



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCC NO. 3 OF 2017 (O.S)

IN THE MATTER OF THE PARTNERSHIP ACT CAP 29 LAWS OF KENYA

AND IN THE MATTER OF AN APPLICATION BY SIMON KAMAU GATHU

UNDER ORDER 37 RULE 10 CIVIL PROCEDURE RULES AGAINST ALBERT GACHORE MWANGI TO TAKE ACCOUNT OF PARTNERSHIP

SIMON KAMA GATHU.....APPLICANT

VERSUS

ALBERT GACHORE MWANGI.....RESPONDENT

R U L I N G

1. **SIMON KAMAU GATHU** the applicant herein and **ALBERT GACHORE MWANGI** (Respondent) formed a partnership vide a partnership deed dated 30th March 2016 for purposes of carrying out some businesses. Apparently differences arose on how the business was conducted which resulted into the applicant bringing this suit against the respondent on account of alleged fraud, dishonesty and embezzlement of partnership finds and financial loss.

2. The respondent has in his defence raised a preliminary objection to the suit citing the provisions of **Section 6** of the **Civil Procedure Act**, **Section 45(c)** of **Cap 29** Laws of Kenya and **clause 19** of the partnership deed.

3. The respondent has prayed that the Plaintiff's suit be struck out on the ground that at the time of filing this suit there was another suit No. 36/2017 at lower court pending.

4. He has further cited the provisions of **Section 6** of the **Arbitration Act** which provides that proceedings be stayed when there is an arbitration agreement between the parties. He has further also cited the provisions of **Article 159 (2) (c)** of the constitution which promotes alternative dispute resolution mechanisms and submits that arbitration should be given a chance.

5. The Plaintiff/Respondent has responded to the preliminary objection herein.

On the first ground the plaintiff submits that the suit in the lower court was withdrawn in July this year and therefore there is no pending suit in court as the suit was withdrawn by consent.

6. On the question of the clause on the partnership deed the plaintiff has submitted that they have disagreed so much that they are unable to agree on the appointment of the Arbitrator and that he has come to court for assistance.

7. This court has considered the preliminary objection raised and the response made. On the question of pendency of another suit that is **Chuka Senior Principal Magistrate Civil Case No.36 of 2017**, this court is unable to make a finding on the same as the same is a question of fact and law. While the respondent in this suit alleges existence of the suit, the Plaintiff/Applicant is alleging that the same was withdrawn. Obviously the respondent having raised a Preliminary objection was required to adduce evidence or facts to prove existence of the allegations which in itself is improper because a preliminary objection should be raised purely on points of law without requirements of having to adduce evidence. That ground of existence of another suit is therefore not well taken and in any event the provisions of **Section 6** of **Civil Procedure Act** provides for a stay of a subsequent suit and not striking out of such suits.

8. On the 2nd ground, this court has looked at clause 19 of partnership deed between the parties herein and agrees with the respondent that where an arbitration clause exists in a partnership deed, the provisions of **Section 6** of the **Arbitration Act** (Cap 49 Laws of Kenya) kicks in. This court is required to stay the proceedings and set in motion the arbitration unless,

"satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.."

It is true that under the provisions of **Article 159(1)(c)** alternative forms of disputes resolution including mediation or arbitration is encouraged.

In the premises the preliminary objection is upheld only to the extent of staying this proceedings pending Arbitration as per **clause 19** of the partnership deed between the parties in this case. I will for the interest of justice grant the parties herein 30 days to agree on one arbitrator and in default each to appoint two arbitrators to resolve the dispute. The parties will then be required to attend court and inform it of the progress on the Arbitration. Parties are therefore asked to take a mention date for further orders and directions from this court.

Dated, signed and delivered at Chuka this 3rd day of December, 2018.

R.K. LIMO

JUDGE

3/12/2018

Ruling signed, dated and delivered in the open court in presence of Kiongo holding brief for Mugo for Applicant and Respondent in person.