



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 853 OF 1999

JULIUS KABUI MWANGI.....1ST PLAINTIFF

TERESIAH NJERI MWANGI.....2ND PLAINTIFF

(Suing as heirs and legal representatives of the

Estate of MWANGI CIGHUKA (Deceased)

VERSUS

WANGUI GATUNDU

JOHN WANJANGI GATUNDU

JAMES MWANGI GATUNDU (*All sued as legal*

Representative of the estate of Gatundu Wanjangi

(deceased) & 10 others.....DEFENDANT

JUDGEMENT

1) **Julius Kabui Mwangi** and **Teresia Njeri Mwangi**, the 1st and 2nd plaintiffs respectively, in their capacities as the legal representatives of the estate of **Mwangi Gichuka**, deceased filed an action against the defendants vide the Further Amended Plaint dated 4th October 2005. In the aforesaid plaint, the plaintiffs sought for judgment Against the defendants as follows:

i. An order for appointment of a receiver to ascertain, collect and take control of the following assets of the partnership pending distribution amongst the decease's partners, heirs and or estates:

a) A butchery (*Kiria-ini Butchery*) at Motela, Nairobi

b) A bar business known as "*Kiria-ini Bar*" in Jericho, Nairobi

c) A plot at Ngara purchased in 1969 in which the partnership bought or acquired one-fifth (1/5) share at ksh.18,300/=.

d) Kangema butchery in Nairobi.

e) Shauri Moyo butchery in Nairobi

f) One motor vehicle make Moris van

g) One motor vehicle make Peugeot.

h) Gatundu Bar in Shauri Moyo, Nairobi

- i) Jamaa Butchery in Racecourse, Nairobi*
- j) Kiria-ini Bar at Kiria-ini market, Fort Hall*
- k) L.R. No. 152/1/12/13, Ngara, Nairobi*
- l) L.R. No. 37/262/4, Nairobi west, Nairobi*
- m) L.R. No. 209/327/98, Juja Road, Nyambene Drive, Nairobi*
- n) L.R. No. 36/VII/382, Eastleigh, Nairobi*
- o) L.R. No. 209/4120, Ngara, Nairobi (one-fifth share)*
- p) L.R No. Murang'a Block II/33, Murang'a*
- q) L.R. No. Murang'a Block III/17, Murang'a*
- r) L.R. No. Murang'a Block III/18, Murang'a*

ii. An order for accounts and payment of the deceased Mwangi Gichuka's shares and partnership profits since the year 1970.

iii. An order for the distribution of the net partnership assets in the proportions set out as follows:

- a) Gatundu Wanjangi 2 shares*
- b) Mwati Githuga 2 shares*
- c) Gatundu Kariuki 1 share*
- d) Mwangi Wandutu 1 share*
- e) Maina Ngura 1 share*
- f) Gachanja Gaita 1 share*
- g) Macharia Kariuki 1 share*
- h) Kariuki Wanjangi 1 share*
- i) Kimiti Githua 1 share*
- j) Mwangi Gichuka 1 share*

iv. Costs of the suit.

2) Upon being served, the defendants filed their defences save for the 4th and 9th defendants who failed to do so. When this suit came up for hearing three witnesses testified in support of the plaintiffs' case while two witnesses testified on behalf of the defence.

3) It is the plaintiff's (PW1) evidence that since the death of Mwangi Gichuka, the properties belonging to the partnership expanded to include inter alia:

- a) Gatanga Bar in Shauri Moyo, Nairobi*
- b) Jamaa Butchery in Racecourse, Nairobi*
- c) Kiriaini Bar at Kiriaini Market, Fort Hall*
- d) L.R. no. 152/1/12/13, Ngara, Nairobi*
- e) LR no. 37/262/14 Nairobi West, Nairobi*

f) LR no. 209/327/98 Juja Road, Nyambene Drive Nairobi

g) LR no. 36/VII/382 Eastleigh, Nairobi

h) LR no. 209/4120, Ngara, Nairobi (one fifth shares)

i) LR no. Murang'a Block II/33, Murang'a

j) LR no. Murang'a Block III/17, Murang'a

k) LR no. Murang'a Block III/18 Murang'a

4) The plaintiff further averred that the 1st, 2nd and 4th defendants confirmed that the six assets i.e (e), (f), (g), (i), (j) and (k) herein above belong to the partnership. The plaintiff further stated that finding by the High Court in Nairobi H.C.C.C no. 826 of 1970 that there is insufficient evidence at that stage to show that the plaintiff is entitled to a share in any other business is taken care of by the admission of the 1st, 2nd and 4th defendants in that aforesaid 6 properties are assets of the partnership.

5) The plaintiff further stated that the partnership **owned one-quarter of L.R. no. 209/2565 and one-fifth of L.R. no. 209/4120, Ngara Nairobi.** The plaintiff has maintained in his evidence that all the 10 partners contributed to the initial capital and that his assertion has not been controverted by the defendants.

6) The defendants namely the 1st, 2nd, 4th and 9th defendants denied the plaintiff's claim and averred that Mwangi Gichuka, deceased did not have any interest, share, equity or right in any of the businesses or properties mentioned by the plaintiff. They further stated that there was no evidence presented to show how the money from the partnership known as **Kiraini butchery** was utilized to purchase other properties the plaintiff now claim the deceased had a share or interest.

7) It is the evidence of the 6th and 7th defendants that **Gachanja Gaita**, deceased and Macharia Kariuki, deceased were partners in **Kiriaini Butchery** which partnership which later became known as **Gatundu Wanjangi and Partners.** The duo stated that Mwangi Gachuka, deceased was a partner hence the plaintiffs' are entitled to the claim stated in the plaint. The aforementioned defendants admitted the plaintiff's claim but offered no credible evidence to buttress the admission.

8) At the close of the evidence, learned counsels appearing in this matter were invited to file and exchange written submissions.

It is the submission of the plaintiffs that the prayer for the appointment of a receiver was granted and is therefore spent. It was pointed out that one **Joseph Wanjau Gathuri (PW3)**, the receiver manager testified and produced his management report indicating how much money had been collected so far by the two receivers. This submission was not contested by the defendants. With respect, I agree with the plaintiffs that the first prayer was granted and therefore it is no spent.

9) The plaintiffs submitted that the 1st, 2nd, 4th, 6th and 7th defendants filed a defence to deny the plaintiffs' claim while the 3rd defendant is said to have admitted the plaintiffs' claim in his defence. It is also pointed out by the plaintiffs that the 5th and 9th defendants filed no defence to resist the plaintiffs claim.

10) The issue which commended itself for determination is whether there existed a partnership between the late Mwangi Gichuka and the defendants known as **Gatundu Wanjangi & Partners.**

11) According to the plaintiffs, the partnership between the parties to this suit known as **Kiriani Butchery** was later christened to **Gatundu Wanjangi & Partners.** It is the submission of the plaintiffs that when the parties and their counsels appeared before Justice Mwera on 16th December 2010, they recorded a consent order indicating that there was no dispute as to the existence of the partnership.

12) The 6th and 7th defendants in their submissions appear to concur with the plaintiffs that the late Mwangi Gichuka was one of the founder partners in the then business known as **"Kiriaini Butchery"** which later became known as **'Gatundu Wanjangi & Partners'.** The duo urged this court to reject the 2nd and 4th defendants' defence as mere denials. They argued that the business and assets acquired from the proceeds

of Kiriaini butchery were businesses and assets of the partners of Kiriaini butchery.

13) It submitted that it is from the income of the original business that other businesses and assets were acquired now called **“Gatundu Wanjangi and Partners”**. The 6th and 7th defendants urged this court to find that all incomes realized from the said business or assets acquired should be shared equally or according to the share contribution of the partners once accounts are taken.

14) However, the 1st, 2nd, 4th and 9th defendants are of the submission that there was insufficient evidence tendered to show that the deceased’s estate was entitled to a share in any other business. It was pointed out that the late Mwangi Gichuka testified in H.C.C.C no. 826 of 1970 claiming that the profits/moneys from Kiriani butchery was invested in other businesses and properties but he was unable to convince the court that he was a partner in any other business other than **‘Kiria-ini Butchery’**.

15) It was also argued that the plaintiffs did not tender evidence to show how the money from the partnership know as **‘Kiria-ini Butchery’** was utilized to purchase other properties they claimed the deceased had a share or interest in.

16) The 3rd, 5th and 8th defendants are of the submission that the claim by the plaintiffs that the proceeds from the business known as Kiriaini Butchery were never used to establish the business presently known as Gatundu WanjAngi & Partners. It was pointed out that the late Mwangi Gichuka did not tender evidence to show he had a share or claim in Gatundu Wanjangi & Partners when he testified before this court in Nairobi H.C.C.C no.826 of 1970.

17) It was also submitted that the claim in the aforesaid partnership was not listed as assets of the estate of Mwangi Gichuka, deceased in the schedule of distribution in the certificate of confirmation of grant vide **Nairobi Succession Cause no. 2371 of 1994**.

18) The 3rd, 5th and 8th defendants further argued that the purported admission by one Gatundu Kariuki made on 13th August 1999 should be treated with a pinch salt because the same person denied the plaintiffs’ claim when he with others were sued in Nairobi H.C.C.C no. 826 of 1970.

19) It is also argued that the plaint on which the purported admissions were made did not contain a single allegation of the properties ascribed to **Gatundu Wanjangi & Partners**. The properties ascribed to Gatundu & Wanjangi partners were made vide the Further Amended Plaint dated 4th October 2005.

20) It is argued that none of the defendants filed a defence to the Further Amended Plaint hence the admission cannot be relied upon. The 3rd, 5th and 8th defendants further submitted that it is the amendment that introduced the properties generally referred to as **“Gatundu Wanjangi & Partners”** listed assets for the first time.

21) The trio also argued that the plaintiffs have failed to discharge the burden of proof as required under Section 107 of the Evidence Act (Cap. 80 Laws of Kenya). It is stated that no evidence were presented to show that **‘Kiria-ini Butchery’** later christened as **“Gatundu Wanjangi & Partners**.

22) I have considered the evidence and submissions presented by both sides over the issue as to whether or not the plaintiffs have established that the late Mwangi Gichuka was a partner in **“Gatundu Wanjangi & Partners.”**

23) The plaintiffs having claimed that the late Mwangi Githuka was a partner in aforesaid partnership and therefore they are bound to discharge the burden of proof pursuant to the provisions of Section 107 of the Evidence Act which provides as follows:

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he assets must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24) The plaintiffs have stated that some of the defendants admitted in the defence the plaintiffs’ claim. The 3rd, 5th and 8th defendants have disputed the admissions stating that the same was in respect of a plaint which did not

make reference to the properties owned by Gatundu Wanjangi & Partners.

25) With respect, I agree with the 3rd, 5th and 8th defendant's submission. There is no evidence that the defendants who purported to admit the plaintiffs' claim filed any defence to the Further Amended Plaintiff which plaintiff specifically listed the assets of Gatundu Wanjangi & Partners.

26) The fact that some defendants admitted the plaintiffs' claim, did not in itself excuse the plaintiffs from discharging the burden of proof. The plaintiffs are bound to present evidence to prove that the properties listed as owned by Gatundu Wanjangi & Partners originated from "Kiria-ini Butchery".

27) It is not in dispute that the plaintiffs submitted as an authority and evidence, a copy of the judgment in Nairobi H.C.C.C. no.826 of 1970 to bolster their claim in this suit. In the aforesaid judgement the court found the late Mwangi Gichuka to be partners together with the defendants in the partnership known as "**Kiria-ini Butchery**" and the court declared that the deceased was entitled to claim his share of the assets or properties owned by Kiriaini Butchery.

28) The court was quite emphatic in its judgment that there was insufficient evidence to show that the plaintiff (now deceased) was entitled to a share in any other business.

29) The court further stated that if proper accounts have been kept they may show that partnership funds were invested in other businesses.

30) It is also apparent from the judgment that the court issued an order for the taking of accounts and for a receiver to be appointed. No evidence were tendered to show that the order for taking of accounts was complied with. Perhaps if the taking of accounts was undertaken it could have revealed that the proceeds from '**Kiria-ini Butchery**' were used to purchase or establish **Gatundu Wanjangi & Partners**.

31) However, the plaintiffs have totally failed to present credible evidence to show that proceeds from **Kiria-ini Butchery** were used to acquire the assets registered in the name of **Gatundu Wanjangi & Partners**. I therefore find no merit in the plaintiffs' suit.

32) Three preliminary issues were raised and argued by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th defendants against the plaintiffs' suit. It is argued that the plaintiffs' suit is resjudicata, statute barred and abated.

33) On the question of being statute barred, it is the defendants' contention that this suit is statute barred pursuant to the provisions of Section 9(3), 4(4) and 4(1) (e) of the Limitations of Actions Act (Cap 22 Laws of Kenya). It is argued that, so long as this suit is predicated on Nairobi H.C.C.C. No. 826 of 1970, no action can be brought upon the aforesaid judgement after the lapse of twelve (12) years from the date of judgment.

34) Secondly, it is also argued that the plaintiff's claim for accounts was brought over six (6) years since the cause of action arose hence it is statute barred under Section 4(3) of the Limitation of Actions Act.

35) In response to the defendants' submission, the plaintiffs together with the 6th and 7th defendants are of the view that this suit is not statute barred. It is their submission that under Section 37 of the Partnership Act every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner, therefore the partnership stood dissolved following the death of Mwangi Gichuka on 7.5.85 i.e two months after the delivery of the judgment in Nairobi H.C.C.C 826 of 1970 whereof the deceased was declared a partner.

36) It was also pointed out that since all the partners are dead the partnership should basically be wound up under Section 46 of the Partnership Act.

37) With respect I am persuaded by the submissions of the plaintiffs, the 6th and 7th defendants' submissions. Section 46 of the Partnership Act provides as follows:

"Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement or accounts as between the firm and the outgoing partner or his estate, then the estate is entitled at the option of himself or his representative to such a share of

profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assessor interest at the rate of eight per centum per annum on the amount of his share of the partnership assets.”

38) I am convinced that the plaintiffs being the legal representatives of the estate of Mwangi Gichuka, deceased are entitled to bring this suit for purposes of liquidation of the partnership and further to distribute the net assets of the partnership to the partners.

39) The other preliminary point is whether this suit is resjudicata. It is the submission of the 3rd, 5th and 8th defendants that the plaintiffs’ suit is resjudicata and time-barred under Section 4 (4) of the Limitations of Actions Act since the judgment upon which this suit is predicated upon was more than twelve (12) years old at the time of filing this suit.

40) The plaintiffs are of the submission that the cause of action in this suit is different from that obtaining in H.C.C.C no. 826 of 1970.

41) It is pointed out that the instant suit is for liquidation and or winding up of partnership and the subsequent distribution of assets and profits while in the former suit the deceased prayed for a declaration that he was a partner of the 1st to 9th defendants under Section 46 of the Partnerships Act.

42) Having considered the rival submissions I am persuaded by the arguments put forward by the plaintiffs that the current suit cannot be regarded as resjudicata because it is in respect of the liquidation and or the winding up of a partnership with a view of eventually distributing the assets and profits of the partnership to the partners and or their successors.

43) It is also clear that the plaintiffs are not seeking to enforce the judgment in H.C.C.C No. 826 of 1970 but they are basically seeking to have the winding up of ‘**Gatundu Wanjangi & Partners**’ which partnership the plaintiffs have failed to establish that Mwangi Gichuka, deceased was a partner. The preliminary objections are therefore overruled.

44) The 3rd, 5th and 8th defendants through their advocates have argued that this suit has abated since all the partners are dead.

45) The plaintiffs have stated that the submission on abatement should not be entertained because this suit does not concern the individual defendants named but the estates of the deceased partners.

46) It is not in dispute that the issue of abatement was brought up in the submissions. None of the parties tendered evidence showing when any of the defendants died. It was incumbent upon the parties raising the issue to present evidence so that this court can make a decision based on the evidence required in establishing abatement. I therefore decline to entertain the argument for above reason and on the basis that the same was raised too late in the proceedings.

47) In the end, the plaintiffs have failed to establish their claim on a balance of probabilities. Consequently, the suit is dismissed. Since this suit involves the estates of partners who are now deceased, a fair order on costs is to order which I hereby do, that each party meets their own costs.

48) The funds held in the joint account of advocates be released to the respective property owners.

Dated, Signed and Delivered at Nairobi this 16th day of October, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendants