



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO 83 OF 2010 (OS)

VELJI NARSHI JETHA SHAH..... PLAINTIFF

VERSUS

KANTILAL NARSHI SHAH .....1<sup>ST</sup> DEFENDANT

DIPESH KANTILAL SHAH.....2<sup>ND</sup> DEFENDANT

**RULING**

This ruling is delivered in the Originating Summons dated 11<sup>th</sup> February 2010 brought, in alia under **Order XXXVI rules 4,7 and 12** of the **Civil Procedure Rules ( 2009 Rev Edition)** in which the Applicant seeks orders as follows:-

1. That the partnership known as Paste and Grind Enterprises be dissolved.
2. That the partnership accounts be taken.
3. That the partnership be wound up upon such partnership accounts being taken.
4. That costs of the Originating Summons be awarded to the Plaintiff.

The application is premised mainly on the grounds that the defendants have failed to render proper or any accounts of the partnership while managing the same. It is supported by the affidavit sworn by the Plaintiff on 12<sup>th</sup> February 2010 and filed on 15<sup>th</sup> February 2010. The Plaintiff has deponed that the partnership was registered on the 16<sup>th</sup> December 1998 and that he joined the partnership on 9<sup>th</sup> February 1999 as evidenced by the Notice of Change of particulars annexed to the supporting affidavit as **annexture C2**. That the 1<sup>st</sup> Defendant was the Managing partner in charge of all transactions most importantly sales, finances and the keeping of accounts whilst the 2<sup>nd</sup> Defendant was a sleeping partner and a student at all material times.

In his affidavit, the Applicant depones also that he resigned from the partnership after forming the opinion that the partnership was breaching tax regulations by not paying tax and/or declaring lesser turnovers. He says that he was paid KShs. 1.6 million being the sum equivalent of a third of the partnership's immovable property- Ntima/Igoki/1969 (valued at KShs.5.6 million) representing his one-third share, upon his resignation. For reasons not clearly stated, the Applicant states that he attempted to return the said sum of money to the 1<sup>st</sup> Defendant on condition that confirmation was given that appropriate taxes due to the Government had been paid. His cheque for KShs.1.6 million was later returned to the Applicant. The Applicant depones further that although the accounts of the partnership were produced by the firm's auditors as per the copy of Reports and Accounts dated 31<sup>st</sup> December 2000 (**annexed as C3**) the Applicant was not satisfied with the said accounts and rejected them, hence his present suit against the Defendants. He holds the view as expressed in paragraph 12 of his supporting affidavit that:-

**“It is prudent that the accounts be rendered by the 1<sup>st</sup> Defendant to satisfy all the parties to enable (the Applicant) get (his) equitable and fair share of the profits which (he) verily believes (he) never received.” (changes and modification by this court)”**

The application is opposed on the strength of the replying affidavit sworn by 1<sup>st</sup> Defendant/Respondent in which he confirms that the Applicant did resign from the partnership and a certificate of change of particulars in that regard issued on 9<sup>th</sup> October 2000. The same is annexed to the replying affidavit as an **annexture KNS1**. In view of the said resignation, the deponent holds the view that the application before court has no basis in law and should be dismissed. As regards the order for accounts the deponent states that the same is statute barred under the provisions of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya).

Oral submissions were made at the hearing of the application. Learned counsel for the Applicant (Mr Kimathi) emphasizing that the reasons for the Plaintiff's resignation were that he was unhappy that the partnership was not meeting its tax obligations and was afraid of being exposed to criminal liability and consequential penalties and also that he had rejected the accounts prepared and presented to him upon resignation. Regarding the Respondent's contention that the taking of the accounts is statute barred counsel submitted that the provisions of the Limitations of Actions Act do not apply to a partnership.

Submitting on behalf of the Respondent, learned counsel Mr. Jeevanjee told the court that the Plaintiff is not entitled to the orders sought since the partnership was and remains resolved upon his resignation on 9<sup>th</sup> October 2000. He cited sections 3 and 4 (3) of the Limitation of Actions Act to support the Respondent's position that the claim for accounts is statute barred. He submitted also that the allegations of non payments of tax were not supported and asked this court to find that the Originating Summons has no basis and to dismiss the same.

I have considered the application, and the documents filed in relation thereto and the submissions made by counsel on either side. It is common ground that the Applicant did resign from the partnership. Under Section 30(1) of the Partnership Act (Chapter 29 of the Laws of Kenya) a partnership may be determined upon the giving, by any partner of a reasonable notice to the other or others of his intention to determine the partnership. Not only did the Applicant herein give his notice of resignation to his two partners but also caused a Notice of Change of particulars of the partnership to be filed with the Registrar General's office requesting that his name be removed immediately from the partnership. This is evidenced by **annextures KNS1**, which constitute the notice signed by the three partners on 9<sup>th</sup> October 2000 and a certificate of change of particulars issued by the Registrar on the same date.

Audited accounts of the partnership for the year ending 31<sup>st</sup> December 2000 were then prepared showing the balance sheet and the income statement for the year ending 31<sup>st</sup> December 2000 which the Applicant says he rejected. Essentially a partnership is a contract in law and in fact and the provisions of Section 4(1)(a) of the Limitation of Actions Act do apply as regards the time within which an action arising from the same can be filed. The said section provides as follows:-

**“4. (1) The following actions may not be brought after the end of six years from the date of which the cause of action accrued-**

**(a) Actions founded on contract;”**

The partnership between the Applicant and the Defendants determined on the 9<sup>th</sup> October 2000 when he voluntarily resigned. I find that Section 38 of the Partnership Act is supportive of this. He was paid his third share in the partnership property but claims that he is entitled to more. That he rejected the accounts prepared by the firm’s auditors is not, in my view, a ground for filing the present suit almost ten years after his resignation and the preparation of such accounts. The rights of shareholding of an outgoing partner are determined and settled in accordance with the provisions of Section 46 of the Partnership Act. Under Section 47 of the said Act any claim by an outgoing partner of a share in the partnership assets/shares as may be due from the continuing partners constitutes a debt accruing at the date of determination of the partnership. This means therefore that the Applicant ought to have filed his suit within six years of his resignation. Therefore, in addition to what I have found as regards Section 4(1) (a) of the Limitations of Actions Act, his claim is still statute barred under Section 4(1) (d) which provides that actions to recover a sum recoverable by virtue of a written law, (other than a penalty or forfeiture) may not be brought after the end of six years from the date on which the cause of action accrued.

In view of the above, it is clear that the Applicant’s claim is statute barred. Moreover, I find that his cause of action against the two Defendants is not clearly demonstrated. For the above reasons, the Originating Summons fails and is hereby dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>th</sup> Day of MARCH 2011.**

**M.G. MUGO**

**JUDGE**

In the presence of:

Ms. Karumba holding brief for Mr. Kimathi                      For Applicant

Mr. Jeevanjee

For Respondent