REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

civ app 51 of 83

JOSEPH NDUNGU ……..…… APPELLANT

AND

ONESMUS MBUGUA …….. RESPONDENT

(Appeal from the judgement of the High Court of Kenya at Nakuru (Masime, J) dated 28th April, 1983

In

Civil Suit No 164 of 1977

JUDGEMENT OF MADAN, J A

The respondent filed a suit against the appellant for accounts of the partnership between them to be taken, and impliedly or upon amendment, for all the usual necessary orders subsequently thereupon . At the request of the parties the learned judge recorded a consent order for the taking of the accounts including in particular the sum of shs. 43,000/= the proceeds of two cheques withdrawn by the appellant from the partnership account, by their advocates whose joint findings were to be final and binding upon them. The advocates reported back to the court that there were no accounts which could be taken as there were none, and the only issue left for determination was the distribution of the assets.

The appellant agreed that he withdrew two sums of shs. 24,000/= and shs. 20,000/= from the partnership account which he deposited in his personal savings bank account less shs. 1,000/= kept by him from the second sum of shs. 20,000/=. The learned judge not believing that the sum of shs. 19,000/= was the proceeds of the appellant's wheat, he held that the appellant was bound to account to the respondent for half the sum shs. 22,000/= on the basis of their equal partnership. The learned judge entered judgement for the respondent accordingly, and also made a further order for the sale of the rest of the partnership assets, the proceeds thereof also to be divided equally between the parties.

The appellant has appealed. He says mainly that the learned judge erred in ordering him to account for the sum of shs. 44,000/= without the partnership accounts being first taken. The learned judge acted in accordance with the terms of the consent order recorded by the parties themselves. The sum of shs. 44,000/= was found to have been taken from the partnership banking account by the appellant upon his own admission. Only half that sum was lawfully his. He was fortunate in not having had to face other proceedings for withdrawing the money from the partnership account, and clandestinely depositing the whole amount in his personal account.

I would dismiss the appeal with costs.

As Kneller, J A and Chesoni J A agree it is so ordered.

Dated at Nakuru this 4th day of October 1983

C B MADAN

……..……

JUDGE OF APPEAL

JOSEPH NDUNGU …… APPELLANT

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(Appeal from the judgement of the High Court of Kenya at Nakuru (Masime, J) dated 28th April, 1983 In

Civil Suit No 164 of 1977

JUDGEMENT OF CHESONI, AG J A

The appellant and the respondent operated partnership business which broke down in 1977. The appellant admitted in his evidence in court that in April 1977 the respondent signed two blank cheques which the appellant used for withdrawing shs. 24,000/= and shs. 20,000/= respectively from the partnership account at the Barclays Bank of Kenya Ltd., Nakuru. As the learned Judge correctly found the appellant was unable to prove that the money was used for partnership to be distributed between the parties. It is true that the respondent asked for account of shs. 43,000/= but it came from the apellant's own testimony that he in fact withdrew shs. 44,000/= altogether, whereupon the learned Judge held that the appellant was indebted to the respondent to the extent of shs. 22,000/=.

There is no merit in this appeal and I fully agree wit the judgement proposed by Madan J A which I have had the advantage of reading that this appeal should be dismissed with costs.

Delivered at Nakuru this 4th day of October, 1983

Z R CHESONI

AG. JUDGE OF APPEAL

I have read the judgements of Madan J A and Chesoni Ag J A and I respectfully agree with them and that the appeal should be dismissed with costs.

Delivered this 4th day of October 1983.

A A KNELLER

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR