



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CIVIL SUIT NO. 90 OF 2010

KAIHU KARUGO.....PLAINTIFF

VERSUS

**KAMAU NJIGUA
MONICA MUTHONI MWANGI
WAMBUI KAHORERIA**
WAMBUI MUGURU MWANGI.....RESPONDENTS
**PRISCILLA WAMBUI NGUGI
WAMBUGU NJURU T/A KENDA BOARDING & LODGING**

AND

JULIUS IRUNGU KIMANI.....APPLICANT

RULING

The Applicant in an application dated 15th December 2010 sought leave under the provisions of Order 1, Rule 10 (2) of the Civil Procedures Rules to be added as a co-respondent in a suit filed by the Plaintiff. The Plaintiff commenced the suit by way of Originating Summons filed on 19th February 2010, and is seeking orders that the partnership known as Kenda Boarding and Lodging be wound up and that the partnership property be distributed amongst partners in proportion to their respective shares.

The Applicant's main ground is that he has been a partner in the said partnership receiving dividends periodically, and he stands to suffer very serious prejudice if he is not joined as a party to the suit. His claim of partnership is by virtue of being the sole surviving son of Kimani Gachau, whom he avers was one of the original partners of Kenda Boarding and Lodging. He further avers that upon being a minor at the time of his father's death in 1969, the deceased's shares were taken over by the Plaintiff in an informal representative capacity, and that he has since been receiving some proceeds of the partnership periodically.

The evidence tendered by the Applicant to support his application are written documents which he avers are the original records of the partnership, and which show that his deceased father was one of the original partners. The Applicant also relies on a signed acknowledgement of receipt of rental income

money from a firm of advocates , which indicates that he is one of the partners of Kenda Boarding and Lodging.

The Plaintiff opposes the application on three main grounds. Firstly he avers that the Applicant has tendered no evidence to demonstrate that he is the Administrator of his deceased father's Estate. Secondly, that neither the deceased nor the Applicant are parties to the partnership agreement. Finally that any monetary relationship between the Plaintiff and Applicant was independent of and separate to the partnership. The Respondent relies on a partnership agreement for distribution of profits and losses dated 4th of April 1984, to which the Applicant is not a party.

The hearing of the application was held on 10th October 2011, and both the Plaintiffs Counsel Mr Ombwaya who was holding brief for Mr. Mureithi, and the Applicants counsel, Mr. Juma who was holding brief for Mr. Maira requested for a ruling based on the written submissions.

I have read and carefully considered the pleadings, evidence and written submissions filed by the respective parties to this application as well as the authorities cited. Since this is suit is for the dissolution of a partnership, the applicant can only be joined as a necessary party under Order 1 rule 10 of the Civil Procedure rules if he is a partner, or is representing the interests of a partner or former partner.

On the issue whether the Applicant can be joined as a party to the suit by reasons of being a partner, section 4 of the Partnership Act is relevant and provides the rules for determining whether a partnership does or does not exist. The relevant rule for this application is in section 4 subsection (c) (iii) which state as follows:

(c) the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular -

(iii) a person being the widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner is not, by reason only of that receipt, a partner in the business or liable as such;....

The provisions of the Act are clear that receipt of profits from a partnership by reason of being a child of a deceased partner is not conclusive as to the existence of a partnership.

Further, in **Mworia vs Kiambati (1988) KLR 665**, the Court of Appeal stated that in a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by the partners' conduct, and by the mode they have dealt with each other and other people. In the absence of a written partnership agreement between the Applicant and other partners, the Applicant can only be a partner through an oral partnership. Other than the receiving of rental income from the partnership, which could be by virtue of his deceased father's partnership, the Applicant has not provided any other evidence of engagement in any of the partnership businesses in the manner described by the Court of Appeal in the foregoing.

The second issue is whether the Applicant can be joined as a party to the suit arising from his deceased father being one of the original partners. On this issue several legal points arise. The documents tendered as evidence of the original partnership are in a language not known to the court.

Section 86 of the Civil Procedure Act is clear that the language of the High Court shall be English and written applications to the High Court shall be in English. If a document is not made in the English language, the party must furnish a duly certified translation of it into the English language. The court can therefore not make any determination on the Applicant's deceased father's partnership on the basis of the said documents.

The Applicant has also not complied with the provisions of Order 24 Rule 4 of the Civil Procedure Rules. Under Order 24 Rule 4, the Applicant could only be joined as a legal representative of his deceased

father, since what he is alleging is that there is a claim of his deceased father as an original partner that is subsisting against the surviving partners. The Applicant therefore needed to comply with the provisions of Order 24 rule 4 in two respects. Firstly, the Applicant needed to show the effect of his father's death on the original partnership, and specifically that the partnership did survive his father's death. Secondly, the Applicant also needed to adduce evidence to show that he has been duly appointed as the legal representative of his deceased father under relevant provisions of the law.

The application by the Applicant dated 15th December 2010 to be added as a co-respondent must fail for the above reasons. The Applicant will bear the costs of this application.

Dated, signed and delivered in open court at Nairobi this 25th day of October, 2011.

P. NYAMWEYA

JUDGE