REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 68 OF 2017

GODFREY OCHIENG' JUMA...PLAINTIFF/APPLICANT

VERSUS

MAKARIUS MAKWATA..DEFENDANT/APPLICANT

JUDGEMENT

1. The Plaintiff – **GODFREY OCHIENG JUMA** – filed this matter against the defendant – **MAKARIUS MAKWATA** – on 6th November, 2014. The Plaint originating the suit is dated 28th October, 2014. The Plaintiff averred that sometime in the year 2014 he and the defendants agreed to terminate their partnership using a formula based on the capital contribution of each, which stood at 74% for the plaintiff and 26% for the defendant. The partnership involved joint ownership and operation of a school ran in the name and style of Immaculate Heart School. They valued the school at 11,690,000/=. A term of the dissolution was that the plaintiff would buy off the defendant at Kshs. 3,000,000 and therefore become the sole owner of the school.

2. The Plaintiff was supposed to pay the defendant by 30th March, 2014, failing which the school would be sold, with the parties intended to share the sale proceeds in the ratio of their capital contribution. In the meantime, the parties were supposed to account for all the monies received and settle all outstanding debts. In this regard, the plaintiff was supposed to account for Kshs. 271,825 while the defendant had to account for Kshs. 2,556,213. The plaintiff complied; the defendant didn't. The defendant was said to have another debt amounting to Kshs. 505,600 which had arisen from unpaid school fees for his children. The plaintiff put the defendant's total indebtedness to Kshs. 3,061,813, which he views as an appropriate and adequate set-off against the Kshs. 3,000,000 that he was supposed to pay the defendant. He wants a declaratory order to that effect. On that basis too, the plaintiff wants the partnership declared as dissolved, with a further order issued vesting ownership of the school in him.

3. More specifically, the plaintiff prays for the following:

> *1. A declaratory order that the defendant's indebtedness to Immaculate heart school of Kshs. 3,061,813 be and shall be applied to write off or cancel the defendant's claim of Kshs. 3,000,000 against him.*
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> *2. A declaratory order that the defendant's indebtedness to Immaculate Heart School of Kshs. 3,061,813 having been applied as in Order 1 above, the plaintiff be and is hereby held to have bought off the defendant's shares in Immaculate Heart School and by virtue of this, the partnership document/deed or partnership relationship, read or implied, that was hitherto in existence and basis of plaintiff and defendant running of Immaculate Heart School be declared dissolved forthwith.*
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> *3. A declaration that the plaintiff be and is hereby held as the sole proprietor of Immaculate Heart School and all the properties thereof.*
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> *4. An order vesting all properties of Immaculate Heart School to the Plaintiff including title deeds in respect of the land parcel which the school is currently built, the school registration certificate, receipt books, registers, vouchers, school property, cheques, books of accounts and bank accounts to the plaintiff.*
>
> *5. An order in the nature of permanent injunction against the defendant from interfering with the plaintiff's quiet ownership, management of, and running of the school.*
>
> *6. Costs of the suit.*

4. The defendant denied the plaintiff's claim vide a defence filed on 28th April, 2015. He also counter-claimed. Later on the defendant amended both the defence and counter-claim. That was done vide an amended defence and counter-claim dated 26th May, 2017 and filed on

29th May, 2017. According to the defendant, he and the plaintiff were not partners; they were founding members of the school. The school's value was also not 11,690,000/=; it was 23,000,000/=.

5. In the counter-claim, the defendant averred that he started the school and the plaintiff only joined him later. Both of them bought the land on which the school currently stands. The defendant then started the school in 2009 and ensured enrolment of the first students. He was the one doing the day-to-day running of the school.

6. Sometime in the year 2010, there was a misunderstanding which the defendant attributed to the plaintiff's intention to undermine him. The defendant alleged that the plaintiff employed a manager and an accountant answerable to him. There were several meetings held to resolve the misunderstanding. Eventually however, it was agreed that there had to be a parting of ways, with one partner buying off the other or the school itself being sold and the proceedings shared between the parties. The value of the school was mutually agreed at 11,690,000, with both parties said to have contributed equally.

7. The defendant further averred that since the misunderstanding arose, he has not been involved in the running of the school. The plaintiff was said to have been running the school since the year 2012.

8. The defendant would wish to get the following orders:

> *(a) That there be proper valuation of the school to establish its value and thereafter the plaintiff to buy off the defendant's shares. Under the prayer also, the defendant wants a declaration that the school is jointly owned by himself and the defendant.*
>
> *(b) That the court assesses the goodwill value of the school.*
>
> *(c) An order that the defendant be paid 60% of the total value of the school by the plaintiff.*
>
> *(d) A mandatory injunction compelling the plaintiff to produce updated statements of accounts from the year 2012.*
>
> *(e) An order that the defendant be paid proceeds from the school owing to him from 2012 to date.*
>
> *(f) General damages for loss of income for the period starting 2012 to date.*
>
> *(g) Costs of the suit and counter-claim.*
>
> *(h) Interests on the above from 2012 to date.*

9. The court started hearing the matter on 12th November, 2018. The plaintiff gave evidence as PW1 while the defendant on his part was DW2, DW1 being the valuer called by him to do valuation of the school. The evidence of each party is in substantial concurrence with their pleadings. The plaintiff, for instance, reiterated that they started the venture together, with each contributing according to his ability. Differences set in at some point and despite various meetings called to resolve them, suspicion and mistrust persisted until it became inevitable that there had to be a parting of ways. The plaintiff was ready to buy off the defendant at Kshs. 3,000,000 but he realized that the defendant's debt to the school amount to more or less the same amount. He therefore decided to push for a set-off.

10. The plaintiff produced many exhibits, majorly minutes of the various meeting called to ensure smooth running of the school. Among the exhibits was the agreement to dissolve the partnership or business arrangement between the two (PEX (f)), with terms clearly spelt out. There was another meeting after that agreement, held on 18th January, 2014, and aimed at tying the loose ends of the agreement of dissolution. The minutes of that meeting were produced as (PEX (n)).

11. The plaintiff further opposed the defendant's counter-claim. To him, the value of the school mutually agreed upon earlier is still valid. He opposed the defendant's suggested entitlement to 60% value of the school and further averred that the school has never made a profit. He ultimately asked the court to dismiss the defendant's counter-claim.

12. The defendant on his part gave a story that is a bit different. He said he started the school and ensured it was up and running. He recruited the first pupils and teachers and put measures in place to ensure that more pupils joined the school. But the plaintiff came interfering and ultimately edged him out. He took over the running of the school. That happened in the second term of the year 2011. His style of running the school further created mistrust and soured relations between them.

13. The defendant wanted peace. He realized that it would be good for him to opt out. A meeting was called and the valuation of the school was put at 11,690,000/=. It was agreed that he would get 4,500,000/= in order to leave the school to the plaintiff. The plaintiff agreed only to change his mind later and say he would be willing to pay Kshs. 3,000,000/=. The defendant acceded to this too. A time frame was set for payment. But the plaintiff didn't pay. At a later meeting, he offered to give the defendant a tractor instead. The defendant refused. The plaintiff then agreed to pay the monies in instalments for six years. The defendant produced many exhibits, many of them similar to those of the plaintiff.

14. When things turned this way, it was proposed that the school be sold to a third party. The defendant got a buyer but the plaintiff resisted. The defendant then demanded to be paid his agreed entitlement of Kshs. 3,000,000/=. The plaintiff refused and filed this case. The defendant denied the plaintiff's entire claim and expressed his wish thus*: "I ask the court to grant me what I ask for in my defence and counter-claim".*

15. There was also the evidence of DW2, which is about valuation of the school. The defendant was behind the valuation and the whole school including the developments on it at the time of the valuation was put at Kshs. 23,000,000/=.

16. Both sides were subjected to incisive cross-examination by learned counsel on both sides. Both sides maintained their respective positions generally.

17. Hearing over, learned counsel on both sides filed written submission. The plaintiff's submissions were filed on 22nd July, 2019. The plaintiff gave a summation of the case; discredited the defendant's evidence by pointing out some alleged contradiction; asserted the cardinal rule that parties are bound by their pleadings; emphasized that the defendant signed some documents he purports to dispute; and then focused on the issues that he felt should be determined by the court.

18. And the issue involved establishing whether the parties were partners, the monetary or capital contribution of each party, the value of the school, whether the defendant is indebted to the school and the extent of such indebtedness if any, whether the plaintiff is entitled to the reliefs sought, and whether the defendant's counterclaim should succeed.

19. Concerning the issues, the plaintiff submitted, interalia, that the dealings between the parties showed that they were partners, that the value of the school was agreed at Kshs. 11,690,000 with contribution of each apportioned at 74% for the plaintiff and 26% for the defendant, that the defendant was indeed indebted to the school with such debt consisting of un-accounted for money and arrears in school fees all amounting to Kshs. 3,061,813, and that the plaintiff is indeed entitled to the reliefs sought while the defendant's counter-claim should fail. For some raised arguments, instances of supportive evidence and citation of case law were given to persuade the court.

20. The defendant's submissions were filed on 29th July, 2019. He gave his own appreciation of the case and then submitted that there was no partnership between the parties; that when all is considered, his contribution to the school was more than that of the plaintiff; that the real value of the school is Kshs. 23,000,000 as vouched for by DW2; that the indebtedness to the school was not proved; that the school has been making profit from which only the plaintiff has benefitted; that he deserved damages for loss of income from the year 2012 to date; and that he is entitled to costs. The defendant also tried to back up his submissions with instances of tendered evidence.

21. I have read and considered the pleadings, both oral and documentary evidence, and the rival submissions. It is clear to me that the exhibits relied on by both sides mainly comprise of minutes of meetings held to address financial, managerial, or administrative issues bedeviling the school. The parties were blaming each other for the issues. The meetings also sought to engender good faith between the parties so that the school could run smoothly. Despite the well-intended efforts of other people who participated in the meetings, the objectives intended to be achieved largely remained elusive and it became inevitable that both parties had to go their different ways. I am now being called to determine a dispute that arose after parties had already agreed on the modalities of parting ways.

22. The dissolution agreement had five clauses and they were as follows:

> *1. That Godfrey Ochieng Juma buys off the 3 million shares in one instalment which belongs to Makarius Makweta.*
>
> *2. That the registration number of the school (PE/6706/11) be in the name of a manager appointed by Godfrey Ochieng.*
>
> *3. That the school title deed plus all the property in the school be converted to Godfrey Ochieng Juma's ownership in order for the business to be a sole proprietorship.*
>
> *4. That all transactions be done urgently to enable peaceful transition period.*
>
> *5. That this agreement shall only be fully binding after the fore mentioned conditions are met by the two directors before a final agreement is ratified and signed in presence of three witnesses to seal the dissolution of the partnership.*

23. It is important to emphasize the importance of any dissolution agreement. It requires, among other things, utmost good faith. It has no room for a party to play some cards under the table. It should capture all the details of what is to be done by each party and give a timeframe for doing what needs to be done. The parties should sign it in order for it to be binding. And the sharing formula should be clear.

24. What the parties herein included in their pleadings is at variance with what was envisaged in the dissolution document. From what each side has presented, it is clear that there has been a hardening of position by each party thus making it impossible for each to accommodate the other. But the dissolution agreement represents the single most important instance when the two parties had a meeting of minds.

25. It appears to me clear that it is the plaintiff himself who came up with a proposal of Kshs. 3,000,000/= to buy off the defendant. The defendant did not object. This is shown or captured in the minutes of a meeting held on 7th December, 2013. It is after that meeting that a dissolution agreement was entered into. And that happened on 6th January, 2014. The payment of the 3,000,000/= by the plaintiff to the defendant was not expressed to be conditional upon payment of any debt by the defendant. The plaintiff himself came up with the issue of debt much later. In my view, the plaintiff had changed his mind. He didn't want to pay the defendant. And the change of mind came much later. I say this because even at the meeting held on 18th January, 2014 the plaintiff did not raise the issue of debt. The meeting came after the dissolution agreement and the plaintiff should have raised the issue but didn't.

26. Here in court the plaintiff did not prove the debt. What we have as evidence is his word against that of the defendant. The issue of the debt alleged by the plaintiff is one of accounting. Yet the plaintiff never saw it fit to call an accountant to explain the issue more clearly and sufficiently. The plaintiff, himself is not an accountant. The plaintiff lacked tact. In a court of law, you don't raise a serious issue like that the same way you would raise it in a market place. You need to prove and proof of such an issue requires an expert, preferably somebody with basic accounting knowledge or at least somebody who kept the records at the time.

27. But the more crucial consideration however is that the issue should have been raised at the meeting that took place before dissolution agreement and should have been captured well in the dissolution agreement itself. It seems clear to me that the dissolution agreement did not envisage revisiting of issues discussed in earlier meetings. It simply aimed at ensuring that there was a peaceful parting of ways. It aimed to foster peace in a conciliatory manner so that no party would feel unduly cheated by the other. It is therefore difficult to read good faith in the behavior of the plaintiff in the period following the signing of dissolution agreement.

28. But the defendant himself is also not entirely free from blame. In the minutes of the meeting that took place a few weeks after the dissolution agreement he is shown lamenting that the agreed ratio of capital contribution did not reflect "his services to the school for many years". He was raising this issue yet he had accepted the offer of Kshs. 3,000,000 proposed earlier to be given to him. And that is not the only instance. He is shown to have unilaterally advertised the school for sale online without involving the school administration or at least informing the plaintiff. These are not acts of good faith.

29. The defendant's counter-claim further reflects what he felt he was entitled to. His claim that the court assesses goodwill; that he be paid 60% of freshly evaluated school; that he be paid proceeds accruing to him from 2012 to date; and payment of general damages, can all be appropriately seen as an attempt to claim a higher stake of entitlement. The defendant would have done well to place all these concerns on the table for deliberation during the meeting that preceded the agreement of dissolution.

30. Having said all this, I think it is now time to declare my position. And the position is this: The wisdom relating to the manner in which this matter should be handled is to be found in the collective contributions of all the people who participated in the various meetings called to settle the differences between the two parties herein. It is wisdom that extended to, and informed, the dissolution of the partnership between the parties. It is further manifested in the meeting called a few weeks after the dissolution agreement.

31. Both parties had the good sense initially to see the wisdom and accept the dissolution agreement. But that good sense was only temporary. Each party developed and embraced other ideas shortly after. They were later to become intrigants hell-bent on back-stabbing and blackmailing each other. The plaintiff's suit and the defendant's counter-claim should be seen against the backdrop of these later developments.

32. I see value in the wisdom I have just mentioned. The plaintiff's claim shows clearly that he wants to get the school on a silver – platter. He has no regard at all to the contribution made by the defendant. If the court agrees with the plaintiff, then the defendant is supposed to be sent home with nothing to show at all for a project he conceived and implemented.

33. On the other hand, if the court agrees with the defendant, it will be allowing him to harvest what he has not sowed. It will be ignoring the immense contributions made by the plaintiff to make the whole enterprise a success. It is clear to me that the plaintiff has put his heart in the project and he would wish to see it expand and grow. I read in his evidence that he has even bought land and intends to expand the school there. These are all good plans but he cannot be allowed to edge out the other party as if that party has all along been of zero value to the school.

34. Now looking at the issues that both parties want to guide the court, I choose not to be guided by those issues. And I make that choice because these are not issues agreed by both sides. If anything, they are issues that reflect clearly the irreconcilable differences between them. But both however are agreed that they were in a partnership. The court therefore will operate on that premise. In a partnership, it is often the case that there is no outright winner when it comes to dissolution. You win some. And you lose some. And that happens in order to balance the scales of justice and fairness.

35. In the plaintiff's claim he wants to get a declaratory order that the defendant's indebtedness to the school amounting to Kshs. 3,061,813 be applied to as a set-off against the defendant's claim of Kshs. 3,000,000/=. I have already stated elsewhere that the plaintiff did not prove this indebtedness. It was his word alone against that of the defendant. I pointed out that the alleged indebtedness was a matter of accounts and he should have called accounting evidence to reinforce his allegations and give it credibility. It is an elementary principle of the law of evidence that if one party alleges a fact and the other party denies it, that fact is not proved. To prove the fact, you need to bring better and stronger evidence than the party denying it. This is what the plaintiff failed to do.

36. Besides, the plaintiff also failed to demonstrate good faith by laying this fact on the table at the time dissolution agreement was being made. His allegations of the defendant's indebtedness therefore come across as an afterthought. It is contrived to deny the defendant his agreed entitlement.

37. I therefore decline to grant the plaintiff this prayer (that is prayer 1). The plaintiff also wanted – And this is prayer 2 – that once a set off is allowed, he be held to have bought the defendant's shares in the school. Well, the set-off has not been granted. The plaintiff has not therefore bought off the defendant's shares in the school. This prayer therefore is also declined.

38. The plaintiff also has prayers 3,4 and 5, which, in a nutshell, are about declaring him the sole owner of the school, granting an order vesting the school properties in him, and a permanent injunction against the defendant restraining him from interfering with the ownership and management of the school. These are good prayers and my view is that the plaintiff is entitled to them. But they can only be granted conditionally. As I pointed out earlier, cases of this nature are not always a winner-takes-all scenario. The plaintiff reneged on his undertaking to pay the defendant Kshs. 3,000,000 agreed upon in the dissolution agreement. I grant him prayers 3,4 and 5 on condition that he pays the defendant Kshs. 3,000,000 as agreed earlier. He has to pay it with interests at court rates and the money will continue generating interests as long as it is not paid. I will come to the issue of costs later. I want to handle this issue while handling the issue of costs relating to the defendant's counter-claim.

39. I now come to the defendant's counter-claim. His first prayer (prayer a) is that there be a declaration that Immaculate Heart School is jointly and severally owned by him and the plaintiff. I find no problem granting this prayer. But it also has to be granted conditionally. I grant the prayer to run as long as the plaintiff has not paid him the Kshs. 3,000,000/= agreed in the dissolution agreement plus any interest on that amount that may have accrued. Immediately the plaintiff pays, the prayer lapses and the whole school and everything in it becomes the

property of the plaintiff. The granting of the prayer also comes with a corresponding obligation namely: The defendant has to ensure that he signs all the necessary documents required to make the plaintiff the sole proprietor of the school.

40. Prayer (b) in the defendant's counter-claim asks the court to assess goodwill. This prayer is difficult to grant. Before assessment of goodwill, it has to be shown that it exists. The defendant needed to demonstrate this but he didn't. I expected that the defendant would show well that the school has been making profit. He even needed to show the profit made. Goodwill arises from the good reputation of an enterprise. And good reputation comes from profitability and good delivery of goods and/or services. No evidence was led by the defendant in this regard. The plaintiff alleged that the school has not been making profit. I think he was making a point and part of his disagreement with the defendant could possibly be related to this. And the substance of the minutes availed to the court by both sides seem to show a school facing challenges that could impact negatively on profitability and reputation. The point is: I decline to grant the prayer. The court was not enabled to grant it.

41. Prayer (c): This is about paying the defendant 60% of the total value of the school. Here, the defendant is behaving much like the plaintiff. This is something that he should have placed on the table for deliberation when dissolution was being discussed. Besides, the plaintiff is shown to have invested much more in the school. Why should he be the one to get less? What the defendant is asking for does not make any business sense. And I guess that the defendant would wish the value of the school pegged on the valuation that he himself did. Again I find this unacceptable. The plaintiff was never part of that valuation and it appears clear that even the school management was not involved. I decline to grant this prayer too. Prayer (d) is about taking of accounts. This prayer is spent. The defendant himself asked for it through an application and it was granted.

42. Then there are prayers (e) and (f), which are about the defendant being paid proceeds from the school from 2012 to date and also being awarded general damages for loss of income. Question is: Why didn't you raise all this before accepting the offer of Kshs. 3,000,000? And what are the proceeds you are talking about. Have you computed them so that you can tell the court to award you? Have you led any evidence on them? The obvious answer to all these questions is No. I decline to grant these prayers.

43. I now come to the issue of costs. The defendant asks for them. The plaintiff also asks for them. If the defendant had not filed a counter-claim, I would have been minded to grant him costs because I would have viewed him as a victim. But the counter-claim shows that he is as much on the war-path as the plaintiff himself. After reading the pleadings, evidence and submissions, I was convinced that I couldn't grant any costs to the plaintiff. It is clear to me that he disregarded all wise counsel and filed his suit intending to send the defendant home empty-handed. But the defendant himself did not help matters when he filed a counter-claim that seems to have the aim of teaching the plaintiff a lesson. The order on costs therefore is this: Let each party bear his own costs.

44. As a summary, and for the avoidance of doubt, the plaintiff is granted prayers (3) (4) and (5) in the plaint but only on condition that he pays the defendant Kshs. 3,000,000 agreed in the dissolution agreement plus any interest that may have accrued. The interests are to be calculated at court rates. For the defendant, prayer (a) is granted. He is declared to be in joint ownership of the school with the plaintiff. And as long as he has not been paid what the court has ordered he continues being such owner until he is paid. If and when the defendant is paid, he has to sign all the necessary documents required to make the plaintiff the sole owner of the school. Each party to bear his own costs.

Dated and signed at Kericho this 20th day of May, 2020.

A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 27th day of May, 2020.

A. OMOLLO

JUDGE