



REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI AT NAIROBI
CIVIL APPEAL NO. 75 OF 1999

JOSEPH KAMAU KAGAIAPPELLANT

VERSUS

FRANCIS GITAU KAGAIRESPONDENT

JUDGMENT

This appeal arises from the judgment and/or order of the Resident Magistrate (T.W. Wamae Mrs) in the Chief Magistrates Court Thika Civil Case Number 1150 of 1997 delivered on 3rd February 1999 and questions orders granted by her which were not prayed for in the plaint.

In a suit filed in that court and dated 26th September, 1997 the plaintiff/respondent sought the following orders; namely;

(a) dissolution of partnership agreement between the plaintiff and the defendant

(b) that the defendant be ordered to release the motor vehicle to the plaintiff and to give an account for the period, between 10.7.97 and the time he releases the motor vehicle to the plaintiff.

The parties appeared before that court on 6th August 1998, and 2.9.98 when the case was heard and submissions made. The judgment was delivered on 3rd February 1999 wherein the magistrate dissolved the partnership as prayed for in prayer 1 of the plaint and though she declined to grant prayer 2, she directed as to how the motor vehicle should be disposed of and proceeds shared between the parties. This is the order the appellant has appealed against to this court.

In this court on 17th April 2002 counsel for the parties appeared and either presented or opposed the appeal. With counsel for the appellant urging that the learned magistrate acted in excess of her jurisdiction by making an order which was not prayed for and prayed that the additional orders be set aside.

That the magistrate failed to grasp the whole intention and purport of the partnership agreement in that without audited accounts, the figures given in evidence could not be relied upon in apportioning shares in distribution.

According to counsel, once the magistrate did what the respondent had wanted, she should have left the matter at that.

For the respondent counsel stated that what the magistrate did was to distribute the asset of the partnership which was motor vehicle registration number KZZ 878 matatu and the magistrate was entitled to do this since the memo of appeal did not say what should happen in the event the appeal was allowed. He asked that the appeal be dismissed with costs.

I have heard and recorded submissions of counsel for both parties in this appeal and perused the lower court record of proceedings and judgment.

This is what the learned Magistrate said after dissolving the partnership and dismissing a prayer for the release of the motor vehicle and for accounts:

From the evidence in (on) record and as hereby mentioned earlier in this judgment I find the defendant paid less by Kshs.194,130/=. Although the defendant alleges that what the plaintiff had paid before the partnership agreement would not be considered, I find that the plaintiff would be prejudiced. Further, since the agreement does not specifically exclude that amount from the consideration I find that the parties by implication agreed to have it taken into consideration. Consequently the plaintiff has to be paid the Kshs.194,130/= from the partnership. It is therefore hereby ordered that the motor vehicle which is the only asset of the partnership be valued the cost of which must come from both parties. If the motor vehicle is valued it should be sold and its proceeds should first pay the plaintiff his Kshs.194,130/=. If the sale price exceeds what the plaintiff is owed the balance is to be shared equally by the parties. If the sale price is less than what the plaintiff is owed the defendant to pay the balance. In the alternative if the plaintiff to keep the motor vehicle. If the motor vehicle's value is less than what is owed the defendant must pay balance and if it exceeds the amount paid the plaintiff must pay half of the excess to the defendant".

To my mind the figure in issue was Kshs.194,130/= being the difference out of what between respondent and the appellant paid towards the purchase of the motor vehicle forming the partnership.

From my reading of the lower court record this figure was not challenged by the appellant and the learned magistrate did not get this figure from the blue to include it in her judgment.

And I do not know what the appellant had in mind by filing this appeal but one thing is clear, that if the learned magistrate had ended her judgment at dissolving the partnership agreement and dismissing the prayer for the release of the motor vehicle and the taking of accounts, then the appellant would have been sole beneficiary of it by keeping the motor vehicle and not accounting for it.

What justice and fairness would have been done? None. In my view the learned magistrate was perfectly entitled to give the directions she gave in order to resolve the dispute between the parties once and for all and I do not feel she should be faulted for doing so. This greedy attitude on the part of the appellant under the guise that the magistrate made orders she was not called upon to do by the respondent won't just do.

I dismiss this appeal with no order for costs.

Delivered and dated this 20th day of May, 2002.

D.K.S. AGANYANYA

JUDGE