

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E 658 OF 2022

DANIEL MWANGI KAMAU.....1ST APPLICANT

MARGARET NJOKI KIRURI.....2ND APPLICANT

VERSUS

ANNE WANJIRU KIRURI.....RESPONDENT

RULING

1. The brief background (gathered from the material before this Court) of the Notice of Motion dated 16th September 2022 filed by the firm of OMA Advocates for the Applicants herein are husband and wife while the Respondent is the is a sister to the 2nd Applicant. The Applicants and the Respondent entered into a Partnership on operating a Restaurant by the name Ribs & Wings. This business grew and they opened a branch in Gigiri, Waiyaki Way, Karen and Tigoni. On 29th June 2021 the parties executed the Partnership Deed (hereafter referred to as the Deed).
2. According to the Applicants, the Respondent allegedly declared that she was the sole owner of the Tigoni and Karen Restaurants and that she would dissolve the Partnership. She allegedly further went ahead to open a restaurant in the same premises with Ribs & Wings Gigiri Branch and stole property including the 1st Applicant's personal property and he reported it at Gigiri Police Station vide OB. No. 16/414//09/2022 to the police.
3. The Respondent is alleged to have proceeded to brand the Restaurant with the same name Ribs & Wings purporting that she owned the intellectual Property. She further registered with the Kenya Intellectual Property Institute the name and log Ribs & Wings as solely belonging to her and locking the Applicants and changing passwords and access

codes to social platforms on which Ribs & Wings was doing online marketing and customer transactions which acts the Applicants term fraudulent and denies the Applicants their only source of income.

4. On the other hand, the Respondent alleges that she is the one who came up with the business name “RIBS AND WINGS” and engaged orally her friend one Joy Adero who she says will be her witness. The Respondent alleges that she shared her business idea with her sister (2nd Applicant) and she agreed to come on board bringing in her spouse (1st Applicant) too and they executed Deed.
5. However, she alleges, the Applicants who were the sole signatories to the business account treated the business money as their own private property and started misappropriating business funds. That they would pay their own bills with the business money and when the Respondent raised her concerns, the same were not heeded to and therefore, she gave notices to the Applicants and exited the partnership.
6. Against that background, the Applicants filed this application under a certificate of urgency under *Section 3A and Order 40 of the Civil Procedure Act; Section 7 of the Arbitration Act* seeking orders that;
 1. Spent.
 2. Spent
 3. An order of temporary injunction do issue to restrain the Respondent either by herself, or through any partnerships, or otherwise from interfering with the operations of the restaurant trading as Ribs & Wings, pending the inter-partes hearing and determination of this application.
 4. An order of temporary injunction do issue to restrain the Respondent whether by herself, or through any partnerships, or otherwise from entering into, or continuing to be in, competition, directly or through any partnership, with the operations of the

Ribs & Wings, pending the inter-partes hearing and determination of this application.

5. An order of temporary injunction do issue to restrain the Respondent whether by herself, or through any partnerships, or otherwise from engaging or continuing to engage with any of the suppliers, landlords, or immediate previous landlords of the restaurants trading as Ribs & Wings, pending the inter-partes hearing and determination of this application.
6. An order of temporary injunction do issue to restrain the Respondent whether by herself, or through any partnerships, or otherwise from interfering, employing or otherwise engaging or continuing to engage with any of the immediate former employees of the restaurants trading as Ribs & Wings, pending the inter-partes hearing and determination of this application.
7. An order of temporary injunction does issue to restrain the Respondent whether by herself, or through any partnerships, or otherwise from confiscating, withholding, destroying, or otherwise utilizing any of the property and equipment belonging or otherwise in use by any of the restaurants trading as Ribs & Wings, pending the inter-partes hearing and determination of this application.
8. An interim mandatory injunction do issue compelling the Respondent to transmit to the Applicants herein the passwords, access codes, or any other electronic codes and signals needed to access online accounts and platforms for the restaurants trading as Ribs & Wings and cease solely communicating with the said account and platforms with regard to the restaurants trading as Ribs & Wings.
9. An interim mandatory injunction do issue compelling the Respondent to return the confiscated SIM card for the telephone

No. 0115858384 in working order to the Applicants pending the inter-partes hearing and determination of this application.

10. The relevant OCS under whose jurisdictions the various restaurants that have been operating as Ribs & Wings ensure compliance and/or enforcement of these orders.

11. The costs of this application be in the cause.

7. The grounds are on the face of the application and the Applicant states that the orders sought are appropriate to measures necessary to preserve and protect the arbitration subject matter pending the arbitral proceedings and that failure to issue the said orders would render any attempt at arbitration nugatory. He states that they are yet to have an Arbitrator appointed though the Applicant wrote to the Respondent for concurrence in the appointment of the Arbitrator.
8. Opposing the application herein, the Respondent filed a replying affidavit sworn by Ann Wanjiru Kiruri on 3rd October 2022. She deposes that as at the time she developed the RIBS AND WINGS brand, it was only a brand and not registered as a business name or a company and therefore she set up in her name and also registered online platforms in her name since there were no registration particulars for a business or a company.
9. She therefore states that injunction and request for online platforms is impossible as since they are all registered in her personal particulars including her cell phone number. That in the circumstances, she cannot hand over her personal Sim card that she used to contact work-related contacts as that would amount to infringement of privacy.
10. She further states that she gave a notice of dissolution of the partnership but the Applicants wanted resolution through arbitration and which the Respondent still considered and the 1st Applicant was tasked to appoint an arbitrator but he ignored and /or refused to do so and at the same time failed to give way forward. This caused the Respondent to issue a second

notice of intention to dissolve the Partnership. The Applicants confirmed that they were agreeable to dissolution hence the requirement for arbitration was totally disregarded by all parties and agreed to dissolution.

11. Lastly, she states that the Applicants having come to court with unclean hands should have their application dismissed. She urges the Court to dissolve the partnership and order distribution of the Assets and Liabilities of the business as per their share contribution.

SUBMISSIONS

12. Parties filed and exchanged submissions as directed by Court. In their submissions, counsel for Applicant reiterates the material in the affidavits by parties herein and urge the Court to strike off the Respondent's replying affidavit for being defective and incurably defective for having been commissioned the affidavit drawn by the same firm representing the Respondent.
13. On merit, counsel submits that whereas Article 159 of the Constitution prohibits Courts interfering with matters where the parties have chosen arbitration as their preferred method of dispute resolution mechanism, Section 7 of the Arbitration Act permits court's intervention so as to maintain status quo. He therefore submits that the arbitration is under threat for reasons that the Deed is still in force and not terminated thus if no orders are issued, the Arbitrator, if appointed, will have nothing to arbitrate.
14. On their part, counsel for the Respondent also restates the contents of the affidavits and in response to the submissions by the Applicant, he submits that the Replying affidavit by the Respondent is incapable of being defective as the averments are true and if leave of the court is to be sought and granted, the Respondent would still swear the same affidavit albeit before a different commissioner for oaths but since the matter is already being heard, counsel urges the court to uphold the

pleadings. Counsel further submits that there is no Preliminary Objection on record to warrant the submissions made by the Applicant seeking striking out.

15. On merit, counsel submits that while interpreting the said Partnership, no meaning can be inferred where parties did not state in the agreement and in this case, there is no specific agreement in the Deed executed by the parties that capture the trade mark “Ribs and Wings” as the property of the Partnership. As a consequence, the Applicants have no claim to the Trade Mark.
16. On whether the partnership should be dissolved, counsel submits that the Partnership relationship between the partners is no longer tenable due to facts exhibited before this Court and further refers to Clause 16 of the Patronship Deed on reasons for dissolution and further Section 44 (2) (b) and (c) of the Partnership Act in support of dissolution. He proceeds to assess how the assets would be shared once dissolution is ordered.
17. Lastly, counsel submits that there are no arbitral proceedings in existence and due to unreconcilable differences between the parties, the court should consider dissolution as there would be no special outcome from arbitral proceedings. He urges the court to dismiss the application herein.

DETERMINATION

18. After hearing the parties, the first issue would be whether the Respondent’s replying affidavit herein should be struck out for contravening section 4 (1) of the Oaths and Statutory Declarations Act as the advocate in the same firm commissioned an affidavit for the Respondent who he is acting for. The section is clear in its provision that;
“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any

instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

19. While the Respondent admits that violation, it is that the Applicant never raised the issue early but only raised it in the submissions. The issue is whether any substantive justice would be done in this matter if the said affidavit is struck out. Both parties have submitted on the main issues raised in the said affidavit. They are in agreement on the relationship between the parties herein and more or less agree on the background of this dispute.
20. They are in agreement that there was a Partnership Deed executed by the parties. They are in agreement that serious disagreement arose between them in this partnership and that indeed a dispute arose between them. It is therefore apparent then that in the circumstances of this case, striking out the said affidavit will overshadow the primary objective of dispensing substantive justice between the two parties. This Court therefore opts to go to the merit of this application.
21. The main issues then for consideration are:
 1. Whether this court should grant the injunctive orders sought by the Applicant
 2. Whether this court should dissolve the Partnership and distribute the assets of the Partnership.
22. For clarity, and from the Court record, no interim orders were issued pending hearing and determination of this application and therefore prayers 3 to 7 are also dispensed with.

23. As stated, the parties admit to the said Deed which they executed on 29th June 2021 and under Clause 23, the parties agreed that all claims and disputes whatsoever arising under the Deed would be referred to Arbitration. A dispute did arise between the parties in regard to the management of the resources of the Partnership.

24. That having been established, then interim intervention by this court is provided for under section 7 of the Arbitration Act that:

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

25. Under this section, there need not be any arbitral proceedings pending in order for the Court to grant interim orders of protection. The jurisdiction of this Court is confined on the issue as to whether to grant or not to grant the interim orders of protection so as to maintain the status quo. This Court is also alive to the Court of Appeal decision in **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR** where the Court stated the factors to be considered before issuing an interim measure of protection under Section 7 of the Act that is;

- 1. The existence of an arbitration agreement.*
- 2. Whether the subject matter of arbitration is under threat.*
- 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?*

4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?

26. As it has already been established that there is an arbitral clause to the Deed, the court has to consider whether the subject matter of the arbitration is under threat. In this case it is noted from the material before this court that the parties herein have deeply dwelt on the merits of the case.
27. Asking this Court to interpret the Deed and ascertain that there is no mention of “Ribs and Wings” as Partnership property and whether it is a brain child of the Respondent, or whether the registration of Ribs and Wings as a Trade Mark solely owned by the Respondent was fraudulent or not, or further still, whether the cell phone number herein is personal and private to the Respondent are all matters of evidence best suited for ventilation before the Arbitrator. This court’s decision of on the issues would certainly risk prejudicing the outcome of the arbitration in the circumstances.
28. As regard the mandatory orders sought in prayer No. 8 and 9 of the application, it is worth reemphasizing that mandatory injunctions are granted only in the clearest of cases. The Applicant must establish through the evidence availed before court that there are exceptional circumstances to warrant granting of the orders sought. This is not a clear case for this court to issue such orders as the said orders are likely to be in vain in the circumstances. This is not a proper case for interim orders of protection.
29. It is clear that the Partnership has seriously become toxic to the extent that the Respondent requests this Court to dissolve it. There is no doubt that the Deed provides for its dissolution. The process to be followed when seeking dissolution of a Partnership is well established under Section 44 of the Partnership Act 2012 and Order 37 of the Civil Procedure Rules.

30. The request herein has been made as a response to a Miscellaneous application for interim orders of protection. Those are not orders that can be made without going through evidence by parties and certainly not in this miscellaneous application. There are no pleadings before this Court upon which the request for dissolution is anchored.
31. Indeed Clause 4 of the Deed provides that partnership remains in existence until dissolution and if dissolution was in question, that issue would be placed before the Arbitrator. The Applicant herein intimates that he is *desirous of legally seeking redress and resolution of the conflict and he believes that the arbitration is the manner mandated by the Partnership Deed to do so*. The Request by the Respondent that this dissolves the Partnership is rejected.
32. Parties are therefore encouraged to pursue arbitral as they had consciously envisaged when they entered into this partnership. Any party to this agreement has a right to move towards seeking appointment of the Arbitrator in accordance to the Arbitration Act. It is not just the responsibility of the Applicant herein.
33. In the circumstances I find no merit in the application dated 16th September 2022 and the same is hereby dismissed. Due to the circumstances of this matter, each party shall bear its own costs.

Dated, signed and delivered Virtually at Kisii this 22nd Day of May, 2023.

PATRICIA GICHOHI

JUDGEA

In the presence of:

N/A for Applicant

N/A for Respondent

Isindu, Court Assistant