



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 611 OF 2003
LINDA WATIRI MURIUKIPLAINTIFF

V E R S U S

- 1. NEVILLE PATRICK GIBSON WARREN**
- 2. DANIEL JAMES CORRY McVICKER**
- 3. HAMISH WOOLER KEITH**
- 4. ZULFIKAR H. ALIBHAI (All practicing as advocates under the
firm name of Daly & Figgis Advocates)DEFENDANTS**

J U D G M E N T

The Plaintiff, a partner in the law firm of DALY & FIGGIS, ADVOCATES, sued the Defendants, similarly partners in the same law firm, for the main reliefs that the law firm be dissolved; that pending such dissolution a receiver be appointed by the court to receive all the income of the firm and pay all outgoings; an order directing the taking of accounts and the making of all enquiries necessary for the purpose of that determination; an order, upon taking such accounts and determination of the share of each partner, that the Plaintiff be paid her full and rightful share of the firm; costs of the suit; and an order for interest. It appears that the parties soon entered into negotiations with a view to settling the dispute out of court.

There does not appear to be any defence filed by the Defendants. At any rate on 8th January, 2004 the parties filed a consent letter dated 18th December, 2003; by it they agreed on how to proceed towards disposal of the suit. An order was entered by the court on 9th January, 2004 in terms of that consent. The only role reserved for the court by that consent (clause (a) thereof) was:-

“(a) THAT this honourable court be pleased to determine as a single issue, whether the terms of the Partnership Deed dated 31st October, 1990 applied to the partnership between the Plaintiffs and the Defendants.”

Certain consequences, as per the consent, will flow from determination of that issue. By a ruling dated 18th and delivered on 22nd June, 2007 this court (Waweru, J) determined, after hearing rival arguments,

that the only factual basis for determination of that issue is the partnership deed dated 31st October, 1990, and two letters, one dated 26th March, 1997 and the other dated 9th April, 1997. These three documents were already in the court record. The learned counsels for the parties then put in written submissions which I have carefully read and considered, together with the authorities cited.

The partnership deed dated 31st October, 1990 is a rather long document. It is not necessary to set it out here in *ex tenso*. It was executed between NEVILLE PATRICK GIBSON WARREN, TIMOTHY CRANSWICK NOAD, MICHAEL HASLUCK SHAW and ROBERT IAIN COLQUHOUN EYRE HARRIS (all called “**the continuing partners**”) on the one hand and DANIEL JAMES CORRY McVICKER (called “**the incoming partner**”) on the other. All five together were called “**the partners**” in the deed. By that deed the partners agreed to carry on in partnership, with effect from 1st January, 1990, the profession of advocates under the name of “**DALY & Figgis**” in continuation of the former business of that name then carried on by the continuing partners. Full terms of the partnership were elaborately set out.

In the course of time some of the partners left the firm and new ones were admitted. At the time the Plaintiff was admitted into the partnership, of the original five partners, only Neville Patrick Gibson Warren and Daniel James Corry McVicker remained. They are the 1st and 2nd Defendants respectively. New partners had been admitted, including the Plaintiff, the 3rd and 4th Defendants, and one ANHAR MULLA, since retired.

The Plaintiff was invited into the partnership by the letter dated 26th March, 1997. It is addressed to her by the 1st Defendant. It is necessary to set out the letter in full:-

“**Ms. Linda Muriuki**

Nairobi

Dear Linda,

On behalf of Daniel, Anhar and myself, I am pleased to offer you an equal one-fourth partnership in Daly & Figgis with effect from 1st July, 1997, upon the following terms and conditions:-

1. Payment of Existing Partners

This consists of the purchase from the existing partners of a one-fourth share in the assets owned by the partners based on the present book value thereof – Shs. 656,852= - and the purchase of the one-fourth share in the goodwill of the partnership which represents the right to a share in the firm’s expectation of profits in the future plus a share of work in progress – Shs. 5,000,000/=. The total amount of Shs. 5,656,852/= is payable to the existing partners over a period of up to 3 years without interest.

2. Nominal and Working Capital

This is and remains your money, but is in a sense “deposited” with the firm and may not be drawn out until retirement.

Nominal Capital is Shs. 100,000/= which should be paid in full by the end of the first year of partnership.

Working Capital which represents the partners’ undrawn profits varies from year to year depending upon the needs of the firm. I cannot give you a precise figure as we will not know the figure as at 30th June, 1997 until the interim half-year accounts have been prepared in July or early August, 1997.

However, in order to give you a very rough idea, working capital per partner as at 31st December, 1996 stood at Shs. 31,806/=, the lowest ever for reasons I will explain to you, but we currently expect this to be somewhat more. You would be expected to build up to the appropriate figure within 2 years of entry until your undrawn profits equals the undrawn profits of the other partners.

3. Drawings

When money is available in the office account, the partners make drawings on a completely equal basis reflecting their equal profit sharing. However, in order to pay the existing partners and to provide Nominal Working Capital, your drawings would be restricted so as to enable the payments to the existing partners to be completed within 3 years and the Nominal and Working Capital to be paid as indicated in paragraph 2 above.

4. Other Terms

These are incorporated in the Partnership Deed to be entered into by yourself. A copy of the current Deed is attached. It is likely that some minor amendments will be made to up-date this Deed.

I enclose for your confidential perusal copies of the audited accounts for 1994 and 1995 and unaudited accounts for 1996. There are not likely to be any changes to the 1996 accounts.

If you do have any queries, please let me know.

Yours Sincerely,

N. P. G. WARREN”

The Plaintiff accepted the offer by her reply dated 9th April, 1997. I shall also set out that letter in full:-

“Mr. N. P. G. Warren,

NAIROBI

Dear Mr. Warren,

Thank-you for your letter of offer dated 26th March, 1997.

I wish to confirm acceptance of the offer of equal one-fourth partnership in Daly & Figgis.

In light of the partnership’s current income trend, however, the 3 year period within which I am to purchase from the existing partners a one-fourth share in the assets owned by the partners, together with a share in the Goodwill of the partnership seems rather tight. I therefore request that the existing partners consider a six month moratorium, with the 3 year payment period rescheduled to January, 1998.

I look forward to receiving your decision on my request.

Yours Sincerely,

L. W. MURIUKI”

I have considered the written submissions filed for the parties. It was submitted for the Plaintiff that in inviting the Plaintiff to join the partnership the existing partners anticipated that a partnership deed would be entered into between them and the Plaintiff, and that the copy of the partnership deed dated 31st October, 1990 enclosed with the letter of offer was purely by way of example. No such deed was ever executed. The deed of 31st October, 1990 was intended only to be a basis for negotiating a new partnership deed between the existing partners and the Plaintiff. In the event, they failed to do that. There is thus no partnership deed, duly drawn and executed, that is binding upon the Plaintiff and the Defendants. The deed dated 31st October, 1990 is not such; it was not even the deed of the existing partners as between themselves as three of the original partners in the deed had retired and one of the existing partners, A. Mulla, was not a signatory of the deed. Furthermore, two new partners, the 3rd and 4th Defendants, had been admitted, and they were not signatories to the deed of 31st October, 1990.

It was the submission of the Plaintiff's learned counsel that the terms of the Partnership Deed dated 31st October, 1990 are not applicable as between the Plaintiff and the Defendants.

For the Defendants it was submitted as follows. The letter dated 26th March, 1997 was sent with a copy of the Partnership Deed dated 31st October, 1990 attached thereto. The Plaintiff accepted the offer with the only qualification regarding the terms of the schedule of payment; all other terms were accepted. The Plaintiff was treated as an equity partner from the year 1997 until 31st December, 2003 when she retired from the partnership by the consent entered on 9th January, 2004. The Plaintiff was known to all other third parties, including clients who transacted with the firm, as an equity partner. During the period of the partnership she received drawings calculated in accordance with the Partnership Deed dated 31st October, 1990.

It is further submitted for the Defendants that in the plaint dated 19th June, 2003 the Plaintiff does not seek any orders in the nature of declarations that she was not an equity partner of the firm, or that the same was a partnership at will; the presumption therefore is that she admits that she was at all material times an equity partner of the firm. The argument that she is not bound by the Partnership Deed dated 31st October, 1990 merely because she never signed any deed of partnership is flawed in law and in equity. It is flawed in law because the terms of a contract may be contained in more than one document, whether some of those documents are expressly referred to or not. It is evident from the letter of offer (which incorporated the deed) that indeed that deed was to be taken to contain terms of the partnership. The argument is flawed in equity because the Plaintiff is estopped by conduct from denying that she was a partner under the terms of the Partnership Deed dated 31st October, 1990 as her interaction with clients and the Defendants was governed by the terms of that deed, which deed was circulated to her with the letter of offer.

Learned counsel for the Defendants is thus of the view that the Partnership Deed dated 31st October, 1990 applied to the Plaintiff.

It seems to me that the Defendants' learned counsel is inviting the court, yet again, to consider other evidence beyond the Partnership Deed dated 31st October, 1990, the letter of offer dated 26th March, 1997 and the letter of acceptance dated 9th April, 1997. If the court were to consider other evidence beyond these three documents, it would be contrary to the ruling, already referred to, dated 18th and delivered on 22nd June, 2007. The court would thereby exceed the mandate granted to it by the parties by their contract encapsulated in the consent letter dated 18th December, 2003. This would not be a proper thing to do and would be illegal.

The real issue here is, did the letter of offer incorporate the Partnership Deed dated 31st October, 1990? I think not. In a document crafted by a lawyer, it would have been the easiest thing to do to state expressly and without ambiguity that the terms and conditions of the Partnership Deed dated 31st October, 1990 shall, or shall be deemed to, bind the Plaintiff and the Defendants in their new partnership. Instead, what was said was that other terms

“...are incorporated in the Partnership Deed to be entered into by yourself. A copy of the current Deed is attached. It is likely that minor amendments will be made to up-date this Deed.”

Clearly, it was the intention of the Defendants, which was accepted by the Plaintiff, that a new partnership deed would be entered into between them and the Plaintiff. It matters not that in all likelihood the new partnership deed would, in all material particulars, be virtually identical to the deed dated 31st October, 1990. It would, nevertheless, be a new deed of partnership executed, as by law provided, by the Defendants and the Plaintiff. The copy of the deed dated 31st October, 1990 forwarded to the Plaintiff with the letter of offer was merely meant to inform her of what the new deed of partnership between her and the Defendants was likely to be like. It was not intended to incorporate the partnership deed into the offer made by the Defendants and accepted by the Plaintiff. All the terms and conditions that were intended to bind the Plaintiff up-front were clearly spelt out in detail in the letter of offer. Other terms and conditions were to be negotiated and agreed, guided of course by the existing deed dated 31st October, 1990, and reduced into a partnership deed to be executed by the parties. In the event no such deed was ever signed by the parties.

I therefore find, for the above reasons, that the terms of the Partnership Deed dated the 31st October, 1990 did not apply to the partnership between the Plaintiff and the Defendants.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 14TH DAY OF DECEMBER, 2007

H. P. G. WAWERU

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