



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 36 OF 2010

JULIANA AKINYI OWINO.....APPELLANT

VERSUS

KIARIE SHOE STORES.....DEFENDANT

J U D G M E N T

- 1). In the appellant's Memorandum of Appeal dated 23rd March 2009 the appellant has cited 5 grounds of appeal. Substantially the suit was dismissed for the reason that it was non suited.
- 2). Briefly, the appellant was involved in a road traffic accident along Biashara street within Kisumu City on 29-6-2006. The motor vehicle Reg. No. KAR 460Y lorry allegedly belonged to the respondent. She sustained serious bodily injuries. He then proceeded to file suit seeking general and special damages.
- 3). The existence of the accident is not in dispute. What the court found as stated above was that the respondent had wrongly been sued. The original plaint

described the respondent as a limited liability company whereas the amended plaintiff described it as a business name. The trial court found for a fact that the suit was non suited as there was no proper defendant.

4). The parties herein have filed rival submissions as well as cited several authorities. I have perused the proceedings and apart from the record from the Registrar of Motor Vehicles dated 4-5-2007 which shows the registered owner of motor vehicle KAR 406Y as the respondent there is nothing else. There is no Certificate of Registration from the Registrar of Companies.

5). The appellant conceded in her evidence that she did not carry out any search but testified that:

“I do not have a Certificate of Company I read them on the lorry....”

The question that needs to be answered is whether Kiarie Shoe Stores is capable of being sued. The same was registered as a business name. This is not disputed by the parties but what is in dispute however is its capacity to sue. The appellant contends that the requirements of then Order XXIX (not repealed) of the Civil Procedure Rules envisaged a situation where the business name can sue. The said rule stated:

“Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit, all rules under this order shall apply”.

6). It is necessary to look at the Registration of Business Name Act Cap 499 at

this juncture. Section 2 (1) thereof provides:

“Business name” means the name or style under which any business is carried on whether in partnership or otherwise”.

My reading of Order XXIX Rule 9 above and the section 2 (1) above clearly envisages a situation where a person or persons can trade under a name or style and not directly under their names. Does the name cloth the person or person with any legal authority in the absence of their name (s)?

7). My reading of the opening remark under Order XXIX Rule 9, namely “Any person carrying out business....” presupposes that that person ought to be known. As compared to a limited liability company, where the proprietors or directors of company need not be explicitly shown I find that in a case of a business name, the legislators intended that the proprietors, or the individuals trading in such a name or style owed to be known on the face of it. It is safe to conclude therefore that a mere name registered under chapter 499 of our laws does not clothe it with the requisite juristic personality in the absence of the names of the owners. Thus I find that the intention of the drafters of the repealed Order XXIX now Order XXX of the Civil Procedure Rules intended that the business name cannot sue or be sued in the absence of the proprietors.

8). The appellant has argued that the respondent did not deny the averments in the amended plaint namely paragraph 2A. First, the adversarial system in which we operate does not demand that every item ought to be traversed. In any event there is no dispute that the respondent is registered as a business name.

9). The appellant established that the respondent was the registered owner of the motor vehicle. However, that was not sufficient to establish who the respondent was. In other words the certificate of registration from the Registrar of Companies or Business names would have clearly shown the proprietor of the respondent. Since it was not a limited liability company it was necessary to have sued the proprietors of the respondent. The business name alone therefore is not a juristic person capable of suing or being sued.

10). The court in the Fort Hall Bakery Supply Co. -VS- Fredrick Muigai Wangoi [1959] EA 474 held that:

“A non existent person cannot sue, and once the court is made aware that the plaintiff is non existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed”.

The trial court proved for a fact that the appellant had brought suit against a non existent person. As reasoned above the business name is not a person capable of suing or being sued.

11). I have read the good authorities supplied by the parties as well as their submissions. In Dostii -VS- Nawaz Transport Co. [1982 – 88] KAR supplied by the appellant the same is relevant save that in that authority the proprietor was well known.

In the premises I do not think the trial court misdirected itself. There was no defendant properly so called in the suit. As much as it is unfair it was incumbent upon the appellant to do proper homework as this is an adversarial system, where

the winner takes it all.

The appeal is dismissed with no orders as to cost.

Dated, signed and delivered at Kisumu this 23rd day of June, 2014.

H.K. CHEMITEI

JUDGE