



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 1103 OF 1982

JOSEPH OTIENO MADANYI.....PLAINTIFF

VERSUS

PHILEMON R ONYANGORESPONDENT

PATRICK C AHENDARESPONDENT

APOLLO R ALUOCH.....RESPONDENT

JUDGMENT

The plaintiff, Mr Joseph Otieno Madanyi, by this suit, seeks against the defendants Philemon R Onyango, Patrick C Ahenda and Apollo R Aluoch, the following orders:

1. A declaration that the plaintiff is the lawful proprietor and manager of Garissa Commercial College.
2. Special and general damages against the defendants for conversion and/or fraud together with costs and interest thereon at court rates.
3. Special and general damages against the 1st defendant for breach of trust and/or agreement.
4. That the defendants be ordered to give full account of the moneys received from the college business and expenditures of the same from the month of July, 1980 to the date of judgment and the full bank account for the same period.
5. That the monies found to be due to be paid to the plaintiff forthwith as the proprietor of the business.
6. That the defendant be ordered to return and surrender to the plaintiff the original triplicate or any other company of the certificates of registration of schools of the plaintiff and be permanently restrained from using the said certificates or copies thereof or any other certificates of the plaintiff to run the same or another business in the name of Business Educational Institute (1981) or any other business of whatsoever nature.
7. That the defendants be ordered to vacate and surrender possession of the plaintiff's rented premises occupied by and whereat the plaintiff's firm Garissa Commercial College is carrying on business.

8. That the defendants be permanently restrained from using the equipments, books, furniture and properties of whatsoever nature that belong to the Garissa Commercial College.

9. Costs and interest.

According to the plaint, the plaintiff contends that he is the sole registered proprietor of a concern called Garissa Commercial College, which at the material time was carrying on business on premises leased from one Hassan Shidiye Mohamed, known as plot No 170, Sankar Road, Garissa Town, and that the defendants carry out their business in Garissa under the name and style of Business Educational Institute (1981). When the plaintiff's business commenced, the first defendant, who was based in Garissa was to oversee it by agreements on behalf of the plaintiff and the plaintiff duly purchased all the necessary equipment for the purpose of the business. By early 1981, the first defendant is said to have refused and/or failed to render the accounts of the business to the plaintiff who was based in Nairobi contrary to the agreement between them. The first defendant is also said to have opened a bank account without the authority of the plaintiff for the said business in April 1981. The first defendant and the other two defendants are said to have removed the plaintiff from the business and converted the assets of the business to their own use. Ultimately in November, 1981, the plaintiff states that the defendants caused to be registered a business in the name and style of Business Educational Institute 1981 on the same premises in which the plaintiff's business was operating and used the plaintiff's certificate of registration to procure registration of the latter business. Consequently the plaintiff contends that he has suffered loss and damage and seeks the orders already listed hereinabove.

The defendants filed a defence to the above allegations. They denied the contents of the plaint and asserted that the 1st, 2nd and 3rd defendants were the actual proprietors of Garissa Commercial College and that the lease of the premises in which the colleges carried on business was between the 1st defendant and the owner of the premises. The 1st defendant contended that he was not asked to manage the business but that the 1st defendant had asked the plaintiff to manage the business in compliance with the Education Act. The plaintiff is however said to have failed to take up the appointment. The defence also contends that the equipments were contributed to or bought by the plaintiffs and that in 1980, there were only 3 students in the school.

The defence further states that the name of the college was never changed and that the Business Education Institute is a new business. It also contends that the plaintiff had been originally engaged as an employee and as he did not take up the engagement, the defendants had no objection towards him. Consequently, the plaintiff's suit should be dismissed with costs.

The evidence adduced by the plaintiff shows that the plaintiff at the material time was a manager with Messrs Philip International Ltd, where he used to be a credit controller. According to the plaintiff, he registered Garissa Commercial College on the 19th November 1980 with himself as a sole proprietor. To support this contention, he produced a certificate of registration of school as Ex A. The certificate is issued by the Ministry of Education and authorises the firm to run a school of 3 classes with the plaintiff as the manager and was issued with a fraud certificate on 4th March 1988 and states that it cancels an earlier one issued in November 19, 1980. The plaintiff also produced a certificate of registration under the Business Names Act issued on 5th August 1982 on which he is shown as the sole proprietor of the college. The earlier certificate of registration under the Education Act was expressed to be valid only in accordance with section 15(1) of the Education Act and similarly shows the plaintiff as the manager of the college.

In addition to the above evidence, the plaintiff also deposed that in 1980, April, he negotiated a lease for plot No 170, Sankur Road, Garissa at Shs 1,000/= per month. In support of the above the plaintiff produced a letter to that effect by one Hassan Shidiye Mohamed, addressed to the Ministry of Education. It is said to be witnessed by the 1st defendant. It is on record as Ex 4. He also stated that rents were being paid in the name of the college and that he also employed instructors including a Mr Ochieng and others with the 1st defendant as an administrator at Shs 800/= per month. He also stated that the terms were agreed in the presence of Morris Nyamangu who gave evidence as PW1 and Peter Oloo. At the meeting, it is stated that it had been agreed that the 1st defendant would render monthly accounts to the plaintiff

who was then stationed in Nairobi. In support of this contention, the plaintiff produced a letter dated 14/2/1981 as Ex 5. The letter is by the 1st defendant.

On equipment, the plaintiff deposed that in June 1980 he supplied 10 typewriters, 10 tables, 10 chairs, cupboard and 5 typing books. This was after he had received authority from the Ministry of Education through a letter dated 15/5/80 and that he started operating the school in July, 1980. The letter from the Ministry of Education was produced as Ex 6. However when the plaintiff failed to receive regular reports from the 1st defendant, he demanded the college correspondence file from which he discovered that the 1st defendant had formed a partnership with the other 2 defendants whom he did not know at the time and were running this college on their own account. They had in fact opened a bank account in the name of Garissa Commercial College without his consent with Barclays Bank. He produced correspondence relating to the account as Ex 7 (a) and (b). The plaintiff also produced letters by the 3rd defendant informing the Ministry of Education that the name of the business had changed to Business Educational Institute as Ex 8 (a) and (b).

On account of the above turn of events, the plaintiff requested the defendants to hand over the college to him. They however refused and printed letterheads showing that the college was run by Business Educational Institute (1981). The letterheads and receipts were produced as Ex 9(a) and (b). The plaintiff also found that the defendants had registered Business Educational Institute as a business and he therefore filed the current suit for the already stated reliefs in 1982. Later he also lodged a complaint with the Registrar General and produced a letter to that effect as Ex 10 and on the defendants being made aware that the Registrar General was investigating the matter by the said letter of 3/7/85, the defendants abandoned the premises and the plaintiff came to know about it through a Mr Peter Oloo. When he went to check, the plaintiff found the premises locked but with nothing inside. He then reopened the college by himself. Meanwhile, the plaintiff now seeks a declaration that he is the sole owner of the college, value of the equipment converted by the defendants, loss of profits for the period 1980 to 1985 and damages for wrongful conversion of his college by the defendants.

On cross-examination the plaintiff conceded that the certificate from the Ministry of Education does not show him as the proprietor but manager. He explained that this is because there is no column for a proprietor and that the certificate of registration shows him as owner of the business.

The plaintiff's witness, Mr Morris Nyamunge, who gave evidence as PW1, largely confirmed the plaintiff's contentions. He stated that in 1979, he introduced to the plaintiff an idea of starting a commercial school in Garissa as he intended to open such a college in Homa Bay and suggested that Garissa would be most appropriate. Acting on the advice, the plaintiff duly completed Ministry of Education forms for the purpose of starting a college at Garissa. He then gave the forms to the witness who processed them on his behalf through the PEO's office Garissa before forwarding them to the headquarters of the Ministry in Nairobi who eventually issued a certificate of registration. The witness also stated that the plaintiff appointed the 1st defendant as his manager in charge of administration. The witness produced the file relating to the college as Ex 1. On being cross-examined the witness denied having introduced the plaintiff to the 1st defendant to act as his manager.

The defendants disputed the plaintiff's contentions. In their defences filed on their behalf, they specifically denied that the plaintiff was the sole proprietor of the college and contended that they are the sole proprietors thereof; they denied that the plaintiff was the one who leased the premises from the landlord and asserted that the 1st defendant was the one who entered into the case arrangements; they denied that the plaintiff was the one who approached the 1st defendant to administer the college and contended it was themselves who approached the plaintiff to be their manager; they denied that the plaintiff had purchased equipments for the college and that they are the ones who purchased the same for the college typewriters and that the college had no textbooks. They also state that in 1980 the college had only 3 students and denied having converted or changed the college to their own use or into the name Business Educational Institute. They further state that the plaintiff as an employee is not entitled to the prayers sought in the plaint.

At the hearing, the defendants gave evidence on their own behalf as DWI, DWII and DWIII. DWI

deposed that he knew the plaintiff in 1981 through PWI, Peter Nyamunge as he wanted to start a commercial college and was informed by PWI that the plaintiff could be acceptable to the Ministry of Education as a manager. Prior to this DWI, DWII and DWIII had in 1980 decided to open a college. They therefore sent DWII to collect application forms for that purpose from the Ministry of Education. However, when they took them to the Ministry of Education, they were rejected, as they did not have qualifications to run a commercial college. This was in March 1980 and when they went to look, DWI who was a cousin of the plaintiff introduced them to the plaintiff. PWI then brought the plaintiff's documents with which they obtained the certificate of registration from the Ministry of Education with the plaintiff's name shown as manager of the college. DWI then produced the certificate of registration as Ex D1. He also stated that they started running the school in May 1980 before they received certificate of registration and that the plaintiff never took up this appointment. He also deposed that to run the school, the defendants employed one Saida Farah as an instructor and Omar Abdi as a messenger. Later on departure of Mrs Farah, the defendants employed a Mrs Felgona as the Principal of the college. In April 1981, as the plaintiff had not taken up his job, the inspectors threatened to close down the school and advised that they find another qualified manager. To satisfy this requirement, they formed themselves into a firm by the name Business Educational Institute to manage the school. In May 1981 the plaintiff showed up in Garissa and started to claim that he was sole manager of the school and used the influence of one Julius Omolo who is a Senior Superintendent of Police to remove DWI from the school. When the school was closed, they had only 7 students and used to pay Shs 150/= per month each. He further deposed that the defendants used to contribute running expenses by themselves. On the intervention of the Provincial Education Officer's office, the school was reopened by Peter Maurice Nyamunge, PWI but 3 students had run away leaving only 4. The problem persisted until 1982 when the plaintiff filed the current suit. In 1982 they had only 9 students, 10 in 1983, 4 in 1984 and the school closed in 1985.

On equipments, DWI deposed that the DWII is the one who contributed 6 typewriters for typing lessons, DWIII 1 typewriter and himself 2 typewriters, desks and chairs were made from timber purchased by themselves. The three also used to pay for the premises which they had agreed to lease as from April 1980 at shs 1,000 per month. They also paid 2 months' rent and were increased from time to time and produced correspondence relating to the rents as Ex D5. DWI also produced Ex D6 in respect of rent paid by himself. He further produced Ex 7 and 8 by which they had registered the college and the institute. In March, 1982, DWI deposed that there was a theft at the college and report was made to the police. To support this contention, he produced Ex 9 and that exhibits produced by the plaintiff were among those in the lost files. The witness further produced exhibits showing that the school borrowed books from DWI's place of work and that the school had closed down due to financial problems.

DWII and DWIII largely confirmed DWI's evidence. DWII stated that he contributed 7 typewriters and produced invoices for same while the rest of the them contributed the other 3 typewriters. DWIII confirmed that they used to contribute towards rent. They denied that the plaintiff was ever the sole owner of the college and/or that he ever was a partner in the business.

As can be seen from the above summary of evidence adduced herein and the pleadings the main issue is the ownership of Garissa Commercial College. Did the college belong to the plaintiff or the defendants? In written submissions submitted on behalf of the plaintiff, Miss Nyaanga argues that by reason of the registration under the Registration of Business Names Act and the Education Act, the plaintiff is definitely the owner of the college. She also contends that the plaintiff is the one who paid the initial Shs 1,000/= for rent and that he had in fact employed the 1st defendant as his manager as he was based in Nairobi. On the other hand, Mr Odera for the defendants argued that the college was their property as they mooted and registered the business under the Education Act and merely used the name of the plaintiff to obtain the registration of the college. He also urged the Court not to place any reliance on the registration under the Registration of Business Names Act as it was done long after the suit had actually been filed.

Although this Court would have preferred clearer evidence, it is observed that although the defendants contend that they mooted the venture in 1980 and sent the 2nd defendant to obtain forms from the Ministry of Education in Nairobi and filled them and returned them to the said Ministry's offices in Nairobi, the correspondence exchanged with the Ministry of Education, especially the letter dated 15th

May, 1980, plaintiff's Ex 6, shows that the application for registration was done through the Provincial Education Officer's office Garissa and that is why the approval had to be copied to the said office and referring to their earlier letter. This would appear to support the evidence of PW1 to the effect that he was the one who actually processed the application on behalf of the plaintiff in April, 1980 and that he was the one who introduced the 1st defendant to the plaintiff so that he could assist the plaintiff with day to day management of the college as the plaintiff was based in Nairobi. There are also the two letters exchanged between the plaintiff and the 1st defendant on 14th February, 1981 and 20th February, 1981 in which the 1st defendant acknowledges that he has a reporting role to the plaintiff. On account of this and the fact that legally the defendants could not be allowed to operate the College for lack of qualifications, this Court is satisfied on balance of probabilities that the plaintiff was the true owner of the Garissa Commercial College as evidenced by certificates of registration under both the Education Act and the Registration of Business Names .

The next issue that has to be determined is whether the defendant converted the College to their own use and if the plaintiff suffered any loss. On whether or not the defendants did convert the plaintiff's College to their own use, the plaintiff's evidence as confirmed by PW1 is that around April, 1980 he leased the premises in Garissa for the college and employed the 1st defendant as his manager to run the College. The 1st defendant however failed to give him any reports and indeed as evidenced by the letters exchanged between them dated 14th February, 1981 and 20th February 1981; the 1st defendant had by then not complied with the plaintiff's instructions. The evidence also shows that towards the end of the year, the defendants decided to take over the running of the plaintiff's said college and indeed formed themselves into unregistered firm with the 1st defendant as the interim chairman. The defendants' first meeting appears to have been held on 29th April, 1981 when by minute 1/81 it was confirmed that they were running the College on their own account. The defendants also confirmed in their evidence that they actually ran the college on their own account although the plaintiff was shown as the sole manager and they could not have been allowed to run the College without the plaintiff as they were unqualified. On account of this clear evidence in many of this Court's earlier findings that the plaintiff was the founder and sole owner of the College, it is this Court's finding that the defendants actually converted the school to their use.

On the loss suffered by the plaintiff as a result of the conversion, it is in evidence that the plaintiff did purchase some 10 typewriters in June, 1980 at Shs 25,000/= which he supplied to the College at that time and started operating the College in July 1980 after receiving a letter in May, 1980 from the Ministry of Education. The defendants however deny this and state that they started operating the College in April, 1980 and that they supplied the 10 typewriters. In support of this, they produced invoices from Jos Hunsen showing that they purchased the typewriters second hand. On examining the invoices produced as MF1, they relate to machines acquired by them as from August 1980 and in 1981 when the college was already in operation. As the College could not have started operating without typewriters, on balance of probabilities, I am satisfied that the plaintiff did supply 10 typewriters which he bought at Shs 25,000/=. The typewriters purchased by the defendants must have been additional to the ones the plaintiff supplied as in 1981, the College according to the minutes had 31 students and the typewriters in use must have been more than 10. It is also in evidence that these machines were never returned to the plaintiff on the closure of the College. The plaintiff also testified that he supplied 5 typing books which he never got back, but did not give the cost of the said books. I see no reason why this Court should not accept this evidence.

The other loss which the plaintiff claims to have suffered is loss of profits for which he demands an account from the defendants. It is however in evidence that the 1st defendant was to pay rents, salaries and expenses out of the fees collected. The defendants also have testified that at that time Garissa was insecure and such enrolment was fairly low, the highest having been 38 students paying between 80/= per month Shs 200/= per month in 1985. They also had at times contributed to the running of the school from their own income right from the time the College opened. In fact the landlord kept on reducing the rent depending on the enrolment. On account of this it is clear to this Court that even if an account were to be ordered, no profits would be shown and it would be a futile exercise to order for same. The venture was a dead loss but as the plaintiff lost use of the sum of shs 25,000/= to buy typewriters as from July, 1980, interest on the amount at bank rates with effect from that date would be adequate compensation.

On account of the aforesaid findings, I would grant to the plaintiff against the defendants prayers 1, 4 (d) and (e) of the amended plaint and that they should surrender all documents to the plaintiff relating to Garissa Commercial College. I would also enter judgment for the plaintiff against the sum of shs 25,000/= being the cost of the typewriters which the defendants converted to their use plus interest on the said amount at bank rates as from 1st July, 1980 until payment in full as prayed in prayer 2 of the amended plaint – but would make no award for general damages as the venture was a dead loss. Further I make no finding on prayer 3 of the amended plaint as no trust was established or pleaded by the plaintiff and would also refuse prayers 4 and (b) of the amended plaint as it would be a futile exercise as the venture was a dead loss right from the start. I would also award the costs hereof to the plaintiff and interest thereon from the usual dates and at usual court rates.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of October 1992 .

G.P MBITO

JUDGE