



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.148 OF 2013**

**MARION NYAMBURA GATETE & HENRY MAINA GATETE**

**(Suing as Legal Representative for and Co. Administrator of the Estate of late**

**GEORGE GATETE MAINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NELSON KAMAU KARAGU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ARTHUR GACHERU KARAGU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NATHAN NGONJO KARAGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

1. The Plaintiff/Applicant through an originating summons dated 10<sup>th</sup> June 2010 and filed on 15<sup>th</sup> June 2015 sought the following:-
  - a) THAT this Honourable court do order a true and full account of proceeds of rent paid to the defendant before the demise of the deceased on the 7<sup>th</sup> August 1997.
  - b) THAT this Honourable court do order a true and full account of proceeds of rent paid to the defendant from the demise of the deceased thus the 7<sup>th</sup> August 1997.
  - c) THAT this Honourable court do order an account of what is payable to the estate of the late George Gatete Maina.
  - d) THAT the Honourable court be pleased to order that this matter be referred to an Arbitration pursuant to Clause 14 of the Partnership Deed dated the 1<sup>st</sup> day of July 1970.
  - e) THAT a declaration that the deceased and the defendants are equal partners in ownership of Land Reference No. 4953/33/V and therefore proceeds to the equally shared.
  - f) THAT the costs of this suit be awarded to the Plaintiffs.
2. The Defendant/Respondent filed Replying affidavits dated 24th August 2010 and sworn on 23<sup>rd</sup> August 2010. The plaintiff filed Statement of Issues on 12<sup>th</sup> June 2018 and list of document on 17<sup>th</sup> April 2018 and witness statement filed on 1<sup>st</sup> November 2017.
3. The 1<sup>st</sup> plaintiff Marion Nyambura (*deceased*) was wife to George Gatete Maina while the current Plaintiff/Applicant is son of both the late George Gatete Maina and late Marion Nyambura and a legal representative of the deceased estate herein. The current defendants/Respondents were substituted for their late father Elijah Karagu Nathan.
4. The brief facts of the plaintiff's suit are, that the deceased George Gatete Maina, owned equal shares with the late Elijah Karagu Nathan over the suit property. The plaintiff further claim the defendants did not remit to the plaintiff what was due and payable to the George Gatete Maina (*deceased*) during his life time and after his death and as such prays that the court do order defendants to account.

5. The defendants state otherwise, and are of the view that late George Gatete Maina did not have equal shares with the late Elijah Karagu Nathan over the suit property and, that he was not entitled to get anything from the subject property L.R. No.4953/33/V. They thus contest accounting for the proceeds before and after the demise of George Gatete Maina, contending that it is their late father Elijah Karagu Nathan who was collecting rent and was entitled to the full amount of the rental proceedings.

6. At the hearing the plaintiff called one witness; **PW1** Henry Maina Gatete, the sole administrator of the state of George Gatete Maina, who produced his witness statement (**Exhibit P-1**) and list of documents (**Exhibit P-2**) which he adopted as his evidence in chief. Title to **L.R. 4953/33/V** (P-Exhibit -3) partnership Agreement dated 24/3/1975 (P-Exhibit 4). The defendant on the other hand called one witness, **DW1**, Arthur Gacheru Karagu who relied on his witness statement (**E-exhibit 1**) and list of documents (**E-Exhibit 2**); his late father's Replying affidavit sworn on 23/8/2010 and filed on 24/8/2010 by late Elijah Karagu Nathan (**D-exhibit 3**) and prayed that his statement and list of documents be adopted as his evidence in chief.

7. Upon the close of the defence case both sides were directed to put in their written submissions. The plaintiff filed his submissions on 11<sup>th</sup> February 2019, whereas the defence filed their submissions on 25<sup>th</sup> February 2019.

8. I have very carefully considered the pleadings herein, witnesses statements and list of documents, the oral evidence adduced before the court, and rival submissions filed by the advocates for the parties, and doing the best I can in the circumstances as regard issues for consideration and considering the issues put forward by the parties Advocates, the issues arising for consideration can be summed up as hereunder:-

**a) What was the partnership sharing ratio between the plaintiff's late father George Gatete Maina and the defendants' late father Elijah Karagu Nathan?**

**b) Whether the plaintiff is entitled to any rent income or proceeds from L.R. No.4953/33/V?**

**A) What was the partnership sharing ratio between the plaintiff's late father George Gatete Maina and the defendants' late father Elijah Karagu Nathan?**

9. The plaintiff, **PW1**, Henry Maina Gatete, the sole administrator of his father's estate, the late George Gatete Maina, testified that he is the chairman of the group owning the suit property **L.R. No.4953/33/V** (**Exhibit P-3**) which property he stated is owned by 10 families, however the same is registered in the names of four (4) persons on behalf of the 10 families. He stated the 4 persons hold the property in trust as per partnership deed dated 24/6/1975 (**P-Exhibit 4**) which agreement he stated supersedes the one of 1967, which was to expire five (5) years from 1<sup>st</sup> day of July 1970. The partnership Deed dated 1<sup>st</sup> July 1970 provide under No.2 as follows;

**"The duration of the partnership shall be for a further term or period of five years from the first day of January one thousand nine hundred and sixty nine and for such further term or terms as may be mutually agreed upon."**

10. **PW1** stated that there was another agreement dated 24<sup>th</sup> March 1975 (**P-Exhibit 4**) giving the name of the trustees being 4 in number and stated the total number of beneficiaries are 9 in number. **PW1** stated his father was in the first group and all members had equal shares, further or pointing out that all parties to agreement are dead.

11. The plaintiff on being cross-examined, agreed the parties had initially made 3 agreements dated 1/7/1970, 24/3/1975 and the 3<sup>rd</sup> one dated 23/6/1975 which agreements he agreed talk of contribution of money, assets to be owned, profits and sharing of losses and classifies the parties into groups. **PW1** agreed in the partnership Deed of 1/7/1970, the late Elijah Karagu contribution was Kshs.2000, partner number 3, whereas Nathan, George Gatete Maina, contribution was Kshs.1000 as per paragraph 4 of the Partnership Deed.

12. Paragraph 5 of the Partnership Deed dated 1/7/1970 towards the end, it provides as follows;

**".....once discharge, the said properties shall be transferred in favour of all the partners each holding a share thereto in proportion to the sum contributed by him as set out in clause 4 above of the Deed of Partnership."**

Clause 7 of the Partnership Deed further provides;

**"The net profits of the partnership business shall be divided among the partners in proportion to the capital contributed by each of them as set out in Clause 4 above and they shall in like proportion bear all losses including loss of capital."**

Clause 8 of the Partnership Deed continue to provide;

**"Each partner shall have one vote for every shillings one hundred contributed by him towards the partnership capital as aforesaid."**

Paragraph 13 on its part provides;

**"So soon as the annual general account and balance sheet shall have been signed by all the partners the net profits, if any, of the partnership business shall be divided among the partners in accordance with the provisions of this Deed."**

13. **PW1** agreed, that in the Title **L.R. No. 4953/133 V** Registered on 27/1/1967 his father's name do not appear amongst the names of the registered proprietors and agreed there was no agreement made before 1/7/1970 and that the agreement of 24/3/1975 separated the groups

and distributed the properties. **PW1** agreed he has no evidence that George Gatete Maina, his father, contributed more than Kshs. 1000/- and he also admitted he had no document stating Elijah Karagu Nathan contributed less than Kshs.2000/-. **PW1** further admitted he had no single document to show his father as of 27/11/1967 he had made any contribution towards the purchase of **L.R. 4953/133/V**. He agreed though half share of **4953/133 V** was to go to another group he did not agree out of the remaining share, Elijah Karagu Nathan, was to get 2/3 share and George Gatete Maina 1/3 shares, urging though Elijah Karagu Nathan contributed Kshs.2000/- and George Gatete Maina Kshs.1000/- the two owned equal share, in ratio of 50:50 share.

14. The plaintiff on being cross-examined on a document (on page 23) of the defendant's documents, he stated that on 21/7/2015 their family agreed to sell the property agreeing that the same should be shared as follows:-

"a) George Gatete Maina family 1/3 share.

b) Elijah Karagu family 2/3 share." Which document the plaintiff and his father's family signed after which the plaintiff family forwarded the document to the defendant advocate's. The plaintiff stated he was still relying on the said document. He proceed further to state his family do not award 1/3 but 50:50:

15. **DW1**, Arthur Gacheru Kiragu testified that Elijah Karagu Nathan paid Kshs.2000/- and George Gatete Maina Kshs.1000/-. His father's name appears as number 3 under paragraph 4 of the Partnership Deed showing payment of Kshs.2000/- and George Gatete Maina, No.7, showing he paid Kshs.1000/-. He averred that the parties mode of sharing of the suit property is as per clauses in the Partnership Deed. **DW1** averred the shareholding was to be distributed in proportion to the sum contributed by each of the shareholder and that net profits were to be shared in proportion to the capital contributed as set out under the parties agreement. **DW1** stated his father's shareholding was 2/3 and George Gatete Maina 1/3 and not 50:50 as stated by **PW1**; adding **PW1** in one of their documents dated 21/7/2015 they agreed to a ratio of Gateete 1/3 and Karagu 2/3.

16. **Section 107 of the Evidence Act** provides:

**"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. "**

17. The plaintiff contention is that George Gatete Maina had equal shares with the late Elijah Karagu Nathan and as such the partnership ratio between the two was equal. That the 9 partners as per agreement dated 1<sup>st</sup> July 1976 contributed funds under clause 4 and jointly invested Kshs.12000, that was utilized in running three business namely operating of a bar, a transport business and purchase of two (2) properties namely Land Reference numbers **4953/33/V** and **4953/12/V**. The plaintiff contends the two properties were bought out of profits of partnership. The plaintiff had the burden to prove, that the two parties had equal shares, and how the equal shares were arrived at.

18. In the instant suit the Partnership Deed clearly showed each party's contribution in which George Gatete Maina contributed Kshs.1000/- and Elijah Karagu Nathan contributed Kshs.2000/-. The Partnership Deed specifically indicates the mode of distribution on shareholding. The plaintiff has failed to state or produce any document contrary to the provisions as set out in the partnership Deed. I find the partnership Deed speak for itself in that it, provided, that the proportions shall be in favour of each partner, holding a share therein in proportion to the sum contributed by him. On profits, the partnership Deed provided net profit of the partnership business shall be divided amongst the partners in proportion to the capital contributed by each of them as set out in clause 4 and that each partner shall have one (1) vote for every shilling as per partnership Deed. The Partnership Deed further provided the net profit of the partnership business shall be divided amongst the parties in accordance with the provisions of the Partnership Deed. The parties late father herein entered into an agreement dated 24<sup>th</sup> March 1975 being group Agreement by two groups are bound by such agreement. This I find as per its preamble was a group agreement and not partnership agreement. The parties (late fathers) in this suit were in the 1<sup>st</sup> group of the agreement and indicated how the two properties were to be shared out, in which the suit property **L.R No.4953/33/V**, half of it was to be shared by parties (late fathers) in this suit. The sharing was by virtue of the partnership Deed to be in the ratio of 1/3 to 2/3 of half of **L.R. No.4953/33/V**.

19. **PW1's** fairly entered into an agreement dated 21/7/2015 (annexed in the plaintiff's documents dated 17/4/2018,) which **PW1** acknowledged, and which he had amongst other plaintiff's family executed stating, the shares of the two estates should be 1/3 to Gatete family and 2/3 to Karagu family.

20. **Section 120 of the Evidence Act** provides:-

**"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

21. In view of clear and uncontroverted contents contained in the Partnership Deed and the plaintiff's family acknowledgement of the two estate shareholding to be in the ratio of 1/3 to 2/3, in a document made and signed by the plaintiff, I find the plaintiff is estopped from stating, that the shareholding is equal. I find from the evidence on record and the contents of the Partnership Deed, the ratio of partnership sharing between the late George Gatete Maina and the late Elijah Karagu Nathan is 1/3 to 2/3 respectively.

**B) Whether the plaintiff is entitled to any rent income or proceeds from L.R. No.4953/33/V?**

22. The plaintiff in the originating summons prays for an order for the defendants to render true and full account of the proceeds of rent paid to the defendants before the demise of (his father) the deceased on the 7<sup>th</sup> August 1997. The plaintiff further sought an order for an account

of what is payable to the estate of the late George Gatete Maina.

23. The burden of proof, that the defendants were collecting rent before the demise of the plaintiff's father in 1997 lies with the plaintiff before an order for accounts can be made in his favour. **PW1**, in his evidence testified, that the partner of his late father, one Elijah Karagu Nathan died on 10/1/2014. He did not state prior to his death, the defendants were the ones who were collecting the rent. During cross-examination **PW1**, stated that he admitted the administrators of the estate of Elijah Karagu Nathan estate never collected any rent from the suit property on behalf of the deceased. **PW1** stated his father passed on in 1997 and he forced his way to collecting the rent after the death of his father and after the death of Elijah Karagu Nathan he resumed the role of collecting of the rent at a rate of Kshs.30, 000/- from each tenant. He then continued to collect rent at a rate of Kshs.50, 000/- from December 2014. **DW1** denied having been involved in collecting rent and stated he was uncomfortable with **PW1** collecting rent as he has never accounted for all money he has collected. **DW1** further stated he cannot account for money which he has never collected though he did not plead for the plaintiff to account for all money he had collected.

24. I find from the evidence adduced by **PW1** and **DW1** it is the plaintiff who was collecting the rent since the death of his father and the defendant's father. Taking from 2014 upto date the plaintiff has collected substantial amount in respect of the rent which I find as per **DW1**'s evidence he has not accounted for the same; which lead to filing of suits at court of law, some of which were mentioned as Hccc Appeal No.875 of 2001 and Hcc Civil Appeal No. 340 of 2012 and BPRTrc No. 16 of 2001; CMCC No.245 of 2006 in which the plaintiff was not successful. In view of the above I find the plaintiff has completely failed to demonstrate that the defendant ever collected any rent from the suit premises at any one given moment. I find from the plaintiff's own admission, that he is the only person who has been collecting rent all the material time and not any of the defendants. That if anyone is supposed to account for the collected rent either at the rate he first gave of Kshs.30, 000/- or thereafter Kshs.50,000/- per month the plaintiff and not the defendants. I therefore find the plaintiff's claim for rent income or proceeds from **L.R. No.4953/133/V** from the defendants is baseless and the same falls and I further find the defendants cannot be called to account as they have never collected any rent in respect of the suit premises.

25. The plaintiff prays for an order for the defendant to account for proceeds collected before and after the demise of late George Gatete Maina on 7<sup>th</sup> August 1997. In the instant suit there was no dispute in this matter that George Gatete Maina and Elijah Karagu Nathan were partners, whose ratio of shareholding, I have found to have been 1/3 to 2/3 respectively, but no evidence has been adduced by the plaintiff to show whether the deceased Elijah Karagu Nathan collected any rent and failed to account and if so when. The plaintiff had to discharge the burden of proof by showing the deceased Elijah Karagu Nathan collected rent, when and whether he did not account for it. Had this been done the court would have considered the applicability of the law and the claim then. No evidence has been produced to show that any of the defendants collected any rent. The evidence on collection of rent points to no other person other than the plaintiff herein. He is the one who should have been asked to give the accounts to the defendants in respect of the money he collected and failed to account for; since August 1997 to date, as he had admitted having been collecting rent and not accounting for the same. In view of my findings, I find no basis for ordering the defendants to account for proceeds collected before and after the demise of George Gatete Maina on 7<sup>th</sup> August 1997 as there is no evidence connecting any of the defendants with the collection of the rent.

26. I proceed to make the following orders as regards the plaintiffs originating summons:-

- a) **The originating summons is without merit.**
- b) **The Estate of George Gatete Maina is entitled to 1/3 of the suit property L.R. No.4953/33/V.**
- c) **The Estate of Elijah Karagu Nathan is entitled to 2/3 of suit property L.R. No. 4953/33/V.**
- d) **The originating summon is dismissed with costs to the defendant's.**

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of April, 2019.**

**J .A. MAKAU**

**JUDGE**