



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 178 OF 2012 (OS)

IN THE MATTER OF PARTNERSHIP OF PLOT NO.10 NDIMAINI MARKET

BETWEEN

DANIEL MWANGI MURIUKI.....1ST PLAINTIFF

SIMON KARIUKI RUKUNGU.....2ND PLAINTIFF

AND

JOYCE GATHONI THUA.....DEFENDANT

JUDGMENT

FACTS

1. The Originating Summons is dated the 7th August, 2012 wherein the applicant seeks for orders that this court does the following questions;

- (i) Should the partnership between the plaintiffs and the defendant in the ownership of plot No.10 Ndimaini Market be dissolved;
- (ii) Should the accounts of the partnership be taken from the year 2005 to date;
- (iii) Should the defendant account for all the income she has collected from the year 2005;
- (iv) Should this plot be valued and together with the income in the audited accounts be shared out among the first plaintiff, second plaintiff and the defendant in the ratio of 2:1:1 respectively;
- (v) Who should pay costs;

2. Directions were taken on the 23rd April, 2015 that the Originating Summons filed by the plaintiffs shall be deemed to be a normal Plaint and the Replying Affidavit in response shall be deemed to be the Defence; the parties were then ordered to comply with Order 11 of the Civil Procedure Code; the matter proceeded for hearing and thereafter the parties were directed to file written submissions in summary form; hereunder is a summary of the plaintiff's case and the defendant's response;

PLAINTIFF'S CASE

3. The evidence of Daniel Mwangi Muriuki (**PW1**) (hereinafter referred to as Daniel) was that he was the 1st plaintiff in the suit herein; that he is a son of the late Paul Muriuki who died on the 9/05/1980;

4. He testified that Muriuki Chiira and Thua Chiira were brothers and that Rukunga Mbaya was their cousin; Muriuki was employed at Gailey & Roberts in Nairobi; Rukunga was also working in Nairobi and was employed by Barclays Bank; whereas Thua was living at home and worked on a coffee plantation;

5. The property known as Plot No.10 was allocated to the three (3) brothers and cousin in 1946 by the Nyeri District Commissioner; the subject property was then undeveloped and a commercial plot and the three adopted the name 'Thua Chiira & Co'; he produced the search certificate and the same was marked as '**PExh.1**';

6. The two brothers mandated their cousin Thua to supervise the construction on the property and sent monies for materials and labour; the construction commenced in 1948 and was completed in 1952; in the front a shop was built and at the back two rooms were built and the units were rented out; the business that was carried out on the premises was that of a small hotel and a shop; and at the end of the year the income was shared;
7. His father passed on the 9/05/1980; Rukunga passed on the 2/06/1983 and Thua died in 1989; Daniel produced the two Death Certificates marked as **'PEXh.2'**; upon the demise of the three original owners their three widows took over the running of the property and they all shared the proceeds;
8. Upon his retirement together with the 2nd plaintiff they took over the management of the property from their respective mothers; that they modernized the premises and made improvements on it by connecting electricity; after adding value to the property he got a doctor to open a clinic thereon;
9. The income generated per unit was between Kshs.100 to Kshs.500/- per month; and the monies from the rentals was collected and deposited in the joint account held at Equity Bank Karatina Branch; the bank statements were marked as **"PEXh.3"**; the joint account was in the names of the Muriuki, Thua and Rukunga; that the account was for depositing the rents that were collected;
10. He later commenced the succession proceedings and obtained a Grant to the estate of his late father; his cousin the 2nd plaintiff also took out Letters of Administration to the estate of Rukunga who was his father; that he knew that Joyce had commenced succession proceedings at Karatina but no determination has been made that the plot belonged to her late husband because a caution on the property was placed by the plaintiffs;
11. All was well until when Joyce started making demands; a meeting was then held and an agreement drawn on the division of the four (4) shares; it was agreed that Daniel be allocated two (2) shares; that of the two shares one belonged to his late father and one belonged to his mother; that the 2nd plaintiff be allocated one (1) share and the defendant was granted one (1) share; pursuant thereto three (3) Share Certificates were issued and are marked as **"PEXh.4"**;
12. The agreement and all documents were signed by all the parties; but on the 1st July 2005 he again encountered problems from Joyce; her contention was that the subject property wholly belonged to her late husband; she also commenced collection of the rent directly from the tenants and did not share the proceeds; that he lodged a complaint with the County Council of Nyeri because this was where the property was registered;
13. Daniel, the 2nd plaintiff plus his two witnesses and the defendant and her daughter attended a meeting to resolve their issues; this meeting which was in the form of an arbitration was held on the 9/10/2007 between the litigants herein together with their respective witnesses and the mandated Council Committee; the parties paid Kshs.2000/- to the council as fees for the hearing of their case; under cross-examination he stated that he never coerced Joyce into going to the council meeting; that all along she knew that the council was the custodian of the property and she even willingly paid her share of the fees;
14. The deliberations and the outcome were recorded in the Council minutes produced as **"PEXh.5"**; at that point in time none of the parties had taken out letters of administration and this was reflected in the minutes; his evidence was that the council made no assumptions on the word **"Co"** as it was aware that the property was jointly owned by their parents; pursuant to the outcome of the hearing a letter dated the 28/01/2008 was issued with the directions that the plaintiffs and the defendant be registered as co-owners of the property; the letter dated the 28/01/2008 and search are marked as **"PEXh.6"**;
15. Despite the outcome of the Council the Joyce continued to singularly collect the rentals which she continues to collect directly from the tenants without sharing;
16. Daniel emphatically stated that he was suffering and continues to suffer as he was the one who paid the rates and continues to pay these Rates to the council for the subject property;
17. The plaintiffs called one witness in support of their case; Francis Maina Njoroge (**PW2**) in his testimony stated that around the year 1984 he used to be a tenant of Nyakiago Rukunga who was a widow of Rukunga and she was also his mother-in-law; and he operated a hotel business on the subject property from 1984 to 1986 and the rental was Kshs.200/- per month; this rental he paid to either the widow of Rukunga or to Muriuki's wife; that he never paid any rent to Joyce who would passby to check on whether he was still in occupation; he vacated the premises in 1986 because he got a job elsewhere; that during the period of his occupation he never had problems with the owners of the premises;
18. He recalled that he knew that there were other owners of the property namely Daniel and Joyce Gathoni Thua; but admitted in cross-examination that he did not know the details of the acquisition and the initial allottees nor the people who had constructed the buildings or shops thereon;
19. Daniel in closing his case prayed that the court dissolves the partnership; that accounts be taken from the 1/11/2005 to date; and the monies the defendant has collected to date be accounted for; that the building be valued and then sold and the proceeds be shared in the ratios of 2:1:1; and the defendant to shoulder the costs of the suit;

DEFENDANT'S CASE

20. The defendant (herein described as Joyce) stated that she got married to Thua Chiira in 1964 and was his third wife and widow; and confirmed that he was a brother of Muriuki and that Rukunga was a relative and from the same clan; she produced the Death Certificate of

her late husband marked as **(DExh.1)** that her husband was the owner of the plot in Ndiamaini having bought it from a Kameru whom he had a partnership with and had bought him out; she produced Search Certificate **(DExh.2)**; upon his demise she took out Letters of Administration at Karatina in Succession Cause No 115/2008 which cause is now in Nyeri; a copy of the Grant was produced and marked as **“DExh.3”**;

21. When she had gotten married she found the buildings thereon had already been built; which buildings were built by her late husband and consisted of a hall and four (4) rooms; which she later divided into a hotel with a kitchen, rooms for sleeping and a bar and butchery;

22. Her evidence was that her late husband had a business that used to sell beer; that an account was opened and the proceeds from the sale of the company assets was banked there; her contention was that the monies in the account was not from rentals but from the sale of bottles and jerricans of the company; that she was not a signatory to the account and had never withdrawn monies therefrom or been given any of the proceeds;

23. Joyce initially confirmed having sat down at a meeting with the plaintiffs; but later retracted and denied ever sitting down with them to discuss the issuance of shares; that when he brought her a letter she obliged and signed though she did not know why she was signing she did so because she trusted Daniel as a son;

24. She then received a letter from the Council summoning her to attend a meeting which she attended with her daughter; she thought she had been summoned because of the ongoing construction and therefore duly paid the fee so as to be allowed to proceed; that apart from showing the committee the Letters of Administration she never uttered a word; she confirmed that Daniel was invited to give his story; but later when she went to pay rates is when she discovered that the property now had three owners; she instructed her advocate to initiate a case for theft against the plaintiffs; but to date no action taken on the allegations of theft;

25. She reiterated that the plaintiffs did not have a share in the subject property and that the Council had nothing to distribute to them;

26. Joyce prayed that the plaintiffs case be dismissed.

3RD PARTY'S SUBMISSIONS

27. The third party called no witnesses and relied entirely on its Replying Affidavit made on the 19/03/2013 and also on its written submissions;

28. The third party submitted that the defendant enjoined it to the suit vide the Third Party Notice dated the 18/02/2013; in which the defendant claimed indemnity and or the return of Plot No.10 at Ndimani Market to the estate of the late Echford Thua Chiira; the defendants contention is that the third party unlawfully interfered with the estate of the deceased when it transferred the plot to the plaintiffs and the defendant to hold jointly;

29. This claim was controverted as follows; the plot had been given out by the District Commissioner in 1946 to Muriuki Chiira, Thua Chiira and Rukungu Mbuya; that Muriuki and Thua were brothers and Rukunga was their cousin; they adopted the name of Thua Chiira and Co. under which they registered the subject plot; thereon the three of them proceeded to put up shops and rooms for rental;

30. Upon the demise of Muriuki, Thua and Rukunga the property was taken over by the plaintiffs who are the sons of Rukunga and Muriuki; they were also joined by the defendant who is the widow of Thua; the three took over the property and the business and continued to run it in the same manner as their predecessors until 2005 when the defendant started collecting the rent without sharing it with the plaintiffs;

31. There ensued a dispute which was referred to the Third Party then known as the County Council of Nyeri; at a meeting held on the 12/09/2007 by a committee of the third party it was established that the word **“Co”** existed on the registration documents that the defendant in her proceedings acknowledged the existence of the word **“Co”**; there was ample evidence that the property was owned by more than one person; the search certificate **(PExh.1)** depicts the registered owner of the plot as being **‘Thua Chiira & Co.’**;

32. From the proceedings and from the minutes of the various meetings held between the plaintiffs and the defendant, she affirmed that there existed a partnership; the committee finally resolved that the property had been jointly owned and directed that the names of the plaintiffs and the defendant be entered onto the register in place of the original demised owners; the committee of the third party was well guided by the history of the property when it ordered the substitution;

33. That according to the minutes of the meetings it was clear that the defendant did not provide any evidence to demonstrate the existence of the succession cause; the alleged Nyeri Succession Cause No. 694 of 2008 was also filed after the arbitration of 12/09/2007 and the decision made by the third party; which goes to demonstrate that it did not interfere with the cause;

34. The evidence on record also demonstrates that all the parties being the plaintiffs and the defendant all paid the fees for arbitration and participated in the process; each was given an opportunity to present their respective cases; thus they all submitted to the jurisdiction of the third party for the adjudication of the dispute; the third party contends that there was no bias; that a fair hearing was conducted and that the decision reached was reasonable and binding to the parties;

35. That the issue of the defendant being illiterate does not arise; that even at the hearing hereof her demeanour when she testified showed that she was very literate;

36. The decision of the third party's committee has never been appealed against by the defendant; and her claim against the third party is an afterthought; there was no interference by the third party with the estate of the late Echford Thua Chiira hence it was not entitled to

indemnify and or return the subject property to the said estate;

37. That the claim against the third party cannot stand as it is no longer in existence having been dissolved in 2010; that any orders made against it would be in vain;

38. The third party prayed the suit against it be dismissed with the defendant paying the costs.

ISSUES FOR DETERMINATION

39. After taking into consideration the above evidence and upon reading the rival written submissions this court has framed the following issues for determination;

- (i) Whether a partnership can be implied because there is a registered property in the name of ‘**Thua & Co.**’;
- (ii) Who were the partners; whether there was a sharing agreement or formula; whether the business made profits; whether the parties ever shared any profits; whether the partnership should be dissolved;
- (iii) Whether the suit against the third party should be dismissed;

ANALYSIS

40. The plaintiffs had filed their claim by way of Originating Summons which is a procedure to be adopted in determination of clear simple and straight forward issues; the matters raised by the plaintiffs were found to be serious and complex in nature and could not be canvassed by way of affidavit evidence; a plaint was the only way to deal with such a case; in the case of Wakf Commissioners vs Mohammed [1984] KLR 346 the Court of Appeal held that;

“Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave thee parties to pursue their claims by way of ordinary suit”.

41. The saving grace was that directions were taken on the 23rd April, 2015 that the Originating Summons filed by the plaintiff shall be deemed to be a normal Plaint and the Replying Affidavit in response shall deemed to be the Defence; the parties then complied with Order 11 of the Civil Procedure Code as directed; then the matter proceeded for hearing;

Whether a partnership can be implied because there is a registered property in the name of Thua & Chiira Co;

42. At Section 3 of the Partnership Act a partnership is defined as a relationship between persons carrying on business together with a view to profit; from the evidence adduced by Daniel revealed that there was a plot that had been given out by the District Commissioner in 1946 to Muriuki Chiira, Thua Chiira and Rukungu Mbaya; that Muriuki and Thua were brothers whereas Rukunga was their cousin; and that there was an oral agreement by the parties that the name to be adopted for registration of the subject property was to be Thua Chiira & Co.; which name the defendant does not dispute was the name used for registration of the subject property;

43. The search document “**PExh.1**” also specifically sets out that “**The registered owner of Plot No.10 Ndimaini is Thua Chiira & Co**”; and without a doubt by the use of “**Co**” it may be inferred that the defendants late husband Thua was a constructive trustee of the persons mentioned in the plaintiff’s evidence;

44. Both parties confirm that the dispute was referred to the Third Party then known as the County Council of Nyeri for arbitration; the plaintiffs and the defendant confirmed that they were present at a meeting held on the 12/09/2007 by a committee of the third party; and that it was established that the word “**Co**” existed on the registration documents of the registration documents; and in the defendant’s testimony at the hearing hereof she also acknowledged the existence of the word “**Co**”;

45. This court is satisfied that there is ample evidence that property was owned by more than one person; that by the use of the word “**Co**” in registration of in the subject property it is abundantly clear that Thua had agreed with his fellow partners that the registration would be obtained by him in that name; and that from the date of obtaining that registration he held the property under a constructive trust for the others;

46. The defendant does not also dispute the fact that at the time she got married which was in 1964 she found the property had a building on it which consisted of a hotel and a kitchen; rooms for sleeping; a bar and butchery;

47. It is this court’s opinion that the type of construction described lends credence to the fact that the person(s) who constructed it had the intention of doing business whether rental or otherwise thereon; such a venture is sufficient evidence to imply the existence of a partnership;

Who were the partners; whether there was a sharing agreement or formula; whether the business made profits; whether the parties ever shared any profits;

48. This court is being called upon to determine who the partners were and also determine the life of the partnership; the defendant’s contention was that her late husband had a partnership with a person known as Kameru and that her late husband bought him out; but she gave no specific details of the consideration or of the date month or year when this transaction occurred;

49. The evidence of Daniel was that the partnership was between Muriuki Thua and Rukunga; upon the demise of Muriuki and Rukunga the running of the property was taken over by their widows; thereafter Daniel took over the running of the property together with the 2nd plaintiff and the defendant;

50. Section 39 of the Partnership Act provides that a partnership ceases where the partners die; in this instance by the year 1989 all the initial partners had passed on; there is evidence in the form of death certificates that corroborates the evidence of Daniel on the demise of his father Muriuki; there is also a death certificate for the father of the 2nd plaintiff; lastly the defendant provided the death certificate for her late husband 'Thua'; therefore it follows that the life of the partnership between the three came to an end upon their demise;

51. What happened thereafter is the meeting of three parties, even though the defendant denies this meeting; there is sufficient evidence that the parties herein resolved to take over the running and management of the property; the rentals in the same manner as their predecessors and a bank account at Equity Bank in which the rentals were being deposited; Daniel produced bank statements of an account held at the bank which was in the joint names of the Muriuki, Thua and Rukunga; and it reflects deposits upto December, 2004;

52. Daniel, the 2nd plaintiff and the defendant went further and allocated to themselves shares and resultant Share Certificates were issued and were duly signed by themselves; it was the defendant's contention that she trusted Daniel as a son and thus signed the document without knowing what she was signing; this court notes that she tendered no evidence on fraud or coercion nor was it alluded to in her replying affidavit;

53. It is the court's view that the actions of the plaintiffs and the defendant clearly support the submissions by Daniel that the existence of prior oral arrangements relate to the business of 'Thua & Co'; and is also sufficient proof of the existence of an implied business partnership entity between Daniel, the 2nd plaintiff and the defendant;

54. The same certificates indicate the number of shares each individual was allocated and is also proof that there was an agreement on the formula for sharing as between the litigants;

55. Whereas a partnership seeks by its definition that profits shall be made and shared; in this instance no evidence was adduced by the plaintiff on the profits made by the business; neither was there any evidence adduced as to whether there was ever any sharing at all of the profits; it is apparent to this court that due to the incessant ownership wrangles these two important factors could not be achieved;

56. This court is satisfied that there is documentary evidence and other evidence which confirm Daniel's evidence of the intention to create a partnership between the plaintiffs and the defendant; having observed the demeanor of the defendant at the hearing hereof this court found her not to be illiterate as she so claimed and found her to be a principal witness who was unworthy of credit;

57. This court is satisfied that the parties were partners; and that there was an agreed formula for sharing of profits;

Whether the partnership should be dissolved;

58. The life of the first partnership came to an end upon the demise of its partners; in this instance the plaintiffs are seeking to determine the life of their partnership through an order of the court; it is not in dispute that the defendant in breach of her duty to the partnership vide the succession cause filed in Karatina is attempting to acquire a title to the subject property in her own name; and it is also not in dispute that in breach of her oral agreement with the plaintiffs' whom the court has found to be her partners that she is collecting the rentals singularly and not depositing the same in the bank account; this means that the defendant is guilty of making a pecuniary advantage to herself; and that such conduct is calculated to prejudice the conduct of the business and to deprive the partnership of its property and the partners their benefits;

59. This court is satisfied that there are good reasons for making the orders for dissolution of the partnership;

60. Lastly Daniel sought accounts from the defendant from 2005; this court shall not delve into the issue of rendering accounts because questions of the limitation period may complicate this issue; it is also extremely doubtful whether the defendant would be able to reconcile and reimburse the rentals collected; it is this court's considered opinion that rendering accounts should not be a condition for the dissolution of the partnership but should be considered as a concession to the defendant;

Whether the 3rd party should indemnify the defendant;

61. From the proceedings and from the minutes of the meeting held between the plaintiffs, the defendant and the County Council committee; being well guided by the history behind the acquisition of the property the committee finally resolved that the property had been jointly owned by the initial owners; and the committee directed that there be a substitution and that the names of the plaintiffs and the defendant be entered onto the register in place of the original demised owners;

62. The evidence on record demonstrates that all the parties being the plaintiffs and the defendant paid the fees for arbitration and participated in the process; each was given an opportunity to present their respective cases; therefore they all submitted to the jurisdiction of the third party for the adjudication of the dispute; the third party contends that there was no bias and that both parties were accorded a fair hearing; and that the decision reached was reasonable and binding to the parties;

63. This court concurs with the third party's finding on the ownership of the subject property and therefore finds no reason to interfere with the decision of the third party's committee; it has also never been appealed against by the defendant;

64. This court is satisfied that the defendant is not entitled to seek indemnity from the third party nor to the rectification of the registration of

the subject property;

FINDINGS

65. For the forgoing reasons the court makes the following findings;

- (i) This court finds that a partnership can be implied from the registration of the property in the name of **'Thua Chiira & Co.;**
- (ii) This court finds that the parties were the partners; and that there was an agreed sharing formula for sharing of profits;
- (iii) There was no evidence on whether the business made profits; or whether the parties ever shared any profits;
- (iv) There are good reasons found for making the orders for dissolution of the partnership;
- (v) This court finds that the defendant is not entitled to seek indemnity from the third party nor to the rectification of the registration of the subject property;

DETERMINATION

66. The partnership between the plaintiffs and the defendant in the ownership of Plot No.10 Ndimaini Market be and is hereby dissolved; the time frame for the dissolution is ninety (90) days from the date of this judgment;

67. Accounts of the partnership be taken from the year 2005 to date to determine the moveable, immoveable assets and liabilities;

68. The income collected by the defendant from the year 2005 be deemed as a concession to the defendant;

69. The plot be valued and sold and the net proceeds be shared out among the first plaintiff, second plaintiff and the defendant in the ratio of 2:1:1 respectively;

70. In the event that there is a disagreement between the parties, the parties are at liberty to apply for directions on who should oversee the dissolution;

71. The suit against the third party is hereby dismissed; the defendant shall pay the costs.

72. The defendant shall bear the costs of this suit.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 27th day of September, 2018.

HON.A. MSHILA

JUDGE