff described itself as a firm carrying on business as merchants. It is their stand that this being the position the plaintiff had no right to file the suit as it did as a business name is not a legal entity.
- (4) That business proprietorship and partnerships are not sole entities and so suits for such entities cannot exist on their own. They must be brought in the names of the parties as shown by the legal authorities cited.
- (5) The court is urged to allow the application because there is no opposition to the application as no replying affidavit to their application.
- (6) They maintain that since the plaintiff is non existent, they cannot execute the decree.

The Plaintiff/Respondent put in grounds of opposition in opposition to the application and the major ones are as follows:-

- (1). It is their stand that the claim was filed in 1991, service effected where upon the defendant entered appearance and filed defence but they did not participate in the hearing which proceeded by way of formal proof.

(2). Judgment was given in favour of the plaintiff and the defendants attempt to have it set aside was dismissed and no appeal was filed.

By virtue of the foregoing sequence of events the plaintiff has an impugned judgment which cannot be challenged at the warrants of execution stages.

(3). As regards the application they contend that the same cannot hold as the applicant is trying to urge what they should have urged during the hearing proceedings and since that has been finalized and this court has not jurisdiction to reopen a matter which has been regularized in favour of the plaintiff/respondent.

(4) It is their stand that the action was properly laid under the relevant rules of procedure and cessation to do business does not affect the enforcement of rights which had accrued before the cessation of the business.

(5) The applicant defendant having failed to avail themselves of appeal, review and stay of execution process cannot stop the process at the final stages of execution.

In reply counsel for the defendant/applicant maintained that since issues raised are issues of law they can be raised at any stage of the proceedings.

(2) They are not seeking appeal or review to avoid the decree on the basis of the legal provisions cited.

(3) They maintain that in the absence of substitution after the entity ceased to operate, execution cannot proceed.

(4) The authorities cited support their case fortified by the fact that there is no denial that the plaintiff had ceased to exist.

The Court was also referred to a legal text and legal authorities. In the legal text on Business Law text and cases by George D. Cameron 111 page 834 last line from the bottom it is stated that "*litigation by and against the partnership presents nearly the same situation as in the sole proprietorship individual partners will be named and must join in any law suit*".

In the case of **FREE PENTECOSTAL FELLOWSHIP IN KENYA VERSUS KENYA COMMERCIAL BANK, NAIROBI HCCC.NO.5116 of 1992 (O.S)**. The point of contest was that the suit had been instituted in the name of a religious organization which is merely a society. At page 2 of the ruling Bosire Justice as he then was (now J.A.) observed in paragraph 2 that the religious organization is not a body corporate in order to sue as a legal personality. In paragraph 3 the learned judge observed "*The plaintiff being an incorporated body lacks the capability to own land in its own name*". In the case of **NAIROBI CITY COUNCIL VERSUS CRIS EVARAND** as chairman and three others Nairobi Milimani HCCC 851 of 2002 Mwera J. at page 7 of the ruling ruled that "*the Plaintiff known as Nairobi City Council is not known to the law and is not mandated to run the affairs around here or sue people in matters connected with running the affairs of the City of Nairobi*".

In the case of **V. SHAH TRADING AS KIAMBU SERVICE STORE VERSUS BARUA ESTATE LIMITED SAMUEL GICHERU MBUGUA NAIROBI MILIMANI HCCC.5944 OF 1993, EMUKULE J.** at page 7 of the ruling stated "*It is immaterial in my opinion that the businessmen V. Shah Trading as Kiambu Serve Stores*" has ceased to exist. What is material is that as at the time of the course of action, the business name subsisted and the proprietor thereof is still available to answer any claim under the suit".

On the Courts assessment of the facts herein it is clear that the following factors are not in dispute.

(1) That the plaintiff herein instituted the suit in the name of Kisii Hardware in the year 1991.

- (2) The defendant/applicant was served, entered appearance and filed a defence in the same year in 1991. No objection to the manner of suing was taken up at that opportune time.
- (3) Directions were taken and the suit set down, for hearing. The defendant/applicant did not participate in the hearing which proceedings were by way of formal proof.
- (4) Judgment was duly given and or entered in favour of the plaintiff/respondent.
- (5) There after the defendant/applicant filed an application dated 14th May 2002 among others seeking orders for setting aside the said exparte judgment. A perusal of the grounds in the body of the application as well as the supporting affidavit do not raise the issue of a non-legal entity. That application was thrown out and judgment confirmed.
- (6) It is on record that the bill of costs has been taxed and even paid. The proceedings have reached the stage where by the plaintiff is seeking orders for executions of the main decree.
- (7) There is no dispute that the decree is intact and it has been signed and sealed by the Deputy Registrar of this court way back on 7th January 2004.

The task of this court is to determine whether in the light of the common ground the application is to succeed or not in the light of the provision of law cited. Section 3A of the Civil Procedure Act has been cited. It reads “*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court*” . In order to succeed the applicant has to show that the application is within the principles set out in that section. The circumstances under which this section can be invoked in any proceedings have now been settled by both the superior court and the court of appeal. It is now trite law that this Section makes provisions for the invocation of the courts inherent powers as a residual power to fall back on in circumstances where no other remedy exists for the affected party to fall back to get a relief. A few case law will demonstrate this. In the case of **SALDANHA AND OTHERS VERSUS BHAILAL AND CO. AND OTHERS [1968] E.A. 28**, it was held that there being specific provisions in order 16 and order 9 rule 16 Civil Procedure Rules revised 1948 for the dismissal of suits for want of prosecution, there is no inherent power to dismiss a suit for want of prosecution. In the case of **GYAN INVESTMENT LTD AND ANOTHER VERSUS THE UNITED STATES OF AMERICA [1970] E.A. 675**, it was held inter alia that it is only where there is a specific remedy provided by law, that the inherent jurisdiction of the Court cannot be invoked. Other cases on the subject are the case of **WANJAU VERSUS MURAYA [1983] KLR (CA) 276** where it was held inter alia that Section 3a Civil Procedure Act Cap.21 although saving the inherent powers of the court to make such orders as may be necessary for ends of justice or to prevent the abuse of the power of court should not be cited where there is an appropriate Section or order and rule 7 to cover the relief sought.

The case of **KIBUTHA VERSUS KIBUTHA [1984] KLR 243 (C.A.)** where it was held inter alia that the inherent power of the court under the Civil Procedure Act (Cap.21) Section 3A cannot be invoked so as to override other rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of such other rules which was not the case here.

In the case of **AFRICAN IMPORT AND IMPORT LTD VERSUS CONTINENTAL CREDIT FINANCE LTD AND ANOTHER [2004] 1 KLR 121** it was held inter alia that Section 3A of the Civil Procedure Act will not aid a person where there is a clear provisions of law governing a matter in which a step or steps shall be taken in action.

Applying that to the facts of the application herein it is clear that in order for Section 3A to aid the applicant it has to be shown that there is no other procedure provided for within the Civil Procedure Rules.

Section 34 (3) cited reads “whether a question arises as to whether any person is or is not the representative of a party, such questions shall for the purposes of this Section be determined by the

Court...”. This is to be invoked to determine whether the decree herein is being sought to be executed by the right party in law or not.

Section 63 (e) on the other hand appears to be displaced as what is being sought by the applicant are not interlocutory orders but formal orders. Further Section 63(e) talks of injunctive relief which is not being sought herein. Order XL VIII rule 3 has been called into play because the orders for execution sought to be up set were made by the Deputy Registrar. The provision provides that where objection to the same is made the objection has to be handled by a judge. Hence the current application being handled by this court. Order XLVIII rule 3 is nothing but a procedural provision.

Other provisions of law were cited during the submissions and it is only proper to set them out and determine their relevance. These are Section 19 Civil Procedure Act, Order 1 rule 13 Civil Procedure Rules, and Order 29 rules 1,2 and 3 Civil Procedure Rules. Section 29 Civil Procedure Act simply provides that “*every suit shall be instituted in such manner as may be prescribed by rules. Applying that to the matters in issue here, it is clear that the argument here is not that the suit should not have been instituted in the manner it was instituted. But whether after an alleged change in the legal status, the decree can be executed in the name the suit was instituted in.*”

Order 1 rule 13 Civil Procedure Rules on the other hand makes it clear that applications to strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by summary or at the trial of the suit in a summary manner. This was raised the Plaintiff/respondents counsel to show that there is no room to substitute a party after trial has been concluded. Meaning that if the application succeeds then the plaintiff cannot substitute for purposes of execution only.

Order 29 rules 1,2, and 3 appear to be the most relevant provisions that can be resorted to by this court to resolve the issues herein. It provides “*0.29 (1) 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 course of action partners in such firm to be furnished and as the court may direct 2(1) where a suit is instituted by partners in the name of their firm the plaintiffs or their advocate shall on demand in writing by or on behalf of any defendant within seven days declare on writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.*”

(2) where the plaintiff or their advocate fail to comply with any demand made under sub rule (1) all proceeding in the suit may upon an application for that purpose be stayed upon such terms as the court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub rule (1) the suit shall proceed in the same manner and the same consequence, in all respects shall follow as if they had been named as plaintiffs in the plaint provided that all the proceedings shall nevertheless continue in the name of the firm”.

This courts construction of the provisions of Order 29 rules 1,2, Civil Procedure Rule as set out above is that the above provisions require that where partners carry on business in the name of a firm, action whose cause of action has arisen during the existence of the firm have to be instituted in the name of the firm. Upon such institution if the defendant so wishes may seek disclosure of individuals behind the firm’s name. Non-disclosure where a request has been made attracts consequences thought not drastic as there is no default clause. Rule 3 and its provisal shows clearly that even upon disclosure of the individuals behind the firm name the suit and all other processes have to continue in the name of the firm. There is no provision for a situation where the firm ceases to operate during the pendency of the proceedings. The overriding words in order 29 rule 1 Civil Procedure Rules are “*at the time of the accruing of the course of action*”. This courts interpretation of that provision is that what is of primary consideration is the fact that the firm must be existing as such as at the time of the arising of the cause of action when applied to the situation herein it is clear that it is not disputed that the firm was in existence

as at the time the action was filed.

The defendant has moved to this court to fault the execution because after filing the suit and even before evidence was given in court, the firm ceased operation. In support of this they have put forward RNM1 a letter from the department of the Registrar General Nairobi dated April 30, 2007. The subject of the documentation is “*Kisii hardware*”. The date is on it shows that the registration name is Kisii Hardware. The date of registration is May 20, 1968. The location of the firm is plot No. 789, Section VI along the Main Road Kisii town. The registered proprietor was Zulifikar Jiwa Nathoo Rajwani and he was still so registered as at 1991 when proceedings were filed. The next document relied upon is RNM2 which is a notice of cessation of business. It is signed by one Zul fikar Jiwa Nathoo Rajwani. It is dated 28th day of May 1992. The message in the document is that the business ceased to be carried on as such as from 28th day of May 1992 which was before evidence in the formal proof was given judgment entered, application for setting aside refused, decree drawn and costs taxed. The impression created by the applicant is that all processes undertaken herein after the firm ceased to exist are a nullity as the same were carried out in the name of a non-legal entity. To fortify their stand the applicants have referred this court to authorities already cited herein to show that a non-legal entity stands non-suited. The Respondents on the other hand have argued that the authorities cited are distinguishable from the state of affairs prevailing herein. In the case of **NAIROBI CITY COUNCIL VERSUS CRIS EVARARD AS CHAIRMAN AND FOUR OTHERS** *supra*, at page 2 of the said ruling the court was urged to hold that there was no entity known as **NAIROBI CITY COUNCIL** capable of suing. At page 7 of the said ruling Mwera J. stated that the correct description of the plaintiff should be “*The City Council of Nairobi. Relating this to the facts herein it is clear that Milimani HCCC 851/2002 wasoan misdescription of a party, whereas herein it has not been alleged that the plaintiff has been misdescribed. RNM1 shows clearly that the firm name was registered as Kisii Hardware. This court therefore finds that this authority is distinguishable from the facts herein.*”

Next is the case of **FREE PENTECOSTAL FELLOWSHIP IN KENYA VERSUS KENYA COMMERCIAL BANK SUPRA**. At page 1 of the ruling it is indicated that objection was raised to the proceedings because the suit was instituted in the name of a religious organization which was a mere society. Bosire J. as he then was (now J.A.) ruled that since the religious organization was not a body corporate it lacked the legal capacity to institute the suit in its own name. This authority too does not assist the applicant as herein we are not dealing with an incorporated body. But a body which had acquired legal entity from the fact of its registration as a business firm.

Nearer home is the cited case “**V. SHAH TRADING AS KIAMBU SERVICE STORE VERSUS BARUA ESTATE LIMITED AND SAMUEL GICHERU MBUGUA** *supra*. In this case it transpired in the course of the proceedings that the plaintiff no longer existed as a business and that the business had been converted from a business name registered under the registration of Business names Act Cap.499 Laws of Kenya into a limited liability company registered under the provisions of the Companies Act Cap.486 Laws of Kenya, and this conversion of business from “V. Shah T/a Kiambu Service Store to Kiambu Service Stores Ltd” was completed or effected in 1995. One of the points for determination as shown at page 6 of the ruling by Emukule J. was the plaintiff’s capacity to maintain the suit. At page 6 of the ruling the learned judge made the following findings. “*In the result therefore I have reached the firm and considered view that the capacity of the plaintiff to sustain and prosecute this suit would have been relevant only if the plaintiff “V. Shah was deceased and/in which event the suit would as readily conceded by Mr. Satish Gautama have abated and would thus have become an issue. As “V Shah the substantive plaintiff is alive any orders passed by the court against the plaintiff will be answered of the respondent herein. To determine this one has to go back to the proceedings on record. A perusal of the same reveals that the sole witness was one Zulfikar All Jiwa. He stated on oath that he owns the plaintiff. It has not been shown that Zulifikar Ali Jiwa Nathoo does not exist. RNM2 indicates clearly that the plaintiff had ceased to exist save for winding up of the said firm. There is no deponement that the said business has been wind up. Had that been the case the records at the Registration department would have said so. Until winding up the business still alive and can be indicated”.*”

Authority for saying so is found in order 29 of Civil Procedure Rules itself. The only requirement to be fulfilled therein is that the cause of action do accrue during the subsistence of the firm which criteria was

satisfied herein. The second requirement is that if the defendant wishes to know who are the individuals behind the firm name, he is at liberty to apply to the court for disclosure of the same. No such application was put in place herein. The 3rd requirement is that even after such disclosures have been made the proceedings have to continue in the name of the firm till concluded. This being the correct position the respondent cannot be faulted for seeking execution in the name of the firm in which name the proceedings were commenced in.

Reliance on the provisions in the text in the business text and cases do not operate to oust the clear provisions of the Civil Procedure Rules. As per the text, the individuals behind the firm's name have to be brought on board. The legislation on the basis of which that text was written has not been exhibited and from their content it differs from the legislation governing the situation herein as stipulated in Order 29 Civil Procedure Rules.

This court is therefore persuaded by the decision of the learned judge in the "V. Shah trading as Kiambu Services Stores case, supra that cessation to operate under the firm name under which the suit commenced does not rob the prime mover of the suit of his/her rights arising from the suit solely on the basis of cessation to exist so long as the prime mover of the business is still alive. Borrowing from the reasoning of the learned judge in the "V.Sah Trading as Kiambu Service Stores Case, so long as Zulifulkar Ali Jiwa Nathoo, is alive he is entitled to realize the fruits of the judgment given in favour of the firm of which he is the sole proprietor. It matters not that he was not brought on board at the time of filing of the action as there is no such requirement under order 29 Civil Procedure Rules. Further the notice of cessation of the business displayed is not absolute as the firm was to exist for purposes of winding up. It has not been shown that taking steps to execute the decree herein is outside activities capable of being taken by a firm awaiting winding up.

For the reasons given in herein, prayer 4 of the application dated 4th May, 2007 and filed the same date has been faulted and it is rejected. The plaintiff decree holder is entitled to execute and realize the decree in his favour for the following reasons:-

- (1) The proceedings herein fall squarely under the provisions of order 29 rules 1,2, and 3 Civil Procedure Rules.
- (2) Under the said rules there is no requirement that the proprietor of the firm be brought on board.
- (3) The only requirement under the said rules which were satisfied by the plaintiff was that the firm be in existence as at the time the cause of action accrues. The firm herein was in existence as at the time the cause of action accrued.
- (4) That is no requirement that the action abates or lapses upon the firm ceasing to carry on business as such. In fact the proviso to rule 3 states clearly that proceedings commenced in the name of the firm have to be continued in the name of the firm till finalized.
- (5) The notice of cessation of business relied upon by the applicant stipulates clearly that the firm was to exist for purposes of winding up. There is nothing to show that the said firm has been wind up. Had that been the case the documentation from the registration department would have indicated so.
- (6) As long as it has not been wound up it is still alive and it is entitled to pursue its accrued rights in law.
- (7) Borrowing from the reasoning in the "V. Shah Trading as Kiambu Service Store Versus Barua Estate Ltd and on other Milimani HCCC. NO.5944/1993 as long as the proprietor is alive to respond to court orders, the action does not die with the change of status of the firm. Herein so long as 2001 Zulifikar Ali Jiwa Nathoo lives the business is alive and he is entitled to respond to court orders and it matters not that he was not brought on board as there is no such a requirement.
- (8) The inherent powers of the court donated by Section 3A Civil Procedure Act cannot be called into

play to oust the clear provisions in order 29 rules 1,2, and 3 Civil procedure rules.

(9) Ruling otherwise to shield a judgment debtor from and allow him/her wriggle or out of his obligations arising from proceedings he has participated in would be nothing but an abuse of the court process.

(10) The plaintiff/respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 21st DAY OF SEPTEMBER, 2007.

N. NAMBUYE

JUDGE