



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**HCCC NO.203 OF 2008**

**STEPHEN MARIGI GATHIGI.....PLAINTIF**

**VS**

**GABRIEL GATHECA GITURA.....1<sup>ST</sup> DEFENDANT**

**MOSES SIRONIK MURAYA.....2<sup>ND</sup> DEFENDANT**

**NDUNGU MWANIKI.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. Kihoto Munyaka Building Company (Kihoto) is a Partnership which initially constituted of five (5) Partners. Stephen Marigi Gathigi (Gathigi) states that he is one of the five Partners and brings this suit against Gabriel Gatheca Gitura, Moses Sironik Muraya and Ndungu Mwaniki (the Defendants) seeking that they desist from transacting any business purporting to be Partners thereof.

2. A Certificate of Registration of Change of Particulars issued on 12<sup>th</sup> June 2007 pursuant to the Provisions of Section 14(2) of The Registration of Business Names Act shows the following to be registered as persons trading in the name of Kihoto:-

- Peter Gakuo
- Nahason Muraya
- Gathigi Gathuka
- Evanson Kangaca Mwaniki Karimia
- Kaboi Ngotho
- Ndauwa Wambu
- Gitura Turugi
- Mwathi Mumira
- Njeri Mwaura
- Nyakabi Mwaura
- Stephen Marigi Gathigi

3. Worthy of note is that none of the 3 Defendants is registered as a Partner. As to Gathigi there is a letter dated 10<sup>th</sup> November 2003 from this father Gathigi Gathuku indicating that he had transferred his shares in Kihoto to Gathigi. It would seem that the changes in Particulars came thereafter.

4. Gathigi alongside Daniel Kuria Kangacha had jointly been charged in Nairobi Criminal Case No. 1373 of 2009 with the following charges:-

(i) In Count 1 contrary to section 350(1) of the Penal Code Cap 63 Laws of Kenya it was alleged that on the 11<sup>th</sup> day of May 2007 at Ngong Township in Kajiado District, within the Rift valley Province, the accused jointly forged a certain form namely BN/4 NOTICE OF CHANGE OF PARTNERSHIP purporting it to be the Notice of Change done and signed by the Members of Kihoto Munyaka Building Company.

(ii) Gathigi faced another charge in Count 2 of uttering a false document contrary to section 353 of the same Act, it being alleged

that on the 12<sup>th</sup> day of June 2007 at Sheria House Nairobi within Nairobi area Province, he knowingly and fraudulently uttered a certain forged form namely BN/4 NOTICE OF CHANGE OF PARTNERSHIP to Colleta Maweu of the Registrar general of companies Nairobi purporting it to be a Notice of Change of partnership done and signed by the members of Kihoto Munyaka Building Company.

Parties hereto agreed to stay these proceedings awaiting the outcome of the Criminal matter.

5. The Criminal proceedings were concluded on 26<sup>th</sup> May 2015 in which both accused persons were found not guilty of the charges they faced.

6. The Notice of Change of Particulars issued under the provisions of Section 14(2) of the Registration of Business Names Act was not successfully impeached in the Criminal proceedings and is of significance in resolving the matter at hand. Section 14 of the Act reads:-

(1) On the registration of any firm, individual or corporation under this Act, the Registrar shall issue a certificate in the prescribed form.

(2) On the registration of any change in the particulars registered in respect of any firm, individual or corporation, the Registrar shall issue a fresh certificate in the prescribed form.

(3) Every certificate issued under this section shall show the full names or name of the partners or individual, and in the case of any person who has changed his name his former name or names, and in the case of any person not of British nationality his nationality, and in the case of any individual whose nationality is not his nationality of origin his nationality of origin, and in the case of a minor the fact of minority shall be shown.

(4) A certificate issued under this section shall be sent by registered post or delivered to the firm, individual or corporation registering, who shall thereupon exhibit and thereafter maintain the same in a conspicuous position at the principal place of the business so registered:

Provided that—

(i) where a fresh certificate has been issued under subsection (2), the provisions of this subsection shall apply to such fresh certificate only and not to the certificate originally issued: and

(ii) where any certificate has been lost or destroyed or rendered illegible, a copy of such certificate certified by the Registrar may be exhibited in place of the original.

5. Where a firm, individual or corporation registered under this Act has more than one place of business, the original certificate shall be exhibited and maintained as required by subsection (4) at the principal place of business and a copy of the certificate certified by the Registrar shall be exhibited and thereafter maintained in a conspicuous position in each of such other places of business.

6. If any firm, individual or corporation fails to comply with any of the provisions of subsections (4) and (5), every partner in the firm, or such individual, or such corporation, as the case may be, shall be guilty of an offence.

7. Section 20(1) of the same statute provides:-

“(1) A copy of, or extract from, any document kept, filed or registered at the office of the Registrar, and purporting to be certified under the hand of the Registrar to be true copy or extract, shall in all legal proceedings be admissible as *prima facie* evidence of the contents of the document”.

8. From that Notice the Plaintiff is a Partner in Kihoto and the Defendants are not. Although the Defendants are heirs of some Deceased Partners, they cannot by virtue of their positions automatically become Partners of Kihoto. The Partnership having been formed during the operation of the now Repealed Partnership Act (Chapter 29) is governed by the provisions of that statute. Section 37(1) of the Act is instructive as to what happens on the Death of a Partner and reads:-

“37(1) Subject to any agreement between the Partners, every Partnership is dissolved as regards all the partners by the death or bankruptcy of any partner”.

9. There is no evidence of any agreement to continue the Partnership and it is therefore dissolved by the Death of the Partners. The executors of the Deceased Partners have no right to become Partners with surviving Partners nor to interfere with the Partnership business.

10. For these reasons I grant the Orders sought in the Complaint dated 16<sup>th</sup> April 2008 with costs. It needs to be observed however that given the death of some partners the authority of the surviving Partners continues but so far as it is necessary to wind up the Partnership. In the absence of an agreement to continue with the Partnership, the Executors of the Deceased Partner, if so advised, can seek winding up of the Partnership and the distribution of the Deceased shares.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> day of September, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Odhiambo h/b Njugi for Plaintiff

N/A for Defendant

Nixon - Court Assistant