



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 98 OF 2008

BETWEEN

JANE WANJA GAHIENGO APPELLANT

AND

DAVID WANJOHI KAMAU1ST RESPONDENT

GERALD MAINA KAGUANYO2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated 14th June, 2006

in

H.C.C.C NO. 303 OF 1999)

JUDGMENT OF THE COURT

1. The 1st and 2nd respondents suing as the legal representatives of the Estates of Duncan Kamau Kimani (deceased) and Ethan Kaguanyo (deceased) respectively filed a suit against the appellant as the legal representative of the Estate of Gachiengo Gichuhi (deceased) in the High Court. The respondents sought *inter alia* a declaration that they are entitled to equal portions with the appellant to the interest held by her in land parcel numbers Nakuru Municipality/Block 10/19 and Nakuru Municipality/13/166 (suit properties); cancellation of the titles of the suit properties registered in the appellant's name; registration of the suit properties jointly in the names of the appellant and respondents; and an account of the rent collected by the appellant from the suit properties.
2. The genesis of the said suit was that the respondents claimed that the deceased persons, Duncan Kamau Kimani, Ethan Kaguanyo and Gachiengo Gichuhi formed a partnership and purchased shares in a business known as Nakuru Taifa Hotel, Restaurant & General Store (Nakuru Taifa Hotel) in the year 1963 for a consideration of Kshs. 67,501.55/=; each of the partners contributed Kshs. 22,500.55/= towards the said purchase. Nakuru Taifa Hotel consisted of 6 shareholders each holding a share. By a further agreement dated 11th August, 1971 the deceased persons agreed that the share in Nakuru Taifa Hotel would be held by Gachiengo Gichuki (deceased) as a trustee for the other two deceased persons; the profits and/or dividends accruing by virtue of the said share

- would be divided amongst the three deceased persons in equal portions. The deceased persons also jointly purchased property referred to as Kenda farm. During the lifetime of the deceased persons they honoured the terms of their partnership agreement.
3. After the demise of the three deceased persons, Nakuru Taifa Hotel was dissolved and its assets distributed to its shareholders. Following the distribution, the appellant as the legal representative of Gachiengo Gichuki, was allotted Nakuru Municipality/ Block 13/166 absolutely and Nakuru Municipality Block 10/19 jointly and in equal share with one Felista Wanini Theuri (Felista). The property referred to as Kenda farm was sold and each party received Kshs. 222,222/= from the said sale. The respondents claimed that by virtue of the partnership agreement between the deceased persons, the appellant held the suit properties in trust for them. In the year 1998 Nakuru Municipality/ Block 13/166 was registered in the appellant's name while Nakuru Municipality/ Block 10/19 was registered jointly in the appellant's name and Felista Wanini Theuri, the widow of Theuri Mariga. Theuri Mariga was one of the six shareholders of Nakuru Taifa Hotel. The respondents contended that the appellant fraudulently obtained the said registration and the same was contrary to the partnership agreement. The appellant filed a statement of defence denying the allegations made by the respondents.
 4. It was the respondents' evidence that their fathers and the appellant's husband formed a partnership agreement and pursuant to the partnership they purchased one share of Nakuru Taifa hotel which was registered in the name of the appellant's husband, Gachiengo Gichuki. Pursuant to an agreement dated 11th August, 1971 between the appellant's husband and the respondents' fathers they agreed to share in equal portions dividends and profits accruing from Nakuru Taifa Hotel. The business owned lodging houses and shops which it let out. PW3, Wambugu Mboru (Wambugu), testified that he was the treasurer of the said business; the business comprised of six shareholders who each held a share; the six shareholders were Mwangi Muchai, Gachiengo Gichuki, the appellant's husband, Rugiyo Kimani, Theuri Mariga, Peter Ndirangu Gathanga and himself. Wambugu gave evidence that each of the shareholders had silent partners with the exception of Peter Ndirangu Gathanga; the profits in respect of the said business was shared twice annually between the shareholders and their silent partners. He testified that during the lifetime of the deceased persons he paid the respondents fathers their respective shares of the profits with the knowledge that they were Gachiengo Gichuki's silent partners. After the death of three of the shareholders of the business, their legal representatives' were allowed to participate in the business and share in the profits. The appellant replaced her late husband while Felista replaced her late husband, Theuri Mariga.
 5. The respondents testified that after the death of their fathers, their fathers share of the profits were paid directly to them with the knowledge of the appellant. Subsequently, in the year 1998, Nakuru Taifa Hotel was dissolved and its assets divided amongst the six shareholders. The appellant was allotted Plot No. Nakuru Municipality/ Block 13/166 absolutely and Nakuru Municipality/Block 10/19 jointly with Felista. PW4, Ernest Wendere Theuri (Ernest), Felista's son, gave evidence that after the said dissolution, a meeting was held on 4th August, 1998 between his mother, the appellant, the respondents and himself; the purpose of the meeting was to make resolutions concerning the plots allocated to the appellant and his mother. Ernest stated that lodgings had been erected on the said plot; that it was agreed to convert the lodgings into shops. It was also agreed that a joint account would be opened wherein rent received would be deposited. A joint account was opened in the names of the appellant, 2nd respondent and Felista. It was also agreed that rental income would be divided between the appellant and Felista who would then share their respective shares with their silent partners. It was Ernest's evidence that thereafter several meetings were held and the respondents attended the same as the appellant's partners.
 6. The 2nd respondent testified that he was appointed in the year 1998 to collect rent from the commercial properties and he was paid a monthly salary of Kshs. 3,000/=. The respondents testified that following the said resolutions they received their respective shares of the rental income until 1999 when the appellant refused to share out the same.
 7. On the other hand, the appellant denied the existence of any partnership between the parties. She testified that after she replaced her deceased husband in the year 1990 in the business, she was never informed that the respondents' fathers were her husband's silent partners. Prior to the dissolution of Nakuru Taifa Hotel in 1998, no one ever claimed any share of the profits paid to her husband's Estate; a year after the said dissolution, the respondents claimed that their fathers were

her husband's silent partners hence they were entitled to share in the profits; since she was unaware of the alleged partnership between her husband and the respondents' fathers she referred the respondents to the original shareholders of Nakuru Taifa Hotel; she never received any confirmation that the respondents' fathers were silent partners. While admitting that after the dissolution of the business, a meeting was held in which the 2nd respondent was in attendance, she maintained that he attended the meeting as an employee and not a partner; the 2nd respondent had been employed to collect rent from the rental properties. She further admitted that a joint account in the names of Felista, 2nd respondent and herself had been opened for purposes of depositing the rental income. She testified that she had never shared the rental income from the suit properties with the respondents.

8. After considering the evidence adduced by parties, the trial court entered judgment in favour of the respondents. The learned Judge (Kimaru, J.) directed *inter alia* the appellant to pay the respondents their respective share in the rental income that she had received from 1st August, 1998 up to the date of judgment being Kshs. 188,000/= each from Nakuru Municipality/ Block 10/19 and Kshs. 940, 000/= each from Nakuru Municipality/Block 10/19. The learned Judge also directed the appellant to pay 2/3 of the value of the suit properties to the respondents and in the alternative for the suit properties to be sold and the proceeds to be shared amongst the parties. It is that decision that has provoked this appeal which is based on the following grounds:-
 - ***The learned Judge erred in law and in fact in failing to find that the respondents had failed to establish their case on a balance of probabilities.***
 - ***The learned Judge erred in law and fact in failing to consider submissions of counsel made on behalf of the appellant.***
 - ***The learned Judge erred in law and in fact in making holdings on issues that neither arose from pleadings or during trial and therefore were not subjected to trial.***
 - ***The learned Judge erred in law and fact in failing to appreciate that Nakuru Municipality/Block 10/19 was jointly owned by the appellant and a third party by the name Felista Theuri Wanini and therefore the appellant could not be ordered to buy the alleged shareholding of the respondents and the property could not be capable of sale as held.***
 - ***The learned Judge erred in law and fact when in the absence of any evidence he held that the appellant was liable to pay each of the respondents Kshs. 188,000/= and Kshs. 940,000/=.***
9. Mr. Kisilah, learned counsel for the appellant, submitted that the respondents did not establish the existence of a partnership recognized under **Section 3** of the **Partnership Act**. He argued that the learned Judge's decision was erroneous because under the **Partnership Act** a partnership ended once a partner died and the Act prescribed how property ought to be distributed once a partnership ends. He relied on **Sections 43,47 & 48** of the **Partnership Act**. He urged us to allow the appeal.
10. Mr. Mutonyi, learned counsel for the respondents, in opposing the appeal, submitted that three issues namely, partnership, fraud and accounts arose for determination before the trial court. He submitted that a partnership was established by an agreement and by conduct of the parties. The agreement indicated that each of the deceased persons contributed equally towards the purchase of the share in Nakuru Taifa Hotel. Evidence showed that the deceased persons shared the profits from the business. Mr. Mutonyi argued that after the demise of the deceased persons, their legal representatives continued sharing the profits as per the agreement. While admitting that a partnership dissolves upon the death of a partner, he maintained that the partnership continued by virtue of the parties conduct. According to Mr. Mutonyi, a partnership existed between the parties and the appellant registered the suit properties in her name contrary to the parties' agreement. He submitted that the prayer for accounts was pleaded in the respondents' Complaint. He maintained that the learned Judge calculated the rental income based on the figures given by the appellant in her evidence.
11. We have considered the record, submissions by counsel and law. This being a first appeal we are required to re-evaluate the evidence tendered in the trial court and arrive at our own conclusions.

In *Ndiema Samburi Soti -vs- Elvis Kimtai Chepkeses-* Civil Appeal No. 136 of 2005, this Court held,

“Although the first appellate court is not bound by the findings of fact made by a trial court and is under a duty to re-appraise the evidence and reach its own conclusion, the first appellate court, nevertheless, should be slow to interfere with the findings of fact by the trial Judge. The first appellate court will however interfere when the findings of fact are based on no evidence or on a misapprehension of evidence or where it is shown that a trial Judge has acted on wrong principles in arriving at the finding in issue.”

See also *Mwanasokoni -vs- Kenya Bus Service* (1985) KLR 931.

12. The crux of this appeal is whether the respondents proved the existence of a partnership between their fathers and the appellant's deceased husband. The applicable law in this case is the ***Partnership Act***, Chapter 29, Laws of Kenya which has since been repealed. **Section 3(1)** of the ***Partnership Act (repealed)*** provided:-

“Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.”

See also *Halsbury's Laws of England 4th Ed. (Re issue) Volume 35 at paragraph 2*,

“Partnership involves a contract between parties to engage in a business with a view to profit. As a rule each partner contributes either property, skill or labour but this is not essential. A person who contributes property without labour and has the rights of a partner is usually termed a sleeping or dormant partner. A sleeping partner may have contributed nothing. The question whether there is a partnership is one of mixed law and fact.”

13. **Section 4** of the ***Partnership Act (repealed)*** provides that in determining whether a partnership does or does not exist, regard shall be had to the following rules:-

“ (a).....

(b)

(c) the receipt by a person of a share of the profits of a 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; and in particular—

(i) the receipt by a person of a debt or other liquidated amount by installments or otherwise, out of the accruing profits of a business, does not of itself make him a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being the widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner is not, by reason only of that receipt, a partner in the business or liable as such;

(iv) the advance of money by way of loan to a person engaged, or about to engage, in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or

liable as such, provided that the contract is in writing, and signed by or on behalf of all the parties thereto;

(v) person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not, by reason only of that receipt, a partner in the business or liable as such.”

14. It is not in dispute that Nakuru Taifa Hotel had six shareholders each holding a share and one of the shareholders was the appellant's husband. Were the respondents' fathers, Gachiengo Gichuhi's silent partners in the said business? The trial court expressed itself as follows:-

“ I believed the testimony of PW3 when he testified that these silent partners although not appearing on the record of the partnership were recognized as such by the main partners and that is the reason why when the profits were being shared twice annually, the cheques were paid directly to the main partners and to their silent partners...I believed PW3's testimony that the six main partners and their silent partners shared the profits from the partnership without any problem.”

The respondents produced a partnership agreement dated 11th August, 1971. The terms of the agreement were that the respondents' fathers and the appellant's husband contributed equally towards the purchase of a share in Nakuru Taifa Hotel; the said share was held by the appellant's deceased husband in trust for the respondents' fathers; the profits from the said business would be shared equally between the three deceased persons. PW3, Wambugu, testified that while he was the treasurer of Nakuru Taifa Hotel, the business made profits and he paid a portion of the profits to the respondents' fathers twice annually until the business was dissolved. Based on the foregoing, we concur with the trial court's findings that the respondents had proved the existence of a partnership between the three deceased persons.

15. We are of the considered view that the parties herein succeeded the three deceased persons in the partnership. Why do we say so? This is because firstly, Wambugu gave evidence that after the demise of the three deceased persons, the deceased persons' share of profits was paid to the parties herein until the business was dissolved in the year 1998. Secondly, after the dissolution of the business, PW4, Ernest, testified that a series of meetings were held between the appellant, respondents, Felista and himself for purposes of discussing how to manage and run the suit properties that were distributed to Felista and the appellant. Ernest produced minutes of the said meetings. It was his evidence that the respondents attended the meetings as equal partners with the appellant. Further, Felista, the appellant and the 2nd respondent opened a joint account wherein the rental income from the suit properties were deposited. We find that the trial court was correct in declining to accept the appellant's allegation that the 2nd respondent was a mere employee. This is because the conduct of the parties clearly pointed to a partnership. We further concur with the following trial court's findings:-

“ From the said minutes it is clear that the defendant participated in the said meetings knowing very well that she was dealing with equal partners and not busy bodies as she would want this court to believe from her testimony. It is clear that the initial meetings were conducted in an atmosphere of mutual respect and trust. All the decisions in the said meetings were apparently made by consensus. Even the decision to change the commercial business in Nakuru town from lodging to shops was made without any objection by any member who was present. All the incomes then received were accounted for and were applied for the tasks which the partners had agreed. They even agreed that their partnership, which was silent, and which was based on the partnership of the original deceased members, was to be formalized by an agreement being written.”

In Mworia & Another -vs- Kiambati (supra) this Court at page 668 expressed itself as follows:-

“In some cases, partners establish their business by entering into a deed. In many cases, the

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.” Emphasis added.”

This Court in the case of ***J.K Kinoti -vs- G.J. Kibanga – Civil Appeal No. 343 of 2010*** cited with approval the decision of the High Court in ***Joseph Chesire Sirma -vs- Erick Kipkurgat Kiprono(2005) 1KLR 197*** wherein Dulu, J. held,

“it is obvious that it is the conduct of the parties to a business that determine whether there exists a partnership.”

16. The next issue for consideration is whether the trial court erred in ordering the appellant to pay the respondents rental income that she had received from August, 1998 to the date of judgment. It was the appellant's contention that the trial court made a finding on the same yet it was not pleaded. We perused the Plaint and found that the respondents had sought an order compelling the appellant to tender accounts for the rental income she had collected. We therefore find that the trial court was correct in compelling the appellant to pay the respondents Kshs.188,000/= and Kshs. 940,000/= each in respect of rent collected from Nakuru Municipality/ Block 13/166 and a portion of Nakuru Municipality/Block 10/19 respectively. We say so because firstly, the appellant in her evidence admitted that she received Kshs. 6,000/= and Kshs. 30,000/= monthly as rent from Nakuru Municipality/ Block 13/166 and a portion of Nakuru Municipality/Block 10/19 respectively from 1st August, 1998.
17. Lastly, we disagree with the appellant's contention that the orders issued by the trial court were incapable of being enforced because the title in respect of Nakuru Municipality/Block 10/19 was in the names of Felista and the appellant. We cannot help but note that Ernest testified that the said property had been split into two between his mother, Felista and the appellant. Therefore, the appellant's portion is clearly identifiable.
18. The upshot of the foregoing is that we find no merit in this appeal and hereby dismiss the same with costs to the respondents.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR