

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CIVIL SUIT NO. 255 OF 2002

PIUS OGOOLA..... PLAINTIFF

VERSUS

OTHIENO OKOTH..... DEFENDANT

Before: The Hon. Mr. Justice E.S. Lugayizi

RULING

This ruling is about a preliminary objection that the defendant raised when Court was about to hear the head suit on 11/7/2003. Briefly, the background to the preliminary objection is as follows:

In the late 1990s the plaintiff and the defendant ran a school as partners with equal shares. The school was called “**Premier Secondary School.**” It was located at Kira in Wakiso District, near Kampala. Eventually, the plaintiff and the defendant had serious misunderstandings, which led the Ministry of Education to close and de-register the school in the year 2002. After the closure of the school the plaintiff and the defendant failed to agree on the sharing of the partnership assets and liabilities. For that reason, the plaintiff filed a suit against the defendant, by way of originating summons, seeking Court’s orders, among other things, as to how the parties herein should share the assets and liabilities of the partnership. The respondent denied the plaintiffs claim. Among other things, he alleged that the

partnership was dissolved, in law, in December 2001 when the plaintiff retired from it. On 11/7/2003 when the matter came before for hearing the defendant's advocate indicated that he wished to raise a preliminary objection. Court adjourned the matter to 3/9/2003 with a view to hearing the preliminary objection. Roughly, that is the background to the preliminary objection.

On the day Court heard the preliminary objection (i.e. 3/9/2003) Mr. Kwizera represented the plaintiff and Mr. Othieno represented the defendant. In essence, Mr. Othieno submitted that the originating summons offends Order 34 rule 4 of the CPR in that it reveals that there is a dispute as to the existence of the partnership. He pointed out that while the plaintiff alleges that the partnership subsists, the defendant denies its existence and maintains that the partnership was dissolved when the plaintiff retired from it. Mr. Othieno referred to de-registration of the school in 2002 as further confirmation that the partnership does not exist. He cited section 23 of the **Education Act (Act 10 of 1970)** and sections 36 (c) and 38 of the **Partnership Act (Cap. 86)** to back up his position. For those reasons, Mr. Othieno called upon Court to strike out the originating summons with costs.

On his part, Mr. Kwizera opposed the preliminary objection. He submitted that the originating summons does not offend Order 34 rule 4 of the CPR because it does not reveal that there is a dispute as to the existence of the partnership. Mr. Kwizera then pointed out that although the partnership is, in law, technically dissolved, it still exists because its assets and liabilities have not yet been settled between the partners. In his view the partnership assets and liabilities could now only be settled on a complete winding up of the partnership. He cited **Lindley and Banks on Partnership page 695**, which shows that there is a clear distinction between a "**technical dissolution**" and "**a general dissolution**" of a partnership. He finally urged Court to over-rule the preliminary objection with costs.

In reply to the above submission Mr. Othieno maintained that **Lindley and Banks on Partnership (supra)** only states the common law position which does not apply in Uganda where there is a clear law of partnership governing the matters under consideration.

The relevant parts of Order 34 rule 4 of the CPR read as follows.

“4. When the existence of a partnership... is not in dispute, any partner in a firm.... may take out an originating summons returnable before a judge sitting in chambers against his partner or former partner for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of... winding up such partnership.”

The above provision suggests that a partner, who wishes to have a subsisting partnership dissolved, may only take out originating summons against his partner or former partner where the existence of the partnership is not disputed. The questions to answer, therefore, are two. Firstly, whether the partnership still subsists? Secondly, whether the originating summons does not reveal that there is a dispute between the parties herein as to the existence of the partnership? Court will deal with the above two questions in the order in which they occur.

With regard to the first question **(i.e. whether the partnership still subsists)** Court has this to say. It agrees with Mr. Kwizera that the principle in **Lindley and Banks on Partnership (supra)** is of wide application. It applies in Uganda in the same way as it does in Britain and other common law jurisdictions. Therefore, it means that although technically the partnership in question may be dissolved by operation of the law, in practical terms it continues to subsist because the partners have not yet settled the question of assets and liabilities. It would require a complete dissolution of the partnership to settle that question.

All in all, Court is of the opinion that the partnership still subsists for the purpose of winding up its affairs.

With regard to the second question **(i.e. whether the originating summons does not reveal that there is a dispute between the parties herein as to the existence of the partnership)** Court thinks that it does not. A perusal of the pleadings clearly shows that the parties are agreed that they have not yet shared the partnership assets and liabilities. Once that fact is

established it becomes difficult to deny the existence of the partnership, at least for the purpose of complete winding up. (**See Lindley and Banks on Partnership (supra)**).

In the circumstances, Court is of the opinion that the originating summons does not offend Order 34 rule 4 of the CPR. For that reason, Court has no choice but to over-rule the preliminary objection; and Court hereby orders so.

E.S. Lugayizi (J)

2/10/ 2003

Read before: At 9.38 a.m.

P1. In court

Mr. Kwizera for the plaintiff

Mr. Othieno for the defendant

Mr. Sewanyana c/clerk

E.S .Lugayizi (J)

2/10/2003

Uploaded by kivumbi Sheila.