



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 517 of 2007 (OS)

ALEX STEWART NDAMBO ..... PLAINTIFF

VERSUS

ELIJAH MOGERE OMBWORO .....DEFENDANT

JUDGMENT

By a partnership agreement dated 31<sup>st</sup> March 2004, the plaintiff, the defendant and one Amon Mghanga Mwachugu formed a business to be operated under the name Communications Outsource Centre. The business was to be based at the 680 Hotel Arcade within the City of Nairobi. The said business was duly established. A disagreement arose between the plaintiff and the defendant concerning the manner which the business was being run.

On 3<sup>rd</sup> October, 2007, the plaintiff filed an originating summons pursuant to **Order XXXVI rule 4** of the **Civil Procedure Rules** seeking orders of this court to dissolve the partnership which was registered on 30<sup>th</sup> September, 2003. The plaintiff further prayed for accounts to be taken for the purpose of winding up the partnership. The grounds in support of the originating summons are on the face of the summons. The plaintiff contends that the defendant had failed to give proper account of the business to the plaintiff. He further states that the defendant had been carrying on the partnership business for his own benefit and to the exclusion of the plaintiff. It was the plaintiff's view that it is unfair and unjust for the partnership to continue to his detriment. The originating motion is supported by the annexed affidavit of the plaintiff. The plaintiff swore an affidavit in further support of the originating motion.

The originating motion was opposed. The defendant filed a replying affidavit in opposition to the motion. He conceded that he had been running the business alone on account of the fact that the plaintiff had walked out of the business and stopped making any contribution toward the expenses and the day to day running of the business. He denied the thrust of the plaintiff's case which was to the effect that he, (*the defendant*), had failed to render accounts to the plaintiff. He denied that he had ever earned any income from the partnership and in fact asserted that since the partnership, was formed, the business had been making losses and therefore, the court should compel the plaintiff to reimburse the defendant the expenses incurred by the business. The defendant was opposed to the dissolution of the partnership in the manner proposed by the plaintiff. He urged the court to order the plaintiff to comply with the terms of the partnership agreement as regard dissolution. He further deponed that the plaintiff had attempted to frustrate the partnership by purporting to hand over the premises back to the landlord without acknowledging the fact that it was the defendant who had all along paid the rent due in respect of the said premises. He urged the court to dismiss the plaintiff's suit with costs.

The parties to this suit took directions regarding the manner in which this suit was to be disposed off. The parties agreed to proceed with the trial of the suit on the basis of affidavit evidence. At the hearing of the suit, I heard the submission made by Mr. Murugara on behalf of the plaintiff and by Mr. Kwengu on behalf of the defendant. The two counsel basically reiterated the contents of the originating summons and the affidavits filed by their respective clients in support of their respective opposing cases. The issue for determination by this court is whether the plaintiff made a case to entitle this court dissolve the partnership registered on 30<sup>th</sup> September 2003 between the plaintiff and the defendant, under the business name Communications Outsource Center.

Certain facts are not in dispute in this case. It is not disputed that the plaintiff, the defendant and one Amon Mghanga Mwachugu entered into partnership for the purposes of conducting the business of internet services provision, secretarial bureau and communication services. The said business was to be based at The 680 Hotel Arcade. The partnership deed is contained in the partnership agreement signed between the said parties on 31<sup>st</sup> March 2004. It appears that the defendant was left in charge of day to day management of the business. A misunderstanding seems to have arisen between the plaintiff and the defendant in 2006 when the defendant failed to render account to the plaintiff. The plaintiff discovered that the defendant was using part of the premises leased by the partnership to conduct a business similar to the one conducted by the partnership. The letter of the plaintiff dated 10<sup>th</sup> September 2006 addressed to the defendant is instructive. In the said letter, the plaintiff complained that the equipment of the partnership was being used by a company known as Wavetek Communications, a business associated with the defendant. Instead of the defendant responding to the concerns raised by the plaintiff in his said letter, he instructed an advocate to reply to the plaintiff.

It was apparent that by that time, the relationship between the plaintiff and the defendant had taken a turn for the worse thus rendering the partnership untenable. According to the plaintiff, it was the defendant's refusal to render account that made him to withdraw and lose interest in the partnership. On the other hand, the defendant claimed that it was the plaintiff's refusal to contribute to the day to day management and expenses of the partnership that led to the situation that the plaintiff and the defendant now find themselves in.

It is evident that the relationship between the plaintiff and the defendant has broken down. The two no longer trust each other. The partnership is, for all intents and purposes, no longer in existence. What remains is the formalization of the dissolution of the partnership. The defendant is opposed to the partnership being dissolved in the manner proposed by the plaintiff. He insists that the partnership should be resolved in accordance with the partnership deed.

What does the partnership agreement provide in the event that one of the partners wishes to have the partnership dissolved? The partnership agreement does not provide for the dissolution of the partnership. Item 15 and 16 of the partnership agreement sets out what should happen in the event that a partner wishes to retire from the partnership. Having read the said clauses of the partnership agreement, this court empathizes with the reason why the plaintiff wishes to invoke the **Partnership Act (Cap 29 Laws of Kenya)** instead of the applicable clauses of the partnership agreement. It is clear that since the partnership was formed, the plaintiff has not obtained any benefit from the partnership. Instead, the plaintiff has been called upon, at least once, to pay the rent due in respect of the premises rented by the partnership.

The plaintiff does not wish to have anything to do with the partnership. **Section 39** of the **Partnership Act** grants this court powers to dissolve a partnership where it is established that certain events have taken place that are prejudicial to the partnership. For instance, **Section 39(c)** of the **Partnership Act** provides that where a partner, other than the partners suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, if calculated to affect prejudicially the carrying of the business, the court may dissolve the partnership. Under **Section 39(d)**, the court may dissolve the partnership where one partner has conducted himself in matters relating to the partnership business that is not reasonably practicable for the other partner to carry on the business in partnership with him. From affidavit evidence presented to the court, it is clear that the business is being run at a loss. That is another ground which the court can dissolve the partnership (*see Section 39(e)*).

In the present suit, it is clear that the partnership of the plaintiff and the defendant can no longer be sustained. The defendant's concern regarding the settlement of the debts incurred by the partnership after dissolution shall be addressed when accounts are taken for the purposes of winding up the partnership. The prayer sought by the plaintiff in the originating summons for the dissolution of the partnership is hereby allowed. The partnership agreement entered between the plaintiff and the defendant under the business name Communications Outsource Center is hereby dissolved.

The plaintiff and the defendant are hereby directed to appoint a Certified Public Accountant for the

purposes of winding up the partnership. If the defendant wishes to continue with the business that is currently being conducted by the partnership, he shall be at liberty to do so after buying out the shares of the plaintiff upon determination of the value of the same by an accountant. The said winding up process shall commence with immediate effect and shall be concluded within thirty (30) days of today's date. Either party shall be at liberty to apply. The plaintiff shall have the costs of this suit.

**DATED** at **NAIROBI** this **8<sup>th</sup>** day of **OCTOBER, 2008**.

**L. KIMARU**

**JUDGE**