REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 245 of 1996

1. REBECCA NYAKERU NYONGO

2. MONICA MURUNGI NYONGO

3. HANNAH WANJIRU NYONGO…..
……..APPELLANTS

AND

SIMON KAMAU GITAU.....…….
…….RESPONDENT

(An appeal from the ruling and order, decision of the High Court of Kenya at Mombasa (Mr. Justice Wambilyangah) dated 26th June 1995

IN

CIVIL CASE NO. 189 OF 1993 (O.S))

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JUDGMENT OF THE COURT

From 1974 upto the 9th July, 1986, Simon Kamau Gitau, the respondent herein, and the late Stephen Nyongo Mutinda were in a partnership for the purposes of business. Stephen Nyongo Mutinda, hereinafter called "the deceased " died on the 7th July, 1986. He was survived by three widows, Rebecca Nyakeru Nyongo, Monica Murungi Nyongo and Hannah Wanjiru Nyongo . They are the appellant herein. They obtained letters of administration to the estate of the deceased in 1988. On 30th August, 1993, they filed an originating summons under Order 36 Rule 4 of the Civil Procedure Rules and in that summons, they sought from the High Court three orders, namely:-

1. That the business known as VISITORS INN which had existed between the respondent and the deceased be dissolved.

2. That the accounts of the said business be taken andProfits shared out,

And

3. That the respondent ought to transfer to them the Share of the deceased in certain plots known as Plot Nos.17/XVII, MOMBASA/BLOCK XVIII/112 and 113.

It was common ground in the High Court that the business named in prayer one and the plots named in prayer three were partnership property. Having fully considered the material which was place before him, the learned Judge of the High Court (Wambilyangah, J), declared the partnership dissolved and in respect of the immovable property he ordered that the respondent must transfer to the appellants the share of their deceased husband. In respect of the business known as VISITORS INN, the Judge ordered that the account be taken up to the 31st December, 1991 and the profits be shared out as prayed in the summons. The appellants were aggrieved by the fixing of accounts taking date up to the 31st December, 1991. They apparently want the date left open up to and including the last day on which the taking of the account is to be finalised. The appellants accordingly appeal against this order and they have listed a total of five grounds of appeal.

In our view, there is no substance at all in ground one in which it is complained that the learned Judge erred in law and in fact in resolving the matter in a summary manner given the nature and complexity of the issue. We understand that complaint to mean that the Judge should have received viva voce evidence from the parties before resolving the dispute. As we can see from the record it was the respondent who was insisting that viva voce evidence ought to be received. Counsel for the appellants specifically asked the Judge to determine the matter on the affidavits placed before him. The Judge having done exactly what the appellants asked him to do, it lies ill in their mouth to complain against the procedure adopted by the Judge. That ground must be rejected.

The only ground of substance is really ground two. There, the appellants complain that the learned Judge erred in law and in fact in finding and deciding that the appellants' share of profits were to be limited to the period up to the 31st December, 1991. In support of this complaint, the appellants rely on section 46 of the Partnership Act, chapter 29 of the Laws of Kenya. That section provides:-

"Where any member of a firm has died or otherwise ceased to be partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of eight percentum per annum on the amount of his share of the partnership assets".

There is a proviso to this section but it is not relevant to the circumstances of the appeal.

The partnership was dissolved when the appellants' deceased husband passed away on 9th July, 1986. There was no agreement as to what was to happen to the partnership upon that event. The share of the deceased in the partnership assets remained in the partnership business and was obviously used to generate income for the business. But at some stage the accounts of the partnership had to be settled and the law does not provide that it is the responsibility of the surviving partner to ensure a quick settlement of the accounts. That would be placing too heavy a burden on the surviving partner because as it is often the case, the surviving partner may not even know whom to settle the accounts with where a legal representative of the deceased has not been appointed. In this case it took the appellants up to 1988 to obtain letters of administration to the estate of their deceased husband and during the period 1986 to 1988, even if the respondent had been anxious to settle the accounts, there was simply nothing which he could have done. Clearly the burden must have been on the estate of the deceased to ensure that accounts were settled. Having obtained the grant, it took the appellants up to 1993 to bring this summons to court. In the meantime the respondent was running the business all by himself and in these circumstances, we think the learned Judge was perfectly entitled to take the view that had the appellants acted with

reasonable dispatch, the accounts would have been settled by the 31st December, 1991. Section 46 of the Partnership Act merely sets out how the profits are to be shared out after the dissolution of the partnership. It does not provide that the accounts must be settled at any particular date. In our view the section does not deprive the Judge of his discretion to fix a particular date. We are satisfied that the learned Judge was perfectly entitled to fix the date in the manner he did and the complaints raised in grounds two, three, four and five must fail. That being our view of the matter, this appeal fails and we order that it be and is hereby dismissed. In the circumstances of this appeal, we make no order as to costs.

Dated and delivered at Mombasa, this 24th day of January, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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Ag. JUDGE OF APPEAL