IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo JJA & Gicheru Ag JA)

CIVIL APPEAL NO 131 OF 1987

BETWEEN

JULIUS MWORIA .....APPELLANT

ROBERT RINGERA .....APPELLANT

AND

KIAMBATI.....RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Nairobi, Butler-Sloss J)

October 21, 1988, **Gachuhi JA** delivered the following Judgment.

By a plaint filed on January 5, 1981 by the first appellant, the plaintiff prayed for an order that the defendant do render accounts for the period he has managed the business, the dissolution of the partnership, costs, interest and further relief as the court may deem fit to grant. The first appellant filed the suit as the attorney of Robert Ringera. The plaint was amended later to include Robert Ringera as the second plaintiff. There were no further amendments to the plaint which remained as filed by the first appellant.

The hearing of the suit took some time before three different judges. At the conclusion of the hearing, judgment was delivered, dismissing the suit with costs. The trial judge made finding that:

> "In the light of the 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 partnership, and consequently they are not entitled to the reliefs claimed in the plaint. This claim is accordingly dismissed with costs to the defendant."

The appellants have appealed to this Court against the judgment of the High Court on 14 grounds. Before dealing with these grounds of appeal it is entirely fair to look at the pleading, the basis of the claim. The relevant paragraphs of the plaint are:

> "3. In or about 1974 the defendant and the plaintiff's son aforesaid jointly obtained a loan of Kshs 148,000 from the Industrial and Commercial Development Corporation (ICDC) to commence a partnership drycleaning business in Meru town.

> 4. All the income of the said business which was managed by the defendant were paid into a joint bank account operated on the joint signatures of the defendant and the plaintiff and the same was substantially applied towards repayment of the loan from the ICDC until in or about 1979 when the defendant opened a separate bank account into which he started paying the partnership money and commenced running the business and his own business."

The defendant filed a defence denying these allegation. The relevant paragraphs are:

> "3. The defendant denies having obtained a loan jointly with the plaintiff's son, the said Robert N Ringera and further denies that the loan (which he alone received and has alone repaid) was for the purpose of commencing a partnership business with the plaintiff's son or anyone else. The defendant avers that he does not know the said Robert N Ringera and he never had any intention of entering into a partnership with a person unknown to him.
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> 4. The defendant states that at the time he negotiated for the loan with ICDC the plaintiff was an employee of the said lender charged with the duty of processing the defendant's loan application. The plaintiff may have fraudulently inserted the name of Robert M Ringera in documents prepared by himself relating to the loan. But the defendant and the alleged plaintiff's son did not open or operate a joint account or commence or run any business together as partners. The account mentioned on paragraph 4 of the plaint was and is in the name of the defendant."

As the pleadings stand, the dispute is whether there was a partnership between the plaintiff's son and the defendant. The first appellant as pleaded above, sued as an agent of his son. When the plaint was amended by the inclusion of Robert M Ringera as second plaintiff the body of the plaint was not amended and the first plaintiff remained as an agent of the second plaintiff as before.

He cannot alter his position by evidence as it transpired in his evidence. He goes further to exclude himself from claiming from the defendant as a contributor to the alleged partnership when his counsel Mr. Odero submitted:

> "1st plaintiff is not claiming anything that is not in the plaint. We are bound by the plaint."

This submission was not withdrawn at any time. This first appellant's position remained as that of agent and cannot claim to be a partner by substitution or otherwise. The personalities involved are classified by their own evidence. The first plaintiff is a graduate from the University of Dar es Salaam holding a degree in economics. At the material time the application of the loan was made by the defendant, the 1st plaintiff was employed by ICDC charged with the responsibility of processing loan applications. He was in a position of assisting applicants even advising them. His son Robert Ringera was at the time in school. He later went to India in 1977 where he graduated and obtained a BA degree. He returned to this country in 1981. None of the plaintiffs had experience in drycleaning. The defendant is uneducated. He could only write his name.

He could not fill and complete the loan application by himself. At the time of making the application he was employed in a drycleaning business in Meru. He stated that he had experience in drycleaning for some years though not educated.

For the plaintiffs to succeed in their claim, they must prove the existence of the partnership within the meaning of the definition of partnership. Partnership is defined as:

> "the relationship which subsist between persons carrying on a business in common with a view of profit."

There must be at least two people or two parties. It can be a partnership between a natural person and a limited company or between two unnatural persons. The main object of the partnership is to make profit. The parties must agree to contribute either in cash, or in kind to the capital of the business. Their

contribution may not be necessarily equal. One could contribute skill. As a result of their contribution to the capital they must agree to share profits. The receipt by a person of a share of the profits of the business is *prima facie* evidence that he is a partner in the business but the receipt of such a share or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business (section 4 (c) of the Partnership Act).

In some cases, partners establish their business by entering into a deed. In many cases, agreement is oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by their conduct, the mode they have dealt with each other, and with other people. Their books of accounts, testimony of clerks and agents, letters, admissions, or any other established mode. The burden of proving oral partnership is heavier than where the contract is in writing.

The plaintiffs never set up any agreement to a partnership or proved any of the material terms of a partnership. The second plaintiff stated this in cross examination:

> "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. --------- 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."

The defendant denied in his defence having known the second plaintiff. He further pleaded that it had not been his intention to enter into a partnership with a person unknown to him. Even if it may be alleged that the first plaintiff was the principal partner because his interest and that of his son are inseparable, and that he was using his son as his agent to hide his identity to his employer, if that was the case, being educated as he is and knowing that he was dealing with a person not educated as he himself is, he ought to have made a kind of agreement with the defendant. As it turned out from his evidence, which could only be the evidence of the witness, he relied on documents which the defendant alleged that they were forged. Any payments made and relied upon by the first plaintiff were made without the knowledge of the defendant. Other payments alleged to have been made, there were no receipts to support them or to indicate to whom they were made. If they were made on behalf of the partnership, they should have been documentary supported.

On the loan application which was relied upon by the plaintiffs, the same does not support them. The loan was secured by the defendant's security on his land, coffee, building and chattel mortgage on the machinery. The total value was Kshs 181,200. There is no evidence that the plaintiffs agreed within the defendant to charge the defendant's assets jointly for the loan. The plaintiffs never provided anything as security towards the loan. There is no evidence that the plaintiff took part in the running of the business. No claim was made until the loan was repaid. I cannot imagine how a partner can remain quiet for six years without laying a claim over the partnership business or attending to its affairs or be consulted in any way, can demand accounts or call for its dissolution particularly where there is no such agreement. Mere signatures on documents do not constitute agreement to be a partner in a business. Even of signing cheques, there must be agreement as to the reason for so signing. A party is bound by his evidence unless it is retracted. The first plaintiff in cross-examination admitted this:-

> "At the time my son was old enough to enter into partnership with the defendant. He was capable of entering into the partnership with the defendant. He never entered into partnership with the defendant. Yes I know that partnership are based on mutual understanding and trust between the parties. There was no mutual understanding or trust between the parties.
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> There was no mutual understanding or trust between him and the defendant. Between my son and the defendant there was no mutual agreement as to how the profits and the losses would be shared. There was also no mutual understanding as to the contribution to the business. I didn't tell him that I was negotiating on my own behalf."

The first plaintiff relied heavily on the fact that he was a joint signatory of the cheques issued by the partnership some of the cheques were for the repayment of the loan from the account maintained with Kenya Commercial Bank Ltd Meru. The defendant stated that the first plaintiff told him that he (the first plaintiff) had to become a signatory as it was the requirement of the lender so as to ensure that repayments of the loan were regularly maintained. The first plaintiff being a person of influence and educated while the respondent is illiterate, the allegations by the respondent could not be seriously disputed. In *Jackson v White and Midland Bank* [1967] Lloyd's Rep 68 dealing with joint banking account it was held that:-

> "The operation of such an account in connection with a business may be some evidence of a partnership, but it is certainly not conclusive or even *prima facie* evidence."

The signatory of the cheques by itself is not a proof of partnership bearing in mind that 1st plaintiff was not a partner and had no authority or power of attorney from the second plaintiff to sign cheques. With this evidence can it be said that a partnership ever existed between the 2nd plaintiff with the defendant or even outside the pleadings between the first plaintiff and the defendant?

All the grounds of appeal filed and argued in this court; do not directly challenge the findings of the High Court judge that the plaintiffs failed to prove the existence of a partnership between them and the defendant. They just repeat their evidence in the High Court. They do not bring to the attention of the court any point of law or fact that would prove material terms alleging the existence of the partnership, in the dry-cleaning business operated by the defendant. The second appellant did not attend to argue the appeal.

Having considered the evidence before the High Court and the submissions made before this Court, it is my view that the trial Judge came to the proper conclusion that the plaintiffs failed to establish the existence of partnership as pleaded in the plaint.

I would dismiss this appeal with costs.

As Apaloo JA and Gicheru Ag JA also agree, the order of the Court is that the appeal is dismissed with costs.

Apaloo JA. I also think that this appeal fails and should be dismissed. The question which fell for decision in the court below, was whether there was a partnership between the respondent and the second appellant to carry on business as dry cleaners. On January 5, 1981, the 1st appellant brought a plaint in the High Court seeking "dissolution of the partnership" and an order for accounts. He sought these reliefs as agent of the 2nd appellant who is his son.

The respondent denied that there was any partnership between himself and the 1st appellant's son whom he did not even know. He said, with a loan from the Industrial & Commercial Development Corporation (ICDC) he, in September 1974, commenced business jointly with the 1st appellant. He conceded that in his attempt to obtain the loan from the ICDC, he sought the 1st appellant's help. The latter was then employed by the Corporation as a loans officer and the 1st appellant extended help to him on that basis.

According to the respondent, the 1st appellant gave him certain documents to fill. He believed these to be the papers connected with the acquisition of the loan. The respondent is wholly illiterate and can only sign his name. He said, he appended his signature to these documents.

The respondent swore that the loan was sought by himself alone and was granted to him solely. He said, he repaid that loan single-handed from the proceeds of the business. The respondent asserted that if the loan documents show that the loan was made to himself and some other person, then that party's name must have been inserted in the loan documents without his knowledge. Indeed he said, he did not share profits from the business with any one or accounted to or was asked to account to anybody on the operation of the business.

So on the state of the pleadings, the issue joined between the parties and which the Court came under a duty to determine, was "was it established that the 2nd appellant and the respondent were carrying on the dry cleaning business together with a view to profit?" If the answer to this question be in the affirmative, then the 2nd appellant will be entitled, as a matter of law, to the order for accounts which he sought. If the answer be nay, then *cadit quaestio*, there must be an end of the case. The learned trial judge (Butler-Sloss, J) examined the evidence in depth and with care. In the end, the court concluded that:-

> "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."

That being the Court's view of the matter, the learned judge proceeded to give a negative answer to the only question posed in this case in these words:-

> "The plaintiffs have failed to establish such a partnership, and consequently they are not entitled to the relief claimed in the plaint."

It is against this conclusion that both appellants brought this appeal. Before dealing with the complaints raised against the judgment, it is necessary to state one factual matter which the 1st appellant in particular, stressed in this appeal. At the inception of the dry cleaning business, the 1st appellant and the respondent opened a joint account. This account was fed by the income from the business and cheques drawn on this account were jointly signed by the respondent and the 1st appellant. Sometime in 1979, the respondent opened a separate account of his own into which the income from the business was paid and from which he made repayment of the ICDC loan. The 1st appellant pointed to the fact of the opening of the joint account as a solid *indicia* of joint venture. He also pleaded, in substance, that the opening of this separate account is evidential of the fact that the respondent converted the partnership business into his own. For this reason, he sought dissolution of the alleged partnership. The learned judge thought that the opening of a joint account by the respondent and the 1st appellant did not evidence a partnership between the respondent and the 2nd appellant and was indeed evidence which contradicted that claim. And as I said, the judge dismissed the suit to provoke this appeal.

The judgment was sought to be contested on 14 grounds. A number of these grounds made the same complaint in slightly altered language. Some of the complaints were less than weighty. But the ones on which argument addressed to us revolved, were three and were formulated as follows:-

> "3 The judge erred in holding that the loan documents for the joint business were prepared by the first plaintiff Julius Mworia or that Mworia was in charge of preparing those documents.
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> 4 The Judge erred in holding that the 1st plaintiff falsified the documents for the loan in dispute.
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> 5 The Judge erred in rejecting the plaintiff 's documentary evidence on the existence of the partnership between the parties in preference for the false allegations of the defendant that those documents were forgery."

The learned judge's conclusion was that the partnership alleged by the 1st appellant has not been shown. The oral evidence led by the respondent showed that the parties did not enter into any partnership agreement of any kind nor did they carry on any business together with a view to profit. The evidence is that the respondent did not give any sums to the 1st appellant or indeed the 2nd appellant as their share of partnership profits. Neither of the appellant took part in running the business and the evidence was that the respondent at no time accounted to the appellants of the running of the business nor did the appellants at any time call upon him to account. Indeed according to the unchallenged evidence of the respondent, the first time that a partnership was alleged and accounts sought, was in the plaint. In these circumstances, to displace the judge's holding that no partnership was established between the respondent and the 2nd appellant, the appellants bore a heavy onus of pointing to evidence which shows such a partnership or

indeed any partnership.

The only evidence to which the appellants could point was said to be documentary. So, the appellant's three serious grounds of appeal were founded on these documents. These documents related to the application for the loan and the admitted fact that at one time, the business was operated by a joint account in the names of the respondent and the first appellant. Do these documents or any of them compel a conclusion that the respondent and the 2nd appellant carried on business together with a view to profit or was such a business carried out between the respondent and the first appellant?

As to the loan documents, the fact must be borne in mind that the respondent was wholly illeterate. He could neither read, write nor understand the English language in which these documents were. He only relied on the 1st appellant who was a loans officer of the ICDC to help him secure a loan and he appended his signature to such parts of the document as the 1st appellant requested him to do. The 1st appellant is a highly educated man. He is said to be a University graduate. If he argues that the loan agreement showed that the loan was jointly granted to himself and the respondent, then, in my opinion, he bore the onus of showing not only that he explained the contents of the documents to the respondent, but also that the latter understood their contents.

He did not suggest that he did that. So if the documents showed that the applicants for the loans were the respondent and the 1st appellant, then it is a legitimate inference, that the 1st appellant inserted the respondent's name in the document without his knowledge. That conduct would amount to fraud as that concept in known in equity and in no way avails the 1st appellant. As evidence of a joint loan application, that document is practically worthless.

The 1st appellant stressed the fact that when the Dry Cleaning business was commenced, both he and the respondent opened a joint account into which the takings of the business were put and argued that that was explainable on the ground that it was a joint business. That argument can have validity only if the respondent gave no acceptable explanation for the joint account. But the respondent explained that he opened the business account jointly with the 1st appellant because the latter gave him to understand that this was the requirement of the ICDC which seeks to ensure the safety of its loan by some of its officers joining the loanee in operating a business established with the Corporation's loan.

The respondent said he learnt in May 1979, that this was not in fact true, and that as he was the sole debtor to the Corporation, no officer of the institution was required to operate his business account jointly with him. Upon learning this, the respondent said he closed the joint account and opened one in his sole name. This was on May 23, 1979. Thereafter, he operated his business account by himself and has since repaid the loan without any querry from the 1st appellant.

That evidence has the clearest imprint of truth. If it had been a partnership business and was in reality partnership account, one would have expected the 1st appellant to take issue with the respondent on the closure of the firm's account. The evidence is that the 1st appellant made no complaint of this fact or sought to remonstrate with his "partner" for this breach of faith. His very first act was to bring a suit in January 1981 for dissolution of the partnership and for accounts. If he did not learn of this closure until January 1981, then his total nonchalance of the firm's account can only be explained on the ground that the business was the respondents' own. I think the respondent gave an inherently credible explanation as to why he initially opened a joint business account with the 1st appellant and why he subsequently parted company with him.

In my opinion, on this issue also, the respondent was the victim of deception practiced on him by the 1st appellant. It seems to me contrary to the good conscience of this highly literate appellant that he should rely on these made-up documents as proof of partnership against this totally illiterate respondent.

There is also one important aspect of this case which shows that the 1st appellant cannot be relied on as a witness. When he brought this suit in his own name, he said he did so as agent of his son who gave him power of attorney to do this. The respondent swore that a person going by the name of Robert Ringera was wholly unknown to him. He has not agreed to carry on any business with that person or indeed

anyone else. The 1st appellant's son, the 2nd appellant, simply destroyed his father's case by denying that he either agreed or infact carried on any business with the respondent.

Left in the lurch, so to speak, the 1st appellant then conceded before us, that he in truth was carrying on the business in his sons name. That concession wholly destroyed the basis of the appeal and showed the learned judge's conclusion to have been right. The High Court, it is to be noted, dismissed the suit because it concluded that it had not been established that a partnership existed between the respondent and the 2nd appellant. If the 1st appellant was "resourceful" enough to fabricate a serious and documented case of partnership between the respondent and the 2nd appellant, it would not be beyond him to claim falsely that he was in partnership with the respondent. The respondent swore that he at no time entered into partnership with the 1st appellant to carry on the business of dry cleaners. A consideration of the evidence as a whole, leads me to think that the respondent's side of the matter is the side of truth.

In my opinion, the 1st appellant was a mendacious witness. At all events, having sued as the authorized agent of the 2nd appellant, the 1st appellant cannot be heard to say, that he was not such agent but was in fact the principal and that it was he who entered into the partnership contract with the respondent. On any view of this case, such a claim cannot succeed.

In view of the analysis and evaluation I have attempted of the evidence, it is plain to me that none of the three grounds of appeal recited *supra*, is entitled to succeed. The remaining eleven grounds of appeal taken either singly or collectively contain very little weight and do not justify interference with the conclusion of the court below. Accordingly, as I said, this appeal fails and ought to be dismissed with costs.

Gicheru Ag JA. I have had the advantage of reading in draft the judgments of Gachuhi JA and Apaloo JA. I agree that this appeal should be dismissed with costs.

Dated and delivered at Nairobi this 21st day of October , 1988

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR