REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 45 of 2004 (OS)

JOSEPH CHESIRE SIRMA ……..……PLAINTIFF

VERSUS

ERICK KIPKURGAT KIPRONO ……..……DEFENDANT

RULING

This is a preliminary objection by counsel for the defendant dated 27th April 2004 to the Originating Summons that was filed to bring this action. The Originating Summons for dissolution, taking accounts and winding up of partnership by the plaintiff was filed on 10th April 2004 and seeks for orders that the court determines the following questions between the parties:-

i) What is the nature and value of both the moveable and immovable assets of the partnership?

ii) What is the nature and value of liabilities of the partnership?

iii) In what proportion should the plaintiff and the defendant share both the assets and the liabilities of the partnership as established from the answers to (i) and (ii) above?

iv) What is the extent of indebtedness of the parties hereto to the partnership and vice versa?

v) What are the net savings, or other cash at bank of the partnership and how should these be apportioned?

vi) In what time frame should the dissolution of the partnership, taking of accounts and sharing of profits and losses as well as assets and liabilities thereof be concluded?

vii) Who should oversee the winding up of the partnership in the event of a disagreement between the parties hereto? viii) Who should bear the costs of this suit?

The preliminary objection is based on one broad ground, that the defendant shall raise a point of law that the pleadings herein are fatally defective and ought to be struck out with costs.

At the hearing of the preliminary objection Mr. Chemwok for the defendant submitted that the pleadings in the originating summons are fatally defective and the action should be struck out with costs. He referred to Order 36 rule 4 of the Civil Procedure Rules. He stated that the existence of a partnership is

disputed and the right to a partnership is also disputed, also the dissolution is disputed. Therefore, in his view, none of the parties can come to court through an originating summons in those circumstances.

On the existence of a partnership he referred to paragraphs 3 to 11 and 15 (b), (c), (d) and (e) as well as 16 of the affidavit in support of the originating summons. He submitted that the originating summons is in conflict with Order 36 of the Civil Procedure Rules. He also sought to rely on section 4(a) of the Partnership Act (Cap.29) and submitted that the matters in issue are removed from the procedure of originating summons. He also sought to rely on section 4(b) and (c) of the Partnership Act (Cap.29) and stated that it is clear that the pleadings before the court should not have been filed by way of originating summons.

He also sought to rely on Halisbury's Laws of England 4th Edition Volume 35 at page 501 to support his contention that partnership agreements are usually in writing. In this particular case, there was nothing in writing and no agreement has been exhibited to the court. He emphasized that where an agreement does not exist the court action should not be brought by way of originating summons.

He referred to Halisbury's Laws of England 4th Edition Volume 35 at page 556 paragraph 1102 to support a proposition that an action to enforce a dissolution of partnership must be commenced by writ and not by originating summons. He also submitted that, in a situation where the originating summons is filed, the case must be so clear that it can be disposed of easily. The originating summons is meant to determine matters of law only, not matters of fact. What is before the court are matters of fact which can only be proved through evidence to be tendered in the dock. His argument was that the issues should be clear and simple, if they have to be disposed of by way of originating summons.

He also submitted that there was no name for the subject partnership which was exhibited in court. A joint account does not of itself constitute a partnership nor does sharing profits alone constitute a partnership. Order 36 rule 4 of the Civil Procedure Rules is not an escape clause. In his view, if the court proceeds to hear the originating summons the way it is and realizes in the middle of the hearing that it cannot proceed by way of originating summons, the court will have to convert it to a suit. For that reason they were raising issues for the attention of the court at this early stage to avoid wasting the court's time. He asked the court to look at the annexures to the supporting affidavit. The two identity cards which were not marked as annexures contravene rule 9 of the Oaths and Statutory Declaration Act (Cap.15). He asked the court to strike out the two identity cards. He also referred to the three logbooks and sale agreements which were also not marked as annexures and asked the court to strike them out. He also referred to documents attached to the supporting affidavit after annexure "J2" which had not been marked, and requested that they be struck out. He also submitted that the said documents were not filed in court as they were not stamped. Also all documents after annexure "J5" were not identifiable nor were they received by the court and they should be struck out. Once these documents are struck out the court will not be able to proceed with the originating summons.

He also referred to the Traffic Act (Cap.403) and stated that a copy of the logbook attached to the supporting affidavit after annexure "J1" shows that the owner of the vehicle is Joel Barmasai. Section 8 of the Traffic Act (Cap. 403) provides for a presumption of ownership. Though "J1" is a transfer of ownership, section 9 of the Traffic Act requires registration of the transfer within 7 days, which had not been done.

He further referred to section 27 and 28 of the Registered Land Act (Cap.300).

He stated that paragraphs 9 and 10 of the supporting affidavit raises issues relating to a parcel of land, which cannot be determined conclusively in a judgement to be made by way of originating summons. He stated that section 102 and 103 of the Registered Land Act (Cap.300) were also offended.

He sought to rely on the case of **Official Receiver –versus- Sukhdev [1970] EA 243.** He submitted that an originating summons is not the procedure through which issues of facts should be resolved. He also sought to rely on the case of **Wakf Commissioners – versus- Mohammed [1984] KLR 346** for his contention that originating summons procedure is intended to resolve simple matters and not for dealing

with serious complex issues. He submitted that where matters are complex, the court should dismiss the originating summons and allow parties to proceed through plaint. He referred to the authorities relied upon by counsel for the plaintiff and tried to distinguish them. He referred to the case of **Mukisa Biscuit Co. Ltd. –versus- West End Distributors Ltd. [1969] EA 696** and stated that in an originating summons parties must bring to the court their positions on the propriety of proceeding by way of originating summons early enough. He also referred to Order 36 rule 10 of the Civil Procedure Rules and stated that the issue as to whether the matter is to proceed by plaint should be raised early enough. On the case of **Mutiso –versus- Mutiso [1984] KLR 532** he submitted that that case is distinguishable as one party was not given audience. He submitted that the Court of Appeal held that a party should not be locked out of proceedings. He stated that they have pointed to the court the issues of complexity early to avoid possible problems. He further submitted that in the case of **Samuel Kanyi Gitonga –versus Peter Gacuiga Mugweru & Others Nairobi HC.CC.No.3356 of 1989 (unreported)** the court held that striking out proceedings is a draconian measure, but that striking out of pleadings can be done. He also referred to the case of **Shah –versus- Shah [1982] KLR 95.** He submitted that their objection would save the court the inconvenience of hearing the originating summons and then ordering hearing through plaint in the middle of proceedings. On the case of **Mwalakaya –versus- Bandali [1984] KLR 751**, he submitted that the case is distinguishable as it was based on land registered under the Registration of Titles Act (Cap.281), which was revised in 1989. The properties in issue before the court are registered under the Registered Land Act (Cap.300).

Mr. Gicheru for the plaintiff opposed the preliminary objection. He submitted that it was misconceived and it was an attempt to avoid going into the merits of the main suit. He submitted that the fact that the existence of a partnership is in dispute does not mean that a party cannot come to court by way of originating summons. He sought to rely on the case of **Shah –versus- Shah [1982] KLR 95**. He stated that the only requirement is that the court should look at the originating summons and satisfy itself as to whether it is an action that can be commenced by way of originating summons. The issues before the court in this matter are the dissolution, taking accounts and winding up of the partnership. All those issues are covered under the provisions of Order 36 rule 4 of the Civil Procedure Rules, which provides for taking action through originating summons. It is after hearing the evidence that the court can determined whether there is a partnership or not. If there is a partnership then this action will be proper. He also sought to rely on Order 36 rule 9 of the Civil Procedure Rules which recognizes that though some facts might be in dispute, the court may direct further evidence to be taken. From the pleadings, there is no issue on the existence of the partnership that has been raised. The respondent did not file any reply to the originating summons. He only filed a replying affidavit to the Chamber Summons. An issue can only arise from the pleadings, therefore the issue of the existence of a partnership has not been raised as an issue in this court. He further submitted that even if the existence of the partnership had been properly denied, it could not be fatal to the originating summons. He sought to rely on Order 36 rule 10 of the Civil Procedure Rules. He stated that the provision relied on by counsel for the defendant was repealed by Legal Notice No.216 of 1985 and replaced by the new provision. The authorities cited on behalf of the defendant relate to the repealed provisions. Under the new provisions the court was empowered, at any stage in the proceedings, to continue with the cause as of it had been began by way of a plaint. The court also had power to direct that any affidavit filed in the cause be deemed to be a pleading. He sought to rely on Order 36 rule 10(4) of the Civil Procedure Rules. He submitted that the amendment removed the distinction between an originating summons and a plaint. He was of the opinion that, at the direction stage, counsel for the defendant can request that the matter proceeds through viva voce evidence, which the court has powers to order. He submitted that the amendment of Order 36 was occasioned by difficulties that were experienced in cases such as in the case of **Official Receiver – versus- Sukhdev [1970] EA 243** as well as the case of **Wakf Commissioners –versus- Mohamed [1984] KLR 346.** In order to avoid the mischief, the new provisions were enacted. The court can presume that the suit was filed by way of plaint. The mere fact of the existence of a dispute on facts, was not fatal to the action.

He submitted that Order 36 rule 10 of the Civil Procedure Rules only comes in to assist a party if the proceedings have been commenced. The court can give directions at any stage of the proceedings. Also the argument that an originating summons should be confined to determination of issues of law was erroneous. Order 36 of the Civil Procedure Rules does not impose that limitation. The actual position is the opposite. One of the fundamental documents to be filed in an originating summons is an affidavit

which is a statement of facts in dispute. If only points of law were to be determined, there would be no need for an affidavit. Order 36 rule 9 of the Civil Procedure Rules clearly shows that an originating summons can determine issues of facts.

He submitted that it was wrong to place reliance on the text in Halisbury's Laws of England 4th Edition Volume 35 that proceedings for dissolution of a partnership should be commenced by way of writ. In his view, that position is not applicable in Kenya. That is the law in England. In Kenya, the Judicature Act (Cap.8) stipulates the law applicable. Order 36 rule 4 of the Civil Procedure Rules provides for matters to be determined by way of originating summons. This covers the dissolution, taking accounts and winding up of partnerships. These are the prayers sought in the originating summons. On the issue that there was no partnership agreement, he submitted that a partnership can be oral or in writing. The Halisbury's Laws of England 4th Edition Volume 35, cited by counsel for the defendant did not apply. Where a partnership was oral one needs to go to part III of the Partnership Act (Cap.29), which defines the ingredients required for the existence of a partnership. Before a court can determine whether a partnership exists it has to hear evidence. That cannot be determined through a preliminary objection.

He also referred to Lindlay on Partnership chapter 5. He submitted that at Common Law a partnership can be constituted without the necessity of writing. Therefore the fact that there was no written agreement does not mean there was no partnership. He submitted further that annexure 2 to the supporting affidavit of the originating summons established that there was a joint account between the two parties. Paragraph 22 of the supporting affidavit also supported this position. There was therefore prima facie evidence to show the existence of the partnership. He also referred to paragraphs 20, 21, 27, 28 and 29 of the replying affidavit to the Chamber Summons, which shows that the parties had joint property. He submitted that the issues are intricate and cannot be determined on the basis of a preliminary objection. He sought to rely on the case of **Mukisa Biscuit Manufacturing Co. Ltd. –versus- West End Distributors Ltd. [1969] EA 696 at page 701**. He submitted that the Court of Appeal held that preliminary objections can be raised if facts are not in dispute and should be on pure points of law. He submitted that counsel for the defendant relied on annexures to affidavits rather than points of law. He submitted that in view of the provisions of section 8 and 9 of the Traffic Act (Cap.403), the points of dispute on ownership of the motor vehicles should fail. Section 8 of the Traffic Act sets out the presumption of ownership, which is rebuttable. To rebut that presumption it requires evidence. Paragraphs 19, 20 and 21 of the replying affidavit shows that the defendant admits buying the vehicle jointly with the plaintiff. There was no mention of Barmasai in the affidavit.

On the issue that the land should have been described in accordance with the requirements of the Registered Land Act (Cap.300), he submitted that the land can be described variously. It is a matter of evidence to establish whether that property exists. Under section 112 of the Evidence Act (Cap.80) the person with special knowledge of these properties is the defendant. He cannot keep the particulars secret and say the suit must fail.

On the issue that annexures which are not referred to in the supporting affidavit should be struck out with the affidavit, he submitted that all the annexures to the supporting affidavit were stamped. Any annexure which was not referred to in the affidavit did not form part of the affidavit and the remedy is just to ignore them. Annexure 2 was stamped on the first page and it is a book of accounts and is a continuous document of 7 pages. There is no legal requirement that stipulates that the stamp should be on each page. Also annexure "J5" has 9 pages. Only annexures "J3", "J4" and "J5" do not have the court stamp. However, the duty to stamp documents is the duty of the court. They were paid for and served. Under Order 18 rule 6 of the Civil Procedure Rules, the court is entitled to strike out offending paragraphs of an affidavit or annexures. Other paragraphs and annexures remain intact. He sought to rely on the case **Sammy Lagat –versus- Eastern Produce (K) Ltd. Eldoret HCCC. No.101 of 2001 (unreported)**. He also sought to rely on the case of **Samuel Githonga –versus- Peter Gacuiga Mugweru Nairobi HCCC. No.3356 of 1989 (unreported).** He submitted that, in any case, the plaintiff had been given leave to file a further affidavit so the originating summons is not defective.

I have considered the arguments by counsel for both parties in the preliminary objection. This is a preliminary objection to the originating summons that was filed by the plaintiff Joseph Chesire Sirma on

16th April 2004. The originating summons is dated 13th April 2004. Several issues have been argued for and against the preliminary objection. In my view, the issues for determination in this preliminary objection are as follows:

> **i) Whether the preliminary objection has been based on points of law.**
>
> **ii) Whether legally there is any partnership.**
>
> **iii) Whether if the existence of the partnership is in dispute, the plaintiff can bring an originating summons.**
>
> **iv) Whether some documents attached to the supporting affidavit should be struck out.**
>
> **v) Whether the originating summons should only deal with points of law.**
>
> **vi) Whether the issues raised in the originating summons are issues to be dealt with through plaint rather than by originating summons.**
>
> **vii) Whether the Originating Summons that has been filed is defective.**
>
> **viii) Whether the court should strike out the Originating Summons and order that the matter proceed by way of plaint.**

On the issue as to whether the preliminary objection is based on points of law, Mr. Gicheru has argued that the defendant's objection is grounded on intricate issues of evidence that cannot be determined by way of a preliminary objection. He submitted that a preliminary objection should be based on pure points of law. I have perused the notice of preliminary objection. It merely states that the defendant shall raise a point of law that the pleadings herein are fatally defective and ought to be struck out with costs. In the case of **Mukisa Biscuit Manufacturing Co. Ltd. –versus- West End Distributors Ltd. [1969] EA 696 the Court of Appeal stated at page 701** as follows: -

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

The notice of preliminary objection in our present case is very brief. However, the submissions have been long and on various issues. Counsel for the defendant has argued about the non-existence of a partnership, the defect of documents attached to the supporting affidavit and the discretion of the court to order that the matter proceeds by way of a plaint. In my view the reference to documents filed was merely to establish the legal points. Therefore, in my view, the preliminary objection was properly raised, on points of law.

The second issue is whether, in fact, there is a partnership in existence. I have been referred to Halisbury's Laws of England 4th Edition Volume 35 for the English position as well as the Partnership Act (Cap.29), which provides for the Kenyan position. I will say that the existence or otherwise of a partnership is a matter of law. The English position only becomes of assistance in Kenya when there is no local legislation in Kenya specifically dealing with the subject.

The Partnership Act (Cap.29) (the Act) makes legal provisions for partnerships in Kenya. The definition of a partnership is given in section 3(1) of the Act as follows:-

> **"3(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.**"

Under subsection (2), the definition specifically excludes registered companies and corporations. From

the above definition, it is clear that for there to be a partnership, there have to be some persons carrying on a business in common and with a view of profit. Business is defined in the Act to include every trade, occupation or profession. Section 4 of the Act gives rules to be considered in determining whether or not a partnership exists. Under subsection (a) it is provided that joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof. Subsection (b) provides that the sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are divided.

Subsection (c) provides that the receipt by any person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with profits of a business, does not of itself make him a partner in the business.

From the above therefore, only persons who are in receipt of a share of the profits of a business are taken, prima facie, to be partners in that business. The Act does not provide that a partnership should be in writing. However, section 6 of the Act provides that the persons who have entered into a partnership with one another are called collectively a firm and the name under which their business is carried on is called the firm name. Section 49 of the Act provides that the rules of equity and common law are applicable to partnerships in England shall apply to partnerships in Kenya, except in so far as they are inconsistent with the provisions of the Act. In my view, therefore any matters of law not covered under the Act or other written law in Kenya, will be governed by the rules equity and the common law applicable to partnerships in England. I was referred to Halsbury's Laws of England 4th Edition Volume 35 on the ingredients of a partnership. At page 5 paragraph 2 the essential of a partnership are described as follows: -

> **"Partnership involves a contract between the partners to engage in a business with a view to profit. As a rule each partner contributes either property, skill or labour but this is not essential. A person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping or dormant partner. A sleeping partner may, however, contribute nothing. The question whether or not there is a partnership is one of mixed law and fact."**

Paragraph 4 on the same page goes on to define business as follows:-

> **"The existence of a business is essential to a partnership, and for this purpose business includes every trade, occupation or profession the idea involved is that of a joint operation for the sake of gain."**

Considering the above, it is apparent to me that the definition of a partnership and business in the Act is actually derived from the English position. It is obvious that it is the conduct of the parties to a business that determine whether there exists a partnership. According to Lindley on Partnerships 11th Edition Chapter 5 page 107, at common law partnerships need not be in writing. Therefore in my view there is no legal requirement that a partnership relationship in Kenya has to be established through writing. It can be oral.

In our particular case, there was no written agreement for the establishment of the partnership, on the way the partnership business is to be run and on the way sharing profits is to be done. The affidavit in support of the originating summons depones that there was a verbal agreement to start a partnership and that lorries and land were purchased through the partnership income. In my view, the evidence on record establishes prima facie existence of a partnership, which can only be disputed by evidence. As the defendant has not responded to the originating summons to dispute the existence of the partnership, I find that prima facie there exists a partnership.

On whether if the issue of the partnership is in dispute, a party can bring action in court through originating summons, I refer to Order 36 rule 4 Civil Procedure Rules which provides as follows: -

> **"(4) When the existence of a partnership, or the right to a partnership, or the fact of**

dissolution thereof is not in dispute, any partner in the firm or his representative may take out an originating summons returnable before the judge sitting in Chambers against his partners or former partners or their representative, (if any), for the purpose of having the partnership dissolved (if it is still subsisting) and for the purpose of taking the accounts of and winding up such partnership."

In my view, the provisions of the law very clear. If there is a dispute on the existence of a partnership, then a party cannot bring an action to court through originating summons. In this particular case I see no documents in the originating summons indicating a dispute, nor has the defendant responded to the originating summons disputing the existence of the partnership. So on the basis of what is on record, the plaintiff was correct in coming to court by way of originating summons.

On whether some documents attached to the supporting affidavit should be struck out, I understand Mr. Gicheru as stating that any document that is not properly acknowledged in the affidavit as an annexure and stamped as such an annexure and marked can be ignored. In this regard I find that the supporting affidavit refers a to copy of a motor vehicle transfer for motor vehicle KZE 973 as annexure "J1", copy of passbook number 441874 from Standard Chartered Bank Eldoret Branch as annexure "J2", detailed summary of properties acquired by the partnership since inception as annexure "J3", detailed summary of the number of trips made by the partnership lorries marked as "J4", and accounts relating to trips made by the lorries marked as "J5". These documents are properly annexed to the affidavit. In my view, all documents attached to the supporting affidavit which are not part of these five documents, do not form part of the affidavit and therefore have to be ignored. The affidavit will still remain intact but without the documents that were not properly annexed.

On whether the originating summons should deal with only points of law, I find no substance in that argument. The fact that the procedure for filing or originating summons under order 36 of the Civil Procedure Rules allows the filing of a supporting affidavit, means that the originating summons can address matters of law as well as matters of On whether the issues raised in the originating summons are issues that can be dealt with only through a plaint rather than an originating summons, I have to refer to the issues stated in the originating summons itself. The originating summons states that it is seeking the dissolution, taking of accounts and winding up of the partnership. It goes further to seek specific issues for determination, which I have listed at the beginning of this ruling.

The issues numbering (i) to (viii) in my view, are fairly complex issues. I am aware and bound by the decision of the Court of Appeal in the case of **Shah –versus- Shah Nairobi Civil Appeal No.34 of 1981**, in which the court held that the procedure by way of originating summons in Kenya is not limited to matters in respect of which facts are agreed. Indeed, the fact that an affidavit is filed in support of an originating summons in itself means that some facts might be in dispute. However, the issues to be tackled in prayers (i) to (viii) are likely to be very contentious.

If we talk about the nature and value of moveable and immovable assets; the nature and value of liabilities of the partnership; the proportion that the plaintiff and the defendant should share both in the assets and liabilities.; the extent of indebtedness of the parties to the partnership; the net savings, or other cash at bank of the partnership and how they should be apportioned; the time frame for the dissolution of the partnership, taking of accounts and sharing of profits and losses as well as assets and liabilities; and who should oversee the winding up of the partnership, if the parties do not agree. All these are matters, which are likely to be very contentious. In my view these are complex and involving matters, which it would be inappropriate to deal with strictly through an originating summons. If there was a written arrangement on how these matters were to be dealt with, it would have been less complex and less involving. I am bound by the Court of Appeal's decision in the case of **Wakf Commissioners –versus- Mohammed [1984] KLR 346**, where the Court of Appeal held that originating summons procedure is intended for settling simple matters without the expense of a full trial and not for serious complex issues. On that ground, I am of the view that this is not a matter that should proceed strictly by way of originating summons. On whether the originating summons is defective, I find no defect in it. In my view, it only raises complex issues. That is not a defect as such, per se. The argument that dissolution of the partnership should proceed by way of writ is the English position. In Kenya dissolution of a partnership

can be done by way of originating summons.

On whether I should strike out the originating summons and order that the matter proceeds by way of plaint, I am aware of the decision of the court in the case of Samuel **Kanyi Gitonga –versus- Peter Gacuiga Mugweru and 2 Others – Nairobi High Court Civil Suit No.3356 of 1989 (unreported)**. In that case Justice Bosire, as he then was, held that striking out pleadings is a draconian measure. That it can only be done in the clearest of cases, that is where such pleading is beyond resuscitation by amendment. In this particular case, however, it is not that the pleadings are defective, but that the procedure adopted is for determination of simple straight forward issues. I find no justification for striking out the originating summons. In the case of **Wakf Commissioners –versus Mohamed [1984] KLR 346** the Court of Appeal held as follows –

> **"Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of ordinary suit."**

As I have stated earlier the defendant herein has not filed a response to the originating summons to dispute the facts. Therefore, in my view, at this stage the decision of the above case cannot apply. Therefore, I also find no justification for dismissing the originating summons.

However, on the face of it, I think that the matters raised in the originating summons are complex. Order 36 rule 10(1) Civil Procedure Rules gives powers to this court, at any stage of the proceedings started by originating summons to proceed as if they had been commenced by way of plaint.

On the basis of the powers conferred on the court by this legal provision, I order that the originating summons do proceed as if it was commenced by way of plaint. I also order that the originating summons and supporting affidavit stand as a pleading and that the defendant should file its response to the originating summons within 14 days from today.

The upshot is that the preliminary objection fails. However, I order that costs be in the cause.

Delivered and Dated at Eldoret this 22nd Day of February 2005

George Dulu

Ag. Judge

In the Presence of: