



CIVIL

- Ø **Claim for dissolution of partnership.**
- Ø **The essential component of a partnership.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 216 OF 1989

J.G. KINOTI PLAINTIFF

VERSUS

G.J. KIBANGA DEFENDANT

JUDGMENT

The plaintiff sued the defendant claiming for the dissolution of a partnership called Shamba Chemicals. He additionally sought orders to stop the defendant from operating the partnership account and for an order of injunction to restrain the defendant from excluding him from running the affairs of the business. The defendant in his defence denied the existence of a partnership. The plaintiff in evidence stated that there existed a partnership. That both he and the defendant previously to their association in the business they were employees of Murphy Chemical. About 30th May 1988, they sat down to discuss their future in that employment. This is because Murphy Chemicals had sold its business to May and Baker Company. The defendants suggested that they enter into business together. They sat down and agreed on the name of that business. The plaintiff said that he was the one who suggested Shamba Chemicals. Since the defendant was the one residing in Nairobi, he was left to carry out the registration of that partnership. It was necessary for them to register in order for them to qualify being appointed as distributors of the products produced by their employer, May and Baker. He said that the defendant later told him he had registered the partnership. After the registration, the defendant negotiated the release of products to Shamba Chemicals by May and Baker. As he did so, the plaintiff was looking for premises in the Meru area. He first secured as a tenancy where the rent was Kshs. 2,000/= per month. In total, he paid from his own resources Kshs. 6,000/= as rent. Goods were sent by May and Baker to Shamba Chemical around November 1988. He received them in Meru. According to the plaintiff, the goods were supplied on credit of 90 days. Because the defendant was still in Nairobi, the plaintiff began to sell the merchandise. Around 24th November 1988, they opened a joint account for Shamba Chemicals at National Bank of Kenya Meru. For this, they each contributed Kshs. 6,000/=. The plaintiff stated that when they opened that account it was the first time he realized that his name was not reflected in the registration of Shamba Chemicals. All the while as the plaintiff was assisting in the setting out of the premises for Shamba Chemicals and as he began to sell its products he was still employed by May and Baker. On 15th December 1988 he formerly resigned from May and Baker. When he left that employment, he negotiated the exchange of a

motor vehicle for his terminal dues. According to him, May and Baker agreed to those terms. He and defendant proceeded to open another outlet of Shamba Chemicals at Timau. The plaintiff undertook the construction of shelves for that shop which he said he paid from his own resources. He also said that he did the same for another shop at Kathita River. The plaintiff said that he and the defendant had agreed not to draw salaries in order to build up the business's capital. However, on 7th July 1989 the defendant wrote him a letter suspending him from acting for the company, in any capacity. What is interesting in that letter is that the defendant referred to him as director/partner of Shamba Chemicals. On cross examination, the plaintiff said that after his resignation from employment with May and Baker, he concentrated on the business of Shamba Chemicals. He then said:-

"I was earning a commission from the goods

which I was selling for Shamba Chemicals."

PW2 was the carpenter hired to do the shelves of the shop of that business. This witness said that in 1989 when he did that job of constructing shelves, he was paid partly cash and partly by cheque which cheque was signed by the plaintiff and the defendant. PW3 although, he did not indicate the date, said that he was employed by Shamba Chemicals as its manager at the Meru town shop. The defendant had told him that the plaintiff was a director and that he should therefore respect him. PW4 was an employee of Shamba Chemicals in 1989. He knew both the plaintiff and the defendant to be the directors of that company. The defendant in evidence stated that he has a business called Shamba Chemicals Supplies. He is the sole owner of that business. It is registered in his name. In this regard, he produced the certificate of registration. He said that he engaged the plaintiff in the selling of chemicals for that business before he himself moved to Meru. He denied that the plaintiff was his partner but agreed that they had begun to work towards forming a partnership. He said that the business had two accounts at the National Bank of Kenya being account number 319002 and 319005. He produced "Sole proprietorship form" of the National Bank of Kenya which only reflected his name. He accepted that he withdrew his authority for the plaintiff to operate the company bank account after realizing that the plaintiff had failed to account to the company for money received. He reported the misappropriation by the plaintiff to the Criminal Investigation Department, C.I.D. That was when the plaintiff filed this case.

Partnership is defined in section 3 of the Partnership Act as:-

*"Partnership is the relationship which subsists
common with a view of profit."*

between persons carrying on a business in

It is clear from that definition that partnership is the relationship which exists between persons carrying on a business in common with a view to profit. That relationship involves firstly an agreement between the parties to enter into a legally binding relationship which essentially is contractual in the nature. Tindal C.J. stated in this respect in Green Vs. Beesley [1885] 2 Bing NC:-

"I have always understood the definition of

partnership to be a mutual participation."

It should however be noted that such participation mentioned in that case does not create a legal entity called a partnership. A partnership is essentially composed of people who have entered into a contract with each other. In my view, having reviewed the evidence tendered and having read counsel's well presented submissions, I find that the business of Shamba Chemicals Supplies was a sole proprietorship of the defendant. The plaintiff at the initial stages was working for the defendant on commission basis. He confirmed this when he was cross examined. The minutes that the plaintiff produced in this case show that he and the defendant were negotiating the incorporation of a company. They discussed matters relating to shareholding. It seems that the plaintiff and the defendant were to hold equal shareholding. However, for the formation to take place, the parties required each one of them to make a contribution towards the capital. The minutes of 19th May 1989 show that the plaintiff had not made his contribution. The minutes show that the plaintiff was looking for a buyer of his pickup motor vehicle to enable him pay his share of that contribution. Did the plaintiff ever pay his share contribution? Or, was he still receiving commission for his work from Shamba Chemicals? The plaintiff did not elaborate in his evidence and did not state when he stopped receiving commissions. The plaintiff relied on the opening of account number 319002 as evidence of the existence of a partnership. However, when one looks at plaintiff exhibit number 9, that is, the letter written to National Bank by the defendant when he withdrew his authority of the plaintiff operating that account, it is clear that the account was not a partnership account. Had it been a partnership account, the bank would not have entertained such a letter. It is clear that in operating that account the plaintiff and the defendant were not equal partners. The plaintiff was operating it on the authority of the defendant. It would seem that is why the defendant stated that they intended to incorporate a company but it "never saw the light of day". He also said that the plaintiff was a partner but not a registered partner. The understanding that one get from that statement is that the parties were in the process of registering a company together. Shamba Chemicals supplies was therefore in the process of being corporated. Before that would occur, it is expected that both the plaintiff and the defendant would have been working very closely together. Hence why the employees and the service provider referred to them as directors. I cannot find in the evidence before me an agreement to either run or form a partnership. There was no contract in that regard. The relationship between the plaintiff and the defendant fails the test of the definition of partnership in the Partnership Act. James L.J. in Smith Vs. Anderson [1880] 15 Chan D. saw the concept of creating a partnership as:-

*"An ordinary partnership is a partnership
by contract between themselves to continue
pleasure or during a limited time, and is essentially
contract with one another."*

*composed of definite individuals bound together
combined for some joint project either during
composed of persons originally entering into*

There was an agreement in my view between the plaintiff and the defendant to incorporate a company but the intentions of incorporation were never realized. That is clear from the minutes between the plaintiff and the defendant. There is however no evidence of an existing partnership. In the end, the plaintiff's claim fails. I find that the plaintiff has not proved his case on a balance of probability. The plaintiff's case is dismissed with costs being awarded to the defendant.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO
JUDGE