

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE 2254 OF 1996

THUO KARIUKI.....PLAINTIFF

V E R S U S

MBAI GATUMA)

THIRU NGUTHIRU)

B. MATHONDU MASHUA) :::::::::::::::::::: DEFENDANTS

NJUGUNA MATHIORA T/A)

NYONJORO SLAUGHTER HOUSE)

On 9th September, 1996, the Plaintiff filed this suit against the Defendants seeking the taking of accounts relating to a partnership. The Plaintiff was a partner of Nyonjoro Slaughter House. He was also appointed manager to operate the day to day business. There was no formal Deed for this partnership. Between 1966 and 1967 three landed properties were bought for the partnership business. These were registered in the names of the Plaintiff and Defendants. One of those properties was held by the parties as trustees for the partnership. From 1967, the Plaintiff was not involved in the partnership business. In his own words, "the first and third Defendants ordered him to leave." When the partnership was registered in 1970, the Plaintiff's name was not included. His name was also not included in the Partnership Deed.

On 19th November, 1967 a meeting of the partnership was held to discuss the Plaintiff following serious allegations of financial impropriety against the Plaintiff.. In that meeting, it was noted that the Plaintiff had appropriated the partnership funds. Some members and the police went to the Plaintiff's house after he failed to show up at the premises of the partnership with the money that he had withdrawn from the partnership account. That money was eventually refunded by the Plaintiff. It was noted that the Plaintiff had expressed an intention to leave the partnership and it was agreed that he should be refunded his share in the partnership. The Plaintiff says that no such payment was ever made to him. I do not believe his testimony on this point. The Defendants testimony that he was indeed paid is more consistent with other documentary evidence which showed that the partners met and resolved to pay him, and designated officers who eventually paid him off in cash.

In any event, before I consider the case before the Court, I agree with the Plaintiff's Advocates submission on the issue of limitation. He cited the following statement from volume 28 of the HALSBURY'S LAWS OF ENGLAND (Fourth Edition) paragraph 699:

".....In actions for an account between partners the statute of limitation does not run until the partnership is determined."

Now the important question is whether the Plaintiff is a partner of the registered partnership. There is no evidence whatsoever to support this claim. He may well have been a partner in the original informal partnership but there is nothing to support his claim in the new one that was in writing and duly registered. He withdrew from the partnership in 1967 following allegations of financial impropriety against him, and he was paid his share. He was not only not included in the Partnership Deed but did not also participate in the business of that partnership. Section 4(a) and (b) of our Partnership Act (Cap 29) is clear beyond peradventure that joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof and that the sharing of gross returns does not of itself create a partnership whether the persons sharing those returns have or have not a joint or

common right or interest in any property from which or from the use of which, the returns are derived. Therefore, the fact that the landed properties already mentioned were registered in the names of the Plaintiff and the Defendants, is not of itself sufficient to constitute the Plaintiff as a partner with the Defendants or their business. It is also clear that one of those properties was registered in the names of the parties as trustees for the partnership. In brief, the old partnership was replaced with the new one in which the Plaintiff was not included as a partner. It is my understanding that when it was decided to formalize the partnership the old partnership was dissolved and replaced by the new one in which the Plaintiff was not included as a partner. He cannot, therefore, maintain this action. I am surprised that he waited almost 30 years to bring this action if he was genuinely a partner.

I, therefore, dismiss the Plaintiff's case with costs.

DATED and DELIVERED at NAIROBI this 16th day of July, 2001.

ALNASHIR VISRAM

JUDGE.