

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 98 of 2002

PAN AFRIQUE FORWARDERS LTD. APPELLANT

VERSUS

JALEX INSURANCE AGENCY RESPONDENT

JUDGMENT

By a plaint dated 28th September 2001, Pan Afrique Forwarders Ltd., the appellant herein, sought to recover a sum of Kshs.20,500/= plus interest from Jalex Insurance agency, the respondent herein. When served with the plaint and the summons the respondent filed an appearance and a defence in which it denied the appellant's claim.

On the 21st day of March 2002, the respondent filed a notice of Preliminary Objection in which it prayed for the appellant's plaint to be struck out because the defendant (respondent) was not recognized by law hence it could not sue neither can it be sued. It would appear the Preliminary Objection was argued before Miss Ngugi, learned resident Magistrate who upheld the same in her ruling of 25th May 2002. The learned Resident Magistrate proceeded to dismiss the entire suit with costs. Being aggrieved, the appellant preferred this appeal.

On appeal, the appellant raised 4 grounds in its memorandum which grounds were argued together by Mr. Tindika advocate for the appellant. The appeal was vehemently opposed by Mr. Gichana advocate on behalf of the respondent.

It is the submission of Mr. Tindika advocate that the trial magistrate erred when she misinterpreted the provisions of Order XXIX of the Civil Procedure Rules hence she arrived at the wrong decision. It is argued that the Preliminary Objection was based on the provisions of the Societies Act as opposed to the Partnership Act, which are two different Acts of parliament. The learned Resident Magistrate was also accused of having exercised her discretion wrongly when she dismissed the suit instead of striking it out.

On his part, Mr. Gichana advocate for the respondent was of the view that there was no difference between an order of dismissal and that of striking out an action. Mr. Gichana was of the view that the trial magistrate arrived at the correct decision.

The proceedings taken before the trial magistrate shows that the Preliminary Objection was argued on the basis that the respondent was not a registered business concern hence it could not be sued. On his part Mr. Tindika opposed that view stating that the defendant fell under the Societies Act and not under cap. 499 Laws of Kenya. The learned resident magistrate agreed with Mr. Gichana that the defendant's (applicant's) fell within the ambit of the Partnership Act, Cap. 499 Laws of Kenya hence the suit was filed in contravention of Order XXIX of the Civil Procedure Rules.

In my mind, the question which must be answered is whether or not the trial magistrate appreciated the provisions of Order XXIX of the Civil Procedure Rules. When the summons was served upon Alex Odede Kawuor on behalf of Jalex Insurance Agency, the firm entered appearance through the firm of E.M. Gichana & Co. advocates. In fact a defence was filed in which the defendant admitted having dealt with the plaintiff in business. It is not clear at what point the defendant became non-existent. There is evidence on record that the firm even issued cheques in an account held by National Bank of Kenya in the name of Jalex Agencies. These facts were on the court record and I do not know why the learned trial resident magistrate did not bother to peruse the file to arrive at a balanced decision. Even assuming that these facts did not exist in the court file, was the learned Resident Magistrate right to dismiss the suit? I can easily get the answer to that question by perusing Order XXIX rule 9 of the Civil Procedure Rules. That rule provides as follows:

“Any person carrying on business a name or style other than his own name may be sued in such name or style as if it were a firm name, and so far as the nature of the case will permit, all rules under this order shall apply.”

In this case a business concern has been sued. An appearance has been entered without a protest. A defence has been filed acknowledging the existence of the firm. What is puzzling me is, who raised the Preliminary Objection? Was it raised by a partner or the “**non-existent**” defendant? I have come to the conclusion that the trial Resident Magistrate erred when she dismissed the suit on the basis of submissions of a party allegedly supposed to be non-existent. The only person or persons who can upstage such a suit is or are partners using the business name which has been sued. Any partner aggrieved with service of summons can only seek redress under Order XXIX of the Civil Procedure rules. Even if the learned Resident Magistrate was correct in her decision it was not open to her to dismiss the suit. She could only strike out the action.

In the end I am satisfied that the trial Resident Magistrate's order must be set aside. Consequently the appeal is allowed with the result that the order dismissing the suit is set aside and substituted with an order dismissing the Preliminary Objection and remitting the matter for trial before another magistrate of competent jurisdiction.

Costs of this appeal and that of the Preliminary Objection should be paid to the appellant.

Dated and delivered at Mombasa this 2nd day of June 2006.

J.K. SERGON

JUDGE

In open court in presence of Mr. Gichana for the Respondent

N/A for the appellant.