



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO.689 OF 2001

AZIM SAMEJA T/A BUSINESS 2000.....PLAINTIFF

VERSUS

- 1. LAKHAMSHI VIRPAL SHAH**
- 2. KAMLABEN LAKHAMSHI SHAH**
- 3. SURESHCHANDRA LAKHAMSHI SHAH**
- 4. ASHOKKURMAR LAKHAMSHI SHAH**
- 5. HARSHA LAKHAMSHI SHAH**
- 6. PRITMALAKHAMSHI SHAH**

t/a HIGHPARK INVESTMENTS.....DEFENDANT

RULING

Judgment in this case was delivered on 6th April, 2016. A review application was subsequently filed at the instance of the plaintiff and the said judgment was reviewed on 28th July, 2016. The defendants subsequently filed an application dated 24th June, 2016 seeking the setting aside of the judgment, which application was dismissed on 14th February, 2017.

There is now before me an application dated 29th January, 2020 seeking to allow the firm of M.M Uvyu & Co. Advocates to come on record on behalf of the defendants /applicants, that the deceased named in prayers 3 and 4 of the application be substituted by the parties named therein, and that the judgment dated 6th April, 2016 and the decree and all Orders issued after the death of the defendants is set aside and or vacated.

The named deceased defendants died in the years 2004, 2006 and 2008 respectively. None of those defendants were substituted within one year of their respective deaths. The hearing proceeded in their absence. Several grounds in support of the application have been set out, alongside affidavits sworn by the applicant and two advocates who previously attended to this matter namely, Elizabeth Kamuyu and Francis Mutua.

The application was opposed and there is a lengthy affidavit running into 40 paragraphs sworn by the plaintiff herein.

This suit was filed in the year 2001 before the named deceased had passed on. The defendants in the suit were named individually but all were trading High Park Investments, a business firm said to have been registered under the Business Names Act.

Both parties have filed extensive submissions which I have had occasion to read. The 1st and 2nd prayers of the application were granted by consent.

There has been multiple applications in this matter but this court is clear with respect to the issues in this application, having dealt with the trial leading to the present application. The question that clearly arises is whether or not the death of some partners terminated the partnership, and whether as a result the judgment should be set aside, since the deceased did not take part in the trial.

Sections 31 and 32 of the partnerships Act No. 16 of 2012 cited in the submission of the plaintiff suggest that a person who ceases to be a partner does not cease to be personally liable for partnership obligations incurred while a partner. In the case of **Ismael Adam Suleiman & Another vs. Nawas Transport Company (1983) e KLR** the court held inter alia as follows,

“The suit was not filed against a dead person. It should be looked upon as having been filed against a business firm which is carrying on business and which may be sued under the rules of Order XXIX, an artificial person though it may be but it is created by statute by the application of civil procedure rules. The decree will not be nullity.”

In yet another case of **Express Connections Limited Vs. Ezekiel Kiarie Kamande (2016) e KLR** the court of appeal citing Section 16 of the Partnership Act stated,

“Every partner is liable jointly with co-partners and also severally for everything for which the firm, while he is a partner therein became liable under Section 14 and 15.”

- See also **County Assembly of Kwale vs. Apolo Muinde Daniel Ngonze T/A Apolo Muinde & Ngonze Advocates (2017) e KLR**.

It is the submission of the applicants that the cited partners having died without substitution, then the suit against them abated. Going by the above citation however, the suit having been filed in 2001 when the deceased were alive, and the deceased having died thereafter, it is my view that liability still attaches. Consequently, the judgment may not be set aside since liability was found to be joint and severally.

At this point, I deem it necessary to mention the ruling of this court dated 14th February, 2017. The defendants had sought the setting aside of the judgment herein which is the same order being sought in the present application dated 29th January, 2020.

The last paragraph of that ruling reads as follows,

“The judgment in my view followed a proper hearing after service upon the advocate for the defendant on record but who decided not to attend the proceedings. The order sought cannot be granted without resultant injustice on the part of the plaintiff. I have come to the conclusion that the application is devoid of merit and therefore dismissed with costs to the plaintiff.”

It is instructive that the applicant has remained silent with regard to that ruling. In my view, there were proper defendants in court having been cited by the plaintiff, the proceedings cannot be said to have been undertaken in error and therefore the judgment was regular and lawful. The suit against the deceased defendants cannot be said to have abated and this court, having declined to set aside the judgment in the earlier application, cannot be called upon to revisit the same in this application.

I hold the view that court is *functus officio* in that regard by virtue of Section 7 and explanation (4) of the Civil Procedure Act which reads as follows,

“7. *Res judicata*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (4)-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The defendants did not raise the issue of deceased defendants in the previous application. It is unconscionable to raise it at this stage in a similar application. I am of the view the application is misconceived and therefore dismissed with costs to the plaintiff.

Dated and Signed at Nairobi this Day of 2021

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY, 2021.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent