



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

**MILIMANI COMMERCIAL COURTS
Civil Case 357 of 2007**

**PATRICK OUMA
ANYANGO**

.....
.... **PLAINTIFF**

VERSUS

**JOSEPH OBUNGA
OLIMA.....**

..... **1ST**
DEFENDANT

**PHILIP OCHIENG
GER.....**

..... **2ND**
DEFENDANT

JUDGMENT

By a suit filed by way of an originating summons, the plaintiff sought for the following orders:-

“a. that the partnership subsisting between the plaintiff and the defendants be dissolved, accounts thereof taken, it would be up and property acquired be divided among the partners equally on the grounds inter alia that it is just and equitable so to do and that the relationship between the plaintiff and the defendants has irretrievably broken down.

b. that the costs be borne by the defendants.”

Directions were given that the matter should be determined by way of viva voce evidence. The plaintiff gave evidence in support of the suit; he testified and produced a certificate of registration of a business known as Imagepro Graphics and Design which was registered on 29th November 2002 as a business name. The registered partners were Joseph Obunga Olima, Philip Ochieng Ger, Patrick Ouma Anyango and Tom Otieno Keke. However Tom Keke Otieno resigned from partnership and the Registrar was notified of the change of particulars according to the certificate issued on 26th June 2003.

The plaintiff testified that they started the business on 29th November 2003, at the premises which were located on the 5th floor Tom Mboya street Nairobi. It is the plaintiff who used to work full time because the other partners were employed elsewhere. Each of the partner contributed about Ksh 800,000/= either in materials, time, money or skills as the original capital to set up the business. According to the plaintiff

the partnership had assets worth about 5 million with a work force of about 10 employees.

The plaintiff was however frustrated by the defendants when they sidelined him from the mainstream business and opened another bank account at Cooperative Bank of Kenya. The defendants also started dealing with other traders without any involvement of the plaintiff and entered into sale agreement and other trade deals with other agencies. The plaintiff was also deducted money which was paid to a cooperative society with the funds from the partnership. The plaintiff was also denied salaries and telephone facilities, and when the relationship between the plaintiff and the defendants deteriorated, he left the partnership on 3rd May 2007 and filed the present suit seeking for the taking of the accounts and dissolution of the partnership.

The plaintiff annexed accounts for the year 2004 to show that each partner had contributed Ksh.800,000/- as share capital. Those accounts were prepared by Nderitu & Associates. During cross examination the plaintiff admitted that he contributed 60,000/- to the business of the partnership. He also invested time for 5 years working for the partnership when he was earning a nominal sum of Ksh.20,000/-. He therefore urged the court to enter judgment and award him an equitable share of the partnership after which he is willing to resign, alternatively the partnership be dissolved.

The defendants gave evidence through Philip Ochieng Ger and David Kaniaru Kibiru who testified on behalf of Nderitu & Associates and clarified about the share capital indicated in the audited account in respect of this partnership for year 2004. According to the defendants, the plaintiff had no skills to undertake the work of graphic designs. His role was merely to receive information and convey to the partners who did the work. Due to the plaintiffs' attitude to work and disagreements in respect of work ethics and unsatisfactory performance which led to a near collapse of the business, the plaintiff left the partnership on his own volition.

The defendants denied that the plaintiff contributed any share capital. When the partnership was registered the plaintiff had misrepresented that he would secure a share capital of 1 million from Faulu Kenya for the partnership. The plaintiff failed to secure the capital and none of the partners contributed 800,000/- which was put in the audited accounts for the mere compliance with the accounting standards and for the returns to the Kenya Revenue Authority. According to the defendants the plaintiff diverted payments made to the partnership and when he was called upon to account for certain cheques he collected he failed to do so but instead converted money due to partnership for his own use.

The membership to the cooperative society was discussed among the partners and those who wish to join it so voluntary and the payments were deducted through a cheque off system. The plaintiff also left the partnership voluntarily after he was asked to account for certain cheques that were paid to the partnership but were diverted to his own use. Since the plaintiff walked away from the partnership, the defendants would like to continue with the business. They denied the plaintiff was owed any money by the partnership.

An audit was carried out jointly between the plaintiff and the defendant and according DW2 the capital stated in the account of 2004 reflecting a sum of 2.4 as contributions by the four partners was a misrepresentation. He testified that the amount was indicated merely to comply with the accounting procedures. It is only Philip Ochieng and Joseph Ambuga who contributed the original sum of Ksh.200,000. the sum of Ksh.800,000 was because Philip Otieno was a skilled graphic designer . The capital of 2.4 million was maintained in the account for consistency in the subsequent years.

According to the statement of profit and loss account from the partnership as at 31st May 2007, there is really no money in the partnership for sharing. The partners were entitled to monthly drawings taking all the accounts the company has no money to share.

The above is the summary of the evidence before this court, after the close of the case, both counsel for the plaintiff and defendant undertook to file written submissions, however none were filed therefore I will proceed to evaluate the matter without the benefit of submissions. It is clear that a partnership existed between the plaintiff and the defendants going by the certificate of registration. The plaintiff left

the partnership in 2007, at the moment it is the defendants who are carrying on the partnership. The plaintiff opted to leave due to irreconcilable disagreements with the defendants. Since the plaintiff opted out, the defendants produced a statement of accounts showing the business was making losses, is there any useful purpose being served by the continued existence of the partnership? should it be dissolved?

The plaintiff also sought for an order of the taking of the account and indeed the court ordered the accounts be taken. The defendant testified that they handed over the documents to the plaintiff's auditor so that he could prepare the accounts jointly with the defendants' accountant. DW2 testified that the plaintiff refused to co-operate and he was not interviewed but according to the information gathered from the other partners, the plaintiff was drawing a monthly salary of Ksh.20,000/- per month from the year 2003 up to May 2007. The other partners were drawing Ksh.60,000/- per month. The liabilities taken with the assets showed that the partnership was having a deficit of over 3 million shillings.

The plaintiff in his own evidence testified that he contributed Ksh.60,000/- cash to the partnership. During cross examination he admitted that he did not have any skills having gone to school up to KCPE Kenya Certificate of Primary Education and before then he was selling shoes at Gikomba. The plaintiff also did not claim to have contributed the sum of Ksh 800,000/= as share capital but contended he gave his time. Although DW2 was cross examined at length on the share capital of Ksh.800,000/- which was indicated in the accounts while alluding to the fact that the accounts were manipulated to deny the plaintiff his share, by the partners, the plaintiff himself did not claim to have contributed the said sum to the share capital, he claimed to have contributed only ksh.60,000/-.

Accordingly I do not see any accounts or money that can be divided between the partners. The plaintiff did not establish on a balance of probabilities what account or sums of money are due to him. It is not enough for a plaintiff to just to ask court to make a determination of a share contribution and leave the court to guess what should be ordered in his favor. I wish to draw a parallel with the case of **Kenya Breweries Limited vs. Kiambu General Transport Agency Limited [2002] 2 EA 398**. In that case, the respondent's case in the superior court was based on letters and conduct. In dismissing the suit the Court of Appeal held that the respondent's suit lacked factual and legal basis and criticized the respondent's director Njenga Karume for his cavalier attitude in the presentation of his claim that he threw figures to the court and wanted to be paid a whopping 240 million.

Similarly in this case the plaintiff could not pinpoint the money he brought to the partnership. He could not also point out the assets of the partnership apart from pointing out a deposit which was paid for a go down, it is not clear whether it was bought or leased the reference number for the property was also not given. The plaintiff also did not prepare his own independent accounts which the court could rely on if indeed the court were to be persuaded that the accounts produced by DW2 were a fabrication. As the matter stand, the only accounts are those produced by DW2 who testified that the plaintiff refused to be interviewed or to provide any documents so he only relied on the information given by the defendants.

Taking the totality of the evidence, I am inclined to order the partnership be dissolved since the plaintiff left and the accounts show it is making loses. The debts, liabilities and any assets of the partnership be shared by the plaintiff and defendants on prorata basis, as at May 2007, when the plaintiff left the partnership.

Each party shall bear their own costs of this litigation.

JUDGMENT READ AND SIGNED ON 13TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE