



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 22 OF 2016

THADEUS SAKAWA MITENTI.....PLAINTIFF

-VERSUS-

JARED MUNGEI MASESE.....DEFENDANT

JUDGMENT

1. Thadeus Sakawa Mitenti ('the plaintiff') filed an Originating Summons ("the O.S') dated the 19th December 2016 against **Jared Mungei Masese**('the defendant') seeking the following orders;

i) That the Court be pleased to make a declaration that the defendant/ respondent has failed to discharge his obligations as per the partnership

*ii) That the Hon. Court be pleased to dissolve the partnership of **Bosongo Pharmacy** registered under **BN/2013/208418** with the Registrar of Business names with equal distribution of assets and liabilities.*

iii) That the costs of the suit plus interest thereon at the Court rates be granted to the plaintiff.

iv) Any other relief that the Hon. Court may deem just to grant.

2. The O.S is supported plaintiff's affidavit and statement both dated the 19th December 2016. The defendant filed a replying affidavit dated the 3rd March 2017. He also filed a statement on the 28th August 2017.

PLAINTIFF'S EVIDENCE

3. The plaintiff's adduced evidence as follows; In February 2013 he and the defendant by mutual agreement entered into an oral partnership and registered a firm known as Basongo Pharmacy operating in Nyamache within Kisii County. They brought on board Rose Nyanchoka Onderi ('Rose') and thereafter applied to the Registrar of Business names for change of particulars and a Certificate was issued on the 24th April 2014. On the 1st September 2014 he personally entered into a lease agreement over the premises comprised on L.R. No. KMC/BLOCK III/312 for a monthly rent of Kshs. 41,720/=. At the time of entering the into the lease agreement it was intended to operate a pharmacy different from the partnership pharmacy but by a mutual understanding and agreement of the 3 partners and he accepted and accommodated the partnership business in the said premises. That the defendant thereafter took up another business **Bassi Borabu Pharmacy** within in the same premises in total breach of the terms of the oral partnership affected the operations and management of the partnership. Rose the 3rd partner issued a notice in 2016 and moved out of the partnership with all her shares and thereafter the partnership was unable to operate, hence the need to dissolve the partnership and divide the assets and liabilities as per their share of contribution and nullification of Certificate of Partnership registered under BN/2013/208418. That whilst running the business he encountered challenges, one being managerial skills and harassment of workers. That the defendant has lost interest in the partnership, they have not been able to conduct any meetings and meet their obligations. During cross examination the plaintiff stated that the business no longer operates. He denied dissolving the partnership. He admitted that they went for some kind of mediation after the closure and that they distributed the drugs amongst the 2 of them. That he has given the business to one Edgar to run awaiting the verdict of this court. He denied that the partnership was run by a company. He stated that the company and the partnership are different entities.

4. **John Osoro Ombesi** (Pw2) testified that he entered into a lease agreement with the plaintiff on the 1st September 2014. He was not aware that they were trading as a company. He was involved in the mediation but the plaintiff and defendant did not agree. **Rose Nyanchoka Onderi** (Pw3) testified that she was brought on board into the business by the plaintiff and defendant as a superintendent. She worked with them for 2 years then she quit when the 2 had misunderstandings. During cross examination she stated that she was a registered proprietor of **Bosongo Pharmacy**. That the plaintiff and defendant were partners as the business registration certificate. She was a sleeping partner. She denied that her name was merely being used in the said business.

DEFENDANT'S EVIDENCE

5. The defendant testified that he was doing business with the plaintiff from late 2010. They registered a company by the name **Bosongo Investment Company** and they opened three pharmacies under the name **Bosongo Pharmacy in Nyamache, Kisii and Ogembo**. In December 2014 the plaintiff took over the branch of Bosongo Pharmacy at Ogembo which resulted into a disagreement. They had a meeting and decided that he should take over Nyamache branch of Bosongo Pharmacy the joint business remained in the Kisii branch. Then on the 12th November 2015 he received a letter from the plaintiff demanding that they dissolve the business as he intended to take over the Kisii branch of Bosongo Pharmacy. They did not agree on that so they formed a committee to run the business but it did not work out. That the plaintiff entered into a tenancy agreement with Osoro Ombese and Cyrillus Lucas Machuki Makori for another premises situated in the same building where Bosongo Pharmacy Kisii Branch runs its business on behalf of the Company. He paid Kshs. 360,000/- as good will towards the same and he reimbursed him Kshs. 180,000/- being half the share that he paid to the landlord as good will. That the monthly rent the company pays for the building is Kshs. 41,720/- even though the lease is written in his name its run by the company. That what they have registered is a company and not a partnership and so he cannot dissolve a partnership that is non-existent. That the business was not dissolved and that he did not take half the drugs. That the business was closed in March 2017. During cross examination he stated that he will not be prejudiced if the business if the certificate is cancelled. He admitted having a pharmacy called Boramo Pharmacy. He produced a certificate of incorporation of Basongo Investment Company Ltd. He had no records to show that the said company had filed returns. The company had an account and they were both signatories.

6. Parties filed written submissions. The plaintiff raised 6 issues for determination as follows;

- i. Whether Bosongo Pharmacy was registered as a business entity capable of being dissolved
- ii. Whether disagreement of the parties and non-compliance with pharmacies and poisons board regulations can dissolve Bosongo Pharmacy.
- iii. Whether Bosongo Pharmacy was one and the same as Bosongo Investment company ltd.
- iv. Whether this court has jurisdictions to dissolve the partnership
- v. Whether the plaintiff has proved his case on a balance of probability
- vi. Who should meet the costs of the suit?

This is a summary of the plaintiff's submissions on the above issues; the certificate of registration business No. BN/2013/208418 was issued for the purpose of operation of Pharmacy in Nyamache within Kisii County as the registered office, the certificate produced in court was not for a limited liability company but a business name. As per the evidence adduced the parties ceased to work in harmony and by withdrawal of their superintendent and unfair competition from Borabu Pharmacy a company associated with the defendant the operations of the partnership came to an end. That Bosongo Pharmacy and Bosongo Investment Company Ltd are different entities as Bosongo Pharmacy has a certificate and is registered as a business entity and Bosongo Investment Company is a limited liability company with perpetual seal and capable of suing and being sued. That though the 2 have certain interests in common they are not legally one and the same. On jurisdiction it was submitted that under the Partnership Act a partnership can be dissolved in 2 ways by agreement of the parties or a dissolution. That a partnership can be formed through a partnership deed or through an oral agreement. That in this case the parties had an oral agreement to run and operate a business as partners and that constituted a partnership. That plaintiff expressed his displeasure to the defendant of his misconduct in running the partnership and that the notification to the defendant by the plaintiff called for an amicable dissolution of the partnership which the defendant failed to adhere to. That since the dissolution by agreement failed the plaintiff moved to court for dissolution of the partnership and that this being a court of original jurisdiction it has the powers to dissolve the said partnership since the operations of Bosongo pharmacy cannot proceed further. It was also submitted that the plaintiff has established his case on a balance of probability and is entitled to the reliefs sought.

7. The defendant submitted that the issues for determination are;

- i. Whether there existed a partnership agreement between the plaintiff and the defendant
- ii. Whether or not the business of '**Bosongo Pharmacy**' belonged to **Bosongo Investment Company Limited** or a Partnership between the parties herein
- iii. Is a business name mandatory a partnership?

The defendant submitted as follows on the above issues; that the plaintiff did not produce any documentation to prove that at the commencement of the partnership each partner contributed an agreed amount of shares into the business which was equally shared amongst the partners. That the certificate of incorporation produced bares the names of Bosongo Investment Company Limited and not Bosongo Pharmacy. That only the existence of a company has been proved and not a partnership. That the bank payslips produced show transaction details in the name of Bosongo Investment Limited and not Bosongo Pharmacy. That the minutes of Bosongo Investment Company Committee meeting of 7th August 2016 attended by the plaintiff and the defendant agreed that the managerial system should continue when they settle out their business worth. That this confirms that the 3 pharmacies were opened by the registered company Bosongo Investment Company under the business name Bosongo Pharmacy in line with the objects of the company as found in the memorandum of association of Bosongo Investment Company Limited. That for the partnership to exist there had to be a followed due procedure of conversion of the company to a partnership which was not done hence the company remains as the existing legitimate business. That there was no partnership proved between the plaintiff and the defendant cannot be held to have breached a non-existing agreement and that therefore the court lacks jurisdiction for there exists no partnership to dissolve. That there was no partnership deed proved in court and that the defendant has rebutted

the plaintiff's claim. Reliance was made on sections 9, 14 and 15 of the Registration of Business Name Act.

8. The plaintiff in his supplementary submissions submitted that the sharing of profits was prima facie evidence that the plaintiff and the defendant were partners though the partnership deed was not reduced into writing. That the defendant's submission that what was carried out was a business of the company as evidenced in the memorandum of association was erroneous since the issues to do with Bosongo Investment Company are totally different from the one through the certificate of registration of business which was registered as BN/2013/208418 by the registrar of business. That the court has jurisdiction to determine the matter by virtue of the provisions of sections 3 & 4 of the partnership Act. That the issue raised by the defendant affecting the tenancy in common or joint tenancy cannot constitute the basis under which the partnership cannot be dissolved. That under section 39 of the partnership Act this court has the mandate to dissolve the partnership for breach of covenants, uncalled for misconduct, unfair competition, inability to discharge duty and for equity. That the partnership should be dissolved as the plaintiff has shown that the parties cannot see eye to eye.

ANALYSIS AND DETERMINATION

9. I have considered the evidence the submission and law on partnerships. From the originating summons the issues for determination are;

- i. Was there a partnership between the plaintiff and the defendant?
- ii. If so has the plaintiff established that the said partnership should be dissolved.
- iii. If the answer to **no. ii** is in the affirmative then how should the partnership be dissolved?

Whether there was a partnership between the plaintiff and the defendant.

Let me start by stating that he who alleges a fact has the duty to prove it (see **section 107 and 109 of the Evidence Act Cap 80**). The plaintiff testified that they had a partnership business registered as Bosongo Pharmacy which operated a business which was initially registered as operating in Nyamache vide certificate of registration dated 24th March 2014. That they registered a business firm on the 23rd February 2013 as No. BN/2013/208418 and after inviting their 3rd partner Rose Nyanchoka Onderi they applied to the Registrar of Business for change of particulars and the certificate dated 24th March 2014 was registered carrying business at L. R. No. Isolated Plot/ Nyamache Market. That after the issuance of the said certificate he accommodated his other partners in a premises which he had leased within Kisii town to carry on the said business through an oral mutual agreement. The plaintiff displayed a certificate of registration of a change of particulars dated 24th March 2014. The defendant on the other argues that there was no partnership and that they had a company known as Borongo Investment Company. That the Company opened three Pharmacies under the name Bosongo Pharmacy in Nyamache, Kisii and Ogembo. There is no dispute that the plaintiff and the defendant operated a Pharmacy business within Kisii known as Bosongo Pharmacy within the said 3 areas. The plaintiff exhibited a change of business registration dated the 24th March 2014. This certificate refers to a certificate no. BN/2013/208418. This certificate was not produced by any of the parties. Did it exist and what was its content? I cannot tell but from it came the certificated dated 24th March 2014 which shows that there was a change of particulars of the Business name Bosongo Pharmacy which business was originally registered under provisions of the Registration of Business Names Act on the 20th day of February 2013 under the Business Registration Number BN/2013/208418 and consequent on the registration of such change of particulars; Rose Nyanchoka Onderi, Jared Mungei Masese and Sakawa Thades Mitenti, that the 3 persons were now registered carrying a business at **L.R No. ISOLATED PLOT NYAMACHAE ROAD** under the business name Bosongo Pharmacy. The defendant argues Bosongo Pharmacy a business entity that was created by Bosongo Investment Company. To support this argument the defendant relied on the Memorandum of Association of Bosongo Investments Company Limited which was signed by the plaintiff and the defendant, minutes of Bosogo Limited held on the 7th August 2016 bank statements of Bosongo Investments and deposits slips to show that they deposited monies into the bank account of Bosongo Investment and not Bosongo Pharmacy.

10. I have perused through the Memorandum of Association of Bosongo Investment Company Limited annexed as 'SMM1'. The objects of the said Company are listed at paragraph 3 and ran from numbers 1 to 29. The defendant did not refer to any particular clause that refers to the forming of a business known as Bosongo Pharmacy. Clause 1 in the Memorandum of Association states that the Company was to engage in purchase and sales of human drugs as may be appropriate. The rest of the clauses are general clauses found in a standard Memorandum of Association for Companies. There was a Company that was formed as per the Memorandum of Association the nature of business was not specifically stated in the said document. The Partnership Act 2012 defines the word business as "**business" includes any trade, profession or occupation**".

11. According to the plaintiff the partnership was an oral partnership. The Act defines partnership as, "**partnership" means the relationship which exists between persons who carry on business in common with a view to making a profit; "partnership agreement" means an agreement between persons carrying on business in common with a view to making a profit**; A partnership is formed in 3 ways; through a partnership deed, orally with or without a written document known as a partnership deed. A partnership can also be demonstrated through the conduct of the partners. In this case the pharmacy business was ran by the 3 persons for profit. They sold drugs and shared the income from the business. From their conduct am of the view that there existed a partnership in running the business they had known as Bosongo Pharmacy. The defendant's argument that there was no partnership in light of the evidence adduced by the plaintiff cannot stand. The pharmacy business did not belong to the company as alleged. It was a different entity apart from the company Bosongo Investment Company it was a partnership.

12. The next issue is whether the plaintiff has established whether the partnership should be dissolved. The plaintiff's evidence was after they started they had management issues and thereafter he wrote the letter dated the 12/11/2015 ending the partnership. The defendant does not deny the said letter. He admitted that they formed a Committee and appointed a manager to run the business. The plaintiff stated that this too did not work out. Part V of the Act Section 36 to 40 provides for Dissolution of Partnership and Its Consequences. The Originating summons is brought under Section 39 of the Act. The plaintiff claims that he has come to court because they failed to amicably dissolve the partnership. Section 39 of the Act provides as follows;

Dissolution by the court

On application by a partner, the court may decree a dissolution of the partnership in any of the following cases—

(a) when a partner is adjudged a lunatic, or is shown to the satisfaction of the court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his guardian ad litem or next friend or person having title to intervene as by any other partner;

(b) when a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract;

(c) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business;

(d) when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

(e) when the business of the partnership can only be carried on at a loss;

(f) whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

The plaintiff has moved the court under section 39 (b). The plaintiff's evidence that they could not with the partnership because of management issues. It is the issues between them that cause Rose to move out. It is apparent that the relationship between the plaintiff and defendant broke down the partnership could not continue. The defendant blames the plaintiff for starting another business just next door. The plaintiff blames the plaintiff for not having good management skills. In my view the partnership could no longer continue due to the bad relations between the defendants. In my opinion the circumstances that arose between the plaintiff and defendant render it just and equitable that the partnership be dissolved.

13. The last issue is how should the assets and liabilities be distributed. The plaintiff seeks that there should be equal distribution. The defendant's stand is that there was no partnership. The defendant referred the court to the shareholding in the Memorandum of Association of Bosongo Investment Company. I have already stated that the said company is a different entity. The plaintiff in his Originating Summons has not indicated the assets or liabilities. He has also not indicated what each partner contributed toward the partnership to enable the court decide the mode of distribution. Had the plaintiff tendered the said evidence the Court would have been guided by provisions of section 28 of the Partnership Act. I find that I am unable to make any orders assets and liabilities as no evidence was tendered on the same.

14. Final Orders;

- a.* There was a partnership between the plaintiff and defendant of Bosongo Pharmacy.
- b.* The said partnership is dissolved.
- c.* No order on the distribution of assets and liabilities for lack of evidence.
- d.* Each party to bear its own costs.

Dated signed and delivered at Kisii via Zoom this 28th day of May 2020.

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyambati For the Plaintiff

Miss Nyandoro h/b Mr. Bosire Gichana For the Defendant