



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

**Civil Appeal 69 of 2004**

**MBURU MURUTHI & OTHERS .....APPELLANTS**

**VERSUS**

**KURIA KAMAU .....RESPONDENT**

***(From original Judgment in Civil Case No.298 of 2002 in the Senior Principal Magistrate's***

***Court at Murang'a by G.K. Mwaura - SPM)***

**J U D G M E N T**

This is an appeal arises from the Judgment and decree of the Senior Resident Magistrate at Murang'a (G.K. Mwaura SRM) dated 9<sup>th</sup> July, 2004 in the Senior Principal Magistrate's Court, civil case number 298 of 2002 **Kuria Kamau VS Mburu Muruthi & others.**

By a plaint dated 8<sup>th</sup> July, 2002, the plaintiff, now the respondent in this appeal sued the defendants, the appellants herein seeking:-

**“a) A declaration that he was entitled to a share as of right out of Ksh.4,900/= being the rents collected in respect of the premises being and erected on plot No.17 Rwathia Market.**

**b) Accounts for the rents collected**

**c) Costs of the suit**

**d) Any better and or further relief the court may deem just to grant.”**

The genesis of the suit was that the respondent and the appellants having pooled resources together jointly put up 5 rental rooms, on plot number **AI Rwathia** hereinafter referred to as “*the suit premises*” with the understanding that the rent accruing therefrom would be shared proportional to the amount each had contributed towards the project. It was the plaintiff's contention that the suit premises generated Ksh.4,900/= per month and the respondents had since 1989 failed to account to him the rental income from the suit premises and give him his share of the profits.

The appellants in their defence dated 4<sup>th</sup> September, 2002 essentially admitted that the respondent had together with them jointly developed the suit premises and was entitled to a share of the rental income as a partner. However they contended that it was the respondent who had refused to attend meetings when dividends and or proceeds therefrom were being shared out among the members. They however reiterated that the respondent had been receiving his share of the profits through proxies after failing to

attend such meetings.

In support of the respondent's case, only the respondent testified. In summary the respondents testified that it was the responsibility of the appellants to collect the monthly rent from the suit premises. That the suit premises consisted of a shop which was let out at Ksh.1,300/= per month, a bar let out at ksh.1,500/=per month to the 2<sup>nd</sup> appellant, a hotel let out at Ksh.1,300/= per month and two rooms rented out at Ksh.400/= per month. The total monthly rent collectable from the suit premises was therefore Ksh.4,900/=. This rental income was to be shared by the 4 partners equally. The appellants were the ones to collect the rent. However since 1989 though the appellants had continued to collect the rental income from the suit premises they had failed to render an account to the respondent neither have they invited him to the partnership meetings.

As for the appellants their testimony was put forth by the 1<sup>st</sup> appellant. He testified that they were partners with the respondent. That they collected a monthly rental of Ksh.4,900/= from the suit premises and that the respondent is entitled to 20% of the profits. That though the respondent had claimed that he had not been paid his dividends since 1989, he had actually received two payments. He also testified that after the respondent commenced this cases against them, they had not been sharing out the rental income. That the respondent does not attend the meetings. The appellants' final contention was that they had never refused to render to the respondent an account and to pay him his share of the dividends.

These were the contrasting positions presented before the learned Magistrate by the parties herein. Having carefully sifted through the evidence, analysed and evaluated the same, the learned Magistrate found for the respondent stating thus,

**“.....After considering all the evidence, I find on a balance that since 1989, the defendants haven't paid the plaintiff his 25% share of the rental income from the suit premises. I also find that they have not rendered any account to him. I therefore direct that an account of the rental income be taken. This is from 1989.....after this accounts are taken, 25% of all the rental money is to be paid by the defendants jointly and severally to the plaintiff.....”**

This is the holding that has provoked this appeal.

In 5 point memorandum of appeal filed by the appellant through **Messrs Kimani Kahiro Associates Advocates**, the appellants impugn the learned Magistrate's judgment on the following grounds:

- 1. The learned trial magistrate erred in law and in fact in coming to the conclusion that the plaintiff and the defendants were the only partners in the business the subject matter of the suit in the light of evidence recorded that the business was a partnership between at least twenty six (26) people.**
- 2. The learned trial Magistrate erred in law and in his evaluation of evidence in discounting the evidence of the defence which was properly led before him and in arriving at the conclusion that the plaintiff was entitled to twenty five percent (25%) share of the partnership business from 1989 to date of judgment.**
- 3. The learned trial Magistrate erred in law in entering judgment and making orders which were not prayed for in the plaint.**
- 4. The learned trial Magistrate erred in law in shifting the balance of proof to the defendants instead of deciding the case on a balance of probabilities.**
- 5. The judgment and decree of the court was against weight of the evidence.**

When the appeal come up for hearing the appellants were represented by **Mr. Karingithi** learned counsel holding brief for **Mr. Kimani**, advocate whereas **Mr. Gacheru**, learned counsel appeared for the respondent. Both counsel agreed to have the appeal heard and determined by way of written

submissions. The court acceded to this mode of hearing the appeal. Subsequent thereto, respective submissions were filed which I have carefully read and considered.

As a first appellate court it is my duty to subject the evidence tendered before the trial court to fresh evaluation and analysis so as to reach my own conclusion as to whether the judgment of the learned Magistrate can stand or not. **See Gudka V Dodhia (1982) KLR.376.**

From the record, it is common ground that the appellants and the respondent were partners, that they jointly contributed money towards the developments on plot **A1 Rwathia**, that the respondent was entitled to a share of the income from the suit premises, that the respondent did not attend meetings where dividends were paid out and finally that the partners were entitled to the dividends in accordance with their contribution to capital fund.

As correctly submitted by **Mr. Gacheru**, the case before the learned Magistrate was quite simple since there was agreement on the fundamentals and the issues in contention could be summarized as follows:

- (i) Whether the respondent used to receive his share of the profits through proxies.**
- (ii) Whether the respondent was ever invited to attend meetings of the partnership.**
- (iii) The respondent entitlement out of the income of the suit premises.**
- (iv) Whether there was proper account and full disclosure of the same to all members.**

The respondents' contention is that since 1989 he has never received a share of the dividends. This contention seems to receive some support from the appellant through the 1<sup>st</sup> appellant when he testified that, **"After the plaintiff began case, we have not been sharing out the money."** It would appear that the parties have had several cases. There is even evidence of a chief arbitrating in one of the cases. The respondent consistently maintained that since 1989 he had never been invited to the meetings of the partnership or even received any share of the income. This fact was not seriously challenged by the appellants. By the appellants stating that they delivered to the respondent twice his dividends through proxies is a clear admission that the respondent had not attended any of their meetings since 1989. It he did not attend how then could he have received his share of the dividends.

The appellants stated that from 1989 the respondents had been paid dividends twice. This was done through proxies. There is no evidence that the respondent had appointed any proxy to represent him at the meetings of the partnership. According to the 1<sup>st</sup> appellant, the proxy was the respondent's sister in law. However it is instructive that the said sister in law was never called to testify as to whether she ever delivered any money to the respondent if at all. It is also instructive that 1<sup>st</sup> appellant did not know how much if at all was delivered to the respondent by the sister in law as alleged. In a nutshell, there was no prove that the respondent has ever received his dividends from the respondents since 1989. Nor was there any prove that the appellants had invited the respondent to the partnership meetings. The appellants claimed to have letters inviting the respondent to the meetings and had copies. However he produced in court no such copies. That being the case, one can safely assume that the allegation was not proved. Accordingly and as contended by the respondent since 1989 he has never been invited or attended any of the partnership meetings.

Was the respondent entitled to 20% or 25% of the profits of the partnership? The learned Magistrate found that the partnership consisted of 4 partners. Since each partner was entitled to an equal share of the profits of the partnership, each would accordingly be entitled to 25% of the profits. However in their testimony, the appellants have suggested that the respondent was entitled to 20% of the proceeds of the partnership. However, the appellants did not lead any evidence to justify that fact. If the partners are four and are entitled to share in the profits of the partnership equally then the ratio can only be 25%. I cannot

therefore fault the learned Magistrate for so holding as urged by counsel for the appellants.

I now wish to address the issue raised by the appellant to the effect that a business association comprising of more than 20 persons must be registered under the companies Act failing which the association does not have any legal existence and cannot maintain an action in court. For this proposition counsel relied on *Section 389* of the Companies Act as well as the case of **Fort Hall Bakery Supply Company VS F.S. Wangoe (1959) E.A.474**. According to the appellants' counsel it was evident that the business had partners in excess of 28 persons; going by the evidence on record. If that be the case then the business ought to have been incorporated. As the business would appear to have been unincorporated, *section 389*, of the Companies Act was thereby contravened. In response, the respondent maintained that the appellants had admitted in their defence the existence of only 4 partners. Accordingly they are now estopped from repudiating that admission.

The defendants clearly admit in paragraph 2 of the defence the contents of paragraph 4 of the plaint. The averment in paragraph 4 of the plaint is to the effect that only the respondent and the appellants pooled resources and jointly erected 5 rooms on the suit premises. This is a clear admission that there were only 4 partners. Nowhere in the defence does the appellants aver that there were other partners. In paragraph 5 of the plaint a formulae as to how the profits was to be shared among the four partners is indicated. This averment was not traversed specifically by the appellants. If indeed there were more than 4 partners in the partnership, on what basis would the appellant have testified to the effect that the respondent was entitled to 20% of the profits of the partnership? One would have imagined that perhaps the respondent would then be entitled to 1/28<sup>th</sup> of the profits realized. It is also not lost on me that the issue as to the alleged number of partners only come out in cross-examination. It is also instructive that the appellants did not even know the exact number of the alleged partners – were they 28 or 29? Finally I have perused the appellants written submissions tendered in the trial court. The appellants did not at all raise this issue. In my view therefore the appellants are raising the issue now as an afterthought. I am persuaded going by the evidence on record that the partnership consisted of 4 partners only, the appellants and the respondent. The appellants having conceded to that fact in their joint defence, are estopped by virtue of section 24 of the Evidence Act from repudiating that fact and claiming otherwise.

The appellants also maintain that the learned Magistrate erred in law in entering judgment and making orders which were not prayed for. This ground has no merit at all. Prayer (d) in the plaint talks of “**Any better and or further relief the court may deem just to grant....**” On that basis alone the learned Magistrate had jurisdiction to grant orders not specifically prayed for in the plaint such as an order for appointment of a receiver e.t.c.

Finally the appellants lament in grounds 4 & 5 of the memorandum of appeal that the trial magistrate erred in law in shifting the balance of proof to the appellants. I do not discern such shift from the record. The question of partnership was not disputed. The issue of the respondent not attending meetings and receiving the proceeds if at all since 1989 was not rebutted. I am of the considered view that on the evidence on record, the learned Magistrate was right in arriving at the decision he made. The appellants cannot be heard to say that the judgment and decree of the court was against weight of evidence.

Accordingly the appeal stands dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of January, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**