REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 54 OF 2015

ERICA KETA KULUMBA t/a RISE & SHINE ACADEMY....APPEALLANT

VERSUS

EZERA MUGERA.....RESPONDENT

J U D G M E N T

Historical background and facts

1. As told by the Respondent and largely admitted or rather not expressly denied by the Appellant, Erica Keta Kulumba met Bilha Kahanga Mungera in early 1960s as a teacher and her student in some school upcountry. The two later re-united at Shanzu Teachers College as tutors in 1980 and got into a partnership called Bombululu Educational Services which ran a school christened Bombululu Academy. The partnership was on equal footing and the business was run on a rented premises where they paid monthly rent of Kshs.800/= to the proprietors of the land.

2. Bilha Kabaaga Mugera passed on in October 1993 and her widower, the Respondent, was appointed the administrator of the estate and thereby stepped into her shoes including assuming rights and obligations in the affairs of Bombululu Educational Services.

3. The parties herein were thereafter not able to operate smoothly and therefore opted to part ways upon sale of the assets of the partnership. The parting of ways was crafted in a written agreement dated 31/5/1999 whose consideration was informed largely by a valuation report prepared by KILIRU & COMPANY VALUERS, dated 26/6/1995. The salient terms of the agreement which is the foundation of the dispute between the parties were that the two, ERICA KETA KULUMBA and EZARA LUGANO MUGERA would sub-let the premises the school was operated upon together with its assets to one RISE AND SHINE ACADEMY therein called the financier at a monthly rent of Kshs.14,000/= for a period beginning January 1995 and ending in December 2002. The rent for the entire period was computed in the agreegate sum of Kshs.1,344,000/= and made payable in annual instalments of Kshs.336,000/= with effect from 31/12/1999 and thereafter on the last day of each succeeding year till payment in full.

4. It was also a term of the contract that the said financier would buy from the two, the assets of the partnership at a price and consideration of Kshs. two million six hundred thousand only. That purchase price would also be paid to the two by four equal instalments of Kshs.600,000/= on the due dates as rental income. A deposit of Kshs.200,000.00 of the purchase price was paid upon the execution of the agreement. The entire payment by the financier being Kshs.3,944,000/= was covenanted to be due and payable in full by the 31/12/2002 and the two parties would share the same in the ratio of 50:50%. To the Respondent the Appellant who was also the proprietor of the financier, Rise & Shine Academy, became difficult and did not pay as agreed while to the Appellant there occurred intervening and extenuating circumstances which made the agreement not be performed fully by payment hence the suit resulting into this appeal.

Pleadings by the parties

5. By her plaint dated 23/12/2002, amended on 16/7/2002 and further on 1/9/2012 and further on 1/9/2012, the Respondent sought to recover from the Appellant; permanent injunction to restraining the demolution or alteration of the buildings in the premises let, Kshs.925,950/=, vacant possession, mesne profits at the agreed rents or higher rates as deemed just by the court as well as costs and interests.

6. To the plaint the Appellant filed a statement of defence in which she came out as the name behind RISE & SHINE ACADEMY, denied that her and the Respondent were proprietors of the lands on which the academy was run, LR No. 1305, Plot 1 & 2, Section 1/MN and clarified and named who the proprietors of the land were. The partnership with the Respondent was equally denied with a clarification, without prejudice, that the only partnership that existed was between the Appellant and the Respondents' deceased wife and the appellant denied leasing the proprietory from the plaintiff. There was then denial of the obligations to pay to the respondent any money as pleaded and at all, the execution of the agreement was itself denied without prejudice pleading that if any was ever executed, it was voidable or just frustrated by interviewing circumstances known to the Respondent but after a sum of Kshs.1,027,000 had been paid to the Respondent. The defendant then denied the jurisdiction of the court on the basis that the value of the subject suit premises exceeded the pecuniary jurisdiction of the court with a rider that the suit was incurably defective deserving being dismissed with costs.

Evidence by the parties

7. Based on the pleadings on record each side gave evidence by themselves without calling any other witness. In his evidence, the Respondent, as plaintiff then, produced a certificate of registration of the school in the joint names of the Appellant and his deceased wife as well as a grant of letters of administration issued to him by the High Court, Mombasa. He gave further evidence that the business progressed on well till sometimes in 1998 when he realized that the postal address and bank signatures had been changed and the appellant took sole control of the affairs of the business. Even the name was charged from Bombululu Academy to Rise and Shine Academy. Parties then agreed to dissolve the partnership and had the agreement reduced into writing in 1999 and witnessed by a lawyer. That agreement was produced as Exhibit P4. He said that in the agreement the appellant signed as partner and also for RISE & SHINE ACADEMY. He said that the entire payments were due by 31/12/2002 but were not so paid and there was Kshs.925,950/= he was claiming as at the time of filing suit. He produced ensuing correspondence between him and the Appellant as exhibit P5 and Demand Letter as exhibits P7. He sought to be paid unpaid sums and Kshs.7,000/= per month being his share as rent/mesne profits till payments in full.

8. In cross-examination, the witness admitted he did not know the registered proprietors of the land which the school was run and said that they were obligated to paying rent to the owners. He also admitted that the sum due from RISE AND SHINE ACADEMY was due to him and the Appellant equally but said that the agreement was signed by the Appellant in two capacities – partner and financier.

9. For the appellant evidence was led which did not deny the partnership with the deceased. It also admitted that after the death of the deceased, the Respondent and her continued to run the school. She however pointed out that she was only part of the RISE & SHINE ACADEMY whose management she blamed for failure to pay the sums agreed and that due to disharmony in running the school the agreement was made. She admitted that valuation was done but denied that the institution was sold. He said that she only paid to the Respondent the sum acknowledged as the manager of RISE & SHINE ACADEMY and did not complete due to financial difficulties. She said she was never paid by RISE AND SHINE ACADEMY only to find herself in court as a victim of circumstances but admitted that RISE & SHINE ACADEMY broke the agreement.

10. In cross examination, the witness admitted having run the school with the deceased as partners and that the deceased contributed to the construction of the structures in the school. She denied having seen the valuation report but admitted that the valuer was known to both of them and that the valuer visited the school and she spoke to him.

11. On the agreement she admitted negotiating same and executing it both on her own behalf and on behalf of RISE AND SHINE ACADEMY and that as at the date of testifying she was the manager.

12. Having listened to the evidence and took into account the parties written submissions, in a reserved judgment, the trial court held that the suit against the appellant was not time barred, that the dispute was the interpretation of the agreement dated 31/5/1999 produced as exhibit P4. Having so proceeded the court held:-

> "***I therefore find that the plaintiff brought the suit herein against Erica Keta Kulumba t/a Rise & Shine Academy properly and he could properly claim to be paid the outstanding balance against the defendant. The plaintiff said that he was partly paid by the defendant and that a balance of Kshs.925,950/= remained unpaid. He produced a record of payment (P. Exhibit 5) which the defendant did not challenge. I am convinced that the defendant did not pay the said amount to the plaintiff.***
>
> ***The ground rent if the plot where Rise & Shine Academy took over was said to be paid to the plot owner, the plot was therefore not previously owned jointly by the plaintiff and DW 1. The Academy was also said to have grown since it took over from Bombolulu Educational Services. That being the case and from the foregoing, a permanent injunction as prayed under prayer (a) (i) and an order of vacant possession as sought under prayer (b) of the further amended plaint cannot issue and I decline to grant the same.***
>
> ***The plaintiff did not sufficiently established that he was paying his part of the ground rent prior to December 2002. As such, I therefore decline to award the plaintiff the mesne profit that he had sought for under prayer (b) of the further amended plaint. I however enter judgment for the plaintiff against the defendant for a sum of Kshs.925,950/= plus costs and interest at the current court rates from the time of filing the suit until payment in full".***

13. That is the judgment which has aggrieved and dissatisfied the Appellant and against which this appeal has been pursued on the five(5) grounds of Appeal in the Memorandum of Appeal filed on 17/4/2015. The totality of the grounds are that:-

> **i. "The trial court should have adjudged the suit statute barred.**
>
> **ii. That the court shifted the burden by finding that the Appellant failed to produce a document to show ownership of Rise & Shine Academy and thereby finding that the Appellant and Rise and Shine Academy was one and the same person.**
>
> **iii. That it was erroneous to find the agreement dated 31/5/1999 binding upon the parties to it.**
>
> **iv. That there was never provided in the agreement the remedy of specific performance and that both parties were discharged from any liabilities incurred by the said Rise & Shine Academy".**

Issues for determination

14. Having read the record of proceedings as captured in the Record of Appeal, the judgment by the trial court and the submission offered by parties as orally highlighted, I have taken the view that the following issue demand determination by the court.

i. Did court have jurisdiction to entertain and determine the suit?

ii. Was the suit against the Appellant statute barred?

iii. Who was behind and trading as Rise and Shine Academy?

iv. Did the trial court commit any error as to entitle this court to interfere and intervene in the judgment appealed against?

v. What orders should be made as to costs?

Jurisdiction of the court

15. This issue, albeit pleaded by the Appellant in the statement of defence was never taken up, canvassed nor determined by the court. However, jurisdiction is everything and this court being a first appellate court is entitled and obligated to consider every aspect of the matter even those not determined at trial and to come to own conclusions.

16. The entirety of the evidence was that there was no claim to title of the suit land which was admittedly owned by persons not party to the suit. The dispute was strictly payment of the sum of Kshs.925,950/= being the unpaid sum based on a contract and an order for injunction to stop the Appellant from carrying out demolitions and development on the suit property. The value of the land, its title not being in dispute, was never invited to the litigation and was not subject of determination to influence the jurisdiction of the court. The claim as framed and filed was within the pecuniary jurisdiction of the court and therefore the objection was improperly pleaded. Maybe that informed the decision not to pursue it. I do find that the trial court was properly seized of the requisite jurisdiction to hear and determine the suit.

Was the suit statute barred?

17. According to the agreement dated 31/5/1999, the bedrock of the dispute, the sums due were due and payable in full by the 31/12/2002. The suit was filed in December before the last date for the payment of last instalment. It cannot be said that it was statute barred. Having been grounded on a contract the suit could be brought anytime upto the 30/12/2008. However, the appellants contention was grounded on the fact that when the amendment was effected to name her as trading as RISE & SHINE ACADEMY, the matter had become statute barred. To address that concern, one needs to look at the amended plaint dated 16/7/2004 and the defence to it dated 11/7/2004. That plaint does not name the defendant by name but says RISE & SHINE is a firm or sole proprietorship. However when served, the defendant, other than denying the fact of being a firm or sole proprietorship, stated at paragraph 2 of the said defence:

> **"THE Defendant makes no admission to the description of the parties in paragraphs 1, 1b and 2 of the Amended Plaint in as far as it refers to her save that her name is Erica Keta Kulumba and she trades as Rise and Shine Academy. The Defendant's address for service for the purposes of this suit is care of DECHE, NANDWA & BRYANT ADVOCATES, Imperial Bank Bldg, 1st Floor, Nkrumah Road, P.O. Box 88614, MOMBASA".[emphases provided]**

18. Having been effected in 2004, the suit cannot be genuinely doubted to have been filed within time. That pleading by the Appellant by rules of pleadings bind the Appellant and she could not be allowed to depart from it otherwise than by an amendment. In fact it is the Appellant who identified herself with the RISE & SHINE ACADEMY. The Respondent was content to proceed against it as a firm but the Appellant lifted that vail and exposed herself as the person and figure behind the name. Under order 30 Rule,9 a persons trading in a names other than theirs are suable by such names and a suit cannot be defeated merely because one has not named the person trading in the business name.

19. Having so exposed herself and with the evidence by herself as DW 1 that she ran and managed RISE & SHINE ACADEMY and signed the agreement on its behalf the question of who was behind RISE & SHINE ACADEMY was not in dispute and was not due for the court to investigate. Courts determine disputes and have no business creating or crafting dispute where parties say there exist none. I therefore resolve issues no. 2 & 3 to the effect that the suit against the Appellant was filed within time was not statute barred and that it was the appellant who was the natural person behind RISE & SINE ACADEMY having identified self as such by her pleadings which bound her.

What were the terms of the agreement between the parties?

20. In ground 5 of the Memorandum of Appeal the appeal faults the trial court for having found for the Respondent for the payment of the sum claimed when there was no restitution in the agreement as a remedy and by so finding when the agreement had absolved the two parties from any liabilities of RISE & SHINE ACADEMY. That ground merely calls upon the court to construe the intention of the parties in the agreement.

21. Having read the document, as juxtaposed against the judgment, it is clear to me that the agreement was wholly binding upon the parties and that is why upon entry and payment the Respondent refrained from the affairs of the school as the Appellant took full charge and infact strived to pay the consideration even when she expressed huge financial difficulties.

22. The agreement imposed duties and obligations on the parties. The financier in particular was to enjoy the occupation and user of the premises so long as, she paid the agreed rent and purchase price. He took possessing on that premise and covenant to pay and did enjoy such possession. Can it be said that the Respondent could not recover the balanced of the consideration unless that be provided in the agreement? I do not think so. The rights of the Respondent to expect, receive and sue for the payment accrued the minute the agreement was executed provided there was a default. This finding is not affected by clause 6 of the agreement which absolved the Appellant and Respondent from liabilities incurred by the financier during the lease period. To this court, that clause only absolved the two from the liabilities incurred after execution of the agreement but not from the terms of the agreement. To say otherwise would be to make the entire agreement meaningless

when the parties had acted on its terms with the belief that rights and obligations had accrued and vested.

23. In any event, the suit before the trial court was not one for restitution Integrum. It was a pure case of sum due and owing. I do find no merit on that ground and have the same dismissed.

24. The sum total of the foregoing finding and holdings is that the entire appeal is bereft of merit and the same is hereby dismissed with costs.

Dated and delivered at Mombasa this 19th day of October 2018.

P.J.O. OTIENO

JUDGE