



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL CASE NO 20 OF 2016**

**NAFTALY ARAYASON.....PLAINTIFF**

**VERSUS**

**1. CORETA MUKUHI NDUNGI**

**2. PAULINE WANJIRA NGURE**

**3. WANGUI NGURE**

**4. GEORGE MBUGUA KARANJA.....DEFENDANTS**

**J U D G M E N T**

1. By an Originating Summons filed on 1<sup>st</sup> November 2016, Naftali Arayason (the Plaintiff) sought two key orders:-

**“1. THAT the partnership known as IKINU GICHAGI MERCHANTS of which the Plaintiff is a member be dissolved and the partnership property be distributed.**

**2. THAT the accounts of the said partnership be taken for purposes of distribution to members and for purposes of winding up.”**

2. The Defendants are stated to be Coreta Mukuhi Ndungi, Pauline Wanjira Ngure, Wangui Ngure and George Mbugua Karanja (1<sup>st</sup> to 4<sup>th</sup> Defendants respectively). The Plaintiff claims by his supporting affidavit and evidence that in 1998 and 2001 he obtained two shares in **Ikinu Gichagi Merchants** by way of purchase from the 4<sup>th</sup> Defendant and from Stephen Ngure. He asserts that all the original shareholders save the 4<sup>th</sup> Defendant are deceased. He complains that the Defendants have by their disruptive conduct and multiple suits made it impossible for the partnership business to go on. He identified **Plot No. 18 Ikinu Village** as the sole partnership property which he has occupied as a tenant since 1996. He stated that the 4<sup>th</sup> Defendant had attempted to resile from the sale agreement between them in respect of the sale of one share to him even after he had received the full payment.

3. In their evidence, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants asserted that they are widows of some of the deceased original partners. They admitted that the Plaintiff has been a tenant occupying the sole partnership property since 1996. All of them support the dissolution of the partnership as the relations between them have soured. They dispute the acquisition of shares by the Plaintiff from the 4<sup>th</sup> Defendant asserting that the sale fell through, and that, the share of Stephen Ngure was never transferred to the Plaintiff.

4. For his part, the 4<sup>th</sup> Defendant through a Replying affidavit and evidence at the hearing denied selling and transferring his share to the Plaintiff although that had been agreed upon. That the other partners did not approve the sale and he allowed the Plaintiff, also a tenant of the partnership property to recover his purchase deposit of KShs.10,000/= by receiving his portion of dividends. He disputed the alleged purchase of his share and of a second share by the Plaintiff from another member and dismisses the Plaintiff's documents to the contrary as forgeries. He confirmed that he is the sole surviving partner out of the original five founders, and that the widows of the deceased partners have been participating in the affairs of the partnership. He asserted that the Plaintiff is only a tenant of the partnership and that he has defaulted over the years in payment of rent. He stated that the partnership is riddled with disputes and litigation and would be happy if it was wound up.

5. In written submissions, the Plaintiff restated evidence adduced in support of the originating summons and urged the court to find that the partnership business has been rendered inoperable due to disputes and death of partners. He seeks dissolution of the partnership in terms of Section 35 of the Partnerships Act of 2012. The Plaintiff relied on the case of **Sultanali P. Molu & Another v Kenya Railways Corporation & Another** for the proposition that the death of a partner leads to dissolution of a company. Moreover he asserted that the partnership herein is not running in accordance with the partnerships Act.

6. The Defendants submissions on the alleged purchase of two shares of the partnership by the Plaintiff is that this was not proved. Moreover that the receipt of dividends by the Plaintiff in some period after the purported agreement with the 4<sup>th</sup> Defendant did not give the Plaintiff the status of a member of the partnership. They cite the decision of **Mativo J in Civil Appeal No. 15 of 2010 Hellen Wangari Wangechi v Carumera Muthoni Gathua.**

7. Further, reliance was placed on Section 26 of the Partnerships Act as to admission of new partners into a partnership. That the consent of all existing partners was required. That in light of the wrangles in the partnership, it is no longer a going concern and therefore no finding of fact can be made to the effect that the Plaintiff and Defendants were running a partnership business within the meaning, of the Act. The Defendants assert that the only surviving partner is the 4<sup>th</sup> Defendant. Thus the partnership is liable for breaking up as provided in Section 35(a) of the Partnerships Act. They urge that the partnership be dissolved.

8. The court has considered the evidence tendered by the parties and their respective submissions. It appears that no formal partnership agreement was executed by the founders at inception and that subsequent to its formation, the partnership has operated in a non-formal manner. Thus, neither the sole surviving party among original founders (the 4<sup>th</sup> Defendant) nor the Plaintiff who claims to be the secretary of the partnership tendered formal records in respect of the actual running of the partnership business. The dearth of records in this case presents difficulties.

9. That said, there is no dispute that the partnership herein was registered in 1983. The initial founding partners were:

- a) George Ngure Karanja – deceased
- b) Martin Ngure Karanja – deceased
- c) Njoroge Ngure – deceased
- d) Mbugua Karanja – surviving
- e) Joseph Ndungi Kinyungu – deceased

10. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants are widows or representatives of three of the deceased partners. There is no dispute that the sole partnership property is the **Plot No. 18 Ikinu** and that since 1996 the Plaintiff has occupied it as a tenant. A letter written by the Registrar of Companies to the Plaintiff's advocates **Gatitu Wang'oo and C. Advocates** on 3<sup>rd</sup> June 2007 indicates that **Ikinu Gichagi Merchants** was registered under the Business Names Act on 19<sup>th</sup> September 1983. The registered place of business being **Plot No. 18A Ikinu Market Kiambu**. The nature of the business is stated to be **"General shop provision."**

11. At the date of the letter the following persons were the registered proprietors:

- a) Thuku Kamau
- b) Mbugua Justo Karanja
- c) Ngure Justo Karanja
- d) Njoroge Ngure
- e) Mukora Njoroge

12. These names are either aliases of the founding partners or their representatives or successors. From evidence tendered on both sides, the partnership did not engage in any trade beyond the leasing of its sole property – **Plot 18 or 18A Ikinu**. So far as this case is concerned, two issues require determination, namely, whether the Plaintiff is a shareholder in the partnership through purchase of shares, and whether the partnership ought to be dissolved.

13. Section 108 of the Evidence Act provides that:

**"1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts 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."**

14. The court has considered the evidence by the Plaintiff concerning the alleged purchase of the 4<sup>th</sup> Defendant's 20% share of the business in 1998. The 4<sup>th</sup> Defendant admitted that he had orally agreed to sell his said share to the Plaintiff. Although it is not clear from the 4<sup>th</sup> Defendant's evidence what the purchase price was – KShs.40,000/= or 90,000/=, he admits receipt of KShs.10,000/= as an initial payment, and that the monies were to settle a debt he owed to one George Njoroba. The first sale agreement which the Plaintiff says was executed by

the 4<sup>th</sup> Defendant and himself is dated 9<sup>th</sup> February 1998.

15. On the face of it a sum of KShs,20,000/= was paid on that date, and the balance was to be paid by two instalments of KShs.10,000/= in April and May 1998. Attached to the agreement is an acknowledgment of receipt of a sum of KShs.20,000/= paid on that date in equal amounts in cash and cheque towards settling the 4<sup>th</sup> Defendant's debt and further that the sum consisted of proceeds of sale of the 4<sup>th</sup> Defendant's share **"within Plot # 18 Ikinu to N. Arayason at the value of KShs.40,000/="**

16. Seemingly the balance of KShs.20,000/= was similarly to be paid by the Plaintiff in March and April 1998 to Njuruba. There is no evidence that this sum of KShs.20,000/= was paid to Njuruba. What follows is a further agreement dated 30<sup>th</sup> June 1998 which recites the first payment and contains a statement in clause (b) that **"April 30/98 the vendor stopped the purchaser to pay the balance to George Njuruba and take the money himself"** (sic). And in clause (c) a statement that **"May 30/1998 the vender is paid Kenya shillings ten thousands as final payment of the purchase price"** (sic)

17. A further statement in the agreement states that:

**"The vendor shall notify other partners and transfer his name to the purchaser and sign the application from for change of name and registration with County Council of Kiambu. The purchaser from February 9/1998 shall be entitled to run the management of the Ikinu Gichagi Merchants and receive dividends."** (sic)

18. Although the agreement is purportedly drawn by **Meenye & Kirima Advocates**, it is not signed by an advocate of the firm. Moreover, from the wording of clause (b) and (c) only a further KShs.10,000/= was acknowledged as received by the 4<sup>th</sup> Defendant since the first agreement. Further the agreement appears to acknowledge that the other partners had to approve the admission of the new partner. As for the memorandum of understanding of the same date purported to be drawn by **Meenye & Kirima Advocates** and the attached alleged approval of the partners of the new entrant, only 3 partners – **Martin Ngure Karanja, Joseph Ndungi Kinyungu and George Ngure Karanja** signed these documents. The purported signature of the 4<sup>th</sup> Defendant is included among the members who signed the approval document. One member identified as **Patrick Ngure** or Inactive member, respectively, did not sign the memorandum or the approval document.

19. On the face of the evidence **Patrick Ngure** is **PW2** from whom the Plaintiff claimed to have bought a further share which had in turn been purchased from **Stephen Ngure Njoroge**. During cross-examination, **PW2** stated that:

**"Shares are transacted through completion of a transfer form – application form. The same will be discussed in a meeting of members who then sign to approve the transfer of shares. All members must sign the form to approve. So far as I am concerned, the Plaintiff bought shares from 4<sup>th</sup> Defendant in 1998. Yes, I do recall that I never signed the form because I was away at the time. But the other members did. The two shares were bought by Plaintiff: from Njoroge Ngure (myself) and from 4<sup>th</sup> Defendant in 2010 I sold my share to Plaintiff."**

20. This witness admitted to suing the partnership in **Githunguri Civil Suit No. 23 of 2005** and that he did not sign the memorandum of understanding of 30<sup>th</sup> June 1998. The relevant Plaintiff's documents shows the Defendants as **Joseph Ndungu Kinyungu, Pauline Wanjira Ngure, Wangui Ngure and Naftali Arayason**. **PW2** claimed in the suit to have joined the partnership in 1994 after purchasing the shares of **Njoroge Ngure**, that the 4<sup>th</sup> Defendant later joined the partnership but that **PW2** had been denied dividends. For their part the Defendants denied in their defence, also in the Plaintiff's bundle that **PW2** was a partner in the partnership. The Defendants herein have maintained this position in the present suit and **PW2** did not tender any evidence to establish himself as a partner.

21. Suffice to say that the inclusion of **PW2**, a disputed partner in the Memorandum of understanding herein does not appear to satisfy the provisions of Section 26 of the Partnerships Act. The memorandum of understanding and partners' approval form neither includes all the admitted founding partners nor the proprietors described in the Registrar's letter of 3<sup>rd</sup> June 2009. Neither is there credible evidence as to the actual *bona fide* partners at the time and that by their conduct, the partners then existing allowed the Plaintiff to engage in the business of the partnership. As for dividends received by the Plaintiff, the 4<sup>th</sup> Defendant says these were to repay the part purchase price paid over in respect of the failed transfer of shares.

22. And though he claims to be the secretary of the partnership, the Plaintiff did not bring to court any firm evidence, beyond the admitted receipt of dividends for some period, of his active involvement in the business of the partnership. Which evidence was critical in this case because, he occupied the partnership property as a tenant before his alleged inclusion as a partner. The fact of his continued occupation of the premises which is itself the subject of several disputes, is not in the circumstances, conclusive evidence of his participation in the running of the partnership.

23. In a plaint attached to his affidavit in support of the originating summons, which is in respect of **Githunguri SRMCC No. 87 of 2007**, the Plaintiff had sued **Joseph Ndungi Kinyungu, Pauline Wanjira Ngure, Wangui Ngure and George Mbugua Karanja** as the 1<sup>st</sup> to 4<sup>th</sup> Defendants. At paragraph 9 to 11 the Plaintiff asserted membership of the partnership through purchase of the 4<sup>th</sup> Defendant's shares.

It is averred at paragraph 13 & 14 that:

**"13. The 4<sup>th</sup> Defendant has declined for no good reason to facilitate formal transfer of the (share) he sold to the Plaintiff in spite of having executed the application for change of registration on 11<sup>th</sup> January 1999.**

**14. The Defendants have of late turned against the Plaintiff and have threatened to bring down the premises in Plot No. 18 Ikinu Market and paralyze the Plaintiff's business for no apparent reasons."**

**24. The second prayer in that suit was for an order to compel the 4<sup>th</sup> Defendant "to execute all necessary papers to facilitate transfer of his shares in Pot No. 18 Ikinu Market and in Ikinu Gichagi Merchant to the Plaintiff."**

To my mind, these averments and prayer appear to contradict the Plaintiff's oral evidence herein that he formally became admitted as a partner in the business or was allowed to participate in the business by the existing partners. If the memorandum of understanding and approval form of 30<sup>th</sup> June 1998 is believed three partners signed the documents admitting the Plaintiff herein as a partner. Little wonder then that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants dismiss these documents and the sale agreement as forgeries.

25. Faced with the Defendants' challenge, the Plaintiff ought to have summoned independent witnesses such as the lawyers who drew the documents to testify regarding the transactions therein. **PW2** was not a credible or believable witness in my opinion. He had an axe to grind, arising from his dispute with the partnership. He and the Plaintiff were at first very cagey about how they acquired the share of Stephen Nguere. Their affidavits were vague and they were only drawn out on the details during cross-examination.

26. Reviewing all the available evidence, I am not satisfied that there is credible evidence that the Plaintiff was ever admitted as a partner in **Ikinu Gichagi Merchants**, either expressly or that such admission can be implied from the conduct of the remnant partners, even though he may have paid some monies to the 4<sup>th</sup> Defendant in that regard.

27. On the second question, the matter is more straightforward. It appears that by 2007 when the Plaintiff filed **Githunguri SRMCCA 87 of 2007**, only **Joseph Ndungi Kinyungu** was the undisputed remaining partner. By the date of filing the present originating summons, only the 4<sup>th</sup> Defendant among the original partners was alive. It was admitted in evidence that four of the five partners who set up the partnership are deceased, leaving the 4<sup>th</sup> Defendant, who as I have found did not give up or transfer his share to the Plaintiff. Thus he is the sole surviving partner, the position of the other Defendants being merely representatives of the deceased partners.

28. The partnership is wracked by disputes which have ended up in courts, and the interested parties do not see eye to eye. Apart from the premises occupied by the Plaintiff, it is difficult to say that the partnership is a going concern in the true sense of the word. On the findings of the court, the number of partners fell below two prior to the filing of this suit, with the apparent demise of **Joseph Ndungi Kinyungu**.

29. Consequently in terms of Section 35, 42, 44(1) (c), 45(2) and 46(2) of the Partnerships Act, the court orders that:

a) **Ikinu Gichagi Merchants partnership** has broken up, effective from the date of this judgment.

b) To give effect to the consequent dissolution of the partnership, and in light of the advanced age of the remaining partner, the 4<sup>th</sup> Defendant, the court directs that the said partner and the widows of the deceased partners who are Defendants herein propose within 30 days, the names of two professional firms who are suitable for appointment by the court as liquidators, to take accounts, collect all partnership property and to distribute it to the persons entitled in terms of Section 42 of the Partnerships Act.

c) For the avoidance of doubt, the persons entitled to share in the net partnership property are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, on behalf of their deceased spouses, and the 4<sup>th</sup> Defendant in his capacity as a partner of the partnership.

In view of this outcome, the parties will bear their own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 12<sup>TH</sup> DAY OF OCTOBER, 2018.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Kaburu for Defendants

Plaintiff - Absent