



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 261 OF 2010

BETWEEN

MONICA ACHIENG ONGOYA and APPELLANT

DAVID HESTON ONGOYA (Suing as the personal
representatives of the estate of **SOLOMON OCHIENG**

ONGOYA (deceased)

AND

GEORGE OTIENO OGWENGO RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera J)

dated 22nd January, 2009

in

H.C.C .C. NO. 291 OF 2006)

JUDGMENT OF THE COURT

The appellants are the legal representatives of **Solomon Ochieng** (deceased) and were the plaintiffs in a suit instituted against the respondent, **George Otieno Ogwengo** who was the defendant. In their further amended plaint dated 25th July, 1997 they claimed that from 1990 to the date of his demise on 27th January, 1991 the deceased and the respondent were partners in a sugar cane transportation business under the name and style of "**Ogwengo Contractors**" but which business was managed by the respondent. The deceased, according to the appellants, purchased three (3) Ford tractors for the business of the partnership and also purchased from the respondent another ford tractor at the price of *Kshs.457.15650/* which properties the respondent failed and or refused to release to the appellants after the demise of the deceased.

The appellants further averred that the respondent received and continued to receive income from the said business on behalf of the estate of the deceased which income he has not accounted for and refuses to account for to the appellants. They also pleaded that the respondent was indebted to the estate

of the deceased in the sum of *Kshs.310,000/=* being arrears due and payable by the respondent to the appellants as administrators of the estate of the deceased for the maintenance of the widow and the children of the deceased.

In an amended defence dated 3rd September, 1997 the respondent denied all the appellants' claims and specifically denied the partnership which the appellants had alleged.

The 1st appellant in her evidence before the learned judge, contended that her deceased husband was indeed a partner of the respondent in a sugar cane transportation business although he did not disclose the same to her during his lifetime. She produced evidence of payment of *Kshs.80,000/=* by the respondent and correspondence exchanged between her, her counsel, her relatives and the respondent. She then prayed that the respondent be ordered to continue making the maintenance payments and transfer the log book of tractor registration number KAA 889 B to her.

The 2nd appellant testified that the deceased and the respondent were close friends and at one time before the deceased's demise he asked the respondent to give him *Kshs.100,000/=* towards the purchase of tractor registration number KZR 916 from the respondent. He made the contribution and the deceased purchased the tractor from the respondent. He further testified that the deceased confirmed to him that he had contributed tractor registration numbers *KAA 889 V, KAA 890V and KAA 891 V* to the partnership between him and the respondent. Before his death however, he complained to the 2nd appellant that he had received no payment from the respondent. At his funeral the respondent admitted that the deceased was his partner and that he would pay his widow and children *Kshs.10,000/=* per month of which he paid *Kshs.80,000/=*. The respondent further promised to release to the family of the deceased the three tractors but had not done so. The 2nd appellant prayed for payments of maintenance for the period between February, 1994 to the date of the institution of the suit. He also prayed for an order transferring to them the four tractors namely: (i) KZR 916, (ii) KAA 889V, (iii) KAA 890 V and (iv) KAA 891V with winch. In the alternative he prayed for the value of the tractors. He also prayed for accounts to be taken

The appellants called five (5) witnesses namely, **Stephen Olango Ongoya** (PW 2), **Amos Nyonga Olwanyi** (PW4), **Samuel Kola Ongoya** (PW5), **John Fanuel Ongoya** (PW6) and **Fred Simiyu Ndola** (PW7). Save for PW 7, the other witnesses adduced hearsay evidence with regard to the partnership alleged between the deceased and the respondent. PW 7 on his part confirmed that the respondent was one of Nzoia Sugar Company cane transporters. The documents from Nzoia Sugar Company, produced by consent, all indicated the respondent as the only individual the sugar company dealt with.

Save for PW 7 the other witnesses were unanimous that the deceased had told them of the partnership and that the respondent had at the funeral of the deceased promised to make periodical payments to the family of the deceased towards their maintenance.

PW 5 alleged that he had been approached by both the deceased and the respondent to look after the partnership business in Bungoma. He went to Bungoma after the demise of his brother and supervised four tractors on the instructions of the respondent. He testified that each tractor earned ***Kshs.180,000/=*** during the high season and ***Kshs.100,000/=*** during the low season.

The respondent in his evidence before the learned Judge, contended that he indeed had a sugar cane transportation business with Nzoia Sugar Company Limited in Bungoma County but he ran that business alone. He acknowledged that the deceased was indeed his friend and he assisted him to acquire a house in Nairobi. The deceased secured a loan with Kenya Commercial Bank and repayments of the loan were made through his account. That is why, according to the respondent, the deceased at one time asked his brother **David Otieno** (2nd appellant) to pay the respondent *Kshs.100,000/=* which was part payment towards settlement of his indebtedness with the bank.

The respondent acknowledged that the deceased got interested in purchasing a tractor from him and further that at the funeral of the deceased, he promised to give the 1st appellant one tractor to enable her earn an income therefrom. He also admitted that he promised to assist the widow to buy a sewing

machine and also paid her Kshs.80,000/= as the wife of his friend.

The respondent further contended that all the tractors in his business were solely purchased by him. He produced copies of his bank statements and loan documents he used to finance the purchase of the tractors. He further testified that the deceased requested him to employ his brother, **Samuel Kola Ongoya** (PW 5), and he did so. It was his case that PW 5 was engaged in his business merely as an employee on a salary and not to supervise the deceased's tractors as the appellants had alleged. He admitted that he promised to give the 1st appellant one tractor but changed his mind when family members thought that he wanted to **"inherit"** the widow of the deceased.

In cross examination, the respondent stated that he sold tractor registration number KZR 916 to the deceased who paid a deposit of Kshs.100,000/= and no more. He admitted that the same had not been refunded. He admitted offering the deceased's family, tractor registration number KAA 889V when tractor registration number KZR 916 was grounded. He also admitted promising the same family monthly payments of Kshs.10,000/= with effect from June 1993 from proceeds of the tractor for family upkeep of which he paid upto January, 1994. He then asked the deceased family to collect the said tractor as it was not making any money but they did not.

In re-examination the respondent said:-

"I was giving a newer tractor from my lot of 3 to Monica – KAA 889V. I was to deliver this at Karateng. But before I did so I got the case from them claiming all the 5 tractors I had. In fact the plaintiffs refused to accept the tractor.

Solomon paid for KZR 916. But they are entitled to one tractor KAA 889V."

The learned Judge, after considering the evidence concluded as follows:-

"There was no evidence that the deceased took a loan of Kshs.1.5m or that he bought tractors with it which tractors were part of the assets of the alleged partnership. All the court was told was what all the plaintiffs' witnesses thought or were told by the deceased whom his father (PW 6) described as having been a secretive person. To the contrary, the defendant showed that he took a loan from Kenya Commercial Finance Co. Ltd and bought 3 tractors. He fully serviced the loan and had possession of their log books (registration numbers) KAA 899V, 890 V (891 V). It is no matter that out of grief or desire to assist his close friend's family, at the time of his burial the defendant promised, to help that family financially. He did so but there was no consideration for that help flowing from the plaintiffs' family to the defendant. So whatever the defendant promised, "undertook" or did [did] not form a basis to litigate on at all. He may even have promised to give that family a tractor, but there is no evidence that the tractor was deserved in law.

The Court did consider that the defendant was in the process of selling tractor KRZ 916 to the deceased. He conceded it. Only Kshs.100,000/= was paid out of a total of Kshs.206,597/=. It was not refunded. The plaintiff cannot thus claim tractor no KRZ 916 or its replacement no KAA 889V in the circumstance. In any event what they appear entitled to is a refund of Kshs.100,000/=".

With those findings the learned judge dismissed the appellants' claim with costs. He however ordered the respondent to pay the appellants Kshs.100,000/= paid towards the purchase of tractor registration number KRZ 916.

Those findings and determinations triggered this appeal with assertions that the learned Judge erred in his finding that there was no partnership between the deceased and the respondent; that the learned Judge erred in holding that the undertaking by the respondent to make payments to the deceased's family was not actionable; that the learned Judge erred in holding that the appellants had not demonstrated that tractors registration numbers KZR 916 and KAA 889 V belonged to the estate of the deceased; that the

learned judge erred in admitting oral evidence to controvert and explain the contents of written documents; that the learned Judge erred in holding that the appellants were not entitled to interest on Kshs.100,000/= he found due to them and that the learned Judge erred in rejecting the appellants' prayers.

Mr. D. Otieno, learned counsel for the appellants, in his address before us, contended that the appellants established, on a balance of probabilities, that the deceased and the respondent had been partners in sugar cane transportation business in which the deceased had contributed tractors. In counsel's view, the respondent had admitted the partnership by his conduct and in his correspondence with the appellants and other members of the family of the deceased. The respondent had, in addition for sometime, made periodic payments to the 1st appellant from proceeds of the partnership business and only stopped the payments without giving an account to the appellants. Counsel further submitted that besides refusing to continue remitting the share of partnership profits to the estate of the deceased, the respondent had refused to release the assets contributed by the deceased which included tractors which he identified.

Counsel further complained that the sum of Kshs.100,000/= found due to the appellants should have attracted interest and costs in favour of the appellants which the learned Judge refused to order.

Mr. P.J.Otieno, learned counsel for the respondent, supported the judgment of the High Court. In his view, the appellants failed to prove their case before the High Court to the required standard Counsel contended that the appellants did not, at the trial before the High Court, demonstrate the existence of a partnership between the respondent and the deceased during his life time. He acknowledged that the deceased had intended to purchase from the respondent tractor registration number KZR 916 but had only paid a deposit of Kshs.100,000/= and failed to complete the purchase. With regard to the promise made by the respondent at the funeral of the deceased to make periodic payments for the maintenance of the family of the deceased, counsel submitted that the payments were gratis and not from profits of the partnership business to which the deceased had made no contribution.

With regard to the offer of a tractor to the appellants, counsel submitted that the offer could not form the basis of any contract between the respondent and the appellants and the appellants did not in any event furnish consideration.

In counsel's view, the learned Judge was right in dismissing the appellants' claim and in awarding them Kshs.100,000/= without interest. Interest, according to counsel, was at the discretion of the learned judge which discretion had been properly exercised.

We have considered the record of the High Court, the grounds of appeal and the submissions of learned counsel. We have also given due consideration to the applicable law.

In our view the learned Judge's conclusions flowed from his finding that there existed no partnership between the deceased and the respondent. In his own words:-

“There was no partnership deed or agreement produced or even a certificate of registration of business name. Producing evidence of formation of a partnership would have shown this court the partners their addresses their contribution in assets, rights, obligations and what each did when and where. There was absolutely no evidence that the deceased and the defendant were even partners in any firm let alone one transporting sugar cane at Nzoia Sugar Company.

There was no evidence that the deceased took a loan of Kshs.1.5 m or that he bought tractors with it, which tractors were part of the assets of the alleged partnership. All the court was told was what all the plaintiffs' witnesses thought or were told by the deceased.”

In as far as the learned Judge gave the impression that a partnership must be evidenced in writing, he erred in law. A partnership need not be in writing. It was observed in **Mwora & Another -Vs- Kiambati [1988] KLR 665 at page 668** as follows:-

“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.”

So, even in oral partnership agreements, the terms thereof must be demonstrated and that can be done by the conduct of the partners between themselves and or the mode they have dealt with each other and with other people. We have ourselves considered the evidence which was adduced before the High Court. The appellants did not demonstrate any single term of the partnership agreement, oral or otherwise. The learned Judge cannot therefore be faulted in his conclusion that a partnership between the deceased and the respondent had not been demonstrated. The appellants were therefore not entitled to any payments from the respondent on the basis that the deceased had been a partner of the respondent in any business during his lifetime.

The appellants however, made claims against the respondent beyond the partnership basis. In paragraph 5A of the further amended plaint they averred as follows:-

“5A. Prior to his death the deceased purchased from the defendant a Ford Tractor Registration Number KZR 916, model 5610, at the price of Kshs.457,156.50/=, which tractor was to remain in the possession of the defendant for the use in the aforesaid sugar transportation business for the benefit of the deceased until otherwise decided.”

And in paragraph 6 the appellants pleaded as follows:-

“6. Despite several demands by the plaintiffs as administrators of the estate of the deceased, for the release and transfer of the said tractors to the plaintiffs, the defendant has failed and/or refused to do so.”

The appellants then prayed as follows in paragraphs (b) and (c)

“REASONS WHEREFORE the plaintiffs as such administrators, pray for judgment against the defendant for:

(a)

(b) An order for the release and transfer of the tractors

aforesaid in good condition to the plaintiffs.

(c) In the alternative, the present market value of

similar tractors.”

Did the appellants adduce evidence of purchase of the tractors or any tractor from the respondent by the deceased? The 1st appellant testified in that regard as follows:-

“I see this document (Exh.4). It is dated 24/9/1993. It was returning title deed to me and also saying that tractor KAA 889 B was purchased on behalf of the deceased

I ask that the defendant should be ordered to continue to make payment and transfer the log book in the tractor.”

The 2nd appellant on his part stated:-

“The deceased said that the defendant wanted to sell to him a tractor Reg. KZR 916.”

Stephen Olango Ongoya (PW 2) testified on similar lines. In his own words:-

“My brother also told me he was buying a tractor from the defendant by installment.”

However the most significant evidence on the purchase of a tractor by the deceased from the respondent was given by the respondent himself.

In his evidence in chief at the trial before the High Court he stated, *inter alia*, as follows:-

“Solomon got interested in purchasing a tractor after he cleared the house loan. I had two tractors then registration KZR 915 KZK 916.”

And in cross examination he stated, *inter alia*, as follows:-

“I sold KZR 916 to Solomon. He paid deposit of Kshs.100,000/= and was to get more funds from his brother David Otieno. Solomon did not clear the purchase sum on this tractor. Then he died. I did not transfer the tractor to him. He died on 27th January, 1991. I did not refund money Solomon paid on KZR 916.

Exh. P4 – letter dated 24th September, 1993 to Solomon's widow: returning title deed used to buy tractors KAA 889 V for Solomon – it was a mistake.

Exh. P7 – letter dated 12th April 1994 from defendant to Stephen Ongoya (brother of deceased): about Solomon's tractor – KAA 889 V two tractors were involved: When KZR 916 was grounded, I replaced it with a new KAA 889V.

I wrote back proposing that I release number KAA 889V, they did not come to take it. I changed my mind.

I undertook to pay Solomon's family Kshs.10,000/= with effect from June, 1993 from proceeds of the tractor for family upkeep.

I paid upto January 1994, then asked Solomon family to come and take tractor No.KAA 889V. It was not making money. It was grounded. It remains so. It was not working in 1990 – 2000.”

And in re-examination the respondent testified:-

“I was giving a newer tractor from my lot of 3 to Monica – KAA 889V. I was to deliver this latter at Karateng. But before I did so I got the case from them claiming the 5 tractors I had. In fact the plaintiffs refused to accept the tractor.

Solomon paid for KZR 916. But they are entitled to one tractor KAA 889V.”

We think the letter dated 24th September 1993 addressed to the 1st appellant by the respondent is important. We reproduce the contents in full:

“RE LAND TITLE NO. NAIROBI/BLOCK 62/170 KIBERA – FORT JESUS ESTATE.

I hereby enclose to you the above title which was charged to M/s Kenya Commercial Bank Limited, P.O. Box 44252, City Centre Branch, Nairobi, to enable me obtain a deposit to purchase for the late Solomon Ochieng Ongoya Ford 5610 tractor registration No.KAA 889V.

In the meantime I am making arrangement to deliver the tractor together with the trailer at home (Karateng) in due course when other formalities have been formalised.

Please acknowledge receipt on the attached copy.

Thanking you

Yours faithfully,

SIGNED

GEORGE OTIENO OGWENGO

0. Mr. David Otieno Ongoya

Tarakwa Police Station

Tarakwa

C.c.

Mr. Stephen Olango Ongoya

Nairobi Academy the

Preparatory & Sec. School

P.O. Box 24817

NAIROBI.

This letter was produced at the trial before the High Court by the appellants in support of their contention that the deceased and the respondent indeed ran a business together and his contribution to the business included the tractor and trailer mentioned in the letter. The response of the respondent was that the letter was written in error and that the deceased's title mentioned in the letter was used to secure the purchase of Nairobi Block 62/170 for the deceased. The learned judge found the explanation plausible because no evidence was adduced by the appellants to show that the deceased indeed financed the purchase of tractor registration no KAA 889V.

That letter was written way back on 24th September, 1993 and was produced in evidence in 1997. The respondent acknowledged writing the letter. He had never, before the letter was produced in evidence, denied the contents thereof. We say so, because, he did not produce correspondence with the 1st appellant in that regard. In his evidence in chief he merely said there was a mistake in the letter – for referring to Kenya Commercial Bank and buying a tractor.

We are puzzled that the respondent's explanation was considered plausible by the learned Judge. The learned Judge in reality preferred oral testimony to documentary evidence. He permitted the respondent to alter his letter dated 24th September, 1993 orally. We do not think it was open to the learned judge to do so. The respondent, in the said letter, was referring to a transaction involving a deceased person which transaction he (***the respondent***) had confirmed in the letter. The learned judge permitted the respondent to interpret the said letter to his advantage oblivious of the fact that the deceased would have no opportunity to react to the explanation.

Besides the letter of 24th September, 1993 the respondent freely acknowledged in his evidence in cross examination that he undertook to pay the deceased's family *Kshs.10,000/=* with effect from June, 1993 from proceeds of the tractor for the family upkeep which payment he made upto January, 1994. He then stopped the payments to the deceased's family when the tractor could not earn any income as it was grounded. He therefore asked the deceased's family to collect the tractor but they did not.

In re-examination, the respondent maintained that in his letter dated 24th January, 1993 he was giving tractor registration number KAA 889V to the family of the deceased. He was to deliver the same to the rural home of the appellants at Karateng. He specifically said the following:-

“Solomon paid for KZR 916. But they are entitled to one tractor KAA 889V.”

Given the respondent's letter dated 24th January, 1993 and his own evidence at the trial before the High Court, we think the learned judge's finding that the appellants failed to adduce evidence to show that the deceased purchased any tractor from the respondent had no basis. The respondent himself was prepared to deliver tractor registration number KAA 889V to the appellants without any condition moments before the suit before the High Court was filed. He freely admitted paying to the family of the deceased *Kshs.80,000/=* for their maintenance and only stopped when the tractor was grounded. He said he made the payments from sums earned from the use of the tractor. We do not think that the respondent would make those payments if he was still owed any balance of purchase price on the tractor. He was the one who utilized the tractor and knew its status and it was on the basis of that knowledge that he undertook to make monthly payments to the 1st appellant. As a prudent businessman, we do not think he would have made those payments if any balance of purchase price was still to be paid.

In all those premises, we have come to the conclusion that the appellants proved, by credible evidence which evidence was in consonance with that of the respondent, that the estate of the deceased was entitled to one tractor from the respondent which he had purchased during his life time.

The appellants are therefore partially right in their grounds 4, 5,6 and 8 and we are entitled to interfere with the learned Judge's decision. We do so.

We allow the appeal in part, set aside the judgment and decree of the High Court made on 22nd January, 2009 and substitute therefor judgment for *Kshs.500,000/=* being the value of one tractor as given by the respondent when he testified.

The said sum shall attract interest at Court rates from the date of filing the suit at the High Court until payment in full.

The appellant shall also have half (½) costs of the suit in the High Court as well as half (½) costs of this appeal to be paid by the respondent.

Judgment accordingly.

Dated and Delivered at Kisumu this 24th day of October, 2013

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR