



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVILSUIT NO. 171 OF 1998

LUKA WAGANA & 4 OTHERS
PLAINTIFFS

VERSUS

JOHN CIIRA
DEFENDANT

Coram : Mwera J.
Aswani for Plaintiffs
Owang for Defendant
Njoroge court clerk

JUDGEMENT

This is an old case and no doubt some aspects of it may have escaped the litigants' memory or could not be easily dug up from the proceedings. After the trial the parties were asked to submit. Incidentally no side referred to the particular pleading, there were amendments to them, which the court was to rely on in its decision. On perusing the file the pleadings to be considered are:

- i) the Plaintiff – initially filed on/about 18.8.93 and amended on 02.2.98.
- ii) the Defence & Counter-claim dated 24.4.98
- iii) the reply to defence and defence to counter-claim dated 13.5.98

There was also a set of 19 agreed issues dated 30.9.98.

It was pleaded in the plaint that the 1st, 2nd and 3rd plaintiffs were the sons of the late Norman Maingi a.k.a Mwangi Kariuki. And these 3 plaintiffs were suing as administrators of the estate of their late father. The three claimed that in September 1987 their late father together with the 4th, the 5th plaintiffs and the defendant formed a partnership called Kiriaini Stage Timber Sales, each contributing sh. 5,000/= towards capital. The partnership appointed the defendant as a managing partner to run the timber business, maintain books of accounts and account to the other partners accordingly. That while doing so the defendant failed/neglected to maintain or produce books of accounts for the years 1991 to 1996. Then he became unwilling to cooperate with the other partners in preparation of books of accounts for future proper management of the business as a result of which it collapsed. That after Mwangi Kariuki died on 26.6.1995, the defendant failed to call a meeting of the other partners, including those interested in

Mwangi Kariuki's estate, to decide whether the business could continue or the partnership could be dissolved with assets and liabilities being distributed. That caused loss/damage to the deceased's estate. It was added that the defendant did run a parallel business in the partnership premises, occasioning competition. That there was a conflict of interest which caused loss and damage to the partnership business. Accordingly, the defendant was obliged to account for all benefits that accrued to him in the years between 1991 and 1996.

So the plaintiffs prayed that the court do order that:

- a) the defendant provide audited accounts of the partnership books between 1991 and 1996;
- b) the partnership be dissolved;
- c) the defendant do indemnify the family of the late Mwangi Kariuku of all losses the partnership suffered from 26.6.1996 until the determination of this suit;
- d) the defendant do prepare and produce audited accounts of the personal business he ran in competition with that of the business;
- e) the defendant do pay to the plaintiffs unpaid interest on his capital and loans made to the partnership from 1991 to date at bank rates;
- f) the defendant do pay to the plaintiffs any undrawn balance in his share of the profits of the partnership;
- g) the defendant pay each plaintiff his capital in the partnership;
- h) the defendant do divide the balance to the partners in proportion in which they owned the partnership capital;
- i) the defendant be condemned in costs and interest.

The defendant averred in his defence and counter-claim as follows: He began by denying that the 1st to 3rd plaintiffs were administrators of the estate of the late Mwangi Kariuki. That he with other 8 persons formed the said partnership to trade in timber and related products in 1986. The business was by mutual agreement dissolved in 1987. In the same year he approached one of the former partners, Mwangi Kariuki (deceased) and the 2 agreed to start a similar business, as that dissolved, on the same premises. Then the deceased Mwangi agreed to bring into the partnership the 4th and 5th plaintiffs. These 2 new partners neither contributed moneywise to the firm nor did any work there. Neither had Mwangi Kariuki made any money contribution. That the business was solely financed by the defendant. He denied that each partner contributed sh. 5000/= to the business. As to active partners, the defendant pleaded that only he and Mwangi Kariuki were. The defendant managed the business with Mwangi's consent. That although the 4th and 5th plaintiffs showed no interest in the partnership, their names were retained there by the defendant and Mwangi with a hope that they would later get interested for their own benefit. The defendant denied any wrong-doing, mismanagement of the business or breaching any fiduciary duty to other partners. On various occasions he called all the parties to meetings to resolve any issues but the plaintiffs refused to attend. And that the defendant did not run a parallel business as claimed at all.

Then the defendant put up a counterclaim, repeating that he and the late Mwangi started a new business (see defence) in 1987 and invited the 4th and 5th plaintiffs to join without contributing to its capital. That the defendant single – handedly managed the business, properly and successfully resulting in the acquisition of properties:

- 1) Plot No. LOC 14/KIRU/2836, Muranga District; and
- 2) Plot No. B 4220 "B" Dandora Ph. 2, Nairobi

That partnership assets and the defendant's personal contributions were spent to acquire the 2 properties on the understanding that he be given refunds. The defendant further pleaded that the partnership was in no position to buy the Dandora plot. So he took a loan of sh. 100,000/= from Equity Building Society (later Equity Bank) and sh. 60,000/= from Kenya Small Traders and Entrepreneurs Society, towards the purchase. This was added to sh. 150,000/=, a contribution of a new partner called Simon Muturi Wanguo in respect of the purchase of that plot. That it was agreed that the sums raised through the defendant could be repaid through partnership funds to enable the defendant to repay the loans from the financiers. But

when Mwangi Kariuki died the 4th and 5th plaintiffs disrupted the business and it had to close down. They also refused to sign cheques to withdraw money to repay the financiers. There followed a default in that as at 7.4.98 the defendant owed Equity sh. 133 689/55 and sh. 77, 987/= to Kenya Small Traders. With that the defendant prayed the court to

- (i) order the 4th and 5th plaintiffs to sign relevant cheques to enable the defendant to repay outstanding loans plus interest;
- (ii) to restrain the plaintiffs from interfering in the Kiria-ini Stage Timber Sales;
- (iii) to order the plaintiffs jointly and severally to indemnify the defendant in respect of all claims, actions arising from the operation of the partnership business
- (iv) costs & interest.

The reply to the defence and defence to the counterclaim came on 14.5.98. The 1st to 3rd plaintiff restated that they were the administrators of the late Mwangi's estate. They conceded that the initial partnership of 9 people was dissolved by consent in 1987 then the defendant and Mwangi Kariuki formed a new firm. At this point the pleading was not quite clear (Para 7) but it appeared to state that the new outfit had the late Mwangi, the defendant, James Wanguo Kanyi and Ngure Maingi (4th, 5th plaintiffs), each contributing sh. 5000/= towards capital. All the plaintiffs were active in the business with the defendant as the managing partner who was provided with staff for day-to-day operations. The defendant called no meetings to discuss business issues or that the plaintiffs failed to attend such meetings. The defendant just refused to call such meetings.

As for the counter claim, it was denied that the defendant ran the business with enormous personal contributions or that the other partners agreed to refund/reimburse him of any funds applied to acquire business assets. That the partners were in a position to purchase any property and as such they agreed on 26.10.94 and withdrew sh. 260,000/= from Equity Building Society and Barclays Bank, Kiriaini and with that a plot was bought. The plaintiff had no knowledge of the defendant's securing sh. 100,000/= and sh. 60,000/= from Equity and Kenya Small traders. If he took these loans, they were for his own use. There was no agreement by the partners and neither did they authorize the defendant to borrow any loans. That the partnership business was not closed due to the acts/conduct of the 4th and 5th plaintiffs.

The trial opened before Mugo J on 15.05.06.

Mr. Aswani told the court that the amended plaint of 2.02.98, concerned a partnership where one partner died and the 1st to 3rd plaintiffs were his administrators. That the 5th plaintiff was also deceased. It was not said whether there was a legal representative for the 5th plaintiff. Counsel added that the issue remaining for determination was as per prayer (a) of the plaint –

- (a) that the defendant do provide the audited accounts of the partnership for the years 1991 to 1996 at his cost.

It was added that on 20.8.03 the parties agreed to the dissolution of the partnership. Its accounts had to be taken by an auditor. That the consent letter was filed in court on 5.9.03 but then the defendant refused the auditor to carry out the audit. The plaintiffs therefore would produce accounts prepaid on their instructions. And with that James Wanguo Kanyi (PW1, 4th plaintiff) mounted the witness box. From the opening remarks by Mr. Aswani, it would appear that the partnership was by consent considered as dissolved and only the issue of producing audited accounts remains for determination by the court. Unless for any other good reason, the other 18 agreed issues need not detain the court. But let us see.

PW1 told the court that, he with the defendant John Ciira, Ngure Maingi and the deceased Mwangi Kariuki, set up the partnership herein in September 1987. When Mwangi died in 1995 his family members approached the witness and complained that they were having a problem with the defendant who was the managing director of the business, on the way forward. PW1 called a meeting which was

attended by Geoffrey Maingi Mwangi, son of the deceased Mwangi, Kamangu Ngure the defendant and others. They agreed on the deceased's shareholding and also to the stock of the assets. At a later meeting the defendant was asked to produce accounts. Initially he resisted but later produced some that were not satisfactory. The dispute was reported to a local chief who appointed elders to go into the dispute and report back. It transpired that the partners wished to continue with the business. So the elders who recorded the proceedings recommended and accordingly a decision was reached that the method of accounting had to change. A secretary was to be employed, given new books and required to prepare the accounts but the defendant refused to comply. The matter was returned to the chief but then the partners were served with a letter from the defendant's lawyers, M/s Muthoga Gaturu & Co. Advocates demanding sh. 95,000/=. The defendant claimed that sum as the capital he invested in the business and that on 3.3.97 the partners had agreed to dissolve their outfit. That that had never been agreed and so they trooped back to the chief. It was agreed that the defendant would cease to manage the business. He signed the document (placed before court in a bundle) but did not comply. The partnership ceased to operate but the staff were directed to sell the last timber stocks and deposit money in an account at Equity, Kiria-ini. The other partners did not pay the defendant sh. 95,000/=; they instructed lawyers to handle the demand letter in that regard namely that if the defendant wanted that payment, he had to produce accounts of the business. Their lawyer T.T.M Aswani Esq, did inform M/s Muthoga Gaturu Advocates that the defendant had not maintained and produced accounts for the years 1991 to 1996. And he had refused to cooperate with other partners w.e.f. October 1996 on the subject of producing those accounts. The defendant's demand for sh. 95,000/= was denied, the plaintiffs' stand being that each partner's share could only be determined after the accounts were taken. The defendant had to produce them or he had to cooperate to produce them.

A letter from the defendant's lawyers dated 5.5.97 stated that he desired the partnership to be dissolved and assets distributed. It suggested a meeting by all. In reply the plaintiffs' lawyer was instructed to dispute the position of the defendant while insisting on the accounts being produced.

That the reply reminded the defendant of the agreement before the chief that business would continue but with James Wanguo, Kanyi Ngare Mwangi and Geoffrey Maina running it. It was charged in the same letter of 30.6.97 that the defendant was running a parallel business at the premises of their business to the displeasure of the defendants. The defendant's lawyer did not reply but the defendant himself drafted a document giving a summary of business. Therein he intimated that the partnership was no more but the business was his alone, and the plaintiffs were not entitled to any accounts. The plaintiffs then instructed their lawyer to file the present suit. Thereafter the defendant indicated that he wanted a discussion as per a letter dated 30.9.2003. The defendant wanted the litigants to agree on appointing an auditor so that accounts could be produced and the dispute resolved quickly. The plaintiff's lawyer called such a meeting on 20.8.03 whereby the partners agreed to dissolve the partnership. Luka Waganaga (1st plaintiff) signed the agreement on behalf of the plaintiffs and the defendant too signed. All agreed to appoint M/s Dan Kemoli Kiyingi t/a Kebamu Associates as the receiver/auditor of the partnership to be paid from the partnership assets.

On 18.9.03 PW1, the defendant, Godfrey Mwangi, Luka Waganaga and the auditor met in the latter's offices. They were to give details of the business upon which the auditor would proceed. But the defendant declined to cooperate and he stormed out of the meeting. There was no other meeting and the defendant did not explain why he acted the way he did. The plaintiffs' lawyer's advice was for them to proceed with the issue of the accounts without the plaintiff. The auditor was instructed accordingly by letter (Exh. P2). At this point the plaintiffs' bundle of documents was produced and marked Exh. P1. The plaintiffs gave the auditor bank statements, cash books and minute books (Exh P1 – 116 to 179). The auditor interviewed PW1 – the secretary to the partnership and custodian of the books. PW1 gave all the information including the stocks the defendant was selling separately – same to be excluded from the audited accounts.

In cross examination, PW1 said that at no time was he manager and secretary of their partnership at one and the same time even as he signed letters of 4.8.97 and 4.9.97 as secretary/manager. But they were not addressed to the defendant (MF 1 D-1). He wrote them to the brother of that landlord, on behalf of the manager. PW1 only kept books on correspondence while the

defendant kept other books under his custody. As secretary, PW1 did not make any entries in those books. Only the defendant and the salesgirl. Minute books were open to all partners. The defendant played a major role in running the business, on authority of other partners, earning an allowance. The witness was not involved in day-to-day running of the business. Before Mwangi Kariuki died he was their treasurer – keeping bank books, complying with banking procedures and ensuring orderly systems there. The defendant was responsible for record-keeping as the manager. He was so referred to in the records between 1991 and 1995 while from 1996 he was merely a manager. PW1 called meetings on authority of the defendant who had been duly mandated in that regard. Issues of accounts featured all the time. Even as early as 1987, he had not been keeping them and at a meeting of 8.10.89 it was noted that he refused to produce books of accounts, but the subject was abandoned.

The defendant was confirmed as a continuing manager in the minutes of 9.11.89 and was on 14.03.93 enjoined to bank money at Equity Bank, Kiriaini but not keep it in his pocket. The other partners suspected the defendant of misappropriation of funds up to sh. 800,000/=.

After a long period of adjournment, the matter came up before the undersigned for further hearing. Mr. Aswani told the court that the 1st to 3rd plaintiffs had taken out letter of administration of their late father's estate - Norman Maingi a.k.a Mwangi Kariuki. With that PW1 was back in the box for reexamination.

The witness went back to the letters dated 4.8.87 and 4.9.87 which he wrote to the brother of the land lord their timber business premises and noted some alterations on the draft copy. He could not explain it seeming to throw it to the defendant. The alteration made it appear as if PW1 wrote that letter as a manager for their business. He was the secretary while the defendant was the manager – doing the day – to day running of the business, not PW1. The witness operated from Nairobi but regularly went home. The defendant never produced books of accounts from 1991 onwards.

Geoffrey Maina Mwangi a.k.a Gikonyo Maingi (PW2, 2nd plaintiff) testified that he was the son of the late Mwangi Kariuki who died on 26.6.95. He had a joint grant to administer their late father's estate (Exh P1 – 1) dated 5.12.97. His family approached the defendant, manager of the partnership business, seeking to be told about the late Mwangi's contribution. PW1 called a meeting of all partners on 9.10.95 which PW2 attended. The defendant disclosed there that the firm owned two plots – at Kiru in Muranga and Dandora in Nairobi as well as the timber sales business. They took stock of all the posts and timber (Exh P1 – 183 to 212) amounting to sh. 350,000/=. It was there agreed that the sales girl would be selling the stocks and remitting money to the partnership account at Equity Building Society, Kiriaini. That decision was put into effect. At another meeting held on 6.11.95, PW2 was appointed secretary with the duty of keeping records. He operated from the business premises. While so engaged PW2 discovered that the defendant was selling his own stocks of timber from the same premises. That prompted calling a meeting by the partners but the defendant became hostile. Nothing was resolved; the defendant threatened to evict PW2 from the premises. The witness was also doubling up as an accounts clerk. The dispute was reported to the local chief. A meeting took place on 3.2.97 (Exh P1 – 98 to 100). There it was resolved that the parties reconstitute the firm, open new books and begin trading afresh. Back at their offices, the defendant frustrated efforts to reconstitute the firm and business stalled. That the defendant chased away the staff and closed the premises. Then he wrote a letter (Exh P1 – 101) demanding sh. 95,000/= claiming that he loaned that sum to the firm. His lawyer r M/s Muthoga Gaturu also wrote a similar letter dated 7.3.97. The partners did not admit that demand. They had asked the defendant to render books of accounts from which he could prove his debt. Later the plaintiffs' lawyer replied the defendant's lawyers denying the demand (Exh P1 – 216). The requirement that he produce the accounts remained but the defendant did not oblige/comply, resulting in this suit. However before filing the suit, the defendant invited other partners to a meeting on 18.9.03 where it was agreed that accounts be rendered by M/s Kebamu Associates. At a meeting called by that accountant, defendant stormed out. However, the accountant proceeded with the work and produced a report a copy of which was given to the defendant. The court should accept those accounts so that each party gets its share. And the defendant should be condemned in costs.

It was added that during all this, the defendant sold the Kiru plot to one Alexander Maina Kiai

(Exh. P2) at sh. 180,000/=, all single – handedly, thereby compromising the rights of other partners there. They did not authorize him to do that and the plaintiffs did not benefit from the proceeds.

In cross-examination the court heard that when PW2 was appointed and assigned duties of secretary/accountant saleslady one Joyce Muthoni, maintained the sales and supplies books that were kept in the manager's (defendant) office. The witness had to reconcile those books. Joyce banked some of the sales proceeds but would hand the others to the defendant. PW2 asserted that his late father's contribution to the timber business was sh. 5000/= like the other partners. The witness claimed existence of, but did not produce, an instrument from the files setting out things including how the firm could be run. When PW2's late father was the firm's treasurer, he used to deposit money in the bank, which money he received from the manager (defendant) after selling timber. The defendant was not banking the money but he would know the total sums.

The books reflected sums banked between 1991 and 1995 and those retained by the defendant. The defendant had all books in his office and that is where the treasurer (the late Mwangi) would access them when doing his duty.

The accounts (by M/s Kebamu?) were extracted from the supplies and sales records. When it came to work out the sums that represented purchases, sales, proceeds, expenses, what the defendant held and what was banked, it was concluded (Exh P1 – 142(a) to 176) that the defendant had on himself sh. 2.6m and he signed for that on every page for the years 1994 to 1996. The records placed before court reflected the sums the defendant took and those that were banked. That the sales girl sold stocks during day and when the defendant came later he took the cash and duly signed. The sum of sh. 2.6m simply reflected the worth of the assets – not that the defendant owed it to the firm. The assets would then be apportioned among the partners. But then he refused to produce accounts and the suit herein was instituted in 1998, against the defendant who actually ran the business. The other partners did not. That the plaintiffs lost profits when the defendant closed the business, sent away staff and sold the stocks. That constituted interest claimed in this case.

The court was told that when it transpired that the defendant was selling plot no. 2836 Kiriaini, the plaintiffs sued him at Nyeri. That was a partnership property. The plaintiffs did not agree to this sale (Exh P1 – 52) which was ordered by a tribunal. At this point the court was at a loss as to how a land tribunal got to be involved in a registered parcel of land and even order its sale. The title had all the 4 partners' names (Exh P1 – 52, 53). Mr. Aswani for the plaintiffs informed them that the plot sale proceeds sh. 180,000/= were paid to the defendant and that was contained in an agreement of 25.4.08 (or 03?) Mr. Owang, however told the court that his client (the defendant) denied such.

In reexamination, the court heard that plot no. 2836 was sold to Alexander Kiai by consent of all 4 partners. A dispute appears to have arisen and it was filed in a tribunal at Kiriaini. The tribunal found for the partners, Kiai appealed to the provincial committee at Nyeri. It found for him and ordered that the plot would be sold to Kiai at sh. 180,000/=. PW2 told the court that the sum had to be paid by 31.8.2000. It was apparently not paid and the partners never discussed that issue. However on being shown certain agreement dated 25.4.08 between Kiai and the defendant, the latter was shown to have acknowledged payment on 20.10.07 (Exh P3) – 7 years down the line. The partners did not authorize this later sale and they did not share in the proceeds. They thus filed NYI HCCC 179/08 (still pending) to quash the sale. PW2 went over what he had said evidence-in-chief adding that by the time the defendant sent him away from the business premises PW2 was yet to do the profit/loss account of the business. That could require a qualified person in accounts. The defendant agreed to this but when the agreed accountant came to do just that, the defendant became uncooperative.

In 2003 Wycliffe Onzere (PW3) was employed by M/s Kebamu Associates – an accounts firm. On 9.9.03, the firm was appointed (Exh P4) to do accounts of the partnership herein, following a court order. A meeting of 18.9.03, to get the background material was attended by all 4 partners including the defendant. PW3 learnt that the defendant was the managing partner who ran the business of the firm on a daily basis. That the firm started in 1986 with 9 people but later it was reconstituted to have the 4 partners only – Ngure Maingi, the defendant James Kanyi and Mwangi Kariuki. Each contributed sh.

50,000/= as capital. A further sh. 10,000/= was borrowed from Mwangi Kariuki, all totaling sh. 30,000/= as capital. The defendant (managing partner) did not give any accounts books to the witness. The audit was to begin in 1991, without opening balances. PW3 went back to inception in 1987 to get bearings. He learned that in 1988 some of the earlier partners raided the business and took away stocks of timber. The defendant did not complain to have criminal proceedings instituted. When asked about the value of the stocks the defendant denied knowing the auditors. Instead he said that he had hired a lawyer. PW3 with his team left but asked other partners to give them any material they had.

On 25.9.03 another meeting was arranged. M/s Kariuki & Co. Advocates wrote a letter (Exh P5) dated 10.9.03 addressed to the plaintiffs' lawyer and copied to PW3's firm. It falsely claimed that PW3 firm was biased or compromised. Mr. Aswani denied that (Exh. P6). The meeting of 25.9.03 was rescheduled to 30.9.03 when all partners attended except the defendant, John Ciira. He also failed to attend the meeting of 7.10.03. The other partners provided the documents they had and PW3 set on the audit/accounts work. However, on 21.1.04 the plaintiffs' lawyer (Mr. Aswani) instructed the auditor to cease acting for both sides herein (Exh. P7) but later instructed PW3 to continue with the job but for the plaintiffs only (Exh P8). The witness did that covering the years 1987 to 1998. PW3 relied on bank statements, agreed issues herein, the amended plaint, defence and counterclaim, note books provided by the plaintiffs and the interviews they gave and other material said to have been filed in court in November 1999.

When the witness was about to produce his report Mr. Owang for the defendant objected informing the court that on 20.1.04 Ochieng J had directed that another firm of auditors, not M/s Kebamu, do carry out the work. That that was consent order. No such agreed auditor was installed but the plaintiffs went off on their own with M/s Kebamu. Mr. Aswani responded that when the parties failed to agree on an auditor and the issue was taking too long, the plaintiffs proceeded with M/s Kebamu whose report was about to be produced.

The court asked why the parties did not go back to Ochieng J if the defendant had proved uncooperative, Mr. Aswani posited that the defendant had not written to object to their report nor field any from his own side. The plaintiffs had done their best and the defendant was at liberty to present his own auditor's report in the circumstances. Mr Owang then told the court that on their part they contacted M/s Gachuna who accepted to do the job. But when the plaintiffs were informed about that, the response was that they were going their own way. The parties did not propose any other auditor and the defendant had no report to present. The court then noted that neither party had acted in accord with Ochieng J's directions of 20.1.04 but allowed the plaintiffs to produce their report covering 1987 to 1998 years. Pw3 then clarified that they had no books of accounts for purchases, the ledger, cash book, journals, sales books or a general ledger from which a trial balance could be extracted. The defendant did not furnish them (the managing partner). PW3 had cash sales, a note book from the plaintiffs, bank statements and others earlier alluded to do his work and produce a report (Exh 4a). The managing partner (defendant) did not maintain basic accounts/audit books, and this constituted a hurdle in the exercise. PW3 concluded that:

- i) Fixed assets were worth sh. 619 513/=;
- ii) Current assets sh. 910 620/= with part of that (sh. 566 419/=) not accounted for;
- iv) Current liabilities – sh. 50,000/=

The total was sh. 1,525,133/= net worth before revaluation of the assets, to reflect the market value as at 1998. PW3 said that the unaccounted for figure represented a loss – what the partners did not enjoy. PW3 raised a fee note of sh. 80,000/= which the plaintiffs paid. And that Mwangi Kariuki's advance of sh. 10,000/= to the partnership's initial capital was eventually paid. The witness could not locate from the documents they had any source of external loans. The business had been run on the partners' contributions and proceeds of sales.

In cross examination PW3 said his firm was not given objectives or reasons to undertake the audit. They got to interpret the firm's business transactions so that all could be clear to the partners regarding the firm's financial position. Minutes were availed reflecting salary paid to the defendant. This was not a formal partnership. PW3 made reference to the Partnership Act, though. He noted that there

was a chairman, treasurer and managing partner. The managing partner had to keep books of account and other relevant books. He did not do so. It was added that the defendant never advanced any money to the firm and it was him who told PW3 that each partner contributed sh. 5,000/= towards capital to start the business. That was reflected in the preliminary decree (Exh 4 C). The defendant as the managing partner was bound to keep and avail books of account. The witness said that the sum noted not to have been accounted for, was not necessarily embezzled. And the defendant did not cooperate in tracing it.

Referring to the 1998 accounts (Exh P9 (a)) PW3 was of the opinion that Mwangi Kariuki's interest in the business since inception, by way of profit, stood at sh. 258 038/=.

Moving to house rentals (the Dandora House) PW3 said that the defendant had to ensure that these came in and were accounted for, the way he would account for the timber sales business. It was not clear that those rents were to be collected by Simon Muturi and James Wanguo. And to PW3, he had sufficient material from which to make the report that he produced.

In reexamination PW3 said that as per minutes of the firm's meeting of 21.2.95 (Exh P1 – 62), the defendant was described as the chairman. He, Wanguo and Muturi were joint signatories to the firm's account at Equity Bank. And on 20.10.96 minutes of the management meeting showed that the business was not being run according to agreed resolutions (Exh P1 – 96, 97). A complaint was recorded accordingly. And that PW3 had, to the best of his ability, prepared the accounts report before court. That closed the plaintiffs' case.

The defendant (DW1) went over the history of their partnership when each contributed sh. 5,000/- towards capital. They were 9 partners. The treasurer was one Charles Mugoya. He passed this portfolio to James Wanguo who ran the business down in 1987. This got the partners to go before a tribunal at Nyeri. The decision was that Mugoya pass the rent book to the defendant who would then be a tenant while Mugoya was the land – lord. When DW1 paid rent, entries were made in the rent book held by each (Exh D – 1 (a) (b)). The defendant said that he ran the business by himself initially then later invited the late Mwangi Kariuki and James Wanguo to join him. Each had to contribute sh. 20,000/=. Mwangi and Wanguo did not pay up. The 3 however opened 2 joint accounts at Equity and Barclays banks in 1988. Business went on. In that 1988, 4 former partners came and took away stocks worth sh. 88,000/=. The defendant sued them in Nanyuki HCCC 66/88 (pending). The business was closed but the defendant reopened it alone in 1989. Again he invited James Wanguo and Mwangi Kariuki to join him. He bought timber stocks with his own money plus a loan from the bank. The defendant detailed Mwangi to be the treasurer while Wanguo was the secretary/manager. All went on well until 1995 when Mwangi died. As at this time, the defendant had given a loan of sh. 41,000/= to Wanguo. When he demanded it, Wanguo went and brought in Mwangi's 3 sons (the first 3 plaintiffs) and a meeting of elders was called at the place of business. There neither of those others produced evidence of contribution to the business. Only the defendant did – sh. 138 360/=. So the others were told to go and bring their evidence. Instead they served the defendant with court papers. The defendant claimed that he had bought business stocks with his own money. Then Wanguo and Mwangi brought their own and placed it in the same business place. The dispute was reported to the local police officer. The defendant referred to a certain agreement regarding that dispute.

It was the defendant's position that much as Mwangi and Wanguo did not contribute to the business capital, they still countersigned cheques to draw funds. They were the defendants' relatives and he took this business as a family outfit.

In 1994 they bought a plot at Dandora with money that had been deposited in the bank. The cost was sh. 500,000/= and sh. 240,000/= was withdrawn from the bank. One Simon Muturi came up with the balance of sh. 150,000/= plus sh. 100,000/= the defendant withdrew from his own account no. 7900006 (Equity Bank), to complete the purchase. At this point the defendant's bundle of documents was produced as an exhibit – Exh. D1.

DW1 then referred to Exh. D2 – 12 (D1?) where Equity Bank demanded from him sh. 650,152/30. May it be noted that up to this time it is not clear as to why Equity Bank was making this

demand against the defendant. Anyway the court heard that the Dandora house was registered in the names of Simon Muturi, James Wanguo and the defendant. The defendant made improvements/additions to this house with his own money totaling sh. 142 000/= (more rooms, an iron gate, a bathroom). He cleared an accumulated water bill of sh. 30,000/=. The six tenants were paying sh. 7000/= pm. For 9 months James Wanguo, who was living in Nairobi, did not show the defendant the rents collected. So he decided to detail Simon Muturi to be depositing the rents in a certain account he gave, at Equity Bank, Fourways Branch. Simon died in 2007. The defendant then directed his son David Maina, to continue to collect rents and deposit. But Wanguo came in and stopped that. The two then began to enjoy the rents. The bank balance stood at sh. 87,155/= as at 21.3.11 as per the bank slip the defendant had in court.

The defendant continued that there was a balance of sh. 283 698/= as at 21.3.11 in the business account at Equity Bank (Kiriaini). Regarding the Barclays account, it had sh. 110,000/= at the time Mwangi died. However, that had since been “eaten” by bank charges. The account reflects a debit.

The defendant claimed that he bought Kiru plot no. 2836 with his own sh. 84,000/= in 1989. But later had it registered in joint names including Mwangi and Wanguo. And like in the timber, matter they did not contribute sh. 25 000/= each as promised. One Alexander Kiai began to build on this plot without permission. So the defendant Wanguo and the sons of Mwangi went to a tribunal over Kiai’s actions. Seemingly, a decision made there got Kiai to appeal at Nyeri and because he was one “from home” it was agreed that he pay sh. 180,000/= for the plot (Exh D3). That money had yet to be paid. Focus then shifted to Nyeri HCCC 179/08 where the 1st 2nd and 4th plaintiffs sued the said Kiai and the defendant over this Kiru plot. The defendant produced a bank balance (Equity Bank, Kiriaini) as at 20.4.11- sh. 283698/= (Exh. D5). The business failed because after Mwangi’s death, no withdrawals could be made from the bank. Other signatories declined to sign. The business then had debits for stocks delivered by 3 supplies. Going back to the purchase of the Dandora house (No. 4220 B) for sh. 470,000/=. the defendant told the court that their bank account had sh. 240,000/=. Wanguo and Mwangi told him to go and borrow money from the bank. The partners could refund him later. This was not put in writing just like when he took timber on credit; nothing was put in writing with other partners. So he had pledged his plot no. Loc. 14/KAIRO/695 to Equity Bank to get a loan of sh. 100,000/= in 1994. Another security the defendant pledged was his plot No. Loc 14/KIAMBUTHIA/T224. The latter security has always been with the bank since 1994. The defendant was unable to pay the sh. 100,000/= loan because Simon Muturi had not remitted the Dandora house rents into the bank particularly after he died. Both Wanguo and Mwangi were signatories to the timber account at Kiriaini and the house rent account at Fourways. When the defendant failed to service the 2 accounts his plots (security) were sold (Exh D 2 – 394). The arrears were over sh. 800,000/=. The sale proceeds did not clear the debts and the bank still demands more money from the defendant. He also borrowed sh. 60,000/= from Kenya Small Traders (see the defence/counterclaim) to improve the Buruburu house. He did not access bank accounts to repay so that creditor threw the defendant in a civil jail for 4 months. The defendant had pledged no security to obtain sh. 60,000/= from Kenya Small Traders except to deposit sh. 40,000/= with them. They still demand sh. 168,000/= from him (Exh D2 – 8). Wanguo and Mwangi all the time knew these deals with the lenders. They were executed in order to buy the Dandora house. The 2 did not contribute to those loans. They only told him to go and borrow. By 1999 with no more money to finance the timber business, it collapsed. Staff were sent away. The landlord demolished the business place.

The defendant therefore asked this court to direct Equity Bank to release the funds – sh. 100,000/= and 282 698/= in the 2 accounts to enable the defendant to settle the debts owed including to the timber suppliers. That this suit was brought before the parties sat down to determine shares of each, debts and credits.

During cross examination the defendant again went over the composition of the partnership and denied that despite the agreed sums to be contributed as capital, the other partners had evidence to show that they paid up. He put up capital all with his own money – sh. 138,000/=. He was the manager (Exh P1 – 2, 4). Shown Exh 4 c – the preliminary decree, DW1 said that it came to be when the case was already in court. The court directed that the parties have a joint accountant to do the books but the defendant did not agree to have M/s Kebamu, the firm of Dan Kemoli (PW3) employed. However, he signed the letter

(Exh D 4 (d)) of 20.8.03 and joined the plaintiffs to visit the auditor's office. He did not know what the meeting was for; he announced that he did not have any books to produce. They were with Wanguo.

The court further heard that on 28.3.98 the partners had met (Exh P1 – 112, 113) and opened account no. 06113 at Equity Bank for the rents payment. The defendant signed the minutes. Further, that he opened A/c no. 9164 on 11.9.89 (Exh. P1 – 118, 119) for the timber business with a deposit of sh. 5400/= . Another business account no. 14:473 was at Barclays Bank (Exh. P1 – 116, 117). On 23.10.89 the defendant withdrew sh. 52 000/= from it for the timber business - not to buy the Kiru plot. It was repeated that this was a joint account and the defendant alone could not make a withdrawal from it.

The Kiriaini (Kiru) plot was bought as per the agreement of 25.10.85 (Exh P1 – 26). They paid the owner the balance of sh. 50 000/=. In rather a confusing way the defendant next testified that:

“ I paid for this plot with-my own money. It was part of the money withdrawn from Barclays Bank.”

He bought the plot, from one Gathanga Mbogo, in his own name. Then he invited Mwangi and Wanguo to join so that the 3 could go on with the timber business. This plot is the subject in Nyeri HCCC 179/08 – no. Loc 14/KIRU/2836 (Exh P1 – 38), owned by the four: the defendant, Wanguo, Mwangi and Ngunjiri. That when the defendant signed the agreement of 25.4.08 (Exh. P3) he did not know its contents. It was a sale agreement of plot no. 2836 to Alexander Kiai and therein the defendant acknowledged receipt of sh. 180,000/= (sale price) on behalf of the other partners. But in evidence, he denied such receipt. He claimed that all partnership assets were his property to use as he wished. The 3 other partners did not contribute to by the Kiru plot. Nyeri RMCC no. 89/88 was filed by the defendant, Mwangi and Wanguo.

He denied that at the meeting of 9.10.95 (Exh P1 – 70, 76, 77) he claimed that Wanguo owed him sh. 41,000/=. He was owed sh. 95 000/=. The letter from his lawyers dated 7.3.97 (Exh. P1 – 101) was not a demand for such a sum. He desired his other partners to sign a cheque of sh. 95,000/= to buy timber. When lawyers of both sides (Exh P1 – 220 and 222) proposed meetings to take accounts and distribute assets, the defendant cooperated, except that he could not produce any book of account because it was the secretary who used to keep them.

The defendant acknowledged that he signed daily business collection records (Exh P1 – 142 (a) to 176). As for “cash in” he or their employee took it to the bank. He gave his private properties as security to procure bank loans because he put his own money in the timber business. He borrowed when their 2 accounts did not have money. The defendant denied that the loans he took were personal and that is how his properties were sold on default. But whenever he took these loans he put the proceeds in his own account because his titles served as securities. The defendant referred to the ruling by Kasanga J dated 29.9.99 to the effect that he did not succeed because the court found that he had not used the loans in question for the partnership business. He did not appeal that ruling because the present suit was still going on. He insisted that the other partners did not contribute to the business and he did not have books of accounts to produce. He did not agree with the auditor's report either.

In reexamination repeated more or else what was in examination-in-chief and cross-examination - about the capital (his only), the bank accounts, the 2 properties; the sale of the Kiriaini plot to Kiai who did not give the sale proceeds to the defendant. He also repeated what he said about taking bank loans. With that the defence case closed.

In submission, the plaintiffs maintained that when the firm, Kiriaini Stage Timber Sales was formed in 1987 each partner contributed sh. 5000/= and the defendant was the managing partner. When the outfit was reconstituted later with 4 partners, he continued in the same capacity. He did not maintain books of accounts between 1991 and 1996. As from October 1996 the defendant ceased to cooperate with other partners to account for the way the partnership business was running. So it collapsed. This suit followed so that the defendant could be ordered to provide audited accounts of the claimed years to enable the partners to share the assets/liabilities following the death of one partner Mwangi Kariuki on

26.6.95.

Reference was made to the fact that the defendant filed a defence and counter-claim denying that the other partners did contribute to the business capital but that he worked hard enough and with partnership resources he acquired the Kiru plot no. 2836 and Dandora plot no. B4320 B, phase II. That he supplemented those resources with loans he borrowed from Equity Building society (now Equity Bank) sh. 100,000/= and another loan from Kenya Small Traders Society – sh. 60,000/= so he claimed to be reimbursed sh. 211,673/53 arising from those loans. That the plaintiffs denied knowledge of such loans. However a notice of motion he lodged to have the plaintiffs ordered to sign cheques to repay those loans was dismissed by Kasanga Mulwa J on 29.9.99 on the basis that the defendant had not made out a case regarding how he used the loan money. He did not appeal.

The court was told that when the partners met to try to settle their dispute on 20.8.03, a consent addressed to the court was signed by Luka Wagana on behalf of all the plaintiff and the defendant, the consent which was filed in court on 6.9.03, from which a preliminary decree was extracted to the effect, *inter alia*, that the 4 partners – Mwangi Kariuki, James Wanguo, Ngure Maingi and the defendant each contributed sh. 5,000/= towards the partnership business. To the plaintiffs, this settled the claim and denial regarding individual contribution.

Further, that the consent followed by the preliminary decree stated that Mr Daudi Kemoli Kiyingu t/a Kebamu Associates be the receiver/manager of the partnership, withal the partners cooperating M/s Kebamu started on the exercise but on 15/9/03 but then the defendant stormed out of the whole thing. The plaintiffs nonetheless retained that firm, which relied on whatever material it was given by the plaintiffs to come up with a report to cover the years 1991 to 1996 (Exh P2).

At this point the plaintiffs' position was that the only issue to decide was the taking of accounts, the dissolution of the firm having been agreed and dealt with already.

The court was told that the defendant, as the managing partner, had the duty to avail the books of accounts on which the audit report had to be based. He did not provide them and he was uncooperative. He was the principal person in the running of the business on a day – to – day basis and so he was bound to avail such information/material. He sued to receive the money (Exh P1 142 (a) to 176) and sign accordingly. Neither Wanguo (secretary) nor the late Mwangi got that far in running the business. That the defendant's non-cooperation made the auditor encounter much difficulty in reconstructing the accounts between 1987 and 1998. The defendant claimed that he ran the business single – handedly but he could not avail cashbooks, purchaser's ledger, journals and sales documents. He did not even produce his own set of accounts when he refused to cooperate. Accordingly, the plaintiffs' set of accounts ought to be accepted as best of what could be done.

It was added that plot no. 2836 was partnership property on the defendant's own admission. He sold it to Alexander Kiai, and acknowledged receiving the money. The sale document bore all that and the defendant cannot deny. Similarly the Dandora plot was bought with withdrawals from Equity and Barclays banks (Exh P1 – 178, 179) and so the defendant cannot say that he used his own money and/or loans to make the purchases. No minutes for the partners reflected such. The defendant was not candid in his case or evidence.

On his part the defendant also went over the pleadings and the evidence and reiterated that there was no evidence to show that each partner contributed sh. 5000/= as capital for business.

In any event there was no partnership agreed/deed spelling out things like share contributions, responsibilities, designations etc. The defendant submitted that he contested the preliminary decree herein claiming that advocates did not approve it and it was not extracted. Perhaps at this point, the court may be corrected to note that at no point did such a claim feature in evidence or examination. Submission proceeded that Wanguo did not tell the court what his role as secretary was with the firm. He took notes of the meetings and books and records were kept in the open office – not necessarily by the defendant. That Mwangi, the treasurer of the firm, was responsible for timber sales, banking, expenditure

etc and all along before his death or after, no issue of partnership accounts was raised. He was best placed to explain this.

And that no funds of the partnership were ever embezzled. The defendant devoted his time to the business because he had heavily invested in it. He used personal funds and the loans to ensure that the business did not fail. Particularly in acquiring the 2 plots herein. In any event PW2 did double up as secretary and accounts clerk of the business after his father died.

Despite all the foregoing, the plaintiffs declined to sign cheques to withdraw and expend money. So the business collapsed.

The court was urged to disregard and ignore the evidence of PW3 (Onzere) who wrote the books for the plaintiffs because if the defendant denied him books he had no material to draw up the report he produced. The defendant could not do likewise because he did not have any books in his possession. That on 20.1.04 Ochieng J barred PW3's firm from doing the audit because he was partisan. He should not have gone on even on behalf of the plaintiffs' instructions. That report should be rejected.

Plot no. 2836 Kiru, was still subject in HCCC 179/08 Nyeri wherein all the partners make a claim against the plot purchaser, Alexander Kiai. The plaintiffs therefore were aware of all about that sale to Kiai. The defendant denied receiving sh. 180,000/= from this party. Because the partners were close family members, the defendant lost his two plots No. Kim 695, and Kiambuthia/T224 to a bank creditor from whom he had taken loans to finance their business. The claim as per the plaint should be dismissed but the counterclaim allowed so that the defendant is able to access money in the partnership accounts to pay off the liabilities he incurred when he took loans on behalf of the partnership business.

To determine this cause and glean from the pleadings, evidence and submissions, the broad issues can be seen thus:

A: From the plaint as amended: As noted from the time PW1 testified, the focus is:

i) The defendant to provide audited accounts for the years 1991 to 1996 as his cost

B: From the Defence and Counterclaim:

ii) The plaintiffs do pay sh. 211,673/55 to the defendant together with any liabilities charged by now Equity Bank and Kenya Small Traders and Entrepreneurs Society.

C Other: (iii) Costs and Interest

To reduce the several prayers in the amended plaint, the many agreed issues, the prayers in the counter-claim and to condense the long evidence, it should be noted that the parties on 28.8.03 signed a consent (Exh P4) which was reduced into a preliminary decree filed in court on 5.9.03 to the effect that:

1. the proportionate shares of the parties were sh. 5,000/= by each of the 4 partners.
2. the partnership was dissolved w.e.f 25.6.95 and the dissolution would be gazetted.
3. Dan Kemoli Kiyingu t/a Kebamu Associates, was appointed receiver/auditor of the partnership to get into all outstanding book-debts and credits focusing on (a) credits, property and effects of the partnership;
b) debts and liabilities of the partnership
c) all dealings and transactions between the plaintiffs and the defendant

It was a further order that the goodwill of the business carried on by the partners and the stock-in-trade, be sold on the business premises with the receiver/auditor, on behalf of the partners, fixing the lots of sale with the partners being at liberty to bid.

All the above was to be completed before 21.10.03 with a mention to follow on 19.11.03 for a final

decree.

This was a binding consent on the plaintiffs and the defendant and they were bound to go by the preliminary decree that followed (above). It turned out that the defendant is said to have frustrated the bit of M/s Kebamu doing the audit.

If this point of taking audit can be concluded before going further, it appears that by 20.1.04 the defendant did not think that M/s Kebamu was independent in the matter. So again on that date the parties agreed by consent that:

“ the case [be] referred to an auditor who is to be agreed upon by the parties.”

Ochieng J directed that that auditor would file a report; the matter would come for mention on 18.2.04.

From the testimony recorded, such a auditor was not agreed upon. That was the position on 25.2.04 when the plaintiffs put up the name of Jacob Ombogi and the defendant had M/s Gachuna & Associates. This was a stalemate. The learned judge reminding himself that he could not in the circumstances impose terms on the parties, stood over the matter generally.

From the foregoing it can be deduced that the rest of the preliminary decree regarding contribution of sh. 5000/= per partner and dissolution of the partnership since 25.6.95 remained in place while only the point of agreed auditor was stood over generally.

The defendant argued that with M/s Kebamu Associates taken out of the exercise, their report on instructions of the plaintiffs alone is not valid.

This court does not agree. First, it is the impression of the court that the defendant having been the manager or the managing partner of their so-called partnership did the day-to-day duties of buying and selling timber stocks. He claimed that it was his personal energy, contribution and immense resources that saw the outfit grow. The minutes of their meetings refer to the defendant as manager. Thus to assess the financial state of the business in this regard, the defendant was bound to produce all the relevant books and ledgers for purchases, sales, expenditure etc because that was his duty and he claimed to have performed it pretty well. So why did he storm out of the meeting called by M/s Kebamu and even refuse to cooperate with other partners? Or when he later claimed that M/s Kebamu was not independent in the whole matter and that created a stalemate, why did the defendant not proceed with his choice after they failed to agree on one auditor to replace M/s Kebamu, to produce a report? The conclusion that this court came to is that the defendant did not want to produce the books with which he ran the business and he did not want any audit carried out. The plaintiffs did the best they could in the circumstances to proceed with M/s Kebamu on their own. They gave him whatever material that they had (see PW1) – documents and interviews. From the conduct of the defendant in the whole thing, the plaintiffs' course cannot be faulted. The partnership stood dissolved; the defendant was not cooperative or willing to have accounts taken to determine the credits, debts, liabilities, assets etc of the partnership. The plaintiffs had M/s Kebamu produce reports from 1987 to 1998. They paid for the work. The reports were served on the defendant. He did not react to them one way or the other eg. producing an accounts report of his own. Had he done so, even this court would have occasion to consider the 2 reports and decide which was the better one or what aspects to relate/compare. That the defendant did not wish to be helpful, he cannot validly ask this court to discard/ignore the plaintiffs' audit report. That is the only prayer that the plaintiffs asked this court to determine and it has been so determined. The defendant by failing or refusing to produce the accounts of the business between 1991 and 1996, the plaintiffs' version of the same is admitted in all its aspects. It gives the picture of the operations of the partnership herein over the period in question.

Turning to the defendant's counterclaim, he desired this court to find that the plaintiffs do pay him sh. 211,673/55 as owed. There was no evidence to support this claim or how it came to be. It was a specific sum but with no pleading or evidence to back it up.

The other prayer was that the plaintiffs do pay interest and other liabilities due to M/s Equity Bank and Kenya Small Traders. The court was left with a view that the loans the defendant claimed that he took from the 2 lenders were not applied to purchase/improve the partnership properties No. Kiru/2836 and 34220 "B" Dandora.

There was no evidence in the minutes produced before this court and no documents were produced to the effect that the partnership, informal as it appeared to be regarding the law on partnership, took any loan or authorized the defendant to take any loan to benefit the 2 partnership properties. It is not disputed that the 2 plots were indeed partnership assets. So the plaintiffs cannot be burdened with the loans the defendant took from the 2 financial institutions, pledging his own 2 plots which on default, were sold or he was put in civil jail. He took the loans on his own and for his own benefit and he should bear them himself.

With the partnership dissolved, the partners should move to close the partnership accounts at Equity and Barclays Banks, jointly meet liabilities there if any, or share balances, if any are still available.

In the circumstances of this case it may be prudent for the partners to think how best to share the Dandora plot e.g. to sell it and share proceeds etc, now that the partnership is no more.

Regarding plot no. 2836, another partnership property, the court heard that it was the subject in Nyeri HCCC 179/08. The partners/litigants here may take the best course possible when that case is finally determined or otherwise.

All in all the plaintiffs succeed in their suit with costs. The counterclaim fails with costs.

Judgement delivered on 14.10.11.

J. W. MWERA

JUDGE