



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL

CIVIL SUIT 105 OF 2014

EZEKIEL KAMAU.....PLAINTIFF

VERSUS

MUCHOKI MWAI WILSON.....DEFENDANT

JUDGMENT

BACKGROUND

1. The Plaintiff filed a claim by Plaintiff dated 17th of March, 2014 against the Defendant seeking the following reliefs:

- a. The Defendant do account for the proceeds of the business from April 2012 to the Plaintiff.**
- b. The Property of the business be valued for the purpose of sale or by-off.**
- c. The Defendant do allow the Plaintiff back into the business.**
- d. The due share of the proceeds be paid to the Plaintiff.**
- e. Any other or further order as the Court may deem fit and proper to grant.**

2. In response, the Defendants entered appearance and filed the defence dated 8th of September 2014.

PLAINTIFF'S CASE

3. The Plaintiff testified from the year 2002 he met the Defendant who was his former college mate and agreed to work together in informal partnership in the name **Depolink**. The business dealt with diesel. He said the Defendant played the role of procuring the product while he worked as salesman. He said they never agreed on how to pay each other but they agreed to share profits in the ratio of 3:7. He said they operated from the year 2003 to 2009 when the business stopped after disagreement with the landlord.

4. The Plaintiff testified that they were forced to look for another place to run business and found two plots in Athi River situated off Mombasa road plots No.10 and 7 owned by one **Robert Mulei** and his son.

5. Plaintiff testified that upon finding premises for business, they decided to register the business and called it **Oilden Ltd**. He said the business was set up at Plot 10 and 7 starting in the year 2010 and in the partnership they adopted the ratio of 3:7 for sharing profits; in that the plaintiff owned 150 shares and the defendant 350 shares of the business. He showed court a Partnership Deed, Certificate of Incorporation for Oilden Company Ltd and Memorandum and Articles of Association.

6. The Plaintiff testified that the two of them were in charge of construction and drawings were in the names of plot owners. He said they had already purchased equipment while in Mulolongo using funds from Depolink business. Plaintiff testified that in the building, they operated Mpesa shop, bar and lodging, hotel and café. He said the Defendant's wife run Mpesa shop while his wife run the café. He showed court single business permit agreement and official receipt for hygiene licence. He also showed photographs of the premises.

7. Plaintiff also filed the following documents:-

a. Particulars of Directors dated 12th of November 2013

b. Pin Certificate for Oilden Limited.

c. Single Business Permit for Large Petrol Filling Station valid from 15th of March 2013 to 1st of December 2013.

d. Cash Sale sample Receipt.

e. Bank Statements from Cooperative Bank of Kenya.

f. Demand Notice and Certificate of Posting.

8. I will comment on the above documents in the analysis of evidence.

9. The Plaintiff further stated that, on or about the month of April 2012, the Defendant locked the Plaintiff out of the flourishing business and destroyed the perishables in the Restaurant (which was under the direct supervision of the Plaintiff) and also instructed the employees to take no directions from the Plaintiff. He said since then, the defendant has operated the business account solely to the exclusion of the Plaintiff. The Plaintiff informed court that he has approached the defendant for an amicable solution but the defendant has declined.

10. Plaintiff testified that the defendant failed to comply with court order issued on 2nd December directing deposit of proceeds of business in Cooperative Bank account No.0110xxxxxxxx. The bank statement was not however admitted as evidence as the same is computer printout. He said it is the defendant and his wife who are operating the petrol station today through a company known as **Oilden Logistics Limited** and that he has no access to the company.

11. Plaintiff prayed that the defendant be ordered to account for proceeds of business since 2012, valuation of the business and he be given his share.

12. In cross-examination, he said in the year 2002 he contributed Kshs.100,000 while the defendant contributed Kshs.200,000 for the business being the ratio of 3:7 from the year 2003, they shared profit in that ratio. On further cross-examination, he said he could not quantify what he got in the year 2009 because they used proceeds of the business to buy equipment; the equipment being 3 underground tanks. He said they started buying the tanks from the year 2005; that the 2nd and 3rd tank were purchased in the year 2008; the first being Kshs.40,000 2nd from a friend and 3rd at Jogoo road.

13. He said they never shared anything after being ejected by the landlord at Mulolongo. He however said there is no mention of **Depolink** in the partnership; that he has not mentioned transfer of equipment in the partnership and the partnership deed has no express amount for starting business. He admitted that he never made contribution as per clause 3 of the partnership and never opened account at Equity Bank as per clause 4 of the partnership deed

14. Plaintiff said he contributed 30% to the partnership but had no document to confirm that. He said there is no equipment they purchased in name of Oilden and that they had purchased equipment at the time of registering the company. He said that he took photos he has produced in court in 2014 when he filed the plaint though the photographs have no date.

15. Plaintiff said he has no evidence to confirm that Mpesa and café were run by **Oilden**. He further said his wife was running cafeteria as her own business and that it was not connected to Oilden.

16. In re-examination, the Plaintiff testified that the cost of equipment was not more than kshs 100,000 and no other funds were injected thereafter.

17. PW2 a contractor confirmed that he constructed petrol station for Oilden at plot No.7 and 10. He said both Plaintiff and Defendant paid him. He said when he disagreed with the Defendant, the Plaintiff paid him Kshs.40,000.

18. PW3 said he knew both Plaintiff and Defendant as both were his friends. He said when they wanted a plot for constructing petrol station; he took them to his sister who owned plot No.7 and 10, which were registered in the names of her husband and son. He said that in 2014, the Defendant purchased the 2 plots from his sister at Kshs.1.5M each. He said Defendant paid a deposit of Kshs.300,000 and wrote an agreement. He said the agreement has the Defendant's name as the purchaser. He said he did not know how Plaintiff and Defendant operated but he knew the Defendant had given Plaintiff 25%. He said at times they would go to him together and at times Defendant would go alone; and that he did not know exactly how they operated.

19. PW4 testified that he is the owner of plot number 7 and his son is the owner of plot number 10. He testified that the Defendant knew his late wife and that she agreed to sell a plot to him. He said that his late wife asked him to go and show the Defendant the two plots. He said that it is PW3 who took the Defendant to his home in 2010 but at that time, they did not purchase the plots. He said that him and his son Collins sold the 2 plots in 2014. He said his son Collins was in Denmark in the year 2011.

20. In cross examination PW4 testified that the Defendant paid Kshs.300,000 and that he owes him Kshs.2,700,000 and that there is no agreement between him and Oilden.

21. In cross-examination, PW4 said that he sold land to one person and the person is the defendant.

DEFENDANT'S CASE

22. The Defendant confirmed that he does petroleum business but denied having entered into a partnership with the Plaintiff; he said he started the business in the year 2003 and operated as **Depolink Logistics**. He confirmed that he met the Defendant as a student in the year 1997 and met after college in the year 2006. He said he was paying the Plaintiff commission of 50 cents per litre sold. He said that they worked together as employee up to the year 2013. He said when he disagreed with Plaintiff in the year 2014; he went and paid 3 times the rent he was paying and carried on his business. He said the landlord evicted him and the Plaintiff installed his tank and carried on with the business.

23. He further stated that, if indeed he entered into the partnership deed and/or incorporated the company as alleged, the Plaintiff frustrated all efforts to commence running of the business by failing to contribute any capital for start up the business.

24. Defendant confirmed that he signed a partnership agreement with the Plaintiff but said that it never progressed because him and Plaintiff never availed funds.

25. The Defendant denied existence of any attempts to negotiate the dispute between him and the Plaintiff. He said they never opened an account in equity bank as indicated in the agreement. He said **Oilden Company** never invested in anything; that it never purchased any property nor entered into any agreement. He denied knowledge of receipts produced by the plaintiff and denied having used them in his business and said that the photographs. He said plot no 10 and 17 were sold to him and he does not know plot number 17 produced are for his business **Oilden Logistics Ltd** and that **Farau shop** is for his tenant **Philip Kangethe**.

26. Defendant testified that the company has no property for division, that plots No.10, and 17 are his; that the seller has confirmed that.

27. In cross examination, the defendant said that Depolink Logistics is not a limited liability company and that it started in the year 2003. He said the location changed but it is still operating as a business name.

28. Defendant confirmed that the partnership is for 2010. He said the plaintiff caused him to be removed from business premises in the year 2013.

29. The **defendant** produced in court the following documents:-

a. Health care certificate dated 2nd of February 2012.

b. Single Business permit for the period between 8th of March 2012 to 31st of December 2012 for a Small Eating House, snack Bar, tea house hotel.

c. Licence dated 2nd February 2012 (The Food, Drugs and Chemical Substance Act).

d. Photographs of the Premise.

e. Menu for Emma's Café.

f. Licence.

ANALYSIS AND DETERMINATION

30. There is no dispute that the Plaintiff and the Defendant signed partnership agreement in the year 2010 where they agreed to work together in the company name **Oilden Company Limited**. The Defendant's argument is that the partnership agreement was not actualised whereas the Plaintiff's argument is that the business continued with the capital they had contributed before the formal agreement.

31. What I consider to be in issue is whether Plaintiff made contribution to the Defendant's business; whether he is entitled to a share of the business.

32. Whether there is need to value the business and award the Plaintiff a share of the business.

33. The Plaintiff testified that they contributed initial capital of Kshs.300,000 at the ratio of 3:7. He said that he contributed Kshs.100,000 being ratio and Defendant contributed Kshs.200,000 in the year 2003. He further said that they were sharing profits in that ratio.

34. He has however, did not produce any document to confirm his contribution. From his testimony it is evident that from the time they operated together he got his share as they informally agreed. Plaintiff said they never made any other contribution to the business.

35. PW2 said that he introduced Plaintiff and Defendant to his sister who had two plots registered in the names of her husband and son. PW4 the owner of plot confirmed that together with his son he sold the two plots to defendant. PW3 said the agreement for the plot was in the name of defendant. PW4 the owner of one plot confirmed that he received Kshs.300,000 from Defendant leaving balance of Kshs. 2,700,000.

36. Plaintiff never said anything about purchase of plot. Plaintiff's contribution as per his testimony is Kshs.100,000.

37. In respect to the new site of business, the Plaintiff never talked of any contribution on his part in purchase of the plot. PW4 who was availed by Plaintiff talked of purchase of the plot by Defendant. He said Defendant paid Kshs.300,000. On the other hand Plaintiff said he never made any other contribution after paying Kshs.100,000 as initial capital.

38. On construction despite saying, he paid PW3 Kshs.40,000 for construction he never availed any document to prove that. PW3 said he was paid that amount after he disagreed with the defendant. Without independent evidence it would not be safe to believe PW3 as he confirmed that he disagreed with the Defendant.

39. From the foregoing I find that apart from Plaintiff saying he contributed Kshs.100,000 for equipment before long before they signed formal partnership agreement, he never adduced evidence to prove that contribution neither has he availed evidence of contribution in the business currently running in the name **Dipolink Logistics**.

40. Having made the above finding, I find that it will not be necessary to value the defendant's to determine plaintiff's entitlement.

41. **FINAL ORDER**

1. Plaintiff failed to prove contribution to business run by Defendant.

2. Suit is dismissed with costs to the Defendant.

Judgment dated, signed and delivered at Nairobi this 21st day of February, 2020.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Langat: Court Assistant

Mrs. Ahoma h/b for Mr. Omenta for Defendant

No appearance for Plaintiff