



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 456 OF 2012

THEOPHILUS MUTINDA MUTUA.....APPELLANT

VERSUS

ONESMUS MUTINDA KIMINZA.....RESPONDENT

(Being an appeal from the ruling and orders of the Honourable Ms. Mutuku (SRM)

delivered on the 13th August, 2012 in the Thika CMCC 66 of 2006)

J U D G M E N T

The Respondent herein Onesmus Mutinda Kiminza sued the Appellant Theophilus Mutinda Mutua following an alleged breach of contract.

The Respondent pleaded that on diverse dates in the year 1984, the parties entered into a Partnership agreement to start a partnership and started a business in the name and style of Mutinda Stores carrying out business in hardware and later food store. He averred that in the year 1994 to 1995, the Appellant joined the business as a full manager. The partnership was fine until May, 2005 when the Appellant without reference to the Respondent registered a business name which was a sole proprietorship in the name of Mutinda Stores despite the fact that the business was jointly owned.

The Respondent further claimed that the Appellant enjoyed the partnership and the name Mutinda Stores while still managing the Partnership Business violating the principle of utmost good faith. He claimed that on the 10th December, 2005, the parties agreed that the Appellant as the manager do stock taking amongst others for purposes of dissolving the Partnership. He averred that on 31st December, he realized that the Appellant had not dissolved the business but was still withdrawing money from their account for his own use. The Respondent, therefore, sought the dissolution of the Partnership and injunction for closure of the Partnership (stated as pleaded).

When the matter came up for hearing of the Application dated 27th April, 2012, the magistrate ordered that all the shops be re-opened after proper accounts have been taken and inventory hereof of all the goods contained therein and upon establishing the ownership of the goods. She further ordered that the Appellant do sign and approve the audited financial statement for the years 1987 to 6th March, 2006 prepared by Madawa Auditors & Company within 21 days of delivery of the ruling and that failing to comply with the order, the Respondent may proceed to file the audited reports and the same be deemed as duly approved by the Appellant.

The Appellant aggrieved by the learned magistrate's decision aforesaid filed this Appeal and has listed the following Grounds of Appeal:-

- 1. That the ruling appears to have been made without looking at the background, the material facts and basis of the suit.**
- 2. That the learned magistrate did not realize that the plaint was based on false allegations.**
- 3. That affidavits of the complainant and those of the defendant were not exhaustively considered in that the complainant admits that one of the above interested parties was a share holder and the accountants report does not show his share contributions in the partnership.**
- 4. That the learned magistrate erred by ordering the defendant to sign a document that was incomplete due to the following facts.**
 - a. The businesses started in 1984 while the accountants report starts with the record of 1987 hence making the report incomplete.**
 - b. The accountant report does not show the share contribution of the interested parties.**
 - c. The fact that the interested parties are share holders then the accountant failed to show their shares, profits, losses, credits and debits and because of that they are supposed to approve and sign the same report.**
 - d. The accountant failed to show what the interested parties have in Mutinda stores because of which the complainant made them parties to this suit.**
 - e. The fact that the interested parties have never been heard or given a chance in a court of law to defend their property makes the said accountant's report invalid and lacking merit of approval.**
 - f. The fact that the accountant failed to show the origin of the money Mutinda stores used in carrying out the major constructions, vehicle purchases and buying other assets outlined in the report makes the report incomplete.**
 - g. The fact that the honourable magistrate did not compel the complainant to bring to court our minutes of agreement on dissolution of the partnership makes the document incomplete.**
 - h. In the above minutes in December 2005 I was authorized to withdraw my money from Mutinda Stores, the accountant failed to show the source of money and stock for running the business during January to March 2006 this makes the report inaccurate, non-predictive and inadequately incomplete.**
 - i. The fact that the accountant's report does not show customer cash deposits, material deposits, credits and debits makes the report incomplete.**
 - j. The honourable magistrate did not consider my request to bring to court our accounting methods to prove this report as invalid.**
- 6. The honourable magistrate erred in law because there is no court that can order one person to approve and sign a document that involves properties of other interested parties without their consent:- more so when they have been brought on board by the complainant.**
- 6. That the learned magistrate erred by not considering the other interested parties in the suit in her ruling.**

7. That the learned magistrate erred by not taking into account all other mentioned parties and suppliers with their financial relationship with the partnership business.

8. That the learned magistrate erred in not considering that the accountant's report does not disclose the total assets, origin of the finances for purchasing the same and or constructing the same thus the accountants report failed to disclose full facts of the partnership business.

9. The appellant was aggrieved by the ruling and orders of the honourable magistrate due to the following facts:-

i. The fact that the court has not visited the site before the ruling

ii. The fact that the court made the ruling before seeing our minutes of agreement on the partnership agreement

iii. The fact that this ruling was made without considering the issue of customers deposits and mode of their compensation.

10. The appellant was aggrieved by the ruling and the orders of the honourable magistrate because they were given before considering the following facts:

i. There were no grounds, no material facts on which the plaint was based to justify this suit.

ii. The fact the plaint was based on false allegations.

iii. The fact that the court order dated 7th March 2006 was ambiguous because it never specified the plot numbers of the shops that were supposed to be closed especially when there was the issue of rival businesses.

iv. The issue of our minutes of agreement which authorized me the appellant to withdraw my money from the business and the complainant rushed to court accusing me of withdrawing money from the business and starting rival businesses. This means the complainant pushed me to commit the act so as to get grounds for instituting this suit.

11. The learned magistrate did not consider the issue I raised concerning the rival businesses.

The Application dated 27th April, 2012 had been filed by the Respondent seeking to review orders that had been made on 7th March, 2006. The orders of 7th March aforesaid provided for the shops at Kasinga, Kaewa, Katethya and Kwa Nthuka be closed temporarily to facilitate stock taking, valuation and the parties to appoint a mutual auditor. The Respondent claimed that the shops were closed as per the orders of the court but the Appellant broke and opened them without authority from the court leading to contempt of court proceedings.

In response to the Application the Appellant irregularly filed a supporting affidavit and objection to the Application where he claimed in pertinent paragraphs that the court do visit the site of Mutinda Stores at Masinga Market before reviewing the orders made on 7th March, 2006 for the court to establish if indeed there was a rival business. He also requested the court to visit the business and establish or assess the wastage, loss incurred due to the orders issued on the 7th March, 2006 and that legal procedure be put in place before any of the shops can be opened. He argued that if the shops are opened arbitrarily and released to the owners a lot of evidence will be lost and exhibits destroyed and if they had to be opened and released to the owners, the same should be done according to the law.

In his grounds of appeal, the appellant raised an issue on ground 3 of the Appeal where he claims that the Affidavits were not considered. He has referred to some third parties who are not parties to the case

whom he alleges are shareholders in the business and that the accountant report did not show their contribution in the partnership. The learned magistrate did her best to consider the same. Despite filing of a defective affidavit, the trial magistrate was lenient on the Appellant and picked up the necessary response that befitted the application in coming up with its decision.

In grounds 4, 7 and 8 of the Appeal, the Appellant claims that the learned magistrate erred by ordering the Appellant to sign a document that was incomplete. He considers the document to be incomplete due to the fact that the businesses started in 1984 while the accountant's report starts with the record of 1987 hence making the report incomplete. The other reasons given why the report is not complete are not relevant to these proceedings because they touch on third parties who are not parties to the case. The Appellant failed to avail all the books of accounts required by the Auditors and refused to co-operate with the auditors for his input in the audited accounts. In my view, it is clear that the Appellant is crying foul for no reason other than to delay the completion of the suit which delay is prejudicial to the Respondent. The excuses given by the Appellant for not appending his signature on the auditor's report are not justified yet both the Appellant and the Respondent agreed on the said auditor to prepare the report.

The issue of customers' deposits and their compensation is a matter that will be decided upon dissolution of the Partnership during which the partners will be required to pay their creditors if any.

It is clear that the Appellant was not willing to sign the report and he has no good reasons for his failure to do so. It is unfortunate that this matter has dragged on since 2006 while the business premises are being wasted. The parties should move fast and have the matter heard and concluded so that the Partnership is dissolved now that it is no longer a going concern.

It is unfortunate that though the Appellant filed the Appeal herein, his grounds of Appeal were irrelevant to the case and this court has no option but to dismiss the Appeal with costs.

Dated, signed and delivered at Nairobi this 31st day of March, 2016.

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L NJUGUNA

JUDGE

In the presence:-

..... ***for the Appellant.***

..... ***for the Respondent.***