REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 62 OF 2013

NICODEMUS IRERI ARTHUR MAIRANI.....APPELLANT

VERSUS

JOSIA KATHEE G. NJIRU

JACOB NJERU NJIRU

PATRICK NJUE GEORGE

MOSES NJUKI

SIMON NTHIGA GEORGE

BENSON NJERU.....RESPONDENTS

JUDGEMENT

1. This is an appeal by the appellant against the judgement of the Chief Magistrate dated 26th November, 2013 which in terms of its main content is as follows.

> *"The defendants prayer of taking accounts is considered. I have looked at the defendants further statements where they have tabulated the amount received in this matter. The plaintiff is silent on the rent he has received throughout the period 2000 to date. I direct that accounts be taken to establish the rent payable. I further direct that both parties shall agree on the firm of auditors to take such accounts to establish how much the plaintiff should pay to the defendants.*
>
> *On the 2nd prayer of sharing of the plot, I direct that the plot be shared out equally between the parties. That sharing out should be done in smooth manner so as not to interrupt the businesses of tenants on the premises. The parties to agree on smooth sharing of the plot failure to which parties shall propose to court how to share the plot and units thereon.*
>
> *I further direct that rent from all the units from month of December 2013 and onwards be deposited in an interest earning account in names of both parties and their advocates pending smooth taking of accounts and sharing of the plot.*
>
> *Each party shall bear their own costs."*

2. Its clear from the foregoing passage that no evidence was tendered in the form of audited accounts which would have formed the basis of determining how much money was due to both the appellant and

the respondents. This explains why the trial court directed that *"accounts be taken to establish the rent payable."* And the trial court went further to *"direct that both parties shall agree on the firm of auditors to take such accounts to establish how much the plaintiff should pay to the defendants."*

3. Furthermore, the foregoing is a clear indication that the trial court was lacking evidence upon which it would have decided the amount of money due and payable to the appellant and to each of the respondents. In our adversarial system, it is upon the parties to tender evidence in support of their case. It is only in rare cases that a trial court is called upon to call a witness upon its own motion (*suo motu*) in terms of *section 22 (b) of the Civil Procedure Code (Cap 21) Laws of Kenya.* The provisions of that section do authorize the court at any time either on its own motion or on the application of any party to issue summonses to persons whose attendance is required to give evidence or to produce documents. This section vests in the court inquisitorial powers to call witnesses on its own motion if in its opinion such a person's attendance is required either to give evidence or to produce documents.

4. The trial court in respect of the 2nd prayer of sharing the parcel plot that was contested, directed that the plot be shared out equally between the parties. This finding does not appear to be supported by the material produced at trial by the parties. In this regard, it is important to point out that only the appellant/plaintiff testified as PW 1 and at the end of his evidence, Mr Mugo for the appellant is recorded to have stated as follows: *"We have filed list of documents that we shall rely on and other witnesses will refer to them."* In response, Mr Kathungu for the respondents/defendants is recorded to have told the trial court that: *"The documents they dont have date file in court but can confirm from the one filed in court if they are the same. Seek brief adjournments."*

5. Thereafter, both counsel agreed that the respondents/defendants agreed that the appellant/plaintiff had spent more money than the respondents without specifying the exact amounts of money contributed by each party. They also agreed between themselves that the only issue in contention was whether the appellant/plaintiff had repaid himself and whether that was the agreement. At the end, both counsel agreed that the case was going to be determined by way of submissions by each party.

6. With the above agreement between both counsel, the trial court approved that mode of resolving the issues in dispute by giving each counsel 21 days to file and serve the written submissions. Thereafter, the judgement date was fixed to be on 26th November 2013.

7. The agreement between both counsel to resolve the issues in dispute by way of written submissions is unusual in the peculiar circumstances of this case. This is so because the issues in dispute could only have been resolved by way of oral evidence. For example, the appellant's/plaintiff's amended plaint clearly indicated that the claim against the respondents/defendants was for a sum of Kshs 299,327/- plus interest at 22% from 1st August 1999 till payment in full was effected. Additionally, the appellant/plaintiff pleaded in the alternative that the subject plot be shared 20 by 80 feet for the appellant/plaintiff and 14 by 80 feet for the respondents/defendants.

8. The respondents/defendants responded to the plaint by filing a joint defence in which they denied liability in total and went further to counterclaim against the appellant/plaintiff, for accounts of the partnership business to be taken to be taken in and the respondents/defendants be gi**v**en their rightful share of the rent from the year 2001. They further counterclaimed that the subject plot be shared out equally between the parties. The trial court was faced with this conflict in the pleadings of both parties. The court then took the unusual step of approving the resolution of the issues in dispute in the absence of oral evidence including the auditor's report. The order of the trial court that the subject plot be shared equally is without evidentiary foundation, because there was no agreement between the parties that the mode of sharing be done in that manner. Furthermore, no accounts had been taken of the rents received by the appellant/plaintiff and those received by the respondents/defendants.

9. The appellant raised 19 grounds in his memorandum of appeal to this court. In ground 1 the appellant faulted the trial court for its failure to appreciate that this was a partnership based on shares. In ground 2 the appellant faulted the trial court by failing to appreciative that each partner would benefit from his shares only. In ground 4 the appellant has faulted the trial court to appreciate that the appellant having

contributed more than 3 times the shares contributed by the respondents, the respondents were only entitled to the benefit generated by their shares not from the shares of the appellant. The issues raised in grounds 1, 2 and 4 are all related to the partnership accounts , which a court of law cannot be able to decide in the absence of an audited report of accounts. There was not such a report tendered in evidence. The appellant's appeal succeeds in all these three grounds.

10. In ground 7 the appellant has faulted the trial court for not appreciating that that the trial court lacked jurisdiction to make orders that were not prayed or canvassed during the hearing. The appellant's appeal in this respect also succeeds as the trial court ruled that the parties were to equally share the subject plot in the absence of supporting evidence or admission by the parties. In grounds 3, 6, 9, 10 and 11, 13 the appellant has raised issues that touch on the accounts of the partnership business. In the absence of an audited report of accounts the appellant's succeeds in all these grounds. In ground 5 the appellant has faulted the trial court both in law and fact for failing to give reasons as to why she had disagreed with the committee, which had awarded the appellant Kshs 299,377 and interest, which was not in dispute. In this regard it is important to point out that the respondents denied liability and raised a counter claim in para. 13 therein that: ***"The plaintiff has despite demand by the defendants refused to have the accounts for the period 2001 to date taken to enable the defendants get their rightful share of the rent and he has also refused to have the plot share out between the parties into two equal portions."*** It is clear from this passage that an audited report of accounts was essential to finally resolve the disputed issues both in the plaint and the counter claim. In the absence of such a report or admission by the parties this ground of appeal has merit and is hereby allowed.

11. In ground 8 the appellant has faulted the trial court both in law and fact to consider that under section 97 (1)of the Evidence Act, which provide that when the written terms of a contract are clear no evidence can be given of those terms. This ground is tied up with an audited report of accounts which was not tendered in evidence. Again the trial court could not be in a position to rule on this ground without an audited report of accounts. This ground has merit and is hereby allowed.

12. In the circumstances, I find that the judgement of the trial court did not comply with ***Order 21 Rule 4*** which is coached in mandatory terms as follows: "***Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."*** It is equally clear that there is no way the trial court could have complied with the provisions of ***Order 21 Rule 4*** in the absence of the audited reports of accounts. Furthermore, it is equally clear that the trial court could not have been in a position to frame the issues and make findings in that regard in the absence of the audited report of the accounts. ***Order 21 Rule 5*** is similarly coached in mandatory terms and it states that: ***"In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue."***

13. Furthermore, I find that the trial court dealt with issues which had not been canvassed before it. In this regard, the court found that: *"The parties to agree on smooth sharing of the plot failure to which parties shall propose to court how to share the plot and units thereon."* This finding contradicts the finding by the trial court in respect of the 2nd prayer that the plot be shared equally between the parties. It was not the function of the trial court to advice the parties on how to share the subject plot. That was not the mandate of the court and it was not possible for the court to decide on the mode of sharing in the absence of the audited report of accounts.

14. In view of the foregoing, I find that the trial court did not have evidence to determine the issues in contention in the absence of the audited report of accounts. Furthermore, it could not have made any findings unless the parties had made admissions, upon which the court would have entered a judgement.

15. I therefore allow this appeal and set aside the decree and all consequential orders granted by the trial court. Since the appellant has succeeded by default in the sense that it was his failure to prepare an auditor's report and tender it in evidence, he will not have the costs of this appeal.

16. The trial court should not have approved the resolution of the issues in dispute by submissions in the face of conflict in the pleadings of the parties and in the absence of an auditor's report or admissions by

the parties. In view of the foregoing I hereby remand this case to the trial court or a court of competent jurisdiction in terms of ***section 78 (1) (b)*** to take evidence including an audited report of accounts and then proceed to determine the mode of sharing the subject plot among the parties and the rents that had been collected by the appellant/plaintiff and the respondents/defendants. Thereafter, the trial court should then prepare its judgement in accordance with ***Order 21 Rules 4 and 5 of the 2010 Civil Procedure Rules.*** I have taken this unusual step in view of the provisions of ***sections 1A and 1B of the Civil Procedure Act*** which mandates the court to administer justice efficiently, effectively and taking into account the financial and other judicial resources that are available in an effort to reduce costs.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **14th** day of **DECEMBER 2016**

In the presence of both the appellant and the respondents and in the absence of both counsel.

Court clerk Njue

J.M. BWONWONGA

JUDGE

14.12.16