



**Wairimu ((Suing as the Administrator of the Estate of Juma Kiplenge)) v Andama
& another (t/a Kiplenge , Andama & Makau Advocates) (Civil Application
E001 of 2023) [2024] KEHC 1255 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPLICATION E001 OF 2023
PN GICHOHI, J
FEBRUARY 14, 2024
IN THE MATTER OF APPLICATION BY JEDIDAH WAIRIMU
(AS THE ADMINISTRATOR OF THE ESTATE OF JUMA KIPLENGE)
AND
IN THE MATTER OF SECTION 12 (2) & 37 OF THE PARTNERSHIP ACT
BETWEEN
JEDIDAH WAIRIMU PLAINTIFF
(SUIING AS THE ADMINISTRATOR OF THE ESTATE OF JUMA KIPLENGE)
AND
MAKAU MUTISO 1ST DEFENDANT
AMOS ANDAMA 2ND DEFENDANT
T/A KIPLENGE , ANDAMA & MAKAU ADVOCATES**

RULING

1. Through the firm of Muigai Gatei & Co. Advocates, the Plaintiff filed against the Defendants an Originating Summons dated 16/2/2023 and seeking that this Court makes orders:-
 1. Directing the Defendant to give a full disclosure to the Plaintiff in writing of all details, documents and information relating to all assets in their possession , control or directions belonging to the estate of Juma Kiplenge.
 2. Directing the Defendant to account to the plaintiff on behalf of the estate all monies , benefits which accrued or ought to accrue to the Deceased Estate in respect of the law firm.



3. Directing the Defendant to make a full disclosure of all pending bills of costs accrued by Kiplenge & Kurgat & Co advocates prior to 4th November ,2020.
 4. Directing all profits and or benefits accrued by the law firm of Kiplenge & Kurgat & Co advocates prior to 4th November ,2020 belonging and should devolve to the Estate of Juma Kiplenge and that the Defendants are entitled to share in the same.
 5. Dissolving the partnership of Kiplenge , Adama & Makau Advocates.
 6. That costs be in the cause.
2. The grounds are on the face of the Originating Summons supported by the Affidavit sworn by Jedidah Wairimu on 16/2/2023. She depones that in the year 2000, the deceased established in Nakuru his own law firm by the name of Juma Kiplenge & Co Advocates and eventually, he joined hands with Job Kurgat and established a partnership in the name of Kiplenge and Kurgat Company Advocates in the year 2009.
 3. She further states that during his practice, the deceased represented various clients including the late President Moi and also acquired assets whose documents he kept in his office. That some of the properties are jointly owned with the Defendants herein.
 4. She depones that the Defendants were later incorporated as partners on 4/11/2020 but the deceased passed away on 7/10/2022 leaving huge pending bills of costs in regard to the clients he had personally handled.
 5. She depones that what the deceased acquired before the Defendants became partners cannot be shared with the defendants but rather should devolve the estate of the deceased.
 6. She further depones that she has tried to reach out to the Defendants to discuss these issues but they have dismissed her saying they can only consider the estate on humanitarian grounds yet she was aware of some property that was allocated to the three partners but which the defendants have failed to disclose. She therefore sates that she is apprehensive that the Defendants will not fully disclose the properties owned by the deceased and all accrued profits and benefits unless they are compelled by this Court to do so and there be a settling of accounts between the Defendants and the estate of the deceased.
 7. Upon being served, and through the firm of Kiplenge , Adama & Makau Advocates, the Defendants filed a Notice of Preliminary Objection dated 22/2/2023 on the grounds that:-
 1. The Plaintiff's suit, being an action based on Partnership Deed dated 4th November 2020 comprising of an Arbitration Clause / Arbitration Agreement at Clause 6 that is binding upon parties in this dispute and therefore this suit is an abuse of the court process , incompetent and fatally flawed under section 6 of the *Arbitration Act*.
 2. Owing to the fact that the parties had chosen Arbitration as their forum for dispute resolution, this court lacks the necessary jurisdiction to hear and determine this dispute.
 8. The Defendants therefore urges this Court to strike out the suit with costs to allow the parties to resolve their dispute through Arbitration.



Defendants' Submissions

9. In their submissions dated 23/6/2023, the Defendants submit that the Plaintiff obtained a Grant of letters of Administration with her daughter Ms. Agnes Jebet Kibunja which she used to institute this suit but it is unclear if the 2nd administrator had given her authority to plead and testify on her behalf.
10. They further submit that the Plaintiff lacks locus standi to institute the suit as it is trite law that one requires either a Confirmed Grant or a Grant Ad Litem in order to institute a suit on behalf of the Estate. On this issue, the Defendants cite several cases including the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR and In *re the estate of Helena Wangechi Njoroge (Deceased)* [2015] eKLR.
11. On the issue that this Court lacks jurisdiction, the Defendants submit that it is an uncontested fact that the Plaintiff's suit is based on a Partnership Deed between the late Juma Kiplenge and the Defendants and dated 23rd February 2023 and annexed to the Plaintiff's Supporting Affidavit and marked 'JW3' and which contains an Arbitration Clause.
12. They submit that the parties therein being Juma Kiplenge who is represented by the Plaintiff herein, and Amos Andama and Makau Mutiso being the Defendants herein had already chosen Arbitration as their preferred mode of dispute resolution at first instance.
13. The Defendants therefore submit that the Partnership Deed is a contract that was entered into voluntarily by the parties and therefore the Court ought not interfere with it as was held in the case of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR.

Plaintiff's Submissions

14. The Plaintiff filed submissions dated 11/7/2023. On whether the dispute should be referred to arbitration, the Plaintiff submitted that she is neither seeking to enforce the terms of the Partnership Deed dated 20/11/2020 nor seeking to inherit the 40% shareholding held by the deceased in the law firm and further, she is not seeking any benefits or right from the law firm after November 2020. That from the orders sought, the Plaintiff is asserting her rights as derived from the law and not from the Partnership Deed.
15. The Plaintiff further submits that her reference to and reliance on the Partnership Deed is only to draw the line between the time when the deceased was acting in the name and style of Kiplenge, Kurgart & Co. Advocates and when the Defendants became partners. As a consequence, the Plaintiff submits that the matter raised in the suit do not fall under clause 6 of the Partnership Deed and therefore, the onus is on the Defendants to prove that the matter in dispute falls within a valid Arbitration Clause but they failed to do so.
16. Further, the Plaintiff submits that the fact that there is an arbitration clause does not oust the jurisdiction of the Court and that Clause 6 of the *Arbitration Act* does not give the Court the liberty to dismiss the suit. That even if the Court were to find that the dispute ought to go for Arbitration, recourse is not dismissal of the suit. On that issue, the Plaintiff cites the case of *Mesback Kibunja Kaburi & 3 others v Kirunbi Kamau* E547 of 2020.
17. On the issue of locus standi, the Plaintiff submits that she has exhibited the Grant of letters of Administration and that while parties are bound by their pleadings, the Defendants admit that they did not raise the issue in their pleadings. Lastly, the Plaintiff urges the Court to dismiss the Preliminary Objection with costs.



Determination

18. Having considered the material placed before this Court, the Preliminary Objection raised by the Defendants is that this Court lacks jurisdiction due the Arbitration clause in the Partnership Deed. To start with, a preliminary objection has to fall within the definition given in the case of *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where Law, J stated at page 700:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the suit to arbitration”. [Emphasis added]

19. There is no dispute that there was a Partnership Agreement entered into by partners described as Juma Kiplenge, EBS, Andama Amos and Makau Mutiso. This is the Agreement annexed to the Affidavit in support of the Originating Summons as “JW3” and it is dated 4th day of November 2020. There is no Partnership Agreement/Deed presented to this Court by either of the parties herein and bearing the date 20/11/2020, 23rd February 2023 or any other date.

20. Clause 6 of the Partnership Agreement dated 4th day of November 2020 provides:-

“Control- The partners shall have exclusive control over the business and each partner shall have equal rights in the management and conduct of the partnership business. Any difference arising as to the ordinary matters connected with the partnership business shall be decided by a third party arbitrator chosen and agreed upon by the partners. Any act beyond the scope of this partnership to liability in excess of one Million shall be subject to the prior written consent of the partners.”

21. Further Sir Charles Newbold stated at page 701 of *Mukbisa Biscuit (supra)*:-

“A preliminary objection is what used to be 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 what is sought is the exercise of judicial discretion.”

22. What is clear from the Originating Summons and which is not disputed is that one partner is now deceased. From the prayers thereof, the Plaintiff’s claim appears to be prior to 4th November 2020. Further, though the deceased is said to have died on 7/10/2022, the Plaintiff pleads that prior to his death Juma Kiplenge had carried out a lot of work and whose bills of costs had not been settled. From the averments in the Originating Summons and the Affidavit in support, these are disputed issues.

23. Further, it is noted that in the course of submitting on the Preliminary Objection they had raised, they have encroached on the issue of locus standi for reasons that the Plaintiff has filed this suit using a Grant of Letters of Administration Intestate issued on 19th December 2022. That issue was not part of their Preliminary Objection to the Originating Summons and therefore not pleaded.

24. Be that as it may and even if the issue of locus standi was not pleaded, this Court has a duty to deal with the issue as both parties submitted in the same. However, the case of *In the estate of Helena Wangechi Njoroge (Deceased)* (*supra*) relied on by the Defendants herein is not relevant. In that case one of the reasons that the application was struck out for being incompetent was a special limited grant of letters of administration issued a day after the filing of the application before the Court and Musyoka J held



that the said Grant could not possibly relate back to the application so as to give the Applicant authority to prosecute the Application.

25. Likewise, the case of *Rajesh Pranjivan Chudasama (supra)* cited by the Defendants does not support them. The Court of Appeal had this to say when dealing with the issue of whether the Respondent had locus standi to institute a Summons Application :-

“It is common ground that at the time of institution of the said summons, the respondent was not in possession of a grant of letters of administration. The respondent acknowledges that he may have known of the existence of a Will, but according to him he doubted the validity of the Will. In his view therefore the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo (supra)* this Court differently constituted rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.” [Emphasis added]

26. This Court is therefore satisfied that the fact that the Grant herein has not been confirmed does not divest the Plaintiff of locus standi to file this suit.
27. In view of the above analysis, this Court finds that the issues herein remain to be ascertained at trial and therefore cannot be disposed of by this Preliminary Objection and in conclusion, this Court makes the following orders:-
1. The Defendants’ Preliminary Objection dated 27th February, 2023 be and is hereby disallowed.
 2. Each Party to bear his own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of

Ms Gatei for the Plaintiff

Mr. Mutai for the Defendant

Laurene Njiru, Court Assistant

