



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.203 OF 1996

FRANCIS KARANJA
PLAINTIFF/APPLICANT

VERSUS

DANIEL MACHARIA,

KENNEDY SITUMA & SELECTED ENTERPRISES LTD..
DEFENDANT/RESPONDENTS

Coram: Before Hon. Justice Mwera

Mulwa for the Plaintiff/Applicant

Sangoro for the Defendants

Court clerk – Sango

R U L I N G

This application dated 27-8-04 is brought by the applicant in the Originating summons (O.S.) he filed on 30-8-04 invoking O.36 rr. 1 to 4 Civil Procedure Rules and the Partnership act Cap. 29)

The main prayers are:

- i) That the defendants be restrained from operating the partnership business called Kenchic Inn along Moi Avenue Mombasa.
- ii) That the defendants themselves should not interfere in the running of that Inn especially the operating of a certain account No. 0329089002 Commercial Bank of Africa Mombasa and
- iii) That the defendants should not commit the partnership business to further financial/investment deals.

The grounds on which this application is premised, and so the court was told, included a claim that the partnership (M/S Selected Enterprises) was formed by the plaintiff, the 1st and 2nd defendants contributing equal shares of 33.3%. That the defendants have purported to take over the partnership business without the consent of the plaintiff. It did not clearly appear in the grounds how the 3rd defendants a Limited liability company was featuring in this undoubtedly partnership affair, but during the arguments it was claimed that after starting the business a partners, the same three (the plaintiff and the 1st and 2nd defendants) incorporated the 3rd defendant, with each having one share. That one of the

objectives was that the 3rd defendant was to take over the partnership business.

Back to the grounds, it was further added that the defendants were now threatening to change the partnership accounts and commit that firm to some investments without the consent of the plaintiff. That the defendants, again it is assumed that these are the 1st and 2nd defendants, had breached the partnership agreement by making unauthorized withdrawals of money from the business and committing it to investments unknown to the plaintiff. And that accordingly the orders sought need be granted. Mr. Mulwa argued the application mainly in that vein while Mr. Omolo for the defendants held a contrary view.

While conceding that initially there was a partnership as claimed by the plaintiff Mr. Omolo told the court that the 3 partners then formed the 3rd defendant which took over the partnership business – all regularly and with knowledge, consent and signatures of the plaintiff. That accordingly the partnership ceased to operate. That negotiations followed whereby the plaintiff was intending to sell his shares in 3rd defendant, to the co shareholders (the 1st and 2nd defendants) save that they did not agree on the price. That with that, the plaintiff fell back on the partnership that ceased to operate when the three incorporated the 3rd defendant. That the plaintiff had thus not made out a prima facie case or shown that his shareholding, which had been quantified anyway, cannot be compensated with damages. And that by granting the orders sought, Kenchic Inn's operations would virtually come to a halt because its premises will be closed, the bank accounts frozen and no supplies procured.

In this court's view the litigants agree that there was a partnership. That later they formed a limited company – the 3rd defendant whose objects included taking over the business of the partnership. But what is not shown to this court is that indeed there was cessation of the partnership business and it was taken over by the 3rd defendant. That evidence would have shown well that the partnership "died" and so all the 3 people – the plaintiff, the 1st and 2nd defendants only have business connection through shares in the 3rd defendant. That was clear to both sides. But while the plaintiff maintained that the partnership never ceased, and it was added that the 3rd defendant never paid any consideration to take over the partnership business, the defendants were of the view that there was no longer a partnership.

In this case there stands out a question to be determined. If the partnership still exists then there will follow the question whether or not the 2nd defendants have breached the partnership agreement by opening secret accounts to scheme off monies from the firm without the plaintiff knowing. In the view of this court at this point it is not shown that the partnership ceased to exist and thus there is a case to investigate further by way of evidence. Of course it is arguable as to why the 3rd defendant a limited company which was not and could not be partner in the light of). O. 36 r. 4 Civil Procedure Rules has been sued but that is for another day.

Mr. Omolo told the court that the plaintiff's share could be quantified in money terms and so he can get money compensation. That may be so. But the court was left with the impression that the three – i.e. the plaintiff, and the first and 2nd defendants much as the trust and confidence among them seems to have been expended, they were not acting forthrightly here. But that impression aside, and the court having been told that Kenchic Inn is still operating, the better course is to maintain the status quo for the benefit of all:

- a) Kenchic Inn to continue running with its operations, accounts and all.
- b) All partners and/or their servants/agents to work as if the partnership business was never intended to be taken over by any 3rd party or at all.

The forgoing orders are made in the light of Mr. Mulwa's position that the plaintiff was not seeking by these proceedings to wind up the 3rd defendant (that is not possible in a cause such as this) and that this court had discretion to make such orders as it deemed just and proper in the circumstances.

The foregoing to remain in force until this Originating Summons is determined or further orders of the court.

Costs to the plaintiff.

Orders delivered on 25th November 2004.

J.W. MWERA

JUDGE