



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 42 OF 1981

JULIUS MWORIA.....PLAINTIFF

VERSUS

ELIUS KANAMPIU KIAMBATI.....DEFENDANT

JUDGMENT

This action was begun by plaint filed in court on 7th January, 1981. In paragraph 1 of his plaint, the plaintiff Julius Mworja averred that he was the attorney of his son, Robert M Ringera. On 28th July, 1982, Muli J gave leave for Robert M Ringera to be joined as a second plaintiff. The substance of the plaint remained unaltered.

In paragraph 3, the plaintiffs alleged that in 1974 the second plaintiff and the defendant, Elius Kanampiu Kiambati obtained jointly a loan of Kshs 148,000 from the Industrial and Commercial Development Corporation (I C D C) to commence a partnership in a dry-cleaning business at Meru. In paragraph 4, it was alleged that all the income of the dry-cleaning business was to be paid into a joint Bank account which was to be operated on joint signatures and that that income was to be used towards repayment of the loan obtained from ICDC. It was further alleged that in 1979 the defendant opened a separate bank account, and began paying partnership income into that account, and running the partnership business as if it was his own business.

The plaintiffs claimed an order for accounts to be taken, dissolution of the partnership and ancillary relief. On 2nd March, 1981, a defence was filed. In paragraph 1, the defendant denied that the first plaintiff was the Attorney of Robert M Ringera or that Robert M Ringera was the son of the first plaintiff. The second of these two issues was never a material one. The first ceased to be alive when Robert M Ringera was joined as second plaintiff in the suit.

In paragraph 3, the defendant admitted receiving a loan, which presumably was the loan referred to by the plaintiffs. He denied that the loan was made jointly to the second plaintiff and himself, and denied that the loan was made for the purpose of a business to be run in partnership between the second plaintiff and himself. He denied any intention of entering into partnership with the second plaintiff or with anyone else, and averred that the second plaintiff was a person unknown to him.

In paragraph 5, he alleged that if the name of the second plaintiff appeared in documents relating to the loan from ICDC, it was because the first plaintiff, who was an employee of ICDC and, as such, was in charge of processing the loan to the defendant, had fraudulently inserted the name of the second plaintiff in the loan documents. The defendant denied that the second plaintiff and he had operated a joint account or had run the dry cleaning business as partners. He averred that the account referred to in paragraph 4 of

the Plaintiff was in his own name only.

On 15th February, 1983, the trial of the action was begun before Owuor (Mrs) J. There are twenty-seven pages of notices of evidence taken before that judge. On 17th November, 1983 Owuor (Mrs) J discontinued the trial because of a gross contempt of court by the first plaintiff, Julius Mworira. It was resumed before me on 16th February, 1987. On that occasion, the first plaintiff appeared in person, and was not represented. The second plaintiff did not appear and was not represented. The defendant was represented by Mr Mwirichia. It was agreed between the partners that the case should proceed on the basis of the notes of evidence that had already been taken before Owuor (Mrs) J. At the conclusion of taking evidence, Mr Mwirichia addressed the court on behalf of the defendant.

Subsequently, the first plaintiff filed written submissions on behalf of the second plaintiff and himself. Mr Mwirichia, having received the plaintiff's submissions, commented that there was no evidence to support paragraph 8, (F) of page 5, paragraph 4 of page 6, or paragraph 9 of page 7. It is common ground that there was, and presumably still is, a dry-cleaning business at Meru which is conducted by the defendant. It is also common ground that that dry cleaning business was set up and put into operation by means of a loan granted by ICDC.

If that loan was made solely to the defendant, then, as between the parties to this suit, that loan was the defendant's money. In those circumstances, the second plaintiff could not be held to have made any contribution to the business. He would not have risked losing anything if the business should fail; he would not have been entitled to a share in anything if the business should prosper. There would be no *de facto* partnership.

If, however, the loan was made jointly to the second plaintiff and to the defendant, then, as between the partners to this suit, that loan was partly the second plaintiff's money and partly the defendant's money. In those circumstances, the second plaintiff would be held to have made a contribution to the business. He would have risked losing that contribution if the business failed: he would have been entitled to a share in the profits of the business if it prospered. There would be a *de facto* partnership. And so, the general issue as to whether or not there was a partnership between the second plaintiff and the defendant becomes the particular issue as to whether or not the second plaintiff made a financial contribution towards setting up the dry-cleaning business, and this, in turn, becomes the more particular issue as to whether the loan from ICDC was made to the defendant alone or was made to the second plaintiff and defendant jointly.

In evidence, the first plaintiff has put in documents which are *prima facie* proof that the loan was made to the second plaintiff and the defendant jointly. It is not disputed that the first plaintiff was an official of ICDC and had charge of preparing the appropriate documents. The defendant's case is that the documents should not be taken at their face value.

Their appearance, he says, is misleading. In so far as the name of the second plaintiff appears on the loan documents then it appears there because, without the knowledge or consent of the defendant, the plaintiff took advantage of his position as an officer of ICDC to introduce fraudulently the name of the second plaintiff as a borrower jointly with the defendant.

At page 15 of the record of evidence given before Owuor (Mrs) J the issue was put plainly to the first plaintiff as follows:

Question:

I further put it to you that you used your position at ICDC to trick the defendant by inserting your son's name in the defendant's application from which you were processing as an officer of ICDC?

Answer:

That is not true. I didn't use my position to insert my son's name in the application of the defendant.

When the case was before Owuor (Mrs) J, the second plaintiff gave evidence. It is, of course, the second plaintiff who is alleged to have been a partner with the defendant, and not the first plaintiff. The evidence of the second plaintiff is evidence that goes to the very heart of this dispute. It begins at page 26 of the record, and certain passages may be considered particularly relevant, and worth being cited here.

At page 26 line 3 of his evidence in chief, the second plaintiff said “in 1973, I was introduced by my father to apply for a loan for ICDC. I filled the application forms. I signed the forms.” He then goes on to say that the business was then established and that he and the defendant opened the laundry. He said he used to visit the laundry thereafter, and that he worked there from March, 1977 to mid July, 1977. He said that he was issuing out receipts and checking the balance and that the defendant was in charge. Then he said that in mid 1977 he left the country, and went to India for university education. He does not claim that this departure from the scene of operations was by agreement with his partner, the defendant. Then, the second plaintiff came back in 1981. At line 13, he says:

“My father and the defendant were in charge of the business. Although my name appeared it was my father who was running the business with the defendant.”

When he was cross-examined, at page 27 line 9, he referred to Kshs 100 which he had paid, and went on to say that he didn’t contribute anything else. He said:

“ I didn’t know anything about laundry business myself. In fact I was in school in 1973. I filled the forms. It must have been during the holidays.”

He refers to MFI 3 which is the application for the loan, and is dated 10th November, 1973. That, he said, was during school term; it could have been mid-term. Then, at line 17, he says:

“We didn’t agree with the defendant as to how much I would be getting from the defendant or how much I would contribute to the business. As for salary or allowance (these) were left to my father and the defendant.”

At page 28, the witness says that he was not involved in the process of the loan other than filling in the forms. He said he didn’t know when the account was opened. It may be noted, in passing, that the joint account, which was put forward by the plaintiffs as evidence of partnership between the second plaintiff and the defendant was in the name of the first plaintiff and the defendant. This, of course, was not the partnership alleged in paragraph 3 of the plaint, and was evidence contrary to that allegation.

At page 9 of page 28, the witness said:

“When I came back from India I didn’t go to the business to see how it was doing. I never demanded to see any audited books of accounts for the period I was not in the country. I didn’t demand to see any books of accounts at all. I didn’t demand any payments of profits.

I never checked with ICDC to see if the loan repayments were being made.”

When it was put to the witness that there was no partnership between himself and the defendant, he first of all said that there was, and then went on to amplify his answer by saying.

“I know that the defendant was running that business with my father since 1974.” The witness evidence may be summarized by saying that he was a school boy at the time he is alleged to have entered into partnership with the defendant. He knew nothing about the dry-cleaning business, and detached himself from it when he went away to India. He made no contribution towards the business, and provided no security for the loan from ICDC. He expected to receive nothing from the business, and whether the business failed or prospered was a matter of indifference to him. That indifference is perfectly understandable. The second plaintiff had nothing to lose and nothing to gain in connection with this laundry business. The witness was followed by Johanna Kimutai who said he was a stepbrother to Mworira, the first plaintiff. On page 30, in the first and second lines, the witness said.

“in 1973 my brother established a business. It was a dry-cleaning business. He established it with Kanampiu”.

This is evidence of a partnership between the defendant and the first plaintiff, and is therefore contrary to the claim that the partnership was between the defendant and the second plaintiff.

Even the first plaintiff himself, who has obviously been the prime mover in these transactions, said, at page 14, on the second line from the bottom of the page:

“In 1973 my son never met the defendant to discuss the business; up to to-day he has not done so. He has not demanded any share of profits. He has not paid for any of the expenses of the business.” Again at page 16, line 20, the first plaintiff said:

“the actual business commenced in September. I was there when it commenced. My son was not there. My son didn’t put any money in the business at all”

At page 19, line 14, referring to repayment of the loan, the first plaintiff said: “Me and my son were not involved because we had no interest at all.”

At page 22, line 12, the first plaintiff said:

“Yes, I know that partnership is based on mutual understanding and trust between the parties. There was no mutual understanding or trust between him ie the second plaintiff and the defendant. Between my son and the defendant there was no mutual agreement as to how the profits and losses would be shared. There was also no mutual understanding as to the contributions to the business . I didn’t tell the defendant that I was negotiating the partnership on behalf of my son. I didn’t tell him that I was negotiating on my own behalf.” Nowhere is it explained why the defendant should have pledged his own property as security for a loan that was to be granted in part to the second plaintiff.

In the light of this evidence, and, in particular the evidence of the supposed partner himself the second plaintiff, it is impossible to hold that there was, as alleged in the plaint, a partnership between the second plaintiff and the defendant. The plaintiffs have failed to establish such a partnership, and consequently they are not entitled to the relief claimed in the plaint. This claim is accordingly dismissed with costs to the defendant.

Dated and Delivered at Nairobi this 8th day of July, 1987,

J.W.A BUTLER-SLOSS

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JUDGE