



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO.336 OF 1994**

**JONAH KISESE NTHENGE.....PLAINTIFF**

**VERSUS**

**MICHAEL M. NTHENGE (Deceased)**

Represented by **BEATRICE MUKULU MUTISYA.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 12<sup>th</sup> August, 1994 the Plaintiff sued the Defendant and sought the following reliefs namely:-

- (a) A declaration that partnership existed since 1968 between the Plaintiff and the Defendant and that the items listed in paragraph 5 of the Plaint are partnership assets.*
- (b) An order that the Defendant give all partnership records such as books of account, invoices, orders, sales, all bank statements, assets, vouchers and documents relating to drawings since 1968 to date.*
- (c) That proper accounts and/or auditing of partnership business be taken and shared between the Plaintiff and Defendant at equal shares.*
- (d) That the Plaintiff be given back his share capital and be paid his due profits.*
- (e) That the Plaintiff's wife be paid for services rendered at a reasonable amount that the court may deem fit and just.*
- (f) That the Defendant do remove his structures at the Plaintiff's plot No. 30 at Ngelani and deliver vacant possession.*
- (g) That the partnership be wound up.*
- (h) Costs and interest be awarded.*
- (i) Any other relief that this court may deem fit and just.*

2. The Defendant filed a defence dated 30/08/1994 in which the averments by the Plaintiff were vehemently denied as follows:-

- (i) That there was no partnership whether oral or written in existence as alleged.*
- (ii) That all the properties listed by the Plaintiff if any are in the names of the Defendant which were acquired solely from independent funds.*
- (iii) That there was no joint account at Standard Chartered Bank (K) Ltd at Machakos as alleged.*
- (iv) The Plaintiff's wife if she had been employed was duly compensated and the Plaintiff has no locus standi to lodge claim on her behalf.*
- (v) The Defendant was the sole proprietor of the business and there was thus no trust created in favour of the Plaintiff.*
- (vi) As there was no partnership then the request for audit and dissolution does not arise.*

*(vii) That plot No.30 Ngelani Market is held in common and each party is entitled to occupy their respective portion.*

*(viii) That the Plaintiff's claims are motivated by ill-will, malice and jealousy towards the Defendant.*

3. The Defendant before the hearing of this matter passed on and was substituted by his wife Beatrice Mukulu Mutisya. The suit was thus set down for hearing whereby the Plaintiff called five (5) witnesses in support of his case. The Defendant failed to tender evidence and thus their case was closed. The matter proceeded before Wendoh J, Onyancha J and Lenaola J (as he then was). Hence I did not have the benefit of observing the demeanor of the witnesses during their testimonies.

The Plaintiff herein **Jonah Kisesse Nthenge (PW.1)** stated that he is a retired teacher and that the Defendant Michael Mutisya Nthenge (now deceased) was his younger brother and that they entered into a partnership together where they ran businesses in which the Defendant was the one handling the day to day activities. He went on to state that in 1974, they erected a building on Plot No.30 and set up a bar and butchery business. They later purchased a lorry Reg. No. KUQ 870 for transportation of goods at Kshs.460,000/= on hire purchase. They also opened an account with Standard Chartered Bank being A/C No. [particulars withheld]. He stated that they bought an adjacent Plot No. 34 and erected some rooms for rentals. He also stated that they purchased Plot No. 86 within Machakos Town where they constructed two residential houses thereon and the rental income was channeled to the business. He also stated that a pump was constructed on plot No. 30 where Kerosene was being sold. He also accused the Defendant for using a sum of Kshs.480,000/= to purchase shares in a certain bakery. The Plaintiff further went on to state that a pick-up vehicle was purchased from the proceeds of the business. He stated that he used money from the business to buy plot 192 Mua Hills which later precipitated into a **case number 391 of 1994** where the Defendant sued him and which the court ruled that the land should be shared jointly. He now wants the partnership dissolved and properties shared since the Defendant had claimed to own everything to himself.

The Plaintiff was cross-examined at length by Counsel for the Defendant and he admitted that most of the properties and documents were in the names of the Defendant. He also admitted that his wife is ready to make her claim for compensation for the services rendered while working for the joint business.

**Samuel Jonathan Makau (PW.2)** stated that he had known the Plaintiff and Defendant to be partners in business as he used to supply them with goods to their shop and the cheques drawn were in names of both the Plaintiff and Defendant. He also confirmed that Plot 86 Muthini had been bought with proceeds from the business. He also confirmed on cross –examination that he was not part of the negotiations leading to the purchase of Plot 86 and also indicated that Plot 30 Ngelani market has already been shared between Plaintiff and Defendant's family following the disagreement over the said plot.

**Ruth Wayua Kisesse Nthenge (PW.3)** was the wife of the Plaintiff having been married in 1971. She stated that she worked in the shop belonging to both Plaintiff and Defendant from 1968 to 1991 and used to receive a salary of 300/= and left in 1991 after the disagreements over the partnership between her husband and Defendant cropped up. She maintained her husband is the registered owner of Plot No. 30. She also stated that two vehicles were purchased from the proceeds of the business but which have been retained by the Defendant. She went on to state that the Plaintiff and Defendant ran a joint account for the business and that cheques used to be signed by the two of them.

**Francis Mwanza Mulwa (PW.4)** was a brother in law to both the Plaintiff and Defendant as he married their sister. He stated that while practicing as an Advocate in Machakos Town, he drew a sale agreement over Plot No.86 Muthini Site and Service Scheme whereby both Plaintiff and the Defendant were purchasers but that the two had directed him to have only the Defendant be the purchaser while the Plaintiff was made a witness as the National Housing Corporation which granted Mortgage facilities required only one name for purposes of registration. He confirmed that the parties herein were generally business partners and that the purchase of the said plot was one of their business ventures. On being cross examined, he stated that there was a mortgage on the land but did not know the person who paid the mortgage.

**Joseph Musyoka Mutevu (PW.5)** was the Assistant chief for Mutituni sub-location from 1990 – 1998. He stated that in 1991 he arbitrated a dispute between Plaintiff and Defendant over the sharing of some properties alleged to have been held by way of a partnership. He stated that he divided Plot No. 30 into two portions as directed by the parties. He also oversaw stock taking of items in the shop whose value came to Kshs.14,459.75. However the subdivision of the assets could not be concluded, since according to him, the Defendant demanded two thirds (2/3) of all the assets. He stated that he had known the parties to have shared properties. On cross-examination, he confirmed that Plot No. 30 Ngelani market was to be shared equally while Plot No. 34 belonged to the Defendant wholly. He also confirmed that the Defendant was registered as owner of the vehicles registration number KQA 199 and KUQ 870 as well as Plot No. 86.

4. Learned counsels were directed to file written submissions. However it is only counsel for the Plaintiff who filed submissions dated 30/10/2017 and filed on 1/11/2017. I have considered the said submissions as well as the evidence of the Plaintiff and his witnesses. I find the following issues necessary for determination namely:-

*(i) Whether a partnership existed between the Plaintiff and the Defendant,*

*(ii) Whether the partnership has any assets, and if so how is it to be shared,*

*(iii) Whether the Plaintiff is entitled to the books of accounts to the partnership,*

*(iv) Whether the Plaintiff's wife should be paid for services rendered to the partnership,*

*(v) Whether the Plaintiff is entitled to costs of the suit.*

5. As regards the first issue, the Plaintiff has stated that he had entered into a partnership with the Defendant. He stated that prior to the Defendant coming into the picture, there had been a partnership set up by the Plaintiff with other persons namely James Kitonga, Gregory

Kavisi, Philip Makau and Joel Muthooko. The Defendant was later introduced into the partnership and after a while the other partners left leaving the Plaintiff and Defendant to continue. The Plaintiff stated that the partnership business started in 1970 upto 1990. He produced bank slips from Standard Chartered Bank (K) Ltd Machakos Branch indicating that the business was being jointly run by both the Plaintiff and the Defendant. He also produced trade and conservancy licence documents from the local authority further showing that the business ran on Plot No.30 Ngeleni Market was jointly owned by the Plaintiff and Defendant. At the time of disagreement between the Plaintiff and Defendant, the then area assistance Chief **Joseph Musyoka Mutevu (PW.5)** arbitrated over the same and oversaw the division of Plot No. 30 Ngeleni market as well as stock taking. The said witness confirmed that indeed the parties were in a partnership and just when the rest of the assets could be shared out, the Defendant demanded a (2/3) share instead of **50:50** sharing and therefore no settlement was reached forcing the filing of this suit. The evidence of **Francis Mwanza Mulwa (PW.4)** and **Samuel Jonathan Makau (PW.2)** further confirmed that the parties herein had been in a partnership. He was well known to them as he was their brother in law and he went ahead to confirm that the parties herein had purchased Plot No. 86 Muthini Site Scheme although the same was agreed to be in the names of the Defendant who was then managing the business. Again **Samuel Jonathan Makau (PW.2)** had been a major supplier of goods to the Business and had known the two to be partners. Again the wife of the Plaintiff **Ruth Wayua Kisese Nthenge (PW.3)** confirmed that there was a partnership between the parties herein as she used to work in the shop managed by the Defendant herein. The Plaintiff has stated that even though the partnership was not reduced into writing, he and the Defendant who was his younger brother had carried out the partnership business on the basis of trust. The Plaintiff was categorical that he had wholly trusted the Defendant who was his younger brother to run the business for the benefit of both of them. He also trusted him to invest the profits from the business in other ventures as well as purchasing other assets. The Plaintiff maintains that the Defendant used the proceeds of the business to purchase shares in a bakery and also bought two vehicles KUQ 870 and KQA 199, Plot Numbers 34 Ngeleni and 86 Muthini. I am satisfied from the evidence of the Plaintiff and his witnesses that there was a partnership between the Plaintiff and the Defendant. Even though a partnership deed document was not signed by the parties, the evidence adduced left no doubt of the existence of a partnership. If any assets were acquired by the Defendant as a result of the proceeds then he held them in trust for himself and plaintiff. The Defendant opted not to tender evidence to controvert that the Plaintiff which I find unchallenged.

6. As regards the second issue, the evidence of the Plaintiff and his witnesses have clearly established that the partnership business had led to the acquisition of assets. The initial property namely Plot No. 30 Ngeleni market was the base of the business where the shop had been set up. Already the structures developed on the said plot have already been shared out between the Plaintiff and the Defendant. The area assistant chief Joseph Musyoka Mutevu (PW.5) stated in his testimony that the said plot was divided equally between the parties herein. The Plaintiff and the witnesses have confirmed that several assets were acquired namely Residential Plot No. 86 Muthini, Plot No. 34 Ngeleni Market, motor vehicles KUQ 870, KQA 199, Kerosene tank, shares in Kerekei Bakery, Water Tanks, stock valued at Kshs.14,459.75. Even though the assets might have been in the names of the Defendant, I find the same are held in trust for the plaintiff since they were acquired with use of the business proceeds. All these assets should be shared equally between the Plaintiff and Defendant. The Defendant opted not to tender evidence so as to controvert that of the Plaintiff which is uncontroverted. It would be unfair to the Plaintiff being a partner in the business to leave empty handed while the Defendant takes possession of all the partnership assets.

7. As regards the third issue, it is noted that the Plaintiff in his plaint and prayers sought for the books of account to the partnership. Indeed the parties herein started disagreeing in 1990 and at the time of the filing of this suit, the parties were no longer running the partnership jointly as the issue of division of the properties starting with plot No. 30 Ngeleni had been embarked upon. It was therefore prudent for the Plaintiff to seek to have the defendant to furnish the books of account so that the same may be audited. It appears none of the documents were available. Since the Defendant had been the one running the business on behalf of both Plaintiff and himself and after they parted ways, I find it is only fair and just for the plaintiff to have access to the books of accounts relating to the partnership for his perusal and further action. I therefore find that the Plaintiff is entitled to the said books of accounts.

8. As regards the fourth issue, it is noted that the Plaintiff's wife Ruth Wayua Kisese Nthenge (PW.3) had worked in the shop then run by the Defendant on behalf of the partnership. She has admitted in her evidence that she used to be paid a sum of Kshs. 300/= per month. She must have been satisfied with the said sums and therefore it is rather surprising that the issue is now being raised late in the day and after the parties had parted ways. In any event if the salary was not adequate, she should have raised her issues with the Defendant who was then managing the business. Again, I find the Plaintiff's wife is an adult in her own right and should pursue her claims or rights but not to hide behind the plaintiff who does not have a locus standi to sue on her behalf. Hence I find the claim for compensation on behalf of Ruth Wayua Kisese Nthenge by the plaintiff lacks any legal basis and is dismissed.

9. As regards the fifth issue, the rule is that costs follow the event. It is noted that the Defendant opted not to tender evidence and thus the Plaintiff's evidence remained uncontroverted. The Plaintiff is entitled to the costs of the suit.

10. In view of the foregoing, it is the finding of this court that the Plaintiff has proved his case against the Defendant on a balance of probabilities. Judgement is entered for the Plaintiff as follows:-

***(a) A declaration that a partnership existed between the Plaintiff and the Defendant and the items listed vide paragraph 5 of the Plaint are partnership assets.***

***(b) The partnership business between the Plaintiff and defendant is hereby wound up.***

***(c) The partnership assets listed in paragraph 5 of the plaint shall be shared equally.***

***(d) The partnership assets listed in paragraph 5 of the Plaint and in possession of the Defendant shall be held in trust for the Plaintiff pending sharing between the Plaintiff and Defendant.***

***(e) The books of accounts relating to the partnership be made available to the Plaintiff for his perusal and further action.***

***(f) The Plaintiff is awarded costs of the suit.***

Orders accordingly.

**Dated and delivered at MACHAKOS this 30<sup>th</sup> day of July, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Muli for Mutua Makau - for the Plaintiff

No appearance for Nzilani Muteti for the Defendant

Josephine - Court Assistant