



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 650 OF 2015

MARY WAMBUI KAMAU.....1ST PLAINTIFF

CATHERINE NJERI.....2ND PLAINTIFF

SYLVIA GATHONI T/A MARY HAPPY DAY NURSERY SCHOOL &

THE MARY HAPPY SCHOOL.....3RD PLAINTIFF

VERSUS

RICHARD KIRIMI KINOTI.....DEFENDANT

RULING

1. With tremendous Respect, Counsel herein have been most unhelpful in helping the Court to resolve this issue.

2. On 24th October 2017, the following consent was reached by Counsels,

“By consent the Court to determine the following 2 issues,

1. Whether the contribution by each partner to the Business should be considered during Distribution.

2. How much the Defendant should be paid by remaining Partners to buy out the Defendant from the Business?.”

3. On the basis of that Consent parties filed their respective Affidavits, Bundle of Documents and submissions and on 18th January 2018, this Court reserved its Decision for 15th March, 2018.

4. In the course of preparing the Judgement, it became apparent to me that the issues framed were not in consonance with the pleadings filed herein and I asked Counsel to indicate to me whether their respective Clients had abandoned their pleadings in favour of the issues framed. This was one of the three matters I asked Counsel to address me on. Both sides choose to address them by way of further submissions.

5. I have read those submissions and I am surprised by the position taken by the parties and I explain why.

6. Let me start with the Plaintiffs. The Plaintiffs Claim is comprised in the Amended Plaint dated 9th June 2015 and filed on 22nd June 2015. In those pleadings they seek the following prayers:-

i. Nullification of transfers of motor vehicle registration numbers KAU 834Y, KAE 200F AND KAL 827M.

ii. Permanent injunction restraining the Defendant, his servants and/or agents from transferring, alienating, using or wasting, pledging as security or offering as collateral for loans, interfering with the ownership and or possession of motor vehicles Registration Numbers:-

a. KAU 834Y (Nissan Bus)

b. KAE 200F (TATA Bus)

- c. KAL 827M (Isuzu)
- d. KBJ 710P (NISSAN CARAVAN)
- e. KAX 106L (NISSAN BUS)
- f. KBH 284L (SUBARU STATION WAGON)
- g. EX-CK-F 162 (Chassis No.576302, Engine no. 6/98NV/1628MD LEYLAND BUS)

iii. Permanent injunction restraining the Defendant by himself, servant and/or agents from entering upon or interfering with the management, school workers and assets and in the running of the Mary Happy School and Mary Happy Day Nursery School.

iv. A permanent injunction restraining the Defendant by himself, his servants and/or agents from interfering with the 1st Plaintiff's peace and/or threatening her life, trespassing on her person.

v. The business enterprise bearing the name and trading in the name and style of The Mary Happy School be dissolved.

vi. The partnership known as The Mary Happy School be wound up.

vii. The Defendant's capital contribution be assessed and paid to him in cash.

viii. Cost of the suit provided for be paid by the Defendant.

The Plaintiffs maintain that they have not abandoned their claim and that the two issues framed are strictly within their pleadings.

7. Now, in prayer (viii) of the Plaint, the Plaintiffs have taken an unequivocal position that the Defendant's Capital Contribution be assessed and paid to him in cash. This is a position that as a basis of Winding Up the Partnership known as The Mary Happy School, the Defendants be paid off his Capital contribution. This is at odds with issue (i) which requires this Court to determine whether the contribution by each party to the Business should be considered during Distribution. At odds because the Plaintiffs already acknowledged position in the Amended Plaint, is that, distribution should be on the basis of the Defendants Capital contribution. The confusion is even more stark when in the 1st Plaintiff's submissions on the question of Distribution, the 1st Plaintiff takes the position that distribution should be on the basis that each member of the Partnership is entitled equally in the Capital and Profits of the Business. This is a position shared by the 2nd and 3rd Plaintiffs.

8. As for the Defendant he seeks the following prayers (*see his Amended Defence and Counterclaim dated 6th July 2015*).

a. The Plaintiffs' suit to be dismissed with costs.

b. A declaration that the Defendant has indefeasible and proprietary right in the school, facilities thereon and the land where the school stands and is entitled to participate in the management and a share of the profits derived from the school.

c. An order by this Honourable Court appointing an appropriate person and/or persons to manage the school subject to compliance with the necessary regulations.

d. In the alternative and without prejudice to prayer (c) above, an order that the Plaintiffs do furnish to this Honourable Court or to the Defendant periodic accounts of the school's financial status with effect from May 2012 to date.

e. An order by this Honourable Court directing all the school customers to pay school fees and related expenses in the school bank accounts and no director or the school staff should collect and receive cash from anybody on behalf of the school.

f. That the Plaintiffs be ordered to pay the Defendant his arrears of salary payable per term at Khs.300,000 as from May 2nd term, 2012 to date.

g. That the 1st Plaintiff be ordered to surrender to the Defendant his personal documents namely; birth certificate, academic certificates, his father's title deeds that are in her possession.

h. An order that no outside persons (apart from the school customers) should enter or even conduct any business in the school premises without the approval and knowledge of the 1st Plaintiff and the Defendant.

i. An order that the illegally contracted First Monitoring Security Services to guard the school gates be terminated forthwith and the gadgets for scanning security check ups be purchased and managed by school staff who have been at the school gates before.

j. Costs of this suit and interest thereon at Court rates.

9. In submissions filed on 20th April, 2018, the Defendant states:-

“From the foregoing it is our submission that the parties did not abandon their pleadings by framing the issues for determination by this Honorable Court. The (sic) merely framed the issues that require this Honourable Court to determine in order to bring this matter to an end”.

10. The two issues as framed proceed on the assumption that parties agree that the partnership be would up. Yet the Defendants case does not seek Winding Up. The two issues are therefore incompatible with the Defendant’s case. In the absence of a concession that the Partnership be would up then the first Order of business for the Court is to determine whether to allow Winding up.

11. It is clear to me that the issues as framed are not in tandem with the respective cases of the parties herein, and the parties need to decide which between the issues that emerge from the pleadings and the issues as framed will determine this matter.

Dated, Signed and Delivered in Court at Nairobi this 21ST day of June, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kwang’a h/b Anzala for 1st Plaintiff

Machio for 2nd Defendant

Kwang’a h/b Gacheru for 2nd & 3rd Plaintiffs

Nixon - Court Assistant