



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, J.J.A.)

CIVIL APPEAL NO. 4 OF 2017

BETWEEN

ESTATE OF GITAU GICHUHI & 5 OTHERS (ALL DECEASED)...APPELLANT

AND

MEENYE & KIRIMA ADVOCATES.....1ST RESPONDENT

JOSEPH MAGONDU NGUGI & 3 OTHERS

(All sued as Trustees of Nyonjoro Slaughterhouse)...2<sup>ND</sup> RESPONDENTS

*(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Milimani, Nairobi  
(Njuguna, J.) dated 31st March, 2016*

*in*

H. C. C. C. No. 363 OF 2011 (O.S))

\*\*\*\*\*

**JUDGMENT OF THE COURT**

Some enterprising Kenyans who hailed from Dagoretti area near Nairobi came together in the early 1960s and decided to engage in business. They acquired some properties one of which was a parcel of land **Title No. Dagoretti/Mutuini/190**, on which they established Nyonjoro Slaughterhouse on which they ran the business of slaughtering animals. They later decided to formalize their relationship and executed a Partnership Deed dated 31st March, 1975. That Partnership Deed recognized the partners and their monetary contributions as follows:

*Names--Kshs.*

*Mbai Gatuma* 6,620.00

*Benard Mburu Gichuhi* 5,817.00

*Gatheru Mbuto* 3,700.00

<i>Bedan Muthonda Machua</i>	<b>3,325.00</b>
<i>Ngugi Magondu</i>	<b>1,525.00</b>
<i>Rodrick Muhoro</i>	<b>1,304.00</b>
<i>Thiru Kiarie Muramba</i>	<b>1,262.00</b>
<i>Mumira Kamau</i>	<b>717.40</b>
<i>Njuguna Muthiora</i>	<b>620.00</b>
<i>Gitau Gichuhi</i>	<b>250.00</b>

It was agreed in the said Deed that the partners would carry on, partake and engage in the business of slaughterhouse proprietors and dealers in and purveyors of meat and all kinds of consumable articles and stores and such other business as the partners may from time to time by simple majority decide to undertake. It was further agreed that all profits realized and all losses suffered by the business would be shared or borne as the case may be proportionately to each partner's contribution and partnership. The partners agreed to be just and faithful to the other or others in all transactions relating to the partnership and at all times to give to the other or others a just and faithful account of the same and full information on all matters relating to the affairs of the partnership and offer every assistance in each partner's power in carrying out the purposes of the partnership to the mutual advantage of the partners.

It was provided in the Deed that a partner could retire from the partnership in which event the remaining partners had a right to purchase the retiring partner's interest in the partnership. It was further provided that upon the death of a partner, a personal representative would take up the position of the partner. If a dispute arose between the partners, it would be resolved through arbitration of a single arbitrator or if there was no agreement on that aspect the dispute be referred to two arbitrators in accordance with the ***Arbitration Act, Chapter 22 of 1961*** (repealed). All the partners signed the said Deed and it was witnessed by an Advocate of the High Court of Kenya. The partnership has always been represented by law firm of **Meenye & Kirima Advocates**.

As fate would have it, with the passage of time, and in the natural order of things, the partners died and were succeeded by their widows, children and grandchildren.

As has been seen the partners had by their own actions and as evidenced in the Partnership Deed, agreed to deal with each other with utmost good faith as is expected of partners in a partnership and to resolve any issues coming between them in a reasonable manner. Their vision was that their business would grow and that they would benefit from such growth in seeing an improvement in their investment for their own good and that of their families coming after them. Regrettably, upon their demise, their successors had a different mindset and could not resolve issues amicably as the said partners had wished. That is how the matter, subject of this appeal ended up in court.

The successors of the partners decided in the year 2010, to sell the only remaining asset of the partnership which was the parcel of land known as ***Title No. Dagoretti/Mutuini/190***. That parcel of land was sold for Kshs 13.5 million. The successors of the partners could not agree on the sharing of that money, a substantial part of which was utilized to cover other issues and expenses so that by the time this litigation reached the court, only a sum of about Kshs 7,000,000/= remained from that original purchase price.

By an Originating Summons which was later amended brought by the firm of Meenye and Kirima Advocates, it was prayed amongst other things that the partnership, Nyonjoro Slaughterhouse, be dissolved under the supervision of the court; that the court give directions and order that the assets of the partnership being parcels of land ***Title Numbers Dagoretti/Mutuini/82, 83, 459 and 386***, together with the improvements erected thereon, be called in, valued and sold and the proceeds thereof be deposited in court; that the sum of Kshs 7,215,000/= being the proceeds of sale of ***Title Number***

**Dagoretti/Mutuini/190** be deposited in court and determination on distribution of the same be made and costs of Advocates, Valuers and Selling Agents be met by the partnership.

**Gideon K. Meenye**, an Advocate of the High Court of Kenya, in an affidavit in support of the said summons stated amongst other things, that his law firm had rendered legal services to the said partnership; that his law firm had no interest in the matter; that the respondents, **Joseph Magundu Ngugi**, **John Mukiri Mbai**, **Owen Njunge Mburu** and **Lucy Wambui Muthendu**, sued as Representatives and Trustees of Nyonjoro Slaughterhouse had by a Trust Deed made on 7th February 2011, appointed the respondents as such trustees and had authorized the representatives to dispose of the said property. It was also deponed that the parties to the sale agreement could not agree on distribution of the purchase price and thus the High Court was asked to make that determination.

John Mukiri Mbai, one of the representatives, swore a replying affidavit where he stated amongst other things, that their lawyer, Mr. Meenye, had not released the purchase price for the sale of land for the beneficiaries; that the lawyer had been asked to deposit the balance of purchase price to a partnership account which he had not; that the law firm had not rendered accounts for the balance of purchase price and that the survivors of the partners wished that the outstanding balance of 7,500,000/= be deposited in a partnership account to be shared by the beneficiaries.

There were intervening applications made, one of which led to the High Court ordering the said balance of purchase price to be deposited firstly, in an account of advocates of the parties and later transferred to be deposited in court.

There is on record minutes of a special general meeting held by the successors of the partners on 17th June 2012, which meeting was adjourned and held on 20th June 2012. Amongst the resolutions made was a resolution that the balance of purchase price be shared proportionately amongst the estates of the original partners in a formula dependent on the contribution of the original partners to the partnership.

Wilson Gichuhi Mburu, an Administrator of the estate of one of the original partners in a replying affidavit to the summons stated amongst other things that the assets of the partnership should be shared amongst the beneficiaries proportionately to the level of contribution by the original partners.

That was the material amongst other materials that were placed before L. Njuguna, J., for consideration and in a judgment delivered on 31st March 2016, the learned Judge decided that the mode of distribution of the net proceeds of sale of the partnership assets should be pegged on **Clause 3** of the Partnership Deed with each respective partner/family getting a share in accordance with the partners original contribution to the business as set out in this judgment.

That decision provoked this appeal which is premised on the Memorandum of Appeal drawn by M/S A. N. Ndambiri and Company Advocates, where 7 grounds of appeal are set out. It is stated in a nutshell that the learned Judge erred in overlooking and/or failing to recognize the appellants as parties in proceedings in the Originating Summons. It is said that the appellants were a different and independent group of beneficiaries/heirs represented by the Trustee of Nyonjoro Slaughterhouse. The learned Judge is also faulted for allegedly ignoring evidence produced through replying affidavits. The learned Judge is also faulted for holding that the proceeds of sale of the partnership assets should be distributed in accordance with original partners contribution to the slaughterhouse business. We are therefore asked to allow the appeal and set aside the judgment of the High Court and make such other or further orders as we may deem fit.

The appeal came for hearing before us on 3rd October 2017, when learned counsel, Mr. Alfred Ndambiri, appeared for the appellants. Learned counsel Mr. Kabue Thumi appeared for the 2nd respondent and also held brief for Mr. Meenye for the 1st respondent. Parties had filed written submissions and the appellant had filed a list of authorities.

In a highlight of the submissions, Mr. Ndambiri contended that two groups had emerged representing the original partners who could not agree on the mode of distribution of the balance of purchase price on the

sale of the parcel of land we have discussed in this judgment. Learned counsel submitted that the appellants were not satisfied with the High Court judgment where they wished to be recognized as a separate group of beneficiaries of the slaughterhouse partnership. Learned counsel submitted that the Partnership Deed should not have been recognized by the trial court and should have been ignored. Learned counsel completed his submissions by submitting that the proceeds of sale of assets of the Partnership should have been divided equally.

Mr. Kabue Thumi did not agree. According to counsel, the trial Judge considered all the evidence tendered and analyzed the same. According to counsel, the original partners had an ascertainable interest in the partnership based on level of contribution and that should be the reference point in ascertaining shares in the partnership.

We have considered the whole record, the submissions made and the law and have come to the following determination:

When the summons came for hearing before the learned Judge, a consent was recorded where it was agreed, *inter alia*, that Nyonjoro Slaughterhouse as a partnership be dissolved under supervision of the court; that parties file affidavits and the trial proceed by affidavit evidence and submissions of counsel. The learned Judge considered the matter before the court and recognized the Partnership Deed and the capital contribution of each partner. The learned Judge held as follows:

***“In my view, and in the absence of clear documentation or evidence, the just and appropriate rationale to use should be the ratio of contribution of the Capital by the Partners as captured in the Partnership Deed. This view is informed by the fact that the buying of the properties preceded the Partnership Deed, subsequently, when drafting the Deed, the parties must have considered not only the Capital Contribution of each Partner but also the contribution of each partner in the purchase of the properties in question.”***

As we have stated, the original partners who had together in the early 1960s to do business had the foresight to reduce their relations into a Partnership Deed. That Deed recognized capital contribution of each partner which is set out at **Clause 3** of the Deed. The partners agreed to be faithful to each other in all information relating to the affairs of the partnership and to give to each other a just, true and faithful account and all information relating to the affairs of the partnership and to offer every effort in each partner's power in carrying out the partnership business. We repeat this because it is unfortunate that the successors of the partners despite the clear good intentions of the original partners (their fathers and grandfathers) to do business together, and relate well in the business, their successors could not sit and agree on a rather simple straightforward issue of distribution of money upon the sale of the asset of the partnership which the partners had sacrificed to acquire.

The founders of the partnership had recognized that disputes may arise between them and that is why the Partnership Deed provided for the appointment of an arbitrator or arbitrators to resolve disputes. The successors of the partners did not find it fit to use that route to resolve a dispute about sharing out of money. They have instead chosen litigation that started at the High Court and ended up in this Court, a rather expensive and energy sapping route which also leads parties relations to be affected negatively for a long time. This cannot be what the original partners wished or envisaged.

The learned Judge of the High Court considered all the material placed before her and decided that because the Partnership Deed had set out the capital contribution of each original partner, it was best that the successors of the partners receive a share of the sale proceeds proportionate to the contribution of each partner as recognized in the Partnership Deed.

Mr. Ndambiri, learned counsel for the appellants faults the learned Judge for that holding and is of the view that each successor receive an equal share of the sale proceeds. We do not agree. Learned counsel has not given any valid reason why that should be the case. The learned Judge was right to follow **Clause 3** of the Partnership Deed and to make the findings that she made.

In the end, we have not found any merit in any of the grounds of appeal. We cannot find any error in the findings of the learned Judge. Learned counsel for the appellants has not given any or any valid reason for faulting the learned Judge. On the material placed before the learned Judge, it was reasonable to hold, as the learned Judge did, that it must have been the intention of the partners that their capital contribution be the basis of ownership of shares in the partnership.

The appeal has no merit and we accordingly dismiss it.

In view of the fact that it was the Advocate who took the matter to court for determination on how proceeds of sale should be shared, and also because the said Advocates have stated that they have no interest in the matter, we think that the proper order on costs is that each party meet their own costs. For the avoidance of doubt, M/s Meenye and Kirima Advocates, will be paid their costs for handling the matter before the litigation.

Those, then, are our orders.

**Dated and delivered at Nairobi this 24th day of November 2017.**

**G. B. M. KARIUKI SC**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**