



REPUBLIC OF KENYA



**Maingih v Ndirangu (Civil Case E014 of 2024)
[2024] KEHC 11346 (KLR) (Civ) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E014 OF 2024**

JN MULWA, J

SEPTEMBER 25, 2024

BETWEEN

JANE WANGECHI MAINGIH PLAINTIFF

AND

SIMON WARUI NDIRANGU DEFENDANT

JUDGMENT

1. The Plaintiff herein Jane Wangechi Maingih brought this Originating Summons (OS) under provisions of Order 37 Rule 10 of the Civil Procedure Rules and Partnership [Act N. 16 of 2012](#) Cap 29 Laws of Kenya seeking Orders against the Defendant Simon Warui Ndirangu for:
 1. Declaration that the Plaintiff – Jane Wangechi Maingih is entitled to be paid, and is hereby paid a sum of Kshs. 4,000,000/= as a retiring partner by the defendant – Simon Warui Ndirangu as per clause 3 of the partnership dissolution deed.
 2. Declaration that the plaintiff – Jane Wangechi Maingih is entitled, and be hereby paid accrued monthly arrears a sum of Kshs. 24,000/- from 27th November, 2014 until date of payment as a retiring partner by the defendant – Simon Warui Ndirangu as per clause 3 of the partnership dissolution deed.
 3. That land parcel Certificate of lease number 1568 under certificate of Ownership No. 2031 issued by Embakasi Ranching Co. Ltd measuring 0.1344 with each partner entitled and in possession of equal half (1/2) share be sub-divided in two half and separate titles issued as per clause 3 of the Agreement dated 11/05/2012 and the defendant to produce the lease title documents for equal subdivision.
 4. That the defendant to bear the costs of the originating summons.



5. The judgment be entered accordingly and decree issued.
2. The originating summons is supported by an affidavit sworn on 24/01/2024 by the plaintiff and upon grounds enumerated at its face and particularly urging that the Defendant be compelled to comply with the signed and executed partnership deed dated 25/05/2004 between the parties under business partnership name Jasipa Primary School located at Ruai Nairobi and all other subsequent agreements executed between and by the partners.
3. In regard thereto the defendant filed a [Replying Affidavit he swore on 22/02/2024 and documents annexed thereto as well as witness statements dated and filed on 8/03/2024.
4. On 14/03/2024 directions on hearing of the OS were taken by consent of parties' Advocates that the OS shall be determined upon documents and affidavits filed by the parties and written submissions.

Plaintiff's case and submissions

5. The plaintiff case is grounded on the following documents filed with the Originating Summons and affidavits:-
 - a. Partnership deed dated 25/05/2004.
 - b. Sale Agreement dated 18/02/2011 in respect of Land Parcel No. 1568 certificate of ownership No. 2031 issued by Embakasi Ranching Co. Ltd.
 - c. Agreement dated 11/05/52012 (in respect of 50:50 shareholding in the partnership) including ownership of the Embakasi Ranch Land Parcel.
 - d. Partnership dissolution deed dated 27/11/2014.
6. Based on the above documents as well as the Defendant's Replying Affidavit and Reply to the Defendant's submissions dated 18/07/2024 the plaintiff filed her submissions.
7. It is her case that the defendant failed to comply with the terms of the dissolution agreements by failure to pay the lump sum of Kshs. 4,000,000/= and the monthly allowance of Kshs. 24,000/- from date of dissolution of the partnership being 27/11/2014 as well as failure to facilitate subdivision of the land parcel at Embakasi Ranching Company to create her ½ share therein.
8. The plaintiff further denies part payment of Kshs. 1,314,000/= leaving a balance of Kshs. 2,686,000 by purported cash and cheque payments but admits a payment of only Kshs. 140,000/=. The plaintiff thus claims Kshs. 3,860,000/= from the defendant and ½ share of the property as it was not factored in the dissolution deed of 2014 having been resolved during the existence of the partnership and what was remaining was only subdivision of the title each partner having taken possession and developed their portion of the property.
9. Upon her above case, the plaintiff prays that the prayers at the OS be allowed as prayed.

Defendant's Case and submissions

10. The defendant filed the following documents-
 - a. Replying affidavit sworn on 22/02/2024
 - b. Witness statement dated 8/03/2024.
 - c) A handwritten tabulation of money sent to the plaintiff; and



- d) Copy of receipts issued by the school for Kshs. 100,000/= dated 23/10/2021, and Kshs. 40,000/= issued on 31/07/2021 to the credit of the account
- d) Kshs. 30,000/= in respect of Stacy Muaki by a recent dated 23/01/2022 issued by the school
- e) Kshs. 18,000/= for Tracy vide a receipt from school dated 23/01/2022.

The defendant's submissions are dated 27/05/2024.

- 11. It is the defendant's case that the suit is time barred based on the documents filed by both parties pursuant to Section 4 of the *Limitation of Actions Act* providing for (6) six years limitation period for an action based on contract, based on date of dissolution of the partnership deed dated 27/11/2014. The defendant argues that the Plaintiff did not apply or obtain leave of court to file the suit out of time as provided under Order 50 Rule 6 of the Civil Procedure Rules.
- 12. The defendant therefore urges for dismissal of the suit citing the case of Gathoni V. Kenya Co-operative Creameries Ltd [1982] KLR 104 and his inability to trace the payment receipts over the period, as well as the Plaintiffs failure to produce documents stated at its Notice to Produce served upon the plaintiff requesting for production of its Bank and Mpesa statements in aid of reconstructing the payments under Section 68 (1) of the *Evidence Act*.
- 13. On the issue as to whether the plaintiff is entitled to the monthly payments/arrears from 27/11/2014 to date, the defendant relies on Clause 3(1) of the partnership Dissolution Agreement, and submits that he has since paid Kshs. 1,314,000/- as stated in his affidavit and as such the plaintiff is not entitled to the monthly payments of Kshs. 24,000/= or at all.
- 14. On the ½ share of plot parcel No. 15682 at Embakasi Ranching Company, it is the defendant's submission that pursuant to clauses 2, 3 and 4 of the Dissolution deed, the partnership assets and liabilities were assessed and final balance taken into account, and that the sum of Kshs. 4,000,000/- buyout took into account the said land parcel and therefore, states that the plaintiff is not entitled to the ½ share of the land parcel and cites particularly cause 4 whereof the retiring partner assigned and released to the continuing partner the ½ share and interest of and in the business and stock-in- trade assets and personal chattels etc.
- 15. It is therefore the defendant's case that the waiver was effectuated in exchange for the buyout of Kshs. 4,000,000/=.

Issues for Determination

- 1. Whether the plaintiff's case by Originating Summons dated 24/1/2024 is time barred by virtue of Section 4 of the Limitations of Actions Act.
- 2. Whether the Plaintiff is entitled to reliefs sought in the Originating Summons.
- 3. Who bears the costs of the suit.

Analysis and Determination

- 16. The background to the dispute herein is straightforward. By the Partnership Agreement dated 25/05/2004 both parties agreed to ran or operate Jasipa Primary school upon the agreed terms which they continued to upto the dissolution of the partnership by a Deed of Dissolution of the Partnership dated 27/12/2014.



17. During the subsistence of the partnership the partners bought a land parcel at Embakasi Ranching Company which at time of purchase they agreed to share equally to each of the partners at ½ share to each.
18. At a further partnership Agreement dated 11/05/2012 and executed by the two partners in presence of their joint Advocates Kabue Thumi & Co Advocates the partners mutually agreed to; at clause 5 thereof to support a maximum of three children of either of them upto the highest level of education the children would wish to attain solong as the partnership subsisted upon half of the school fees payable in respect of three children would go into the partnership whereas the other half would be paid to the plaintiff Jane Wangechi Maingih.
19. At clause 3 thereof the partners, agreed to purchase a plot jointly using income derived from the partnership which they did being Land Parcel No. 1568 within Ruai township approximately 0.1344H with each partner being entitled to one half (1/2) share thereof.
20. At clause 10, the partners resolved to conduct the partnership business with utmost faith, diligence and honesty. Further, at clause I, the partners re-affirmed that the partnership was based on a 50:50 ratio in so far as the rights and property of the partnership was concerned.
In between the business of the partnership seemed to be run as agreed upto 2014 when they resolved to dissolve the partnership.
21. By a Partnership Dissolution Deed dated 27/11/2014 executed by both partners, by consent of both partners one partner resolved to retire (Jane Wangechi Maingi) while the other Simon Warui Ndirangu (defendant) resolved to continue with the business of running the school but upon agreed terms appearing therein.
Of relevance hereto are clauses 2, 3, 4, 6, 8 which the court shall interrogate separately as they form the basis of the dispute before the court.

Issue No. 1 – whether the suit (Originating Summons -OS) is statutorily time barred.

22. The Partnership Dissolution Deed is dated 2/11/2014 upon which the partners mutually agreed that:-

At clause 2-

“...the assets and liabilities of the partnership have been assessed and the final balance sheet and profit and loss account have been taken and both parties have seen the accounts and are satisfied about its correctness.

Cause 3

The continuing partner shall pay to the retiring partner a sum of Kshs. Four million (Kshs. 4,000,000/-) as consideration of the share and interest of the retiring partner in the assets, stock-in-trade, goodwill and rights of the partnership which shall be paid as hereunder:-

- i. It is hereby mutually agreed that the retiring partner shall continue receiving her monthly allowance of Kshs. Twenty four thousand (Kshs. 24,000/-) until the time she receives her first instalment of the aforesaid sum of four million (Kshs. 4,000,000/=). For the avoidance of doubt the monthly allowance does not constitute part of the buy-out sum of Kshs. Four Million (Kshs. 4,000,000/).



- ii. It is hereby mutually agreed that the 1st instalment of the buy-out sum captured in clause 3 herein shall be paid within one year of execution of this agreement with parties agreeing on reasonable timelines for the payment of the balance from time to time having regard to the financial position of the business.

Clause 4

The retiring partner as beneficial owner hereby assigns and releases unto the continuing partner ALL THAT the one-half share and interest of and stock-in-trade assets and other personal chattels including the goodwill here TO HOLD the same into the continuing partner absolutely forever.

Clause 8

The continuing partner hereby agrees and undertakes that he should notify the dissolution of the partnership to all the relevant authorities and both parties should fully co-operate in the execution of the relevant documents including but not limited to bank documents as and when required to ensure that the smooth operations of the school is not curtailed and to give effect to the changes herein.

23. Two things arise from the above agreements particularly the dissolution deed dated 2/11/2024.

The plaintiff submits that the monthly allowance of Kshs. 24,000/= was not honoured as per clause 3(i) of the deed, nor has the lump sum Kshs. 4 million been paid as per clause 3(i). Clause 3(ii) was conditional to a 1st installment being paid of the Kshs. 4 million within one year or upon reasonable timelines with regard to the defendants financial position.

24. The court notes that none of the above timeous payments were complied with by the defendant. This is clearly seen by demand letters by the plaintiff's advocates- Mwangi Wahome & Co. Advocates dated 24/10/2023 demanding from the defendant payment of Kshs. 4 million and surrender of ½ share of parcel no. 1568 by subdivision at Embakasi Ranching Company, citing the dissolution agreement.

The defendant while admitting the salient material facts raised by the plaintiff and the partnership dissolution deed avers that the ½ share of the land parcel was factored into the share and interest in assets stock-in-trade and rights of the partnership.

25. The defendant further states to have paid to the plaintiff for the three months after execution of the dissolution of partnership deed, but no proof of such payments have been provided for the months December 2014, January 2015 and February 2015. Further no iota of evidence of payment of Kshs. 1,314,000/= the defendant alleges to have paid to the plaintiff nor the periodical payments in the sum of Kshs. 2,686,000/= being due and outstanding. These in the court's view are but allegations that have not been substantiated or proven. It is the payee who ought to produce evidence of payments as he bears the burden of proof. That burden of proof cannot be shifted to the Plaintiff in the circumstances of this suit. It is trite that he who alleges must prove as provided under Sections 107 and 109 of the [Evidence Act](#).

26. In the issue of the suit being time barred, Section 4(1) of the Limitations of Actions Act provides for a six year period in which an action in relation to breach of contract ought to be instituted. In the case of Gathoni V. Kenya Co-operative Creameries Ltd (Supra) the court of Appeal rendered that the law of Limitation of Actions is intended to protect Defendants against unreasonable delay in bringing of



suits against them, and expects a plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.

27. While that is true, reasonable delay to take action is determined by the circumstances of each case. The court without any other proof of payment is left with no option but to find that the first payment to the plaintiff by the defendant in respect thereof was made on 31/07/2021 which then set the wheel rolling for all other subsequent events, as stated in the deed of dissolution of the partnership. The defendant has not provided to the court dates of payment or times when he states to have stopped making payments to the plaintiff. The plaintiff on her part admits having received only Kshs. 100,000/= and kshs.40,000/= on 23/10/2021 and 31/07/2021 respectfully and nothing turns on the alleged payment of Kshs. 1,314,000/= for lack of proof.
28. There being no cogent or proof of timelines as to alleged the payments it will be safe for the court to take the date of default as 23/10/2021 when the last admitted payment to the plaintiff by the defendant was made. That in the court's opinion is when time of default started running for purposes of limitation under the agreement and further guided by Clause 3 of the Partnership Dissolution Deed which provides for the buy-out of Kshs. 4,000,000/= upon the 1st installment payment. Clause 3(1) stated verbatim at paragraph 22 of this judgment.
29. There is therefore no gainsaying that the suit herein by Originating Summons and the reliefs sought therein was instituted within the six years period as provided at Section 4 of the Limitations of Actions Act and therefore not time barred.

Issue No. 2 – whether the plaintiff is entitled to reliefs sought in the originating summons.

30. Clause 3 of the Agreement dated 11/05/2012 between the parties hereof resolved that they would subdivide the land parcel they jointly bought using income derived from the partnership parcel No. 1568 (subject property) with each partner being entitled to one-half(1/2) share.
31. The plaintiff submits that this agreement conclusively deals with the property shareholding so that by the 27/11/2014 dissolution of partnership deed, the property had already been shared and therefore nothing had been left for review, nor was it part of partnership property. Each of the partners stated to have taken possession and developed their ½ share of the property prior to dissolution of the partnership, and the only pending transaction was the subdivision of the same.
32. A close perusal and consideration of the dissolution deed I find no mention or reference of the property as an asset of the partnership as it clearly mentioned assets stock-in-trade, good will and other rights of property, whichever property it referred, to which this court could only refer to have meant the subdivision of the only property acquired during the existence of the partnership. Against clause 2, 3 and 4 of the partnership dissolution deed, no mention of the parcel of land in question was made. It would have been very easy for the partners to describe any property held jointly by the partners at its dissolution if any existed.
33. The liabilities envisaged in the deed could not therefore encompass the mentioned land parcel as the defendant wishes the court to find and hold. By the above, the court finds that the plaintiff has a legitimate entitlement to the property at half share.
34. On the matter of the monthly payments to the retiring partner (plaintiff) by the continuing partner (defendant), the defendant by his replying affidavit clearly admits not in compliance with the Dissolution Deed, at paragraph 6 and 8 thereof.
35. At paragraph 4 of his affidavit the defendant avers and confirming that at the Dissolution Deed of 27/11/2014 he agreed to pay the plaintiff Kshs. 4,000,000/= as consideration of share and interest of



the retiring partner, but denies that the plaintiff would or was to continue receiving monthly allowance of Kshs. 34,000/- until such time when he would deposit the first instalment of the buy-out sum being Kshs. 4,000,000/-.

36. Despite his assertion that he paid the plaintiff for the first three months after execution of the agreement, he has produced nothing to show that he indeed made such payments. As I have stated above, the only payments proved by the defendant is Kshs. 140,000/- on 1/07/2021 and 23/10/2021.

37. It is trite that evidence must be adduced to prove payment. It is not enough to allege. An allegation ought to be proved as provided at Section 107 and 109 of the *Evidence Act*.

The defendant admits in his Replying Affidavit at paragraph 7 and 8 that a sum of Kshs. 2,686,000/= after paying Kshs. 1,214,000/= out of the sum of Kshs. 4,000,000/=. The defendant admits that by the Dissolution Deed, he was required to pay to the plaintiff the buy-out of Kshs. 4,000,000/=. It is therefore without a doubt that the property number 1568 Embakasi Ranch was not factored in the said agreement. That is the simple logic to the question as to whether the plaintiff is entitled to half share of the said property. The property was never an asset of the partnership at the date of dissolution and for good reason it was not included therein.

38. It is therefore the court's finding that the plaintiff is entitled to half (1/2) share of the undivided land parcel no. 1568 under Certificate of ownership No. 2031 issued by Embakasi Ranching Col. Ltd as per clause 3 of the Agreement dated 11/05/2012.

39. Clause 4 of the Partnership Dissolution Deed is expressly clear that the plaintiff (retiring partner) would continue to receive a monthly allowance of Kshs. 24,000/- until the time she receives her first instalment of Kshs. 4 million buy-out from the defendant.

The question therefore is to determine when the first instalment of the buy-out was made to the plaintiff if at all it was made.

40. Documents presented to the court by the defendant show that the first instalment was made on 31/07/2021 for Kshs. 40,000/= and 2nd installment on 23/10/2021 for Kshs. 100,000/-. Despite stating that he made other payments to the tune of Kshs. 1,314,000/- to the plaintiff has not been substantiated. What the defendant deems to be evidence of payment is a handwritten paper with name of the plaintiff, and written payments total Kshs. 1,313,000/=

41. A perusal of the same does not show the writer of the document no names indicated and no dates of payment. Two account numbers are written thereon. The account holders and the banks where the accounts belong are not shown. These hand scribbled written copies of papers cannot be evidence of any bank transactions. They bear no evidential value.

42. The only amount the defendant made to the plaintiff and that which should be held to constitute first instalment of the buy-out is the sum of Kshs. 40,000/= paid on 31/07/2021.

43. By the dissolution Agreement the monthly payment of Kshs. 24,000/- was to continue from date of agreement to date of first instalment of the buy-out. This in any event did not constitute part of the buy-out as provided at clause 3(i).

44. The monthly allowance was to be payable from date of agreement (12/11/2014) to date of payment of first instalment. A calculation of unpaid allowances runs from the month of December 2014 to September 2021 being eighty one (81) months

At the rate of Kshs. 24,000/- the unpaid amount now due and owing is Kshs. 1,944,000/=.



However the sum of Kshs. 140,000/= paid to the plaintiff by the defendant will be discounted being for six months leaving 75 months unpaid being Kshs. 1,800,000/= at the date of filing this suit.

That is therefore the amount the court condemns the defendant to pay in regard to breach of Clause 3 of the partnership agreement.

45. The upshot of the above is that the plaintiff has proved her claim against the defendant to the required standard of proof upon a balance of probability.

Disposition

46. For the foregoing, judgment is entered against the defendant as per the orders sought in the Originating Summons dated 24th January 2024 more particularly that:

1. A declaration is hereby issued that the Plaintiff – Jane Wangechi Maingih is entitled to be paid a sum of Kshs. 4,000,000/= as a retiring partner by the defendant – Simon Warui Ndirangu, in terms of clause 3 of the partnership dissolution deed.
2. A declaration is hereby issued that the plaintiff – Jane Wangechi Maingih is entitled to be paid accrued 75 monthly arrears in the sum of Kshs. 24,000/- from the date of filing of this suit, the 27th November 2014, being kshs.1.800,000/= until payment in full as a retiring partner, by the defendant – Simon Warui Ndirangu as per clause 3 of the partnership dissolution deed.
3. That land parcel Certificate of lease number 1568 under certificate of Ownership No. 2031 issued by Embakasi Ranching Co. Ltd measuring 0.1344 with each partner entitled and in possession of equal half (1/2) share be sub-divided into two equal portions and separate titles be issued to the Plaintiff and the defendant as per clause 3 of the Agreement dated 11/05/2012. To effect the subdivision of the property the defendant is ordered to produce and avail the lease title documents to facilitate the subdivisions to the relevant authority.
4. That the defendant shall bear costs of the originating summons.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2024.

JANET MULWA

JUDGE.

