



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 154 OF 2015**

**SIZZLERS CAFE.....PLAINTIFF**

**VERSUS**

**SALAAM HOLDINGS LIMITED.....DEFENDANT**

**RULING**

1. **Salaam Holdings Limited**, the Defendant, filed the Notice of Preliminary Objection dated 16<sup>th</sup> December, 2019 to the suit by **Zizzlers Cafe**, the Plaintiff, raising the following grounds:

- (a) That the Plaintiff described as a partnership and business name does not amount to a legal person in law and cannot sustain a suit in its own name.
- (b) That the Plaintiff not being a juristic person, the suit is incurably defective, untenable in law and is **“dead on arrival”**.

That therefore, the suit should be struck out.

2. That the learned Counsel for the Defendant and Plaintiff appeared before the Court on the 22<sup>nd</sup> January, 2020 and consented to filing written submissions on the preliminary objection. That subsequently, the learned Counsel for the Defendant and Plaintiff filed the written submissions dated the 28<sup>th</sup> January, 2020 and 22<sup>nd</sup> February, 2020 respectively.

3. The following are the issues for the Court’s determinations:

- (a) ***Whether the Plaintiff has capacity to sue and sustain this suit in its name.***
- (b) ***Whether the suit should be struck out with costs.***
- (c) ***Who pays the costs of the preliminary objection?***

4. The Court has carefully considered the grounds on the preliminary objection, learned Counsel’s written submissions and the superior courts’ decisions cited therein, the pleadings and come to the following determinations;

(a) That the **Partnership Act No. 16 of 2012** is described on the heading as an Act of Parliament to provide for partnerships and for connected purposes. That **Section 7** of the said Act provides as follows:

**“7. The carrying on of Partnership business –**

**(1) Each partner in a partnership shall have responsibility for the business of the partnership.**

**(2) A partnership shall be capable of;-**

**(a) Suing and being sued in its own name;**

**(b) Entering into contracts and owning or holding property for the purposes of the business of the partnership;**

and

**(c)Subject to the partnership agreement, providing continuity for the partnership business despite a change in the partners.”**

That the Plaintiff herein is described at paragraph 1 of the Amended plaint as **“a partnership carrying on business in Eldoret...”** That the Defendant at paragraph 2 of their defence disputed that averment in the following words; **“The defendant does not admit paragraph 1 of the plaint.”** That in the case of **Mukhisa Biscuits Company Limited Vs West End Distributors Limited [1960] E.A. 696** at page 701, the Court stated as follows about raising preliminary objections where the facts are disputed;

**“A preliminary objection is in the nature of what used to be a demurer. 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...”**

(b) That as can be discerned from above, the pleading by the Plaintiff that it is a partnership has been disputed by the Defendant through their defence, and to determine that issue would definitely require the calling of evidence. That accordingly, the issue of whether or not the Plaintiff is a partnership cannot be a ground of a preliminary objection in view of the Court of Appeal decision in **Mukhisa Biscuits** Case above.

(c) That the provision of **Section 7 of the Partnership Act No. 16 of 2012** that commenced before the filing of this suit is clear, that a partnership can sue or be sued in its name. That the provision of **Order 30 of the Civil Procedure Rules** leaves no doubt that a partnership has capacity to sue and be sued in its own name. That being the case, the Defendant’s preliminary objection has no merit and is rejected.

(d) That the Defendant having failed in their preliminary objection, should as provided for by **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** pay the Plaintiff’s costs of the same.

5. That in view of the foregoing, the Defendant’s preliminary objection vide notice dated the 16<sup>th</sup> December, 2019 is hereby rejected and dismissed with costs to the Plaintiff. Orders accordingly.

**Dated and delivered at Eldoret this 7<sup>th</sup> day of May, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy registrar through the online media given by Counsel/Parties.

Christine: Court Assistant