



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NUMBER 29 OF 2015

KIBUI GICHIGO AMUTAVI.....PLAINTIFF/APPELLANT

VERSUS

ELIAS MONYEKA KIHUTWA.....DEFENDANT/RESPONDENT

RULING

1. This case was filed on the 22nd April 2015. Both the plaintiff and the Defendant are said to be residents and working for gain at Nyahururu Town. The subject matter of the suit is a partnership – a business in the name “*Club Heritage Home of Comfort*”.

It is stated that each of the parties contributed financially towards the renovation, buying furniture and all other items towards the business that the two parties jointly purchased under an agreement dated 10th November 2014 for a sum of Ksh.100,000/= which sum they paid in full. However, it appears that a dispute arose as to the operation of the office business. The plaintiff filed this suit seeking an order of dissolution of the partnership and sharing equally of the proceeds and profits therefrom between the plaintiff and the defendant.

2. In his defence, the defendant denied existence of any partnership business between himself and the plaintiff nor any contributions by the plaintiff towards the business alleged to be a partnership as none existed. It is his statement that the business was a sole proprietorship that he alone purchased the business premises and injected capital and dismissal of the suit with costs.

3. Together with the plaint, an application under the provisions of **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** was filed seeking orders for the immediate closure of the business and in the alternative an order to restrain the defendant from preventing the plaintiff from accessing the “*Club Heritage Home of Comfort*” among other prayers. The defendant by his preliminary objection dated 25th July 2015 and filed on the 27th July 2015 raised the following grounds of objections:

- (1) *That from the the pleadings, the defendant resides in Liakipia University.*
- (2) *The plaintiff to resides and works for gain at Nyahururu.*
- (3) *The sale agreement and cause of action arose at Nyahururu.*
- (4) *The business subject of the suit is situated at Nyahururu township.*

(5) That there is a Chief Magistrates Court within Nyahururu town the is competent to hear and determine the suit.

(6) That the High Court has appellate jurisdiction to hear and determine appeals from the said Chief Magistrate's court at Nyahururu.

(7) That filing of the suit at the High court is an abuse of the court process and in contravention of the **Section 11, 12, 13,14 and 15 of the Civil Procedure Act**.

He urged the court to strike out the suit with costs.

4. In his submissions on the Preliminary Objection, M. Chege Advocate for the plaintiff conceded that all the parties and the cause of action arose at Nyahururu, within Laikipia County.

He however stated that the subject of the suit was a **partnership**, which is governed by the provisions of the **Partnership Act Number 12 of 2012 Section 2** - that **interprets a partnership as:**

“the relationship which exists between persons who carry on business in common with a view of making profit.”

To buttress his assertion, he stated that each of the two partners contributed capital in excess of Kshs.589,000/= towards the business. Citing **Section 2 of the Act**, he submitted that “**Court**” means the **High Court where the gross assets of a partnership does not exceed Kshs.300,000/=**. He further submitted that, as the gross assets of the partnership was more than Kshs.300,000/=, the High Court is the court that has jurisdiction to hear the case, and that this court is the relevant High Court.

5. The defendant submitted that the suit ought to have been filed in the Chief Magistrates Court at Nyahururu or in the High court if there was substantial question of law to be tried. He cited Sections 11- to 15 of the **Civil Procedure Act** to support the objection and urged the court to exercise its power Under **Section 18(1) of Civil Procedure Act and Order 47 (6) (2) of Civil Procedure Rules** to transfer the suit to the Chief Magistrates court. The matter of the alleged partnership was not mentioned at all.

6. An objection to the jurisdiction of the court goes to the core of a case. As stated in the “Lillian S” case – **Owners of Motor Vessel “Lilian S” -vs- Caltex Oil Kenya (1989) e KLR**. Jurisdiction is everything, and the moment a court realises that it has no jurisdiction, it ought to down its tools, See also **Supreme Court Application No. 2 of 2011 Samuel Macharia & Another -vs- KCB(2012) e KLR**. From the pleadings, it is evident that the cause of action is based on an alleged partnership between the plaintiff and the defendant, and which the defendant denies. The plaintiff states that “**Club Heritage Home of Comfort**” is a joint venture where both parties injected capital in excess of Kshs.589,000/=, and both were expected to share profits from the business.

7. The issues for the court's determination, as to whether or not it is seized of the necessary jurisdiction are two fold:

(1) *Whether the subject matter of the suit and/or cause of action is a partnership.*

(2) *If the answer is in the affirmative, does the High Court have territorial or pecuniary jurisdiction to hear an determine the suit?*

I have stated above, and without going into the merits of the case and the application as filed, that it is evident that there is a relationship between the plaintiff and the defendant who carry on a business in common with a view of making a profit. The definition of a partnership under **Section 2 of Act No. 12 of 2012**.

Section 3(1) states that:

“a partnership is the relation which subsists between persons carrying on business in common with view to profit.”

8. The Act defined a “Court” as the High Court where the gross assets are more than fifty thousand shillings. It is not in dispute that what each contributed into the purchase and capital of the business is more than Shillings Fifty Thousands, but also subject to proof of each parties actual contribution.

From the definition, there are three essential facts without which a partnership cannot exist. These must be:

(1) a business

(2) carried out in common

(3) with a view of profit.”

In a business where profits are shared, it is concluded that *prima facie* there is a partnership that may be oral or in writing. The Act is silent on this. I have taken into account the parties pleadings. All allude to the existence of a business partnership. What is in issue is the share holding and/or what capital each injected into the business and sharing of the profits from the said business.

9. Parties are bound by their pleadings. From the above, it is now evident that there was a partnership between the plaintiff and the defendant. See the case **Hellen Wangari Wangechi -vs- Carumera Muthoni Gathua (2015) e KLR.**

I have stated above that the gross assets of the partnership as may be deduced from the pleadings, is well over the limit given in the in the Act. A Resident Magistrate is granted jurisdiction to hear and determine partnership disputes where the gross assets do not exceed Kshs.50,000/=. The court, defined as the “High Court”, is granted jurisdiction where the gross assets are over Fifty Thousand Shillings. It therefore follows that the Resident Magistrate's court cannot hear and determine disputes in a partnership where the gross assets are more than fifty thousand shillings. That leaves the High Court with the necessary jurisdiction to determine the dispute and the burden of proof will depend on whether the plaintiff will satisfy and discharge such burden to the required standard.

10. The two issues as framed in my considered view are answered in the affirmative. Consequently, the court finds that the suit hereof is filed in the proper court with the necessary jurisdiction.

The upshot is that the preliminary objection is without legal basis and is dismissed with costs.

Dated, signed and delivered in open court this 26th day of May 2016

JANET MULWA

JUDGE