REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 650 OF 2015

M W K .....1ST PLAINTIFF

C N.....2ND PLAINTIFF

S G

T/A M H DAY NURSERY SCHOOL & THE M H SCHOOL.....3RD PLAINTIFF

VERSUS

R K K.....DEFENDANT

JUDGEMENT

1. The Partnership, M H School has hit an unhappy stretch and the Partners now agree that it is time for it to be dissolved.

2. After reaching a deadlock in their quest for an amicable settlement, they framed two issues for the Court's determination through a Consent recorded on 24th October 2017. That Consent also set out the context in which the issues would be resolved. The entire Consent reads as follows:-

> "Court: 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?
>
> Matter should proceed by way of Affidavit evidence and written submissions.
>
> Parties to file and serve their respective affidavits and written submissions within 30 days.
>
> The valuation reports by Auditors to be filed in Court within 14 days.
>
> Interim orders extended.
>
> Mention on 15th December 2017".

3. So as to clarify the fate of the matter upon determination of those two issues, Counsel for the parties entered into another written Consent on 21st day of June 2018 in the following terms:-

> "(1) This Honorable Court proceeds to determine the two issues earlier framed and proceeds on the basis that Business be wound up.
>
> (2) That the determination of the two issues shall be a final determination of the matter before this Court".

The essence of the two Consents was that the parties had moved away from their pleadings and had recalibrated and narrowed the scope of

the dispute.

4. From the rival affidavits filed herein, the Court is able to sketch out the following background to the dispute.

5. M W K (The 1st Plaintiff or M) lived with R K K (the Defendant or R) as wife and husband for a considerable period of time. Mary thinks it is 13 years while Richard asserts it is 14 years or so spanning from 1997 to March 2012. Whatever the period, they are now estranged. C N (the 2nd Plaintiff or C) and S G (the 3rd Plaintiff or S) are daughters of M and Stepdaughters of R.

6. The partnership was registered on 15th June 2004 in the names of R, M, C and S. A Certificate of Registration was duly issued under the provisions of The Registration of Business Names Act (Cap 499).

7. The contention by M is that she used income from her late Father's Estate and loans she took to build the School. Prior to the establishment of the partnership M had set up M H Nursery School as a Sole Proprietorship. She depones that with the income she had saved from the Nursery School, she was able to put a down payment of Khs.1,200,000 for the purchase of LR. NO. [Particulars Withheld] (the land). The balance of the purchase price was financed by a loan of Ksh.2,400,000 advanced by Cooperative Bank. How the Land was bought is accepted by R.

8. It is common ground that the Land is jointly registered in the name of M, C and R. It is on this Land that the School stands.

9. In paragraph 23 of her affidavit M asserts,

> "In as much as it is clear from the foregoing that I have contributed to almost the full capital of the business, I am informed by my Advocates, which advice I verily believe to be correct that in the absence of an explicit agreement, all the parties are entitled to an equal share of the value of the Partnership".

10. R 's position is that funds for the construction of the School came from loans from Cooperative Bank and Equity Bank and a loan he borrowed from a personal friend by the name Simon Wood (now Deceased). The personal loan of Khs.14,000,000/= was deposited in the account of H K who is M's and his daughter. R's evidence is that, he immediately paid all loans and other debts owed by the school save that to Simon Wood's which substantially remains unpaid.

11. R avers that in a joint decision made with M, he closed his Mitumba Business and funds therefrom were used to construct the 1st Floor of the School. That from January 2003, he was fully involved in all matters of the School including its management.

12. R proposes that distribution of assets should proceed as follows:-

> "33. THAT now the valuation of the business is complete, the following is worth considering:-
>
> a. The School should pay Simon Wood's family the balance of his loan amounting to Khs. 8.4 million plus interest accrued.
>
> b. My arrear in term of salary and profits made by the School from September 2012 to date should be taken into consideration.
>
> c. The 2nd and 3rd Plaintiffs namely; C N and S G have been dependents on the business and therefore not equal shareholders. To my knowledge from the time the business was initiated they have never participated and have been dormant partners. At the time of registration of the business we did not enter into any partnership deed that specified anybody's share.
>
> d. In my view, sharing should be considered in the amount of time, financial and material inputs anyone contributed.
>
> e. I annex herein and mark Exhibit 1 my proposal of how the business and building where the School stands ought to be distributed for consideration by this Honourable Court".

13. This Court has given regard to the submissions filed herein by Counsel for the parties. There is consensus in some areas of Law and Fact and that is where I propose to start.

14. All the 4 parties to this suit were on 15th June 2004 jointly certified to carry on Business under the name of The [Particulars Withheld] School. The Registration was under the Registration of Business Names Act (Cap 499 of The Laws of Kenya). Under the Interpretation provisions thereof (Section 2(1)), a **"Business Name**" means "**the name or style under which any Business is carried on, whether in partnership or otherwise".** There is no dispute that there existed a partnership between the four parties herein in the name and style of The M H School.

15. It is also common ground that as the Partnership was formed during the substance of the now repealed Partnership Act (Chapter 29), that is the Statute applicable to the resolution of this dispute.

16. It is also common ground that there was no Partnership Deed between the partners. In that event, the Court is asked by M, C and S to find that the shares of the Partners in the partnership be determined in terms of Section 28(a) of The Partnership Act (cap 29) which reads:-

"(a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm".

17. R takes a different position and argues that C and S never contributed anything to the Business in terms of Property, skill and labour. The Court is asked to find that the two are dormant partners and that sharing of profits should be based on the amount of time, financial and material inputs contributed by the Partners to the School Business. In supporting this proposal, I was asked to be persuaded by the following passage from Halsbury's 4th Edition Volume 35 at page 5 paragraph 2,

"Partnership involves a contract between the partners to engage in a business with a view to profit. As a rule each partner contributes either property, skill or labour but this is not essential. A person who contributes property without labour, and has the rights of a Partner, is usually termed as sleeping or dormant partner. A sleeping partner may, however, contribute nothing. The question whether or not there is a partnership is one of mixed Law and Fact".

18. Now, the Court is tasked to share the Capital and liabilities, if any, of the Partnership amongst the Partners.

19. In respect to the Capital, the Court takes view that as there is no Partnership Deed that would guide the division, it has to resort to the provisions of Section 28(a) of The Partnership Act. That Section provides:-

"The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules—

(a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

(b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(i) in the ordinary and proper conduct of the business of the firm; or

(ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of six per centum per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;

(e) every partner may take part in the management of the partnership business;

(f) no partner shall be entitled to remuneration for acting in the partnership business;

(g) no person may be introduced as a partner without the consent of all existing partners;

(h) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners;

(i) the partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one) and every partner may, at all reasonable times, have access to and inspect and copy any of them"

(emphasis added)

This has been referred to the Rule of Equality and has been subject of some commentary.

20. Section 24 of the English Partnership Act 1890 is word for word Section 28(a) of The Repealed Partnership Act. Commenting on the effect of the English Statute Lindley and Banks on Partnership (19th Edition) at page 672 paragraphs 19-17 states:-

"The rule or equality embodied in the above section will, in the absence of any contrary agreement, always be applied when determining partners' shares in the firm's fixed capital, income or trading profits and capital or asset surpluses, ie. the amount by which the market value of the partnership assets exceeds their acquisition or book value".

21. I accept that the same holds true for Section 28(a). The rationale for the Rule of Equality being that, in the absence of any express or implied agreement between the partners, the partners consider their shares to be equal notwithstanding their contribution to the partnership be it Capital, Skill, Labour, Business connections or otherwise. It is to be presumed that having not expressed or implied their shares, then the Partners take their contributions of whatever nature to be equal. If it were otherwise, then they would have said so expressly or by implication. Whilst it may sometimes lead to some seemingly absurd or unjust outcome, it removes the need of putting value to the respective contributions of each partner when they themselves did not find it necessary to do so.

22. Whilst R has made a spirited fight to have his contribution given a bigger recognition than that of C and S, he has not been able to point

to an express or implied agreement between the parties that the shares should be unequal. R pegs his hope on the following submissions:-

> "The 2nd and 3rd Plaintiff have all along been dormant Partners and it is our submissions that the sharing of profits should be based on the amount of time, financial and material inputs of the Partners' contribution to the School Business".

I would take it that the reference to share profits is reference to Capital. But in the absence of a written Agreement or implied Agreement (which for example can be gleaned by the manner in which profits were shared), this Court has no option but to assume that the partners intended to have their shares considered as equal.

23. The opposing parties took a joint valuation of the Partnership which returned a Net total valuation of 109,715,673 as at 4th August 2017. This would be exclusive of a contentious loan amount of Khs.8,400,000/- from one Simon T. Wood (the Deceased) that the Court shall return to shortly. The Net Valuation of Ksh.109,716,673 comprises the following:-

Land & Building ……..78,500,000/=

Furniture & Equipment…….4,248,300/=

Motor vehicles ……..9,240,000/=

Business value ……..17,727,373/=

These values are agreed by the parties herein.

24. As the Court moves to assign a value to each Partner's share, it has to make an observation on the question of ownership of LR No. [Particulars Withheld] on which the School stands. Whilst the Valuer separated the value of the Land from that of Buildings, it seems obvious, and accepted by both sides, that the Buildings are part of the land. "Whatever is planted in (built on) the soil goes with the soil" is the maxim. The land is registered in the names of M, C and S as Tenants in Common in equal shares (Defendants Bundle pages 11 to 120). The law on Ownership of that Land, its partitioning or sale if it is incapable of being partitioned is to be found in part IX of The Land Registration Act (Act No. 3 of 2012). In her final written submissions of 23rd April 2018 M argues that this Court has no jurisdiction to deal with the dispute relating to land and that is indeed true. I have no intention of assuming jurisdiction which the Constitution and Statute does not confer upon me.

25. There is a controversy as to whether a loan was ever granted by one Simon Wood (now deceased) to the Partnership. The Plaintiffs deny that such a loan was ever taken by the Business or used towards payment of liabilities of the Partnership. That, in fact there is no claim of any such money from the Estate of the late Simon Wood. The Defendant is accused of making this claim on behalf of the Estate of the late Simon Wood. Because of the disagreement, the alleged loan was marked as a contingent liability in the Joint Valuation Report.

26. Is there evidence of this debt, and if so, how much? The evidence by Mr. K is that his friend one Simon Wood lent some Khs.14,000,000 to the School as a personal loan. That the money was transmitted by a Swift Transfer of £98,000 to one H K's Account No. [Particulars Withheld] at Cooperative Bank Ltd. At the Defendant's Bundle of Documents (page 363) is a copy of a Bank Statement of the Deceased showing a swift payment of £98,000 made on 25th September 2007 and at page 364 is a receipt of that transfer converted into Kenya Shillings (Kshs.13,181,000) into K's Account.

27. Also shown to this Court is what has been christened a "Lending Agreement" (D Bundle pages 361-362) entered on 24th February 2009 between Simon T. Wood on the one part and R K and M K t/a [Particulars Withheld] School on the other in which the 1st Plaintiff and the Defendant confirm receipt of the loan.

28. The Defendant gives a breakdown of how that loan was received and utilized. That statement shows that there was a balance of Khs.8,500,600 although the Defendant says it is Khs.8,400,000/=. Noteworthy are applications for Swift transfer by the 1st Plaintiff and the Defendant from Cooperative Bank Account No. [Particulars Withheld] to the said Mr. Wood on 18th September 2012 and 2nd February 2013 (D Bundle pages 368 and 370) of GBP 2164 and 2,785.71 respectively. Again shown are copies of Mr. Wood's statements showing these two inflows. Of significance is that in the Swift applications the purpose of payment is stated as "loan repayment".

29. All these evidence has not been controverted by the Plaintiffs and on this matter I believe the Defendant when he says that Khs.14,000,000 was lent to the School and it (partnership) owes Kshs.8,400,000 to the Estate of the Deceased. That debt has been established on a balance of probabilities and is a true liability and not a contingent one.

30. Just like the Capital of the Partnership, its liability will be shared equally amongst the Partners. Yet on the issue of liability, regard has to be given to the provisions of Section 48 of The Repealed Partnership Act which is the Rule for Distribution of Assets on Final Settlement of Accounts. It provides:-

> "In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed—
>
> a. losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;

b. the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order—

i. in paying the debts and liabilities of the firm to persons who are not partners therein;

ii. in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

iii. in paying to each partner rateably what is due from the firm to him in respect of capital;

iv. the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible"

(emphasis added)

31. Yet the evidence before this Court is that, although the debt to the Estate of Deceased is due, the Estate has not come forward to claim it. At least as of now! But the Plaintiffs are suspicious that the Defendant will be getting this money through the backdoor. That on this matter the Defendant has come with some cards facing down! On the other hand, following Section 48(b) above, such a debt ought to be paid out prior to the division of the Net Capital to the Partners and there is no knowing if and when the Estate of the Deceased shall be laying a claim. Balancing the interest and concerns of the Partners and giving regard to the Statutory dictate of Section 48, the Court directs that each Partner contributes equally to that debt and such contribution shall be paid into an escrow account to be controlled equally by the Plaintiffs on the one hand and the Defendant on the other. There has been no claim of interest on that loan and so the amount to be deposited is Ksh 8,400,000/=. That money to be paid out only to the Estate of the Deceased.

32. On the question of Land and Buildings, this Court has found that it has no jurisdiction to deal with the matter. In the absence of an amicable settlement between M, C and R, then, the Land Registration Act, no doubt, provides a way out.

33. The Court is now able to answer the two issues posed to it.

a. The Distribution of the Net Capital or value of Partnership shall be shared equally between the Partners.

b. The Defendant shall be paid the value of his Share by the remaining Partners so as to buy him out of the Partnership.

c. In respect to the debt to the Estate of Simon Wood, the Parties shall proceed as the Court has directed in paragraph 31 above. On this limb any party shall be at liberty to apply.

d. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 27th day of July, 2018.

F. TUIYOTT

JUDGE

***PRESENT*;**

Anzala for 1st Plaintiff

Byaharinga for 2nd and 3rd Plaintiffs

Machio for Defendant

Nixon - Court Assistant