



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 303 of 1999

DAVID WANJOHI KAMAU.....1ST
PLAINTIFF

GERALD MAINA KAGUANYO.....2ND
PLAINTIFF

VERSUS

JANE WANJA GACHIENGO.....
.....DEFENDANT

JUDGMENT

The plaintiffs, David Wanjohi Kamau (*suing as the legal representative of the estate of Duncan Kamau Kimani*) and Gerard Maina Kaguanayo (*suing as the legal representative of the estate of Ethan Kaguanayo*) filed suit against the defendant, Jane Wanja Gachiengo (*sued in her capacity as the legal representative of the estate of Gachiengo Gichuhi*) seeking a declaratory order of this court to be declared to be entitled to a share in equal proportion to the interest held by the defendant in land parcels number *Nakuru Municipality/Block 10/19* and *Nakuru Municipality/Block 13/166* (*hereinafter referred to as the suit land*). They further prayed for an order of this court to have the titles of the suit land registered in the names of the defendant to be cancelled and instead they be registered jointly in the names of the plaintiffs and the defendant. They further prayed for an order that accounts be taken in respect of the rents received by the defendant from the suit land. The basis of the plaintiffs' suit against the defendant is that they claim that the deceased persons in this case namely Duncan Kamau Kimani, Ethan Kaguanayo and Gachiengo Gichuhi were partners and owned equal shares in the suit land. After their deaths, the defendant as the administrator of the estate of Gachiengo Gichuhi, had herself registered as owning the entire share that was owned by the three partners. The plaintiffs pleaded that the defendant fraudulently so registered herself without taking into account the share holding of the other two partners.

The defendant filed a defence and denied that the deceased persons were partners. She denied that she had fraudulently registered herself as the owner of the suit land. She averred that she was lawfully registered as the owner of the said suit land as the administrator of the estate of the late Gachiengo Gichuhi. She further denied that the plaintiffs were entitled to any share of the said suit land. She urged the court to dismiss the plaintiffs' suit with costs.

At the hearing of the suit, the plaintiffs called four witnesses in their bid to establish their case against the defendant. PW1 David Wanjohi Kamau (*hereinafter referred to as the 1st plaintiff*) testified that his late father Duncan Kimani Kamau entered into an agreement with Gachiengo Gichuhi, the late husband

of the defendant and Ethan Kaguanyo, the father of the 2nd plaintiff where they agreed that they owned one share in a business known as Taifa Hotel and Restaurant General Stores. The agreement was signed on the 11th of August 1971 before Mindo Advocate. He testified that it was agreed that Gachiengo Gichuhi would appear in the register of the said Taifa Hotel as a partner although in actual fact he would be representing his two silent partners. He testified that the one share was equivalent to Kshs 67,501/55. Each of the three partners paid Kshs 22,500/55. The partners also purchased a parcel of land known as Kenda Farm which was however sub-divided among the three partners without any complaint. The agreement was produced as plaintiffs' exhibit No. 4. He testified that each partner was issued with the titles in respect of their respective portions of land at Kenda Farm (*copies of titles produced as plaintiffs' exhibit No. 5*).

He testified that the partners shared into the profits of the business known as Taifa Hotel since 1963 to 1998 when the partners agreed to dissolve the partnership and to distribute the properties. He testified that the three partners got half a share in parcel number Nakuru Municipality/Block 10/19 and the entire parcel of land known as Nakuru Municipality/Block 13/166. Although the three of them *i.e.* the plaintiffs and the defendant had agreed to have the said parcels of land registered in their joint names, the defendant had gone ahead without the consent of the plaintiffs and had herself registered as the sole owner of the said parcels of land which comprised of the shareholding of the partnership. When the plaintiffs became aware of what the defendant had done, they called a meeting which however was not able to resolve the issue in dispute, although initially the defendant had agreed to share the income received from the said business premises after it was converted from lodging to shops.

The 1st plaintiff produced minutes which were written when the three of them met after the dissolution of the Taifa Hotel partnership. The minutes and the translation thereof were later produced as plaintiffs exhibit No. 10 & 11 respectively. He testified that after the tenants took occupation of the business premises, the defendant refused to share the rent received with them insisting that she was not aware of the existence of the partnership. He reiterated that the partnership between the plaintiffs' fathers and the husband of the defendant existed. He reiterated that his late father had authorised him to be paid the profits from the said partnership from 1975 and he was so paid until 1998 when the main partnership of Taifa Hotel was dissolved.

He recalled that when the partners agreed to sell a property which was owned by the partnership, he was paid the sum of Kshs 222,222/= on behalf of his late father. He conceded that he did not challenge the defendant when she sought to be the administrator of the estate of the late Gachiengo Gichuhi. He reiterated that he had written several letters to the defendant asking her to consider subdividing the suit land between the three partners but the defendant had not responded positively. He reiterated that he was authorised by the court to file suit on behalf of his late father (*he produced the limited grant issued to him as plaintiffs' exhibit No. 1*). He urged this court to allow their claim as prayed.

PW2 Gerard Maina Kaguanyo (*hereinafter referred to as the 2nd plaintiff*) testified that he brought this suit on behalf of the estate of his late father Evans Kaguanyo who died in 1990. He produced the death certificate as plaintiffs' exhibit No. 12. He obtained a limited grant to enable him file this suit against the defendant (*limited granted produced as plaintiffs' exhibit No. 13*). The 2nd plaintiff basically reiterated the evidence that was adduced by the 1st plaintiff. He testified that there existed a partnership between his late father, the father of the 1st plaintiff and the late husband of the defendant. Although the records of the Taifa Hotel partnership reflected the name of the late husband of the defendant only, the truth of the matter was that his late father and the late father of the 1st plaintiff were silent partners of the late husband of the defendant.

He testified that there was no problem between the three original partners because they used to share the profits equally until 1998 when the partnership was dissolved. After the dissolution of the partnership, the successors of the three partners were given two parcels of land namely the suit land. He testified that initially the defendant was co-operative; They had even shared the rent which was initially received up to the month of February 1999. They had also agreed to open a joint account to be operated by the three of them. However, the defendant later changed her mind claiming that she was the sole registered owner of

the suit land and did not therefore recognise the plaintiffs as her partners. He also testified that when a property which used to belong to Taifa Hotel was sold in the year 2002, he was paid a cheque of Kshs 222,222/= being commensurate with the share of his late father in the said partnership. He reiterated that there was no problem with the partnership until February 1999 when the defendant disowned them. It was after this decision by the defendant not to acknowledge the existence of the partnership that they filed the present suit.

He testified that the efforts by the other members of the partnership to have the issue amicably resolved were thwarted by the intransigence on the part of the defendant (*the 2nd plaintiff produced plaintiffs exhibit No. 15 & 16 to support his evidence*). He reiterated that the partnership between the plaintiffs' late parents and the late husband of the defendant existed a fact which was acknowledged by the defendant immediately after the dissolution of the Taifa Hotel partnership. The defendant however changed her mind when she was registered as the owner of the suit land. He testified that initially it was agreed among the partners that a partner would manage the suit premises for a period of three months and would be paid a salary of Kshs 3,000/= per month. This arrangement however failed because the defendant took over the management of the suit premises and excluded the plaintiffs. The 2nd plaintiff denied that he was an employee of the said partnership. He insisted that he was a partner by virtue of having inherited the said share from his father.

PW3 Wambugu Mbora testified that he was one of the shareholders of the business partnership known as Taifa Hotel. He testified that there were initially six share holders in the said partnership namely Mwangi Muchai, Gachiengo Gichuhi, Rugiyo Kimani, Theuri Mariga, Peter Ndirangu Gathanga and himself. He however testified the majority of the six partners had silent partners who shared in their single share at Taifa Hotel. He testified that on his part, he had four silent partners while Gachiengo had three silent partners, Theuri Mariga had three silent partners and similarly Rugiyo Kimani had three silent partners. It was only Peter Ndirangu Gathanga who did not have any silent partners. He was the sole owner of his single share.

He testified that the partnership owned several residential and commercial buildings in Nakuru town. He testified that when the partnership was formed in 1963, it was agreed that the profits of the partnership would be shared between the partners every six months. He recalled that the late Gachiengo (*the husband of the defendant*) had two silent partners namely Duncan Kimani Kamau and Ethan Kaguanyo, the late fathers of the plaintiffs. He testified that the partnership accepted a family member of a deceased partner to take over his place upon his death. In this case, the partnership recognised the plaintiffs as the successors of their late fathers in the partnership. They also recognised the defendant as the successor of her late husband in the partnership.

He testified that in 1998, a decision was made to dissolve the Taifa Hotel partnership. After the dissolution, each two main shareholders were given one big building and one small building. PW3 recalled that in the case of plaintiffs and the defendant, they shared a big building with the family of Theuri Mariga. The Taifa Hotel partnership made a decision that all the main partners would be registered as the owners of the respective parcels of land on the understanding that the silent partners would be recognised as having shares therein.

He testified that this arrangement suited all the original partners and their respective silent partners except the defendant who refused to acknowledge the plaintiffs as her silent partners. He reiterated that the plaintiffs were the partners of the defendant in the said properties and therefore were entitled to a share of the rents received from the said properties. He was emphatic that the plaintiffs were the partners of the defendant due to the fact that their late fathers were the silent partners of the late husband of the defendant. He recalled that the plaintiffs used to be paid by the Taifa Hotel partnership the profits from the rent received every six months on behalf of their late fathers before the Taifa Hotel partnership was dissolved.

PW4 Ernest Wandere Theuri testified that he is the son to Theuri Mariga a former partner in Taifa Hotel. The said Theuri Mariga was now deceased. He testified that when his father died in December 1986, his mother took over as a partner in his place at the Taifa Hotel partnership. He testified that his

late father had two silent partners namely Peter Kibathe and Theuri Wathigia who were his brothers. PW4 recalled that in July 1998 the Taifa Hotel partnership was broken up. The main partners, i.e. the family of the late Gachiengo Gachuhi and the family of the late Theuri Mariga were given one big plot in town and two small plots at Onjuka estate. He recalled that after the partnership was dissolved, the main partners and their silent partners met to decide what to do with the buildings.

He recalled that the first meeting was held on 8th of April 1998. Those in attendance were PW4, the defendant, the plaintiffs and Felister Theuri. He testified that they all agreed to open a joint account which was to be operated by the defendant, Felister and the 2nd plaintiff. The account was to be opened for the purposes of depositing the rent which was to be received from the commercial building in town. They also agreed that an agreement was to be written between the defendant and the plaintiffs to formalise the said partnership in writing. He recalled that on the 14th of September 1998, they again met and agreed to split the two small houses at Onjuka estate between the two main partners namely Mrs Theuri and the defendant. They also agreed that a partner would be in charge of the management of the said commercial building in Nakuru town. Meetings were held on 5th of October 1998, 2nd of November 1998 and the 13th of January 1999 where the partners agreed to convert the commercial building which was being used as lodging to shops.

He recalled that there was a balance of Kshs 110,000/= which had remained on account. They agreed to distribute the said amount between the partners, both main and silent. He testified that he supervised the conversion of the building from lodgings to shops. He testified that after the conversion, the building was split into two so that each main partner could manage his own portion. He reiterated that the plaintiffs and the defendant attended the meetings as partners. He did not agree with the suggestion that the 2nd plaintiff had attended the meeting as an employee of the partnership. He recalled that the formal agreement between the defendant and the plaintiffs was not entered into because the issue of the title to the respective portions of land had not been settled. PW4 recalled that he was later informed by the plaintiffs that the defendant had disowned them and further that she had refused to share the income she received from the said premises with the plaintiffs. The minutes taken in Kikuyu by PW4 were produced as plaintiffs' exhibit No. 10 and a translation made by Mr. Muya advocate was produced as plaintiffs' exhibit No.11 respectively.

The defendant did not call any witnesses other than herself. She testified that she had not known the fathers of the plaintiffs. She testified that she was married to Gachiengo Gichuhi in 1977 and did not become aware of the existence of the Taifa Hotel partnership until when her husband died in 1990. She testified that her husband had not told her the existence of a partnership between himself and the late fathers of the plaintiffs. She however knew that there was a partnership which was known as Kenda Farm which was however dissolved when the land was subdivided between the partners. She testified that she attended all the meetings held by the Taifa Hotel partnership after the death of her husband until the partnership was dissolved in 1999.

She recalled that the meetings were held twice yearly where the profits of the partnership were shared out. She recalled that the profits were paid by cheque. She recalled that the treasurer of the partnership was Wambugu Mboru (PW3). She testified that she was not aware that the plaintiffs' late fathers were silent partners of her late husband. She testified that she obtained the letters of administration of her late husband's estate without anyone objecting to it. It was her testimony that when she first met with the 1st plaintiff, he told him that he was a silent partner to her late husband. She also recalled seeing the 2nd plaintiff working at the commercial building owned by the Taifa Hotel partnership. She testified that she had not attended any meeting that decided on the dissolution of the Taifa hotel partnership.

She conceded that she had participated in the opening of the joint account with the 2nd plaintiff and Felister Theuri so that the rents received from the said premises could be deposited therein. She however testified that the said account was closed after a shortly thereafter. She reiterated that the 2nd plaintiff was not a partner but an employee of the partnership. She was emphatic that she was not told that the plaintiffs were her silent partners when the partnership was dissolved. She testified that when a property of the partnership was sold, she got her share of the purchase consideration from the firm of Sheth &

Wathigo Advocates. She conceded that after she refused to share the rent receipts from the commercial premises, she received several letters from the plaintiffs informing her that they were her partners.

She however did not acknowledge the plaintiffs as her partners. She conceded that she had signed the leases of the said premises with Mrs Theuri and the 2nd plaintiff. She denied the contention by the plaintiffs that they were entitled to a share of the rent received. She testified that since she started receiving rents from the two properties, on 1st of August 1998 she had not shared it with the plaintiffs. She testified that she received the rent of Kshs 6,000/= from the Onjuka estate house and Kshs 30,000/= from the commercial building in town each month. She reiterated that she was not aware that the plaintiffs were her silent partners. She also did not recognise them as her silent partners. She was adamant that she was not willing to give to the plaintiffs what they claimed to be their shareholding. She urged this court to dismiss the plaintiffs' suit with costs.

I have read the pleadings filed by the parties to this suit. I have also carefully considered the evidence that was adduced in this case. I have further considered the submissions that were made by the parties to this suit. The issue for determination by this court is whether there existed a partnership between the fathers of the plaintiffs and the husband of the defendant. The other issue for determination is whether the said partnership was transferred to the plaintiffs and the defendant when the original partners died.

Certain facts are not in dispute in this case. It is not disputed that there existed a partnership between the original six members which was formed in 1963 for the purposes of purchasing commercial properties in urban areas for the benefit of the said members. The partnership between the original six members was referred to as Nakuru Taifa Hotel. According to PW3, the original six members of the partnership were Mwangi Muchai, Gachiengo Gichuhi, Rugiyo Kimani, Theuri Mariga, Peter Ndirangu Gathanga and PW3, Wambugu Mborora. He testified that the original partners were allowed to have silent partners. He recalled that Gachiengo Gichuhi had two silent partners namely Duncan Kimani Kamau and Ethan Kaguanyo. All the other original shareholders had silent partners except Peter Ndirangu Gathanga who owned his share alone.

I believed the testimony of PW3 when he testified that these silent partners although not appearing on the record of the partnership were recognised as such by the main partners and that is the reason why when the profits were being shared twice annually, the cheques were paid directly to the main partners and to their silent partners. PW2 testified that three out of the original six partners have died. The ones who have passed away are; Gachiengo Gichuhi, Rugiyo Kimani and Theuri Mariga. The ones who are alive are Wambugu Mborora (PW3), Peter Ndirangu and Mwangi Muchai. I believed PW3's testimony that the six main partners and their silent partners shared the profits from the partnership without any problem. In my view, this was because the relationship between the original six partners and their silent partners was based on mutual trust. It is apparent that the original partners and their silent partners were people of one age group who trusted each other.

However, it is apparent that things started going haywire when the original members and their silent partners started dying due to old age. Their spouses and children who succeeded them in the partnership did not have similar understanding or trust of each other. They also did not have the vision of the original partners. This is because the younger partners did not trust each other. It is no wonder that the partnership broke up in 1998 and the properties which comprised of Nakuru Taifa Hotel was distributed among the partners. According to PW3, all the other partners distributed the properties between themselves and their silent partners except the defendant who refused to recognise the existence of the partnership between herself and the plaintiffs.

Having evaluated the evidence adduced, I do hold that the plaintiffs have established on a balance of probabilities that there exist a partnership between Gachiengo Gichuhi, Duncan Kimani Kamau and Ethan Kaguanyo. The plaintiffs testified that the three contributed equally to the single share that was held on their behalf by Gachiengo Gichuhi in Taifa Hotel. The produced an agreement dated the 1st of January 1963 written in Kikuyu language and its translation in English as plaintiffs' exhibit No. 2 and 3 respectively. Having read the said agreement, I am convinced that the three were partners of the share which comprised of the single share at Nakuru Taifa Hotel. Their contributions in the said share was

equal. There was no problem between the three partners when they were alive. They shared the profits from the said partnership equally without any dispute. Further, after the deaths of the three partners, their successors continued sharing out profits equally until 1998 when the partnership was dissolved.

The plaintiffs testified that after the dissolution of the partnership, the defendant attended the meetings which were called by the partners to discuss the fate of the properties that had been distributed to them. PW4 produced the minutes which he recorded of the meetings which were held on 4th of August 1998, 17th of August 1998, 14th of September 1998, 5th of October 1998, 2nd of November 1998, 13th of January 1999, 21st of January 1999 and 1st of February 1999. The minutes written in Kikuyu were produced as plaintiffs' exhibit No. 10 and the translation made by S.L.M.H. Muhia advocate was produced as plaintiffs exhibit No. 11 by PW4. From the said minutes it is clear that the defendant participated in the said meetings knowing very well that she was dealing with equal partners and not busy bodies as she would want this court to believe from her testimony.

It is clear that the initial meetings were conducted in an atmosphere of mutual respect and trust. All the decisions in the said meeting were apparently made by consensus. Even the decision to change the commercial business in Nakuru town from lodging to shops was made without any objection by any member who was present. All the incomes then received were accounted for and were applied for the tasks which the partners had agreed. They even agreed that their partnership, which was silent, and which was based on the partnership of the original deceased members, was to be formalised by an agreement being written.

According to the evidence adduced, the defendant started developing designs on the said properties when the titles in respect of the suit land were transferred to her name by the firm of Sheth & Wathigo Advocates. Although the original understanding was that she was going to hold the said property in trust for the other partners, it is apparent that after being registered, the defendant disowned the plaintiffs. I did not believe her evidence that she was not aware of the existence of the partnership between her late husband and the fathers of the plaintiffs. In my view the defendant became greedy once she was registered as the owner of the two properties and made a decision to exclude the plaintiffs from enjoying the income from the said premises. The fact that she was aware of the partnership is borne by the minutes of the meetings that she attended when the main Taifa Hotel partnership was dissolved. In the circumstances therefore, I hold that the defendant is a partner of the plaintiffs. She was registered as the owner of parcels number Nakuru Municipality/Block 13/166 and Nakuru Municipality/Block 10/19 in trust for the plaintiffs as the administrators of the estate of Duncan Kimani Kamau and Ethan Kaguanyo.

Having found that the defendant hold in trust of the plaintiffs the suit parcels of land, I will proceed to determine the best way in which the said properties can be divided between the three partners. I formed the opinion during the trial that the relationship between the plaintiffs and the defendant had deteriorated to the extent that it would be futile for this court to order that the partnership continues to subsist. I will therefore order that the said two properties (*in respect of parcel number Nakuru Municipality/Block 10/19, the portion that is now managed by the defendant*) to be valued by two valuers, each to be appointed by the plaintiffs and the defendant, after which the defendant shall pay the plaintiffs $\frac{2}{3}$ value of the said property (*i.e. each plaintiff shall get $\frac{1}{3}$ share*). In the event that the defendant shall not be in a position to buy out the shareholding of the plaintiffs, then the said properties shall be sold and the proceeds thereof shall be divided equally in three portions between the plaintiffs and the defendant.

The defendant admitted that she received the rent of Kshs 6,000/= per month in respect of the residential house from the 1st of August 1998 to date. She also admitted that she received the sum of Kshs 30,000/= per month from the town property with effect from the same date. She further conceded that she had not shared the said sum received with the plaintiffs. I therefore order that the defendant shall pay each plaintiff the sum of Kshs 188,000/= being their respective share of the rent received in respect of the residential premises from the date that the defendant took possession to the date of delivery of this judgment.

I further order that from now henceforth, pending compliance with the decree of this court as regard the

order issued above, the rent in respect of the said premises shall be shared equally between the plaintiffs and the defendant. I further order that the defendant shall pay each of the plaintiff the sum of Kshs 940,000/= being their respective share from the rent she received in respect of the commercial premises in Nakuru town from the date she took possession to date. I further order that all the rents received shall henceforth be shared equally between the plaintiffs and the defendant.

The upshot of the above is that the plaintiffs have succeeded in their claim. Judgment is therefore entered for the plaintiffs against the defendant as stated above. The plaintiffs shall have the costs of the suit.

DATED at NAKURU this 14th day of June 2006.

L. KIMARU

JUDGE