



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. MILIMANI COMMERCIALCOURT**

CASE NO. 131 OF 2003

**MEIR MIZRAHI AND STANLEY KINYANJUI
(Treasurer and Secretary respectively, of the
Outdoor Advertising Association of Kenya)
suing for and on behalf of**

**OUTDOOR ADVERTISING ASSOCIATION OF KENYA
.....PLAINTIFF**

V E R S U S

**NAIROBI CITY COUNCIL..... 1ST DEFENDANT
ADOPT A LIGHT LIMITED.....2ND DEFENDANT
ALLIANCE MEDIA KENYA LIMITED.....3RD DEFENDANT**

R U L I N G

By an application brought by way of a Chamber Summons dated 22-09-2004, the 2nd Defendant sought inter alia the following orders-

- (1) the interlocutory judgment entered by the Deputy Registrar on 4-09- 2004 be set aside ex debito justitiae***
- (2) the ex-parte order of 15.09.2004 issued by me requiring the 1st and 2nd Defendants to maintain the status quo prevailing as at the date of the said inter-locutory judgment be vacated.***
- (3) the plaint filed on 13-03-2003 be struck out and the suit be dismissed;***
- (4) Meir Mizrahi and Stanley Kinyanjui, the purported Plaintiffs be ordered to bear the costs of this application and the suit;***

The application was supported by the Supporting Affidavit of one Esther Muthoni Passaris (sworn on 22-09-2004 the Managing Director of the 2nd Defendant and upon twenty three grounds set out in the application of which the following are material to this Ruling:-

- (i) the Plaint dated and filed on 13-03-2003 is frivolous and vexatious and will prejudice, embarrass and delay the fair trial of this action and is otherwise an abuse of the process of the court,***

(ii) the Plaintiff have purported to come to court in a representative capacity suing as treasurer and secretary respectively of the Outdoor Advertising Association of Kenya, which they claim is an organization duly incorporated and registered pursuant to the provisions of the Societies Act, (Chapter 108, Laws of Kenya),

(iii) the Plaintiffs have by the averment in paragraph 1 of the Plaintiff filed on 13-03-2003 and duly confirmed by verifying Affidavits sworn by both Meir Mizrahi as Treasurer and Stanley Kinyanjui as Secretary, disclosed that the membership of the Outdoor Advertising Association of Kenya at 1st January, 2003 as comprising of the following-

• Spellman & Walker

• Monier 2000 Ltd,

• Magnate Ventures,

• Adsite Co. Ltd, •

Eagle Outdoor, •

City Clock;

• Gadman Marketing;

(iv) the total number of the companies comprising the Outdoor Advertising Association of Kenya at the commencement of the suit was therefore seven (7) members,

(v) The Societies Act (Chapter 108, Laws of Kenya) defines a ‘society’ in Section 2 as including “any club, company, partnership or other association of ten or more persons whatever its nature or object.”

(vi) It is clear that the minimum number of persons required for an association to qualify as a society within the meaning of a society under the Societies Act is (10),

(vii) the Outdoor Advertising Association of Kenya had, by its own admission, ceased to exist as a society within the meaning of the Societies Act, by 13-03-2003 when the plaint was filed and accordingly Meir Mizrahi and Stanley Kinyanjui cannot purport to be treasurer and Secretary respectively of an organization which is not recognized by the statute under which it purports to its,

(viii) the Plaintiffs accordingly have no locus standi to maintain this suit on behalf of a society that has ceased to exist;

(ix) the Outdoor Advertising Association is in the same position as a dead plaintiff, and suits by which Lord Denning M.R. has recognized in Re Pritchard (deceased) {1963} 1 ALL ER. 837 at 879, (paragraph A) as one of the only true cases of nullity.

(x) the decision of Njagi, J. in the case of Sietco (Kenya) Ltd –Vs- Fortune Commodities & Another (Milimani Commercial Courts H.C.C.C. No. 1264 of 2002 (unreported) – that “where the Plaintiff does not exist as a legal person at the time the Plaint was filed, any proceedings are a nullity and the Plaint qualifies to be struck out as there is no Plaintiff to prosecute the suit.”

There were other grounds but are not material for the purpose of this Ruling, and are covered generally in the course of this Ruling. When this application first came for hearing before the Hon. Mr. Justice H.P.G. Waweru, on 3-11-2004, counsel for the Plaintiffs took issue with the representation of the 2nd Defendant by the firms of Ochieng Oduol, Onyango, Kibet and Ohaga; as having been not in accord with the provisions of Order III, rule 9 of the Civil Procedure Rules which require that where judgment has been entered in a matter, a new Advocate or firm of Advocates will only take over the conduct of such matter

upon an order of court.

This issue which was raised by way of Preliminary Objection on a point of law, was by a Ruling delivered by Hon. Mr. Justice H.P.G. Waweru, dismissed with costs on 28.01.2005, thus paving the way for the parties to argue the sole question which would dispose of the entire matter. That sole issue had been framed by the Court (Hon. H.P.G. Waweru) on 22.09.2004, with the consent of all the parties, and it is this –

“Whether or not there is in existence a Plaintiff or Plaintiffs recognized in law, and if not, what should be the consequences in respect to the suit?”

This was the sole issue urged before me on 4/05/2005; by Mr Ohaga learned Counsel for the 2nd Defendant, and Mr. Havi, learned counsel for the Plaintiff (s). Mr. Ohaga in his submissions reiterated the above grounds, and the Affidavit of the said Esther Muthoni Passaris, the Managing Director of the 2nd Defendant. The learned counsel emphasized in particular that there was no proper plaintiff in this suit, and the situation in this case was similar to that of a dead Plaintiff, and no suit could be filed let alone be maintained by a dead plaintiff. Counsel relied upon the case of Re- Pritchard [1963] ALL ER. 873 where Denning M.R. said at page 289” the only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead.....”

The Plaintiff herein is not of course **“dead”** in the sense of clinical death of a human person. Counsel refers to death of a **“juridical person,”** and in this regard also referred the court to two English cases of –

(i) Russian and English Bank –vs- Baring Bros & co. Ltd [1932] I Ch. 435 and

(ii) Lazard Bros & co. Vs. Midland Bank Ltd [1932] ALL E.R. 571 (1933) A.C. 289.

I shall revert to these and other cases in the course of this Ruling. The thrust of the 2nd Defendant’s application was that where at the time of suit the Plaintiff is clinically “dead” or juridically non-existent, then it cannot found any suit, and if any suit is instituted, then that suit is a nullity and no amount of clarification by annexation of particulars of the individuals of the association, company or society can cure or revive it.

Counsel submitted that although Section 2 (2) of Societies Act provides-

“for the avoidance of doubt that for the purposes of the Act, where any body of persons whether incorporated or

unincorporated is a member of an association, all members of that body are members of that association.....”

this provision defies the principle stated in the case of *Salomon –vs- Salomon & Co. Ltd [7897] A.C.* that a company registered under the Companies Act is a distinct or separate entity from its sponsors or shareholders and it cannot be said, like this provision does, that the company, and also the individual members of the company so incorporated, are also members of, and constitute the society.

It would in learned counsel’s view be absurd to say that a limited company is also together with its shareholders a society. In support of his view, learned counsel cited Section 2 of the Interpretation and General Provisions Act (*Chapter 2 Laws of Kenya*) which defines the expression “person” as follows:-

“person” – includes a company or association or body of persons corporate or unincorporate.”

In this respect therefore, Mr. Ohaga submitted that the expressions, “company’ or **“association”** corporate or unincorporate, must be read disjunctively, so that Section 2 (2) of the Societies Act, extends the definition of a “society” to a body of persons and so that individuals cannot comprise members of the association to make ten (10) members. The Association that is called the Plaintiff or on whose behalf the

suit is purportedly brought, must comprise of several companies which must on their own be counted, and therefore shareholders cannot constitute their membership. If this submission were correct, it means that when the plaint was filed, there were less than ten (10) members of the association, and they could not therefore constitute a society within the meaning of a society under the Societies Act.

There could therefore be no Plaintiff, and the purported action should therefore be struck out with costs to be borne personally by Meir Mizrahi and Stanley Kinyanjui who purported to bring the suit on behalf of the Plaintiffs. Mr. Njagi, learned counsel for the 1st Defendant concurred with Mr. Ohaga's submission, and supported the prayer to strike out the suit. Mr. Havi, learned counsel for the Plaintiffs opposed the Application and relied upon the Replying Affidavit of Stanley Kinyanjui the Secretary –General of the Association sworn on 7-10-2004.

Learned Counsel for the Plaintiffs concedes that the plaintiff is a registered society registered under the Societies Act, it has a valid Certificate of Registration, the registration has not been revoked, it has made its annual reforms and is not under threat of deregistration. The association, counsel submitted is by virtue of Section 2 (2) of the Societies Act, comprises of incorporated, unincorporated, and individual persons, that is to say, natural persons and that it had a present membership of thirty five (35).

Counsel agreed with the principle in *Salomon –Vs- Salomon & Co. Ltd*, that that company is a distinct entity separate from its shareholders or members. However, he submitted the provisions of Section 2 (2) of the Societies Act, is a self-governing piece of legislation which lays down requirements for registration as a society. It overrides any other principle of case law and empowers individual members or bodies corporate to be also members of the society, so that where for instance there are seven (7) members as bodies corporate and three individual members who are shareholders of those bodies corporate, would make up the rear and qualify to register as a society.

Counsel submitted that the Plaintiff exists, it had a membership of more than ten to qualify for registration and it was so registered. It had the power to institute the suit, and in any event membership is a question of fact, and since the Application is founded upon Order VI, Rule 13 (1) (b) (c) and (d), the court is also obliged to look at the facts supporting the application unlike Order VI, rule 13 (2) where no evidence is required, but where as it is here, the plaintiff asserts its presence, and there is no evidence to rebut its existence apart from references in the Plaint, to an association, the plaintiff is entitled to both institute and prosecute the suit on behalf of its members. Counsel also submitted that paragraphs 12, 13, 18, 19 and 25 of the Supporting

Affidavit of Esther Muthoni Passaris contravene the provisions of Order X VIII, rule 3 (1) of the Civil Procedure Rules and should be struck out because the averments in those paragraphs merely refer to advice by the deponent's Counsel, and do not disclose the source of the information and no leave of court has been sought for such averments to be made without disclosing the source. Counsel relied upon the case of –

General (Rtd.) J.K. Mulinge –vs- Lakestar Insurance Co. Ltd, (Milimani Commercial Courts Civil Case No. 1275 of 2001) where the court struck out offending paragraphs of an Affidavit as being contrary to Order XVIII, rule 3 (1) which reads-

3 (1) Affidavits shall be confined to such facts as the deponent is able of his knowledge to prove:- Provided that in interlocutory proceedings, or by leave of the court an affidavit may contain statement of information and belief showing the sources and grounds thereof”.

On allegations that the plaint was a fraud, Mr. Havi submitted that there was no evidence of fraud as is alleged in paragraph (ix) of the Grounds to the Application, and that paragraphs 10-20 and 22-24 of the Supporting Affidavit of Esther Muthoni Passaris consist of scandalous and frivolous matters which should also be struck out. Counsel relied upon the commentaries in Bullen & Leake and Jacob's Precedents of Pleadings, 12th Edition Section 49 – Fraud and Misrepresentation page 452-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the

pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford –vs- Mutual Society (1880) 5 App. Cas. 685 at 697, 209). The statement of claim must contain precise and full allegations of facts and circumstances lending to reasonable inference that the fraud was the cause of the loss complained of (Lawrence –Vs- Lord Norpeys (1890) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly fraudulent conduct must be distinctly alleged and distinctly proved (Danning –Vs- Garrett {1878} 7 Ch. D 473 at 489 General allegations however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

In conclusion, and on the basis of his submission above, Mr. Havi learned Counsel for the Plaintiffs urged the court not to strike out the Plaintiff’s suit because no proper case had been demonstrated by the 2nd Defendant supported by the 1st Defendant to warrant the striking out of the suit as this is not one of those clear cases for dismissal of suit. Those were the respective parties’ counsel’s submissions. The principal issue for determination is the issue framed by Hon. Justice H.P.G. Waweru, with the concurrence of the parties’ Advocates, namely

(1) “Whether or not there is in existence a Plaintiff or Plaintiffs recognizable in law and if not, what should be the consequences in respect of the suit”

Before determining this principal issue there are several other subsidiary issues which should perhaps be disposed of first. These issues are firstly whether or not the suit is a fraud upon the Defendants and secondly whether there are any matters raised in the Supporting Affidavit of Esther Muthoni Passaris which are either frivolous, scandalous or vexatious to the Plaintiffs or in respect of the Plaintiffs’ suit, and whether such offending paragraphs of the Affidavit should be struck out.

Commencing with the second of the subsidiary issues, I have examined paragraphs 10-29 of the supporting Affidavit of the said deponent, and I cannot discern any averment therein which can in the remotest sense of those expressions, be described as either frivolous, scandalous or vexatious, and I can therefore find none of them as being candidates for striking out. I therefore reject this contention by the Plaintiffs counsel. In the same vein, cannot find any of those paragraphs as being offensive to the provisions of Order XVIII, rule 3 (1) or the proviso thereto. It is granted that paragraphs 12, 13, 18, 19 and 25 of the Supporting Affidavit were made without leave of court. The proviso to rule 3 (1) expressly permits such averments in interlocutory applications and in this case the source of the advice is disclosed as emanating from the 2nd Defendants Advocates.

The Affidavit does not therefore violate the provisions of Order X VIII rule 3 (1). The Plaintiff’s contention to the contrary is therefore rejected. Adverting to the subsidiary issue whether or not the suit is a fraud upon the Defendants, I must on the outset say firmly that there is no iota or shred of evidence that the Plaintiff’s suit is a fraud upon the Defendants. It may perhaps be poorly framed but is certainly no fraud upon the Defendant. As clearly indicated in the citation from the authors of Bullen Leake and Jacobs Precedents of Pleadings

“ It is not allowable to leave fraud to be inferred from the facts pleaded, and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved . General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

As stated above, there is no basis for the allegation of fraud upon the 2nd Defendant. There is no distinct allegation, and there is nothing to be distinctly proved. I therefore reject this claim on the part of the 2nd Defendant.

The principal issue, whether or not there is or are plaintiff (s) in this action and the consequences either way, require closer consideration. Mr. Ohaga learned counsel for the 2nd Defendant, and was supported in this by Mr. Njagi; learned Counsel for the 1st Defendant urged the court that under Section 2 (1) of the Societies Act, a society is defined as follows- “Society” – includes any club, company, partnership or

other association of ten or more persons whatever its nature, or object, established in Kenya, or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not except in paragraphs (i) and (ii) of Section 11 (2) (f) of this Act include-

(a) a company as defined by the companies Act, or as a foreign company under Part X of that Act;

(b) any corporation incorporated by or under any other written law.”

The prerequisite for a society under the Societies Act, is that it must be comprised of not less than ten members. In other words it cannot be registered with less than ten initial members. Thereafter the society may be comprised of as many persons as may be allowed to join under the Society’s Constitution. Mr. Havi, learned counsel for the Plaintiff’s submitted from the Bar that the Plaintiff association currently comprised of over thirty five (35) members, and it is validly existing.

I think counsel for the Plaintiff missed the 2nd Defendant’s argument. It is this. At the time of filing suit, the Plaintiff’s membership was by the Plaintiff’s own averment declared to be seven members. This clearly means that the Plaintiff had as of the time of filing suit ceased to exist as a registered society. Mr. Ohaga referred the court to two similar English cases which arose out of the nationalization of Russian banks following the Bolshevik Revolution 1917 in Russia. The first case which Mr. Ohaga referred to was **Russian and English Bank Vs. Baring Bros & Co. Ltd {1932} 1 Ch. 435:**

In that case the short facts were these. The Plaintiff had been incorporated in Russia in 1911 under Russian Law, and established a branch in London in 1915. In 1917, the revolution in Russia took place, and subsequently, as result of the laws passed in Russia, by the Soviet Government; the Bank was dissolved or otherwise ceased to exist. In 1921, the English Branch claimed certain sums from the Defendant as money belonging to the bank in the hands of the Defendants. The English Court held that existence or non-existence of the bank depended on the law of Russia where it was incorporated; under Russian law the bank had ceased to exist, and therefore, applying English law, the *lex fori*, it was incapable of maintaining the action, which must be stayed.

Similarly in the case of **Lazard Bros & Co. –Vs- Midland Bank Ltd {1932} ALL E.R. 571** under similar circumstances as in the Russian Bank and English Bank -Vs Baring Bros & Co. Ltd, a Russian bank which was a corporation formed under Russian law, had no branches or shareholders in England but was indebted to an English creditor and was itself a creditor of an English Bank, exceeding debts owed to an English creditor. Both debts were English debts payable in England and governed by English law. Orders nisi granted by the Court of Appeal were set aside by the House of Lords.

Lord Wright after considering the facts posed several questions, but the most relevant to our case was – whether the order nisi should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant since the judgment debtor had ceased to exist as juristic person before the date of writ.

Lord Wright dealt with this question, and said” ***I shall deal with this question (ii) which is most important and is decisive since, it is clear law, scarcely needing any express authority that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non existent But when the court becomes aware that the Plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed.”***

Similar sentiments were expressed in the case of **Seif V. Sharty {1940} 19 (1) K.L.R. 19** cited in **Continental Credit Finance Ltd. (2002) 2 E.A. 399 at 403, and also in Sietco (K) Ltd –vs- Fortune Commodities & Cooperative Bank of Kenya Ltd** (Milimani Commercial Courts H.C.C.C. No. 264 of 2002) where Njagi J. found that there being no legal person in the name of Sietco (Kenya Ltd) no action could be commenced or maintained by that name. The action was therefore a nullity and was struck out.

Adverting therefore to the case at hand, Mr. Havi pleaded the case of **Albert Ruturi –Vs- Minister for**

Finance {2001} I E.A. 253 for the proposition that representative suits by organisations on behalf of their member were permissible provided-

(i) the organization’s members had standing on their own right,

(ii) the interests which the organization sought to protect were germane to the organization’s purpose, and

(iii) neither the claim nor the relief sought required the individual participation of members,

There is no doubt the seven named members of the Outdoor Advertising Association of Kenya could on their own institute suit against the Defendants if they so minded. I am doubtful that the interests which the organization sought to protect were germane to the organization’s purpose which were not even stated in the Plaint. The Plaintiff’s complaint appears to be exclusion from the lucrative contract – the 2nd Defendant may have entered into or were contemplating to enter with the 1st Defendant.

In this, there can be no common purpose for each member would most probably be fighting for its own inclusion rather than the inclusion of all the members. However and much more important, and I am fully apprehensive of the fact that technicalities are a blot on the administration of justice, where, as in the present case, it is clearly apparent from the Plaintiff’s own pleadings [by which the Plaintiff is bound] that at the time of filing suit, the membership of the Plaintiff’s Association was less than the statutory minimum, the Plaintiff’s association was technically non-existent, it was, as if it were dead, and dead persons cannot maintain any suits. It did not matter that there was a Certificate of Registration in existence at the material time of filing suit, if the membership had fallen below the statutory minimum, it could not maintain any action against the Defendants.

Mr. Havi learned counsel for the Plaintiffs(s) tried ingenuously to breathe life into the Plaintiff by clinging to the leaf of Section 2 (2) of the Societies Act. I have referred to this section at the beginning of this Ruling. It declares that – “for the avoidance of doubt for the purposes of the Act, where any body of persons whether incorporated or unincorporated is a member of an association, all members of that body are members of that association.”

Mr. Havi argued that as case law the principles of Salomon –vs- Salomon & Co. Ltd. that a limited company is a distinct and separate entity from its sponsors, cannot supplant the provisions of statute. This is only partially correct, for the principles enumerated in the Salomon case are no longer case law, it is by virtue of Section 16 of the Companies Act, (Cap 488, Laws of Kenya) part of the law of Kenya. That section declares that upon registration of a company, it becomes a body corporate, a legal person with its own existence, it may be a fiction of law, but it exists, and does things apart from, and independent of its owners, or shareholders who may themselves be other body corporates, and individuals.

This however does not still answer what meaning is to be given to the provision of Section 2 (2) of the Societies Act. I would agree with the submission by Mr. Ohaga, learned Counsel for the 2nd Defendant that it would indeed be absurd to say as is provided in Section 2 (1) that a “Society” as including “any club, company, partnership or other association of ten or more persons whatever its nature of object” and then immediately say in the same section 2 (2) that all members of the incorporated or unincorporated body are members of association. The absurdity comes in the declaration of a minimum membership of ten to form an association, when the incorporated body may consist of double that number or even more.

To cure that obvious absurdity, and no less inconsistency, Mr. Ohaga suggested and I, with respect agree with that argument, that the expressions “Company” or association” “corporate” or unincorporate” must be read disjunctively, so that Section 2 (2) of the Societies Act, extends the definition of “a society” to a body of persons, and so that individuals cannot comprise members of an association to ten (10) members with which a society may legally be registered. The effect of this interpretation is that to form an association under the Societies Act, “any club” “company” corporate or unincorporated must register alone, and so would individuals. It also means that it is highly undesirable for a combination of commercial enterprises be they clubs, corporate or unincorporated bodies, and more so body corporates to

be registered under the Societies Act as an association.

The answer to the principal issue framed by Hon. Mr. Justice H.P.G. Waweru must therefore be that the number of members of the association having fallen below the statutory minimum, there was no legal plaintiff at the commencement of the suit herein. The suit is therefore a nullity.

I am keenly aware that Courts are enjoined under Section 3 of the Judicature Act Cap 8 Laws of Kenya to decide cases according to substantial justice without undue regard to technicalities and dismissal of suit on a technicality leaves behind a very sour taste in the mouth of the litigants(s). Rules of Law must however be observed.

Where for instance the law provides that an association to be lawful must have a certain number of members and it fails to maintain that number, then the association is legally nonexistent, notwithstanding it has in existence a Certificate of registration. That was the case in point here. It declared its members in the suit. It was contra statute. It could not sue. The suit filed and dated 13-03-2003 was therefore a nullity the plaintiff was nonexistent.

In the circumstances the suit is struck out with costs to the Defendants. For avoidance of doubt any previous orders made under the suit are of course deemed to be vacated and discharged by virtue of this Ruling. There shall be orders accordingly.

Dated and delivered at Nairobi this 2nd day of December 2005

M.J. Anyara Emukule

JUDGE.