REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 127 of 2004

BETWEEN

ARTHUR WAMBUGU………………………………………………………….APPELLANT
AND
MWANGI MUHORO…………………………………………………1ST RESPONDENT
WILLIE KIRITU……………………………………………………..…2ND RESPONDENT
LAWRENCE MWANGI……………………………………………..…3RD RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nakuru (Rimita, J) dated 4th May 2001

in

H.C.C.C. NO. 165 OF 1974
****

CIVIL APPEAL NO 250 OF 2007

BETWEEN
WILLY KIRITU…………………………………………………………..APPELLANT
AND
ESTHER NJERI MWANGI…………………………………………..1ST RESPONDENT
LAWRENCE MWANGI……………………………………………..2ND RESPONDENT
ARTHUR WAMBUGU………………………………………………...3RD RESPONDENT
MAKANDUI FARMERS CO. LTD…………………………..……4TH RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nakuru (Rimita, J) dated 4th May 2001

in

H.C.C.C. NO. 165 OF 1974
****

JUDGMENT OF THE COURT

The appellant (**Arthur Wambugu**) was the third defendant in a suit instituted by the **first respondent** (**Mwangi Muhoro**) against the secondrespondent (**Willie Kiritiu** as first defendant), the third respondent (**Lawrence Mwangi** assecond defendant) and the fourth respondent (**Makandui Farm Co. Ltd** as fourth defendant). The amended plaint claimed that in early 1969 the first respondent with the appellant and the rest of the respondentsagreed to form a partnership for the purchase of a farm known as **Land Reference No 9271/1 at Njoro, (the farm)**with improvements thereon and livestock and machinery

therein, under the name and style of **Makandui Farm Company.**

Each of the proposed partners, was to contribute equally towards the partnership's immediate capital requirements, which was set at Kshs. 150,000/=. The respective contributions would entitle each partner to become fully paid. However, some of the prospective partners failed to fulfill their pledges of Kshs. 37,500/=, in which event, the **first respondent,** claims to have contributed Kshs. 75,200/= which he said he did with the knowledge of the rest of the partners, who were supposed to make up for such shortfall in capital contribution. Heclaimed that his excess contribution was to be accounted for in the form of enhanced share in the profits or earnings of the farm and such contribution was to form part of a future partnership agreement, which was expected to be put in place.

The first respondent, in evidence before the learned Judge, contended that his contribution entitled him to 290 acres of the farm and indicated that there was never any joint contribution made between him and the appellant, Arthur Wambugu, whom he described at one juncture to have become greedy and wanted to take more acreage which his contribution of Kshs. 38,000, did not entitle him to. The first respondent stated that other than distinctly contributing Kshs 66,000 and the appellant, Arthur Wambugu contributing Kshs 28,000/= towards refund of Kshs 94,000/= to Deffo Company, there had never existed a joint business relationship between them, from which joint contribution would have been made.

According to the evidence, before the learned Judge, the appellant Arthur Wambugu was unable to show that the Kshs 66,000/= paid by the first respondent to Deffo Company, was from a joint business venture with the first respondent. The appellant is in fact on record admitting that the contribution was the first respondent's alone. These two respective contributions were also confirmed in evidence in that order by Lawrence Mwangi, the third respondent who appears to have been privy to and had information regarding the making of these contributions.

The prospective partners took possession of the farm and other assets in December 1969. At that time, the **first respondent** with the agreement of the other prospective partners, took charge of the management and was assisted in that behalf by **the appellant, Arthur Wambugu**. That arrangement however, came to an end when the **first respondent** was relieved of this responsibility in 1972.

Though the farm was at the instance of some of **the respondents**, eventually registered in the names of all the prospective partners as tenants in common in equal shares, the **first respondent** alleges that that registration took place without his knowledge. Later on, the farm was again, without the knowledge of the **first respondent**, registered in the name of the fourth respondent with all the other **respondents** and the **appellant** being shown as shareholders.

The amended plaint filed in court by the **first respondent**, sought the transfer of the farm, registered as IR 17573/12, to be nullified and the title thereto, to be rectified by expunging that entry. It also prayed that the alleged partnership be declared dissolved in terms of a 1975 agreement between these parties and a receiver appointed with an order that the **second respondent** and the **appellant** do settle their outstanding portion of the Agricultural Finance Corporation loan on terms that are stipulated in that agreement.

The amended plaint prayed that in the event that the **second respondent** and the **appellant** failed to repay the said loan, then, the **first respondent** be discharged from such liability and the court finds that each partner is entitled to such

portion of the land in accordance with the said agreement. The **first respondent** prayed that **the appellant** and the other respondents be ordered to sign necessary documents of transfer and in default the court executes the same to facilitate transfer of the farm.

The **appellant** and the other respondents in their amended defence did not admit the claim. In fact, the appellant, Arthur Wambugu, counterclaimed in that amended defence he filed with the second and third respondents. The appellant counterclaimed for an order that the whole of the farm be subdivided between the first respondent on one hand and the appellant, second and **third respondents** on the other hand. He prayed that such subdivision be in accordance with the capital contribution of each of the parties for the purchase of the farm. **The appellant** also sought mesne profit, for the period the first respondent was alleged to be in unlawful occupation of the farm. That appellant with the other respondents, denied in their joint defence, that the first respondent contributed Kshs.75,200/= and set out what they considered represented the correct contributions of each and all the parties as:-

First respondent--------- Kshs 50,000/=

Second respondent-------Kshs 38,000/=

Third respondent---------Kshs 12,000/=

The appellant------------ Kshs 50,000/=

The said **respondents** gave the total sum they said was contributed as Kshs 150,000/- which according to the amended defence, left no shortfall to be topped up by the **first respondent**. We find this defence's contention unfounded. This is in view of the evidence tendered before the learned Judge in which Willie Kiritu, the appellant in the second appeal, admitted that he did not know what the other parties in the suit contributed.

The amended defence also accepts that possession of the farm, was taken as stated in the plaint but adds that an agreement was reached for each of them to manage it for a period of two (2) years, with the appellant helping to write up the books for the period each of them was managing. The amended defence contended that the **first respondent** failed to provide necessary information to the **appellant** to enable the latter write the books of accounts in compliance with the agreement between these parties. The **first respondent** is also alleged to have become uncooperative and refused to relinquish the management when his time of management came to an end in 1971. Consequently, the farm thereafter had no proper management save that the loan debt with Agricultural Finance Corporation continued to be serviced out of the proceeds from the farm.

The amended defence also contests the **first respondent's** alleged lack of knowledge on how the farm came to be registered in the names of all the parties and eventually in the name of the **fourth respondent**. It stated that the **first respondent** was party to the incorporation of the **fourth respondent** and the transfer of the farm thereto. The amended defence also averred that because the partnership was in respect of ownership and management of the farm that partnership was dissolved on the transfer of the farm thereof to the fourth respondent.

Consequently, **the appellant, Arthur Wambugu,** counterclaimed for the subdivision of the farm between the **first respondent** on the one hand and the appellant with the second and **third respondents** on the other. The subdivision was to be

in accordance withthe capital contribution of each party for the purchase thereof. This appellant, in evidence before the learned Judge, admitted that the 1975, agreement between the parties did not show what contribution, towards the purchase of the farm, was made by each of the parties. Accordingly and in view of the avoidance of that agreement by the provisions of the Land Control Act, the learned Judge was in our view perfectly in order to receive and did receive other relevant evidence on which he based his findings on. Though mesne profits for unlawful occupation and use of the farm was claimed against the **first respondent,** the same was abandoned in argument before us.

The **fourth respondent**, in its defence, also denied that the transfer of the farm was effected without the knowledge or consent of the first respondent. It stated that it was incorporated in accordance with the will of and knowledge and consent of all the parties concerned and their knowledge and consent was evidenced by the shares they each have and by the participation in the affairs of the **fourth respondent**.

The **fourth respondent** stated that parts of the farm were leased to its shareholders who were bound by their respective leases to pay the accrued rent to clear indebtedness thereto to the Agricultural Finance Corporation and the occupation of certain portions by the shareholders did not confer on any of them proprietary rights thereof.

The **first respondent**, in evidence before the learned Judge, alluded to a written agreement, between the appellant and the respondents and denied any knowledge of the fourth respondent and in fact stated that it is not a limited liability company but a partnership. This respondent denied signing the fourth respondent's Memorandum and Articles of Association, in respect of which signature, he sought the services of a document examiner who rendered a report to the effect that this respondent did not sign and what was alleged as his signature was a forgery. This respondent also testified regarding what he referred to as a sub-division agreement. The agreed subdivision of the farm was to be effected as follows:-

1. Second respondent (Willie Kiritu)----149 acres
2. Third respondent (Lawrence Mwangi)-----28 acres
3. First respondent (Mwangi Muhoro)----290 acres
4. Appellant (Arthur Wambugu)------121 acres

The learned Judge, after receiving the evidence, summed up the issue before him for decision and entered judgment thereafter as follows:-

> **"The issue, before me, is what was the contribution of each partner. What is the entitlement of each partner. I have anxiously considered what each party had to say and the exhibits produced in support of the contributions. When deciding who of the parties is telling the truth I think I am entitled to look at all the material placed before me and the history. Although exhibit 4 is rendered void by the unpopular provisions of the Land Control Act, it shows that the plaintiff (Mwangi Muhoro) and the second defendant (Lawrence Mwangi) are truthful about their contributions. The third defendant (Arthur Wambugu) obviously lied about exhibit 4 and gave it an interpretation that cannot reasonably stand. Consequently, I will enter judgment for the plaintiff and also the third defendant in the counter-claim as follows:-**
>
> ***(a) The transfer of L R Number 9271/1 to the 4th defendant be cancelled***
>
> ***(b) L R Number be subdivided among the parties except the 4th***

defendant in the following shares:-

(i) Mwangi Muhoro (plaintiff)------- 290 acres
(ii) Willie Kiritu (first defendant)----149 acres
(iii) Lawrence Mwangi (second defendant)---
28 acres
(iv) Arthur Wambugu (third defendant)------121
acres

(c) Any loan to Agricultural Finance Corporation be paid by the first and third defendants in default part of their share be sold to pay the same

(d) The Deputy Registrar of this Court is appointed and empowered to sign all necessary forms leading to subdivision and transfer of the parties shares as ordered.”

It is these findings and determinations, by the learned Judge, that triggered this appeal with assertions that the learned Judge misdirected himself in relying on an agreement which had been avoided to arrive at each of the parties’ capital contribution towards the purchase of the farm. That the learned Judge failed to find that the capital contribution by the appellant and the **first respondent, Mwangi Muhoro,** was a joint contribution with no distinct shares attributable to either of them and he erred in accepting the first respondent’s claim that he had paid more money than the **appellant**. That the learned Judge misdirected himself in failing to award the appellant the costs of the successful counterclaim.

In dealing with these contentions, which constitute the grounds of this appeal, we have to examine what the findings and observations of the learned Judge are in relation to the issues before him. The main claim, in the counterclaim, brought by the appellant was for the subdivision of the farm in accordance with the capital contribution of each party for the purchase thereof. The learned Judge was explicit that the first respondent and the third respondent were truthful in their evidence before him, regarding their respective contributions. The learned Judge, however, was categorical that the **appellant** was not truthful about his capital contribution and therefore the interpretation of exhibit 4 by the first and third **respondents** was to be preferred.

The learned Judge heard the witnesses, when they testified before him. He had the advantage of assessing their veracity. We do not. The learned Judge, in the exercise of his absolute discretion, chose who to believe and gave his reason for so doing. We do not think, we can fault him in the circumstances, because it is clear to us that he exercised his discretion judicially. We do not agree with the **appellant** that the learned Judge breathed life into the 1975 agreement, avoided by the provisions of the Land Control Act. He needed not do and did not do that. He had direct oral evidence from these parties, who all appear eager that the farm be subdivided and their respective portions be transferred to them.

We say this because what the learned Judge did was to test credibility of these parties by reference to all documents and other evidence before him. The learned Judge is not saying that parties could still use that avoided agreement as a basis upon which to subdivide and transfer the land. For good measure, oral evidence tendered before the learned Judge, coincided with the contents of that agreement. That is the way it should be because the avoided agreement had its genesis from and a product of the inter-dealings between these parties.

There is, however one complaint in this first appeal which we would revisit. This is the complaint in relation to the denial of costs of the partially successful counterclaim to the appellant. The appellant, from a careful reading of the judgment, partly succeeded in his counterclaim. He sought and he was granted an order for the subdivision of the farm. The learned Judge disbelieved the appellant in relation to his interpretation of the avoided agreement and also on the basis of the appellant's alleged capital contribution. The way we see it, the learned Judge, nevertheless ordered the subdivision to proceed not in terms of the avoided agreement but in accordance with the oral evidence before him. We do not think, we can wholly fault the learned Judge in principle, for denying the appellant part of the costs. We, however, agree that the appellant deserves the costs for his partially successful counterclaim and we shall award him half the costs thereof.

We would at this juncture, revert to the appeal preferred from the Learned Judge's judgment by **Willie Kiritu** who was the first defendant in the said suit and the second respondent in the first appeal. The second appeal is **Civil Appeal No 250 of 2007**. **Esther Njeri Mwangi** who is the legal representative of the estate of **Mwangi Muhoro,** is the first respondent together with **Lawrence Mwangi, Arthur Wambugu,** and **Makindui Farmers Co L**td being respectively the **second**, **third** and **fourth** respondents in that second appeal.

The main ground of this other appeal is that the learned Judge misdirected himself in relying on the avoided agreement of **1975**, in calculating what was each party's contribution towards the capital of the partnership. This ground is in all fours with the first ground of appeal in **Civil Appeal No 127 of 2004**, in respect whereof, we have already examined the findings of the learned Judge and came to the conclusion that he cannot be faulted in respect of those determinations.

There is however, a specific complaint that the learned Judge ought not to have dealt with the differences between the **appellant (Willie Kiritu** in Civil Appeal No 250 of 2004, and the **first respondent Mwangi Muhoro)** in the earlier appeal. We do not consider that this ground is founded at all when the evidence before the learned judge is evaluated. The way we understand the evidence of Willie Kiritu, who is the appellant in the latter appeal, is that it was inconclusive or not clear cut regarding both his contribution and therefore the acreage he was entitled.

If we might start with the analysis of his evidence before the learned Judge, with regard to the acreage, we see that he variously claimed 200 acres to begin with and stated he never agreed to take 149 acres but took it to prevent the farm from being auctioned. He also at one time stated he started with 100 acres but ended up with 150 while he should be having 162 and still yearned to have 200 acres. He also referred to land being cultivated according to one's strength in respect whereof he was cultivating 160 acres. We find Willie Kiritu's evidence unhelpful regarding his claim to acreage, other than that was awarded to him in the judgment.

Turning to the contribution towards the capital needs of the partnership, he only testified about an agreement for payment of Kshs 50,000/= by each of the partners but Willie Kiritu, is noncommittal whether he made his contribution in the agreed amount or not. In our respectful view, that was the moment, he should have seized to prove the amount of his contribution; upon which to base his claim for entitlement to some part of the farm. We do not think that he went anywhere near as showing, that he, in addition contributed any other sum, to entitle him to the increased acreage, he lays claim on in this second Appeal.

In the joint defence he, along with the other defendants, filed in court, he is shown as having contributed Kshs.38,000/=

which is the figure the learned Judge must have based his apportionment of 149 acres of the farm to Willie Kiritu. It suffices to mention that, apart from this figure appearing in the avoided agreement of 1975, the same is also part of the pleadings, Willie Kiritu filed and upon which, he exhorted the court in his counterclaim, to order the subdivision of the farm between the plaintiff in the suit on one part and the defendants on the other.

He prayed for that order to be based on the capital contribution by each of them. That, in our understanding of the judgment, is exactly what the learned Judge did. Accordingly, the latter appeal by **Willie Kiritu**, wholly fails with costs, while the first appeal, by **Arthur Wambugu**, succeeds to the extent of the variation of the order for payment of costs of the Counterclaim, earlier on adjudged in this judgment. We order that latter appeal shall stand dismissed with costs to the respondents

Dated and delivered at Nakuru this 12th day of November, 2010.

E.O. OKUBASU
………………………….
JUDGE OF APPEAL

M. OLE KEIWUA
………………………
JUDGE OF APPEAL
J.G. NYAMU
……………………..
JUDGE OF APPEAL
I certify that this is a
true copy of the original

DEPUTY REGISTRAR