



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 343 OF 2010**

**BETWEEN**

**J.K KINOTI ..... APPELLANT**

**AND**

**G.J KIBANGA ..... RESPONDENT**

*(An appeal from the judgment of the High Court at Meru (Kasango, J.)*

*dated 22<sup>nd</sup> October, 2010*

**in**

**H.C.C.C NO. 216 OF 1989)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. By a Plaintiff filed in the High Court on 26<sup>th</sup> July, 1989 the appellant sought the following orders:-
  - *Dissolution of the partnership between the defendant (respondent herein) and himself.*
  - *The defendant be restrained from misappropriating the partnership funds pending the dissolution of the partnership.*
  - *The defendant be restrained from withdrawing any money from the partnership accounts.*
  - *The defendant be restrained from excluding the plaintiff from running the affairs of the partnership.*
  - *Costs of the suit be provided for.*
2. The background to this case is that both the appellant and respondent were employed by Brooke Bond (K) Ltd which dealt with the agro chemicals and agricultural seeds. They both moved to the

- company's subsidiary known as Murphy Chemicals which was purchased by May and Barker Company. Subsequently May and Barker was also purchased Rhone Paulenc (K) Ltd. The appellant was a sales promoter while the respondent was the Chief Accountant at Rhone Paulenc (K) Ltd. It was the appellant's case that around 30<sup>th</sup> May, 1988 the respondent suggested that they should both form a company which would be a supplying agency for Rhone Paulenc (K) Ltd's products. The appellant accepted the proposal and proposed the intended company's name to be Shamba Chemicals Supplies. It was agreed between the parties that they should first register their partnership before embarking on any negotiations with their employer. Since the appellant operated in Meru he left the responsibility of registration of the business to the respondent who was by then in Nairobi. According to the appellant, the respondent informed him that he had registered their business and had received the certificate of registration in September, 1988. The appellant maintained that he did not see the said certificate.
3. Since the respondent had since resigned from employment he negotiated with Rhone Paulenc (K) Ltd the award of the tender of supplying its products to Shamba Chemicals. The tender was awarded to Shamba Chemicals and one of the terms of the agreement was that the goods would be supplied on credit facilities for 90 days by Rhone Paulenc (K) Ltd. The appellant managed to obtain a store in Meru which was sub-leased to him by Songa Mbele General Stores for a period of three months from October- December 1988. The rent was Kshs. 2,000/= per month. It was the appellant's case that he paid the three months rent totalling to Kshs. 6,000/= from his own pocket. Thereafter, he received the first consignment of goods in late October, 1988 and placed the same in the aforementioned store. The appellant supplied the said goods to their customers in Meru. The respondent convinced the appellant not to resign from Rhone Paulenc (K) Ltd until 1989 so that he could continue using the said company's vehicle to transport Shamba Chemicals goods to their customers.
  4. On 24<sup>th</sup> November, 1988 while opening an account with National Bank of Kenya for the business, the appellant discovered for the first time that his name did not appear in the registration certificate of the business. This is when the bank asked the respondent to produce the said certificate. The respondent informed the appellant that he did not include his name in the registration of their business because at that time the appellant was still in the employment of Rhone Paulenc (K) Ltd and if the said company discovered he was a partner in Shamba Chemicals they would not have been awarded the tender or he would have been fired from their employment. The respondent signed a document authorising the appellant to be a signatory to the business current account number 319002. The appellant maintained that both the respondent and himself contributed Kshs. 6,000/= each to open the said account. It was the appellant's case that the parties herein agreed that once he resigned from employment in January 1989 they would make an application for his name to be included in the business registration certificate.
  5. Subsequently, the appellant tendered in his resignation on 15<sup>th</sup> December, 1988 in order to concentrate on Shamba Chemicals. He negotiated with his former employer to use part of his dues to purchase the vehicle which had been allocated to him by the company. He continued using the said vehicle in supplying the business goods. After the end of the lease with Songa Mbele General Stores, the respondent rented a shop in Timau from one Major Mwiti at a monthly rate of Kshs. 1,500/=. The appellant used his own funds to erect shelves in the said shop incurring an expenditure of Kshs. 16,000/=. At the end of January, 1989 the respondent joined the appellant in running the business permanently in Meru. Thereafter, they opened another shop across Kathita River within Meru Town wherein the appellant also footed the expenses of constructing the shelves therein at a cost of Kshs. 16,000/=.
  6. Sometime in March, 1989 the appellant learnt that the respondent had opened another bank account for the business without informing him and that the proceeds from the shops were being deposited therein. It was the appellant's case that he continued working in Shamba Chemicals without earning a salary until the respondent suspended him from his duties vide a letter dated 17<sup>th</sup> July, 1989. Consequently, he instituted a suit in the High Court. In urging the trial court to dissolve the partnership and to divide the properties therein equally, the appellant contended that neither the respondent nor he contributed any capital for the business since the goods were being supplied on credit. He stated that he contributed towards the construction of the shelves in the shops a sum of Kshs. 30,000/=-, rent of Kshs. 6,000/= for the store sub-leased by Songa Mbele General Stores and Kshs. 6,000/= towards the opening of the bank account. The appellant further

testified that the respondent obtained credit of Kshs. 100,000/= from Mercantile Finance which was being re-paid from the current account wherein both the respondent and himself were signatories.

7. On the other hand, the respondent maintained that Shamba Chemicals Supplies was a sole proprietorship registered on 21<sup>st</sup> June, 1988. It was the respondent's case that he engaged the appellant to sell goods for him as an agent; they agreed that once the appellant left employment they would discuss the possibility of the appellant becoming a partner. The respondent testified that he made the appellant a signatory to one of the business accounts held at National Bank being current account no. 319002 to show his desire to form a partnership with the appellant. However, the respondent discovered that the appellant was misappropriating the business funds and had tried to secure a loan using the business as a guarantor without his consent. He stated that the appellant had sold goods worth Kshs. 393,000/= but failed to account for the said money. Owing to the conduct of the appellant, the respondent suspended him from his duties. He maintained at that time the appellant had not yet become a partner since they were still discussing the issue. He decided not to continue with further discussions on the proposed partnership with the appellant. He denied that the appellant made any contributions to his business.
8. After hearing the parties' evidence the trial court (Kasango, J.) vide a judgment dated 22<sup>nd</sup> October, 2010 dismissed the appellant's suit. Aggrieved with the said decision the appellant has filed this appeal based on the following grounds:-

- ***The learned trial Judge erred in law by holding that there was no agreement between the appellant and the respondent to form a partnership whereas it is not requirement in law.***
- ***The learned trial Judge erred in law and in fact by holding that there was no partnership between the appellant and the respondent whereas the evidence on record strongly pointed towards there having been a partnership between the appellant and the respondent by the name Shamba Chemical Supplies.***
- ***The learned trial Judge erred in law and in fact by considering the testimony of the appellant selectively and therefore misconstrued the testimony of the appellant thereby arriving at the wrong conclusion.***
- ***The learned trial Judge erred in law and in fact by failing to consider the documents that were tendered in evidence by the appellant which documents clearly confirm that Shamba Chemicals was a partnership between the appellant and the respondent.***
- ***The learned trial Judge erred in law and in fact by misconstruing the testimony of both the appellant and the respondent that parties wanted to incorporate a company to mean that the parties intended to form a partnership.***
- ***The learned trial Judge erred in law by failing to find that Shamba Chemical Supplies was a partnership between the appellant and the respondent which they intended to transform into a limited liability company.***
- ***The learned trial Judge erred in law by failing to find that the appellant had proved his claim on a balance of probabilities.***
- ***The judgment of the learned trial Judge is against the law and weight of evidence on record.***

9. Mr. Kariuki, learned counsel for the appellant, submitted that a partnership is a question of fact which arises from circumstances and there does not have to be an agreement to form one as the learned Judge thought. He argued that both parties were involved with the business since inception; the appellant looked for the business premises; both parties contributed towards opening of a bank account for the business and the appellant contributed his motor vehicle to the business. Mr. Kariuki submitted that the appellant was not operating as an agent or employee but as an equal partner in the business. He submitted that the respondent admitted during cross examination that he did sign the letter dated 17<sup>th</sup> July, 1989 declaring the appellant a partner in the business. He faulted the learned trial Judge for selectively using statements from the appellant's testimony to arrive at the conclusion that the appellant was earning a commission in respect of the sales he made for the business, yet the appellant was referring to a period before the partnership was formed. According to Mr. Kariuki the learned trial Judge misconstrued the appellant's evidence and thus arrived at a wrong conclusion. He urged us to allow the appeal and to enter

judgment in favour of the appellant.

10. Mr. Kioga, learned counsel for the respondent, in opposing the appeal, supported the High Court's findings. He argued that the learned trial Judge did not say that there was no written agreement she simply stated that there was no contract to prove the partnership. He submitted that the existence of an oral agreement also has to be proved. According to Mr. Kioga a partnership is a relationship between parties and it cannot be proclaimed. It is to be construed from the conduct of the parties for example sharing of profits and losses, and capital contribution is *prima facie* evidence of a partnership though not conclusive proof. Mr. Kioga maintained that the appellant was simply promoting the respondent's products and earning a commission from the sales and was an agent but not a partner.
11. We have considered the rival submissions by learned counsel and examined the Record of Appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co. [1968] EA 123, thus:

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”***

This court further stated in Jabane – vs- Olenja [1986] KLR 661,

***“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”***

12. The issue at hand is whether there existed a partnership between the appellant and the respondent; whether Shamba Chemical Supplies was a partnership. It was the appellant's contention that the partnership commenced in the year 1988. Therefore, 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.”***

In this case there was no partnership deed. We are of the considered view that a partnership agreement can be oral or in writing and it can be oral. See this Court's decision in Mworja & Another -vs- Kiambati (1988) KLR 665 & Lindlay on Partnerships, 4<sup>th</sup> Edition at Page 107. However, an oral partnership agreement still has to be proved by a party claiming its existence. In Mworja & 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.”***

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) the sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;***

***(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 instalments 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.”***

From the foregoing provisions we concur with the findings of Dulu, J. in *Joseph Chesire Sirma - vs- Erick Kipkurgat Kiprono(2005) 1KLR 197* that,

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

The learned authors of *Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 35* state 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.” Emphasis provided.***

14. Having considered the evidence on record we concur with the trial Judge that there is no evidence of an existing partnership between the appellant and the respondent. Why do we say so? This is because firstly, from the evidence the conduct of the parties was such that the appellant was selling the business goods as an agent. The appellant did admit in his evidence that he earned a commission based on the sales he made. He did not tender any evidence that he used to share in the profits or losses of the said business. Secondly, the fact that the respondent authorised the appellant to be a signatory to the business bank account held with National Bank did not of itself infer a partnership. All the evidence pointed to the fact that the respondent was the sole proprietor

of the said business. See ***Mworia & Another -vs- Kiambati (supra)***. We further find, contrary to the appellant's allegations, that the letter dated 17<sup>th</sup> July, 1989 written by the respondent suspending the appellant from acting on behalf of Shamba Chemicals did not acknowledge that the appellant was a partner in the business. Thirdly, it is clear from the minutes produced by the appellant at the trial court that the parties intended to incorporate a company, with capital of Kshs. 400,000/= , to be equally contributed by both parties. The said company was never incorporated. The appellant did not tender any evidence that he contributed part of his capital towards the business. We further find that the mere existence of an intention by the parties to form a company or partnership cannot warrant the declaration of the existence of a partnership between the parties.

15. The upshot of the foregoing is that we find that the appeal herein has no merit and is accordingly dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of December, 2013.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**