



**Mwenda v Afri Business LLP & another (Cause E409 of 2020)  
[2023] KEELRC 1741 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1741 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E409 OF 2020**

**JK GAKERI, J  
JULY 13, 2023**

**BETWEEN**

**PATRICK NJOROGE MWENDA ..... CLAIMANT**

**AND**

**AFRI BUSINESS LLP ..... 1<sup>ST</sup> RESPONDENT**

**ANNABELL KARANJA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion by the 2<sup>nd</sup> Respondent dated October 19, 2021 seeking ORDERS THAT;
  1. This Honourable Court be pleased to strike out the name of the 2<sup>nd</sup> Respondent from this suit.
  2. The costs of this application be awarded to the 2<sup>nd</sup> Respondent.
2. The Notice of Motion is based on the grounds set out on its face and supported by the Affidavit dated October 19, 2021 by the 2<sup>nd</sup> Respondent.
3. The 2<sup>nd</sup> Respondent states that she was improperly joined in the suit as she had no contractual relationship with the Claimant and was simply a partner to the 1<sup>st</sup> Respondent, a limited liability partnership with a legal personality of its own and the joinder was an attempt to lift the veil of incorporation contrary to the law and her presence was unnecessary in the suit.
4. The affiant depones that the Claimant never sought leave of the court to include her name and the amendment was irregularly done and was being prosecuted unjustly.
5. The affiant prays that the Notice of Motion be granted.



## Claimant's Response

6. In his Replying Affidavit sworn on March 10, 2023, the affiant deposes that he served the Respondents diligently until his services were unprocedurally terminated.
7. That although the Respondents deducted statutory dues, the same were not being remitted as he learnt later when he sought a tax compliance certificate.
8. That the 2<sup>nd</sup> Respondent and other partners of the 1<sup>st</sup> Respondent are personally liable for fraud and the Notice of Motion should be dismissed with costs.

## Submissions

9. When the Notice of Motion came up for hearing, the parties agreed to canvass the same by way of written submissions and parties were accorded 14 days a piece with a mention slated for April 18, 2023 to confirm compliance.
10. Mr Mbutha holding brief for Mr Karanja informed the court that he would rely on the submissions dated November 18, 2022 since the issue had been canvassed.
11. The Claimant was accorded 14 days to file and serve submissions but had not done so by the date the court retired to prepare this ruling.

## Respondents submissions

12. Counsel for the Respondent submitted that there was a difference between the 1<sup>st</sup> Respondent and its partners and relied on Section 6(2) of the *Limited Liability Partnership Act, 2011* as well as the Locus classicus decision in *Salomon V Salomon & Co Ltd (1897) AC 78* cited by the Court of Appeal in *Charles Ray Makuto V Almakony Ltd & another (2016) eKLR* to underscore the law on legal personality of a company from its directors and shareholders.
13. Counsel further submitted by alleging that one of the partners of the Respondent was managing, the Claimant was in essence lifting the veil of incorporation of the 1<sup>st</sup> Respondent without justification since the 1<sup>st</sup> Respondent was a legal entity in its own right.
14. That should the court find that the partners of the 1<sup>st</sup> Respondent acted on its behalf, then they would be agents of a disclosed principal and should not be enjoined as held in *Antony Francis t/a Wareham & 2 others V Kenya Post Office Savings Bank*.

## Determination

15. The singular issue for determination is whether the Notice of Motion dated October 19, 2021 is merited.
16. The law relating to joinder of parties is fairly clear under Order 1 Rule 10(2) of the *Civil Procedure Rules, 2010* which provides that;
  - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon



and settle all questions involved in the suit, be added. (See [\*Habiba W Ramadhan & 7 others V Mary Njeri Gitiba \(2017\) eKLR\*](#)).

17. In the instant Notice of Motion, the 2<sup>nd</sup> Respondent wants her name struck off the suit on the ground that the 1<sup>st</sup> Respondent is a legal person.
18. Section 6 of the Limited Partnership Act, 2011 provides as follows;
  1. A Limited Liability Partnership is an entity formed by being registered under this Act.
  2. On being registered under this Act, a Limited Liability Partnership becomes a body corporate with perpetual succession with a legal personality separate from that of its partners.
  3. A change in the partner of a Limited Liability Partnership does not affect the existence rights or obligations of the Limited Liability Partnership.
19. Section 7 of the Act provides that a Limited Liability Partnership is in its name capable of;
  - a. suing or being sued.
  - b. acquiring, owning, holding and developing or disposing of movable and immovable property and
  - c. doing such other acts and things as a body corporate may lawfully do.
20. In addition, it must have a common seal for execution of documents that by law are required to be sealed.
21. The foregoing provisions of the *Limited Liability Partnership Act*, lay it bare that on registration, a LLP becomes a legal person distinct and separate from its partners and employees, if any.
22. It acquires a juristic personality akin to a registered company under the provisions of the [\*Companies Act\*, 2015](#).
23. Its rights and obligations are distinct from those of its parties.
24. The celebrated sentiments of Lord MacNaghten in *Salomon V Salomon & Co Ltd (Supra)* apply to the LLP on all fours that;

'. . . The Company is at law a different person altogether from the subscribers to the memorandum. . .'
25. Under Section 3 of the *Limited Liability Partnership Act*, Limited Partnerships are registered by the Registrar of Companies and partners of the Limited Liability Partnership are agents of the partnership.
26. Membership must be at least 2 persons associated for carrying on a lawful business to make a profit.
27. The existence of a LLP is evidenced by the certificate of registration issued pursuant to the provisions of Section 18(1)(b) of the Act. The Certificate is a conclusive evidence of compliance with the preliminary requirements and registration of the partnership.
28. Under Section 20 of the *Limited Liability Partnership Act*, the name of a limited liability partnership must and with the expression Limited Liability Partnership or 'llp' or 'LLP'.
29. For purposes of management and compliance with the provisions of the law on keeping of records, declaration of solvency or company, a limited liability partnership must have at least one Manager who must be a natural person.



30. Copies of documents provided by the Claimant reveal that the 1<sup>st</sup> Respondent was registered on November 13, 2013 under the name Afri Business Development Reg No BN/20xx/520xx and its nature of business is Business Development Consultancy.
31. Puzzlingly, the 2<sup>nd</sup> Respondent is described as a 'proprietor' not as a partner.
32. The Registered email of the business is Karanja.axxx@gmail.com  
Box Jamia  
Telephone +254726xxx Location Madonna House, Westlands.
33. Strangely, the 2<sup>nd</sup> Respondent tendered no evidence to contradict the documents.
34. None of the documents provided by the Claimant show that the 1<sup>st</sup> Respondent is a Limited Liability Partnership as alleged and the 1<sup>st</sup> Respondent has not provided the Certificate of Registration issued under Section 18(1)(b) of the *Limited Liability Partnership Act, 2011*.
35. The letter on record dated September 16, 2022 from the Business Registration Services, Nairobi relates to 'Afri Business Development' as opposed to 'Afri Business LLP'.

#### **Are the two synonymous?**

36. The court is not persuaded they are one and the same as the names are different.
37. Similarly, while Afri Business Development is a business name and the 2<sup>nd</sup> Respondent is the sole proprietor, Afri Business LLP is represented as a Limited Liability Partnership but no concrete evidence has been adduced as to when it was registered and who the partners were.
38. A certificate of registration would have resolved this fairly straight forward issue of whether there was a legal entity or not.
39. Business names are simply that. Typically, an individual or individuals carrying on business under a registered name. The name does not create a legal entity or personality.
40. Part IV of the *Limited Liability Partnership Act, 2011* sets out the elaborate requirements persons must fulfil in order to register a Limited Liability Partnership.
41. The provisions of Section 17(1) and (2) prescribe the contents of the statement to be lodged with the Registrar of Companies for purposes of registration of a Limited Liability Partnership.
42. Upon registration of the statement, the Registrar issues a certificate of registration.
43. Strangely, the applicant's Supporting Affidavit has no attachments nor does it make reference to any Certificate of Registration or serial number or even date on which the 1<sup>st</sup> Respondent was registered.
44. Analogous to registered companies whose existence is conclusively evidenced by the Certificate of Incorporation issued pursuant to the provisions of Section 18 of the *Companies Act, 2015*, the existence of Limited Liability Partnership is evidenced by the Certificate of Registration.
45. None of the parties furnished a copy of the essential document to buttress their case.
46. The Notice of Motion fails on this score.
47. As to the addition of the 2<sup>nd</sup> Respondent's name to the suit, she depones that amendment of claim requires leave of the court and none was sought and no application for leave to amend was served.



48. The Respondent/Claimant did not respond to this issue.
49. From the documents on record, it is evident that the Claimant filed Suit No E409 of 2020 on August 20, 2020 with the 1<sup>st</sup> Respondent as the only other party.
50. By letter dated July 8, 2021, the Claimant's counsel sought a mention date for entry of an interlocutory judgement on account of the Respondent's failure to enter appearance, followed by another dated August 19, 2021 for a pre-trial date.
51. Strangely, the Respondent filed documents dated December 2020 with the 2<sup>nd</sup> Respondent's name as a party to the suit yet the Notice of Appointment of Advocates is dated April 28, 2021.
52. This matter appeared in court for the 1<sup>st</sup> time on September 13, 2021 and a further mention was slated for 1 October 8, 2021 when the Respondents counsel sought for time to file an application to strike out the 2<sup>nd</sup> Respondent's name from the suit which was filed as confirmed during a mention before the Deputy Registrar on December 14, 2021.
53. However, the 2<sup>nd</sup> Respondent took no steps to prosecute the application and almost one year later, the Claimant filed an application under Certificate of Urgency seeking to amend the statement of claim to include a 3<sup>rd</sup> Respondent.
54. Relatedly, the 2<sup>nd</sup> Respondent adduced no evidence as to when the pleadings were closed.
55. Order 8 Rule 1 of the Civil Procedure Rules, 2010 provides that;  
A party may, without the leave of the court, amend any of its pleadings once at any time before the pleadings are closed.
56. If indeed pleadings had closed, the Respondents filed their documents without leave of the court.
57. In the absence of evidence to show that pleadings had closed by the time the Claimant amended the claim to include the 2<sup>nd</sup> Respondent, the court is not persuaded that the 2<sup>nd</sup> Respondent has demonstrated that the amendment was undertaken without leave.
58. In conclusion and based on the documentary evidence before the court, it is the finding of the court that the 2<sup>nd</sup> Respondent has failed to place sufficient material before the court to show that the 1<sup>st</sup> Respondent is a Limited Liability Partnership.
59. Similarly, it is the further finding of the court that the 2<sup>nd</sup> Respondent has failed to demonstrate that the Claimant amended the claim to include her name after pleadings had closed without leave of the court.
60. In the upshot, the Notice of Motion dated October 19, 2021 is unmerited and is accordingly dismissed.
61. There shall be orders as to costs.
62. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF JULY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

