



Smiles and Grins LLP & another v Smiles and Grins Dental LLP & 4 others (Commercial Case E433 of 2024) [2025] KEHC 8632 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E433 OF 2024
JWW MONG'ARE, J
JUNE 13, 2025**

BETWEEN

SMILES AND GRINS LLP 1ST PLAINTIFF

BRIAN WAMATHAI KAMARA 2ND PLAINTIFF

AND

SMILES AND GRINS DENTAL LLP 1ST DEFENDANT

TERESIA WANGARI KANGETHE 2ND DEFENDANT

JACINTA WAMUYU KANGETHE 3RD DEFENDANT

MICHAEL NG'ANG'A KANGETHE 4TH DEFENDANT

REGISTRAR OF COMPANIES 5TH DEFENDANT

RULING

Introduction and Background

1. Sometime in August 2021, the 2nd Plaintiff (“Brian”) and the 2nd Defendant (“Teresia”) registered the 1st Plaintiff (“Smiles & Grins”) as a limited liability partnership dental hospital and they consummated this business relationship by entering into a Partnership Deed dated 23rd August 2021 (“the Deed”). By a plaint dated 29th July 2024, the Plaintiffs filed the present suit stating that sometime in 2023, the business relationship between Brian and Teresia deteriorated which led to Teresia making it impossible for Brian to discharge his duties as a partner and manager of Smiles & Grins. Brian further avers that Teresia withheld all information relating to the affairs of Smiles & Grins, which breach is continuing. Owing to this situation, on 19th September 2023, Brian communicated to Teresia about his intention to retire from the partnership but that the parties could not agree on the separation terms.



2. Brian claims that Teresia had ousted him from the operations of the partnership whose operations she continued to run as a sole proprietorship, misappropriating partnership funds. Brian further claims that as they were still looking for ways to resolve the conflict and amicably dissolve Smiles & Grins, he discovered that Teresia had fraudulently and in cahoots with the 3rd and 4th Defendants (“Jacinta” and “Michael”) registered the 1st Defendant (Smiles & Grins Dental”) with a name that is deceptively similar to Smiles and Grins and that the former was registered on or about 22nd January 2024. The Plaintiffs aver that the fraudulent actions which are still continuing have illegitimately created a false impression to the public that Smiles & Grins is the same as Smiles & Grins Dental and that these actions are illegal and fraudulent.
3. The Plaintiffs also accuse the 5th Defendant (“the Registrar”) of acting negligently or connivingly with the other Defendants in registering Smiles and Grins dental in absolute disregard of the provisions of section 21 of the *Limited Liability Partnership Act* (Chapter 30 of the Laws of Kenya). The Plaintiffs thus seek various reliefs including declarations that registration of Smiles & Grins Dental was illegal, that the registration was intended to defraud Brian, that Teresia’s actions were illegal and in breach of the Partnership Deed and that all of Smiles & Grins Dental’s assets and revenues belong to Smiles & Grins. The Plaintiffs also seek orders of accounts, audit, indemnification, deregistration of Smiles & Grins Dental, winding up of Smiles & Grins and general damages.
4. Together with the plaint, the Plaintiffs have filed the Notice of Motion dated 8th August 2024 seeking to injunct the Teresia, Jacinta and Michael from operating Smiles & Grins and; Smiles & Grins Dental and their bank accounts, that an order of accounts of Smiles & Grins and Smiles & Grins Dental be rendered and that the Registrar deregisters Smiles & Grins pending hearing and determination of the suit. The application is supported by grounds on its face and Brian’s affidavits sworn on 8th August 2024 and 25th October 2024 and it is opposed by Smiles & Grins Dental, Teresia, Jacinta and Michael (“the Defendants”) through Teresia’s Replying Affidavit sworn on 2nd October 2024.
5. The court issued interim orders on 13th August 2024 and the Plaintiffs, through their Notice of Motion dated 22nd August 2024 now claim that the Defendants have been in contempt of the said orders and they seek that the Defendants be punished for the same. The application is supported by grounds on its face and Brian’s supporting affidavit sworn on 22nd August 2024 and it is opposed by Teresia’s replying affidavit sworn on 2nd October 2024. The Defendants have also filed the Chamber Summons dated 27th August 2024 seeking to refer this matter to arbitration as per the Deed. The Defendants support this application through the affidavits of Teresia sworn on 27th August 2024 and 25th September 2024. The Plaintiffs have opposed the application through Brian’s replying affidavit sworn on 6th September 2024. The three applications have been canvassed by way of written submissions which together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

6. I propose to first deal with the jurisdictional issue of whether the instant suit/dispute ought to be referred to arbitration. It is not in dispute that Clause 20.2 of the Deed provides for an arbitration agreement. However, the Plaintiffs have stated that this provision is only applicable to the partners or their respective personal representatives and does not extend to multifaceted claims involving third parties as raised in their plaint. That referring this matter to arbitration would not resolve the issues between the parties who are not parties to the Deed. I agree. As stated in the introductory part, the



Deed was between Brian and Teresa and not the other parties and that the arbitration agreement can only bound the partners and their personal representatives at Clause 20.2 as follows:

“Any dispute between the partners or their respective personal representatives or between one partner and the representatives of another partners as to any matter affecting or relating to the business or the affairs of the partnership shall be referred in accordance with the provisions of Arbitration xxx 0000 to 1998 or any statutory modification or re-enactment thereof for the time being in force to a single arbitrator to be appointed in default of the agreement by the President of the time being of the Irish Dental Association.”

7. From the above, it is clear that it is only the partners, that is, Brian and Teresa and their representatives that can be bound by the provisions of the Deed and more so the arbitration agreement. As the late Majanja J., stated in *Scales and Software Limited v Web Commercial Systems Limited & another* [2021] KEHC 9060 (KLR), ‘...the court will not enforce an arbitration clause against a third party. The basis of arbitration under the Act is consent of the parties. In the absence of consent, a third party cannot be compelled to submit to arbitration under the Act.’ The Plaintiffs’ claim goes beyond issues in the Deed between Brian and Teresa as it involves claims of misrepresentation, illegality, fraud, negligence and connivance attributed to other parties other than Teresa and who are not parties to the Deed. An arbitral tribunal cannot hear and determine these claims as it will be outside the scope of the arbitration.
8. Whereas the court can order Brian and Teresa to submit to arbitration in respect of issues arising out of the Deed, I find that it will not be equitable and just to do so in the circumstances because there are more issues outside the scope of the Deed than within it. I therefore find that this court is jurisdictionally suited to hear and determine the present dispute. The Defendants’ application dated 27th August 2024 is therefore dismissed at this point.
9. I now turn to the contempt application where the Plaintiffs accuse the Defendants of failing to comply with the court’s interim orders of 13th August 2024. The court allowed the Plaintiffs’ prayer no. ‘C’ of their application dated 8th August 2024 where the Defendants were restrained from operating Smiles & Grins and Smiles & Grins Dental pending hearing and determination of the said application. The Plaintiffs depone that the Defendants were served with the court order on 14th August 2024 but they are still booking patients and continue to carry out the dental business.
10. In response, the Defendants deponed that they were indeed served with the order and they ceased operating Smiles & Grins and that Smiles & Grins Dental is not in operation and has never been in operation since it is only a registered business that has no assets or operations. However, the Defendants lament that the orders have been detrimental to their survival and that of the employees and that the same should be varied to allow Smiles & Grins to operate under the joint supervision of the parties. Going through the pleadings and the annexures therein, I note that the court order was served upon the Defendants via WhatsApp and email on 14th August 2024. The Plaintiffs have also annexed photographs and screenshots taken on 15th August 2024 indicating that Smiles & Grins is operational and that they were still booking patients. This was done after the order was served upon the Defendants. A party is guilty of contempt of court orders once the court is satisfied that the orders were clear and unambiguous, that the Defendant has proper notice of the terms and that breach of the orders has been proved beyond reasonable doubt (See *Ochino & another v Okombo & 4 others* [1989] KECA 65 (KLR)).
11. Whereas the Defendants have argued that the orders were not personally served upon them, our jurisprudence has shifted and developed that knowledge of an order supersedes personal service. The rationale behind this change appears to be the need to protect the integrity and dignity of Court



orders. To excuse a contemnor who has knowledge of a Court order simply because he has not been personally served is to open up Court orders and process to deliberate, willful, contemptuous and cynical disobedience (See Sang v Keter & 5 others [2024] KEELC 14136 (KLR)). As the Defendants were clearly aware of the orders of the court by their own admission and as evidenced by the annexed affidavit of service, they now cannot hide behind the requirement of personal service of the orders to excuse their disobedience of the same. It is now clear that the Defendants have been in contempt of the orders issued on 13th August 2024 as there is evidence that they continued operating Smiles & Grins despite being restrained from doing so by the said orders. I find them guilty of contempt of the court's orders and order that they should show cause why they should not be committed to civil jail for blatantly failing to comply with the said orders.

12. The last application is that of the Plaintiff that seeks orders of accounts, injunctions and deregistration of Smiles & Grins Dental. On the injunctions sought, I do not think it is disputed that the conditions required to be satisfied by the Plaintiffs for the same to be granted were set out in the case of Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358. The Plaintiffs are required to demonstrate a prima facie case with a probability of success, that they will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiffs are expected to surmount sequentially which means that if the Plaintiffs do not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR))
13. The Plaintiffs lament that the Defendants have illegally registered Smiles & Grins Dental under the guise that it was the same business as Smiles & Grins and that the two entities are deceptively similar, contrary to section 21 of the Limited Liability Partnership Act which provides as follows:
 21. Restrictions on registration of limited liability partnership names.
 - (1) The Registrar may refuse to register a limited liability partnership under a name, or allow a limited liability partnership to change its name to one that in the opinion of the Registrar is—
 - (a) undesirable;
 - (b) identical to that of any other limited liability partnership, corporation or business name;
 - (c) identical to a name that is being reserved under this section, the Registration of Business Names Act (Cap. 499) or the laws relating to Companies; or
 - (d) a name of a kind that the Cabinet Secretary has, by written notice, directed the Registrar not to accept for registration.
 - (2) A person may apply to the Registrar in the prescribed manner for the reservation of a name specified in the application as—
 - (a) the name of a proposed limited liability partnership; or
 - (b) the name to which a limited liability partnership proposes to change its name.
 - (3) On receiving an application under subsection (2) and on payment of the prescribed fee the Registrar shall, if satisfied that the name to be reserved is not one that may be rejected on a ground referred to in subsection (1), reserve the name for a period of two



months from the date on which the application was lodged or for such longer period as the Registrar may specify.

- (4) If the Registrar is satisfied that a limited liability partnership has been registered under a name that—
 - (a) is a name referred to in subsection (1); or
 - (b) nearly resembles the name of any other limited liability partnership or company or a business name as to be likely to be mistaken for it, the Registrar may direct the limited liability partnership to change its name.
- (5) A direction may be given under subsection (4) whether the name was registered through inadvertence, mistake or otherwise and whether at the time the partnership was first registered or when it changed its name.
- (6) A limited liability partnership shall comply with a direction given to it under subsection (4) within six weeks after being notified of the direction or within such longer period as the Registrar may allow.
- (7) A person may, in writing, apply to the Registrar to give a direction to a limited liability partnership, to change its name on a ground referred to in subsection (4)(a) or (b).
- (8) The Registrar shall not consider an application under subsection (6) to give a direction to a limited liability partnership on the ground referred to in subsection (4)(b) unless the Registrar receiving the application within twelve months after the date of the registration of the partnership under that name.
- (9) A limited liability partnership which fails to comply with a direction given under subsection (4) commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings.
- (10) If, after being convicted of an offence under subsection (8), a limited liability partnership still fails to comply with a direction given under subsection (4), the partnership commits a further offence on each day or part of a day during which the failure continues and is liable on conviction to a fine not exceeding five thousand shillings for each such offence.
- (11) The Registrar may, if it is satisfied that a limited liability partnership is directed under subsection (4) to change its name had applied for registration under that name in bad faith, require the partnership to pay the Registrar such penalty as may be prescribed and the Registrar may, by proceedings brought in a court of competent jurisdiction, recover such a fee as a debt due to the Registrar.
- (12) A limited liability partnership which is aggrieved by a direction of the Registrar under subsection (4) or a requirement of the Registrar under subsection (10) may, within thirty days after the date of the direction or requirement, appeal to the Cabinet Secretary.

14. The Plaintiffs contend that this erroneous registration and operation places them at great liability and that Brian is unable to discharge his functions as the manager of Smiles & Grins given the fact that the Defendants have appropriated the partnership and its premises for the benefit of Smiles & Grins Dental. In response, the Defendants urge that Brian has no locus to present this application as he voluntarily resigned from the partnership and that he no longer has legitimate interest in Smiles



& Grins. In any event, that Smiles & Grins Dental was properly and legally registered under the Limited Liability Partnership Act, that all due processes and requisite fees were paid leading to its legal registration by the Registrar and that Smiles & Grins Dental is engaged in the business of pediatric, orthodontics and dentistry, that it is an absolute different entity from Smiles & Grins and that Teresia is at liberty to engage directly or indirectly in any other registered business other than partnership business as envisaged under Clause 13.2 of the Deed which provides as follows:

“Partners are allowed to engage directly or indirectly in any business other than the partnership business”

15. In response to the averments above, Brian depones that he only expressed his intention to resign from the Partnership and that they were still in negotiations with Teresia on the same but that these discussions were not concluded. The Plaintiffs reiterate that Smiles & Grins Dental has been fraudulently registered by the Registrar and it is being run illegally by the Defendants with the intention to defraud the Plaintiffs and that it is not a new partnership legitimately formed but it is Smiles & Grins camouflaged as Smiles & Grins Dental without actually dissolving the former.
16. I have gone through the parties’ rival arguments. At this stage, let me point out that the court is not required to conduct a mini trial but must nevertheless determine whether there is a prima facie case at least based on the material before it (See Nguruman Limited(supa). I agree with the Plaintiffs that in as much as Brian evinced his intention to resign from the partnership, the resignation is not concluded as the parties have been discussing how to effect the resignation and it appears that this has not been concluded. The correspondences on record point to this fact as there are inter alia offers for a buy out and no agreement appears to be in place. Thus, it is correct for Brian to state that as it is, he has not yet resigned from the partnership as the negotiations for his exit are yet to be concluded.
17. As to the validity of the registration of Smiles & Grins Dental, I note that the Registrar has not put in a response on the same. In any case, I cannot impute any impropriety on the Registrar and the Defendants at this stage as the Court of Appeal in Patrick Okuku & 7 others v James Kutsushi Atindo & 8 others [2016] KECA 580 (KLR) held that serious allegations of fraud and other wrong doing can only be decided during a proper trial and not on the basis of conflicting affidavit evidence.
18. Nevertheless, I cannot help but notice that there are striking similarities between Smiles & Grins and Smiles & Grins Dental which lend credence to the Plaintiffs’ contention that this is contravention of section 21 of the Limited Liability Partnership Act cited above. Save for the name “Dental”, the names of the two entities are visually and phonetically similar and it has not been disputed that the two entities bear a similar postal address, phone numbers and physical address. Further, whereas the Defendants have stated that Smiles & Grins Dental is not in the same business as Smiles & Grins, I agree with the Plaintiffs that the former’s CR-12 indicates the Nature of Business as “Healthcare” which is general and could incorporate the partnership’s business. I therefore find that there is a valid prima facie case that the registration of Smiles & Grins Dental is problematic to Smiles & Grins which was registered first in time and that there is a high chance that due to the similarities, Brian as a partner could be prejudiced and that the public may be confused.
19. The two entities cannot operate at the same time and since Brian is still a partner and it has not been disputed that he no longer participates in the affairs of the partnership, it is only just that the operations of the two entities be halted in the meantime. As the Defendants have also agreed to a valuation of the partnership and that a determination be made on the issue of dues and shares of the business, I find that an order of accounts will be appropriate so as to assist the court make a just determination. However, I find that an order for deregistration cannot suffice at this stage until the Registrar is heard on the allegations of fraud, connivance and illegality of Smiles & Grins Dental’s registration.



20. In making the aforementioned orders, I have been convinced that the Plaintiffs have a prima facie case with a probability of success, that they stand to suffer financial and reputational damage that cannot be compensated by damages if the affairs of the two entities are allowed to run as they are and that the balance of convenience tilts in favour of granting the injunctive orders and the other orders aforementioned

Conclusion & Disposition

21. In the foregoing, I make the following dispositive orders:

1. The Defendants' Application dated 27th August 2024 is dismissed
2. The Plaintiffs' applications dated 8th August 2024 and 22nd August 2024 are allowed on the following terms:
 - i. The Defendants are found guilty of contempt of the court's orders of 13th August 2024 and that they should show cause why they should not be punished by being committed to civil jail. The same should be done within 30 days from the date hereof.
 - ii. A temporary injunction be and is hereby issued restraining the 2nd, 3rd and 4th Defendants by themselves, their servants, agents and /or employees or whosoever is acting on their behalf and/or under their mandate and/or instructions from operating the 1st Plaintiff and the 1st Defendant pending the hearing and determination of the Main Suit.
 - iii. A temporary injunction be and is hereby issued restraining the 2nd, 3rd and 4th Defendants by themselves, their servants, agents and /or employees or whosoever is acting on their behalf and/or under their mandate and/or instructions from transacting on both the 1st Plaintiff and the 1st Defendant Bank Accounts within Kenya pending the hearing and determination of the main suit.
 - iv. An order be and is hereby issued directing the 2nd, 3rd and 4th Defendants to render accounts to the Plaintiffs detailing all operations, income, expenses, liabilities and assets of the 1st Plaintiff and the 1st Defendant pending the hearing and determination of the Main Suit.
 - v. The Plaintiffs are awarded costs of the three applications

DATED SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE 2025

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J.W.W. MONGARE

JUDGE

In the Presence of:-

1. Ms. Chitechi for the Plaintiff/ Applicant.
2. Ms. Wetunga for the Respondent.
3. Amos- Court Assistant

