REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 86 OF 2003

PURSHOTAM RAMJI KOTECHA …..…… 1ST APPELLANT

BHAGWANJI NARSHIDAS KOTECHA ……....…...…… 2ND APPELLANT

AND

NARANDAS RANCHODDAS PAU …..…….…… 1ST RESPONDENT

SIMEON KIPTUM ARAP CHOGE ……..……. 2ND RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Kisumu (Tanui, J) dated 26th February, 2003

in

H.C.C.C No. 449 of 2001)

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JUDGMENT OF THE COURT

The records availed to us in this appeal show that the first and second appellants, **Purshotam Ramji Kotecha** and **Bhagwanji Narshidas Kotecha** respectively were, together with the first and second respondents **Narandas Ranchoddas Pau** and **Simon Kiptum arap Choge** respectively partners in the business enterprise known as New Bunyore Jaggery Company which they purchased from one Wilson E.C. Mukuna in the year 1978. The shares each held in the same partnership or for that matter, who contributed what towards the same partnership and whether any or some of them indeed contributed anything towards the same partnership business are matters in dispute. Because of what will be clear in this judgment later, we will not comment on the same save to say that a dispute arose as to the conduct of that business particularly on the allegation that the appellants failed and/or refused to render accounts of the partnership to the respondents and that dispute ended up in the superior court where the first respondent commenced proceedings against the appellants and the second respondent by way of an originating summons dated 10th December, 2001. It was headed "*In the matter of taking of redeeming (sic) of Accounts of the Partnership in New Bunyore Jaggery Company*". In that original originating summons, the first respondent was seeking two orders, which were:

"**1. That the defendants be ordered to produce all the books of accounts in respect of the above partnership and to render accounts in respect thereof for the period between 1979 to date.**

2. That upon such accounts being rendered by the defendants, the defendants be ordered to pay the plaintiff his lawful and just partnership profits due to him for the period 1979 and to date."

That originating summons was supported by an affidavit sworn by the first respondent in which the first respondent deponed that the business, New Bunyore Jaggery Company, was commenced sometimes in 1978 and each of the four partners contributed equally in cash towards the purchase of the business enterprise; that the business was registered in the name of the partnership on 3rd January 1979; that the land on which the jaggery stood was also purchased but the same land was registered in the names of the second appellant and second respondent on behalf of and for the benefit of all partners; that there was no written partnership agreement entered into but the rights of all partners were equal; that the first appellant was manager of the business from end of 1979 but he had failed and/or refused to render any business accounts to the respondents despite demands by the first respondent to have the first respondent do so; that at one time at the end of 1979, auditors of the partnership asked the first respondent to sign the balance sheet for the partnership business but he declined to do so as the same accounts did not reflect profits but instead reflected wrong shares of each partner; that on enquiry, the first respondent was told that he was wrong in his allegation that each partner had contributed equally to the partnership business; that the first respondent made several efforts to convene a meeting to resolve the stalemate but in vain; that later in 1998, he saw audited Accounts of the partnership business for the period between 1979 and 1996 and those of the year 1997 to the year 2000 and he was shocked as the same showed that the first respondent had 85% shares of the partnership and that the second appellant had retired in December, 1993; that he was certain that was not the correct position of the accounts of the partnership as no meeting of the partners had been convened to deliberate on partnership matters; that the first respondent was informed that his partnership profits for 1979 to 2000 was Ksh.1,263,609/=; that he had not been given the same and that as a result of all that he believed that the partnership had irretrievably broken down and could not be left to continue in existence and hence the application. The first appellant responded to the same originating summons and filed a replying affidavit sworn on 20th December, 2001 in which he stated that in the initial but uncompleted partnership agreement between the partners, it was stated that the first respondent was to contribute cash towards the acquisition of the partnership property but the first respondent did not contribute any single coin to the assets that became the partnership business; that only the respondents financed the purchase of the land and machines that made up the assets of the business; that the first respondent and himself were partners in another jaggery business known as Beda Jaggery from 1979 but a dispute arose concerning the same jaggery which dispute ended in court by way of Civil Suit - No. 1845 of 1984 at the High Court. The record shows that he also filed an application by way of chamber summons to strike out that originating summons, but that did not succeed as his application was dismissed. The second respondent, named in that originating summons as the third defendant, Simon Kiptum arap Choge, filed an affidavit sworn by himself on 18th January, 2002 in which, he, though grouped as one of the defendants by the first respondent, switched sides and sought to be one of the claimants together with the first respondent. In that affidavit, the second respondent stated that, to his knowledge, each partner contributed equal amounts towards the partnership business; that he was surprised when he saw in the exhibits produced by the first respondent that the partnership interests of each respective partner was disproportionate; that he also knew on his own that there had never been any joint meeting of the partners concerned and that the first appellant's allegation that he had 85% shares of the business was not true. He too felt the partnership could not continue under those circumstances as there was according to him non disclosure and fraudulent acts which had resulted into mistrust and inability to effectively administer the partnership.

As a result of the above, the originating summons was amended and the amended originating summons was dated 25th March, 2002. That amended originating summons was now headed "*In the matter of the Dissolution of the Partnership and rendering of accounts for the firm of New Bunyore Jaggery*". The second order sought was also amended and was made to read:

"**2A. That upon such account being rendered by the defendants, the defendants be ordered to pay the plaintiffs their lawful and just partnership profits due to them for the period 1979 and to date."**

The affidavit of the second respondent was the basis of the amended originating summons.

The record shows that after some preliminary issue such as the application for striking out original originating summons were dealt with, the amended originating summons was set for directions on 15th May 2002. What transpired on that date is, in our view, important and we do set out the proceedings of that day here below:

"**15.5.2002**

Coram: B.K. Tanui, J

Ragot for applicants

Abuta for respondents

Kombedoh – Court Clerk

Order on Direction:

(1) The applicants be deemed plaints (sic) and the respondents be treated as defendants.

(2) The amended O.S together with supporting affidavit to be deemed as plaint.

(3) The replying affidavit of the defendant to be deemed defence.

(4) The matter is to be decided on viva voce evidence.

(5) Hearing date to be taken at registry.

(6) Costs in the cause."

Upon those orders on direction, the matter, now treated for all purposes as a suit commenced by way of a plaint with a statement of defence already filed, proceeded to hearing as ordered by the court and the hearing commenced on 11th July 2002. Before the evidence was taken in the matter however, the following issues were framed:

"**1. Whether the plaintiffs and the defendants made contributions of the initial capital of partnership**

2. If so what was the ratio?

3. Whether or not the partnership has generated any profit? If so how much?

What is the proportion of the sharing of profit/loss?

4. Who is to bear the costs of this suit."

The hearing then proceeded and three witnesses namely the accountant, the first and the second respondents, gave evidence. The case for the plaintiffs was then closed. We make haste to add here that the last witness, the second respondent's evidence was taken on 20th January 2003. After that evidence, on the same day, the learned counsel for the appellants applied for a short adjournment. When the matter resumed in the afternoon of that same day, the appellants, through their counsel, applied for a written statement of the defence which had been filed in court to be admitted. The learned counsel for the respondents objected and the learned Judge of the superior court, after hearing both sides on that application, rejected it stating, *inter alia*, as follows:

"**However, this suit was on 11th December 2001 commenced by an originating summons under**

Order XXXVI rule 4 of the Civil Procedure Rules, and that the respondents were directed to enter appearance within 15 days. On 20th December, 2001, the defendants entered appearance and filed affidavit in reply. Thereafter by directions given on 15th May 2001 it was ordered that the dispute between the partners be determined by viva voce evidence. The applicants were therefore deemed plaintiffs while the respondents were to be treated as defendants. The originating summons together with the supporting affidavit were to constitute plaint which (sic) the replying affidavit was to be the defence. The hearing was therefore commenced under those conditions ……

In those circumstances, the defence filed herein on 20th January 2003 is incompetent and the same is struck out with costs."

That ruling was delivered on 21st January, 2003. What followed the same day is interesting, for on the same day, presumably after the ruling was delivered, the learned Judge marked the matter as stood over to 28th January 2003 for submissions, and on 28th January 2003 in the presence of both counsel, the court recorded that judgment was to be delivered on 26th February 2003. On 26th February 2003, judgment, the subject of this appeal, was delivered. In that judgment, the superior court allowed the claim stating, *inter alia*, as follows:

"**There will therefore be judgment for the plaintiff against the defendants in terms of prayers as follows:**

(i) The defendants are ordered to produce all books of account in respect to New Bunyore Jaggery Company period 1979 to date.

(ii) The defendants are ordered to pay each plaintiff shs.1,263,609, as share of his profits from 1979 to 2000. The said amount is to attract interest at the rate 24% p.a.

(iii) Owing to the refusal and/or neglect of the defendants either to call meetings of partners and their failure to pay profits when they are due which have greatly prejudiced the plaintiff, the partnership is ordered to be dissolved.

(iv) The defendants to bear the costs of this suit."

The appellants felt aggrieved by the above decision of the superior court and hence this appeal which is premised on twenty (20) grounds of appeal. Mr. Mungai, the learned counsel for the appellants, in his submission before us, abandoned nine grounds of appeal and addressed us on the rest of the grounds. Two of these grounds were grounds 6 and 7 which were as follows:

"**6. The learned Judge erred in law and in fact in failing to consider in his judgment the duly filed Defence of the Defendants/Applicants which was on record and in so doing a miscarriage of justice occurred.**

7. The learned Judge's action in barring the Defendants/Applicants from giving their evidence in the suit was in breach of the rules of natural justice in that it in effect precluded the appellants from being heard in their Defence of the allegations."

Mr. Mungai, referred us to the judgment of the superior court and contended that the learned Judge decided the entire case on the basis that the appellants had not filed a defence, and so did not consider the case for the appellants whereas the appellants' replying affidavit had been adopted as a defence so that even if the statement of defence that the appellants sought to file was refused still the superior court had a valid defence on record and had a duty to consider it. He submitted further that the learned Judge erroneously refused the appellants an opportunity to be heard in their defence on the misplaced belief that the appellants having filed no statement of defence were not entitled to be heard.

Mr. Ragot, the learned counsel for the respondents in the appeal, while conceding that the learned Judge

erred in his finding in the judgment that the appellants had not filed a defence, was nonetheless of the view that in totality, the learned Judge arrived at a proper conclusion on the issue, as the appellants' advocate, who was in law the person controlling the defence case failed to avail himself the opportunity to adduce evidence in defence of the suit. Mr. Ragot also referred us to the record and submitted that the learned Judge did not deny the appellants the right to be heard but rather it was the defence counsel that "chickened" out and decided to take a date for submission rather than offer defence.

We have anxiously considered the record before us, the submissions by the two learned counsel and the law, in respect of those two grounds of appeal which we do consider as one ground as they are so entertwined that we find it appropriate to so consider them. It is not in dispute that by dint of the order of directions made by the superior court on 15th May, 2002, the replying affidavit sworn and filed by the first appellant in reply to the originating summons was deemed to be the defence in the case just as the amended originating summons together with the supporting affidavit also became the plaint. Thus, as on the date of hearing of the suit on 11th July 2002, all the required pleadings, namely plaint and defence were before the learned Judge. That clearly was the reason why he deliberated on the agreed issues. Those issues were drawn from those affidavits – i.e. supporting affidavits and replying affidavits all of which were deemed as pleadings. Having framed the issues from the pleadings, the hearing proceeded and the plaintiffs' case continued to the end with the learned defence counsel cross-examining the plaintiffs' witnesses without any hindrance at all. At the close of the plaintiffs' case, confusion took centre stage. We say so because, notwithstanding that there was, as we have stated, a defence on record, at least for the first appellant whose replying affidavit had been deemed as defence, counsel for the appellants, without anything on record to show what prompted him to do so, applied for adjournment which was granted, but thereafter instead of proceeding with the hearing, the court embarked on an application for a draft defence filed earlier to be admitted for purposes of the continuance of the hearing. Clearly, that was unnecessary and the court should have given appropriate directions at that stage to avert what happened later. The learned Judge did not do so. The application was heard. What is rather interesting, is that after hearing that application, the superior court delivered a ruling in that application which showed that the court was alive to the matter before it for in dismissing the application to admit the draft defence, the court stated that as the replying affidavit was treated as a defence, there was no need for another defence to be filed and on that basis, the court dismissed that application for introduction of a draft defence. What is intriguing is that on that same day, the court proceeded to fix a date for submission rather than for defence case. One is bound to ask what was going on. A look at the record does not answer that question for the record is silent as to why the appellants were not being heard after their replying affidavit, which was on record, was deemed as a defence and the learned Judge appreciated that fact and refused a second defence to be on record. The appellants say that they were barred by the learned Judge from being heard. The respondents say that the appellants' counsel failed to seize the opportunity to advance his clients' defence and that he was not denied that opportunity. We have perused the entire record to see if there is any help in resolving that question. The only answer we put our hands on is in the judgment of the superior court. In that judgment, the court stated, *inter alia* as follows:

"**During the hearing the plaintiffs called Mr. Nokwe Adienga who is a certified accountant practicing in Kisumu as Nokwe Adienga Certified Accountant as a witness. Both the plaintiffs also testified but as there was no replying affidavit on record which was to be treated as defence the defendants were not granted leave to testify as they had no pleading to base their evidence. However, later on their counsel stated that he had then filed a defence on which he sought to rely in leading evidence. The counsel for the plaintiffs strenuously resisted this introduction of the defence without leave and eventually I gave a ruling holding that the defence filed at such late time was incompetent and would prejudice the plaintiffs. The issue of filing defence could not arise as the plaintiffs had filed an affidavit in support of the originating summons and what would have been necessary was a replying affidavit to it and not a defence."**

Thus, the learned Judge in the part of the judgment we have referred to above made it clear that he barred the appellants from giving evidence on grounds that the appellants had not filed a replying affidavit to the originating summons and that when they made an attempt to file a defence through an application for leave to do so, the learned Judge rejected it on grounds that it would prejudice the respondents. What, he forgot, with respect, is that his main ground for rejecting the filing of the defence was that there was

already a replying affidavit on record which was, through his own orders on direction, deemed as a defence. Mr. Ragot was throughout involved in the matter unlike Mr. Madialo, the learned counsel for the appellants, who came into the matter mid-stream and might not have known what had gone on including the fact that directions had been given to the effect that the replying affidavit was adopted as a defence. Whereas we do not say that Mr. Madialo was not to blame for the apparent circus that ensued as he must have known and must have been fully instructed on what he was taking over, we feel Mr. Ragot could have been of great help to the court for he knew that pleadings were complete and closed before issues were taken such that when the learned Judge was barring the appellants from being heard on erroneous grounds, Mr. Ragot had the duty as an officer of the court to help put right the proceedings.

Be that as it may, the fact remains that we cannot, with respect, accept Mr. Ragot's position that it was the appellants' counsel who failed them. The position as we see it from the part of the judgment we have reproduced, is that the appellants were not accorded their right to be heard in a matter so contentious that no proper and fair decision could be made without hearing both sides. It does appear clearly from the judgment that the learned Judge did not look at and did not consider the replying affidavit which was deemed as a statement of defence. That was an added injustice to the appellants who were not heard together with their would-be witnesses.

What is the effect of what happened here? In our view, even if one were to accept that the advocate for the appellants did not do his best to ensure that his clients were heard as Mr. Ragot submits, still that in itself would not lessen the duty of the court to ensure that every party that is before it is afforded all reasonable opportunities to be heard and is heard in its case before a decision is made on the entire case. In the case of **ADOLF GITONGA WAKAHIHIA AND FOUR OTHERS VS. MWANGI THIONGO (1982-88) 1029** this Court stated, *inter alia*, as follows:

"**As a matter of law, is it just that judgment should be imposed on them without being heard? Their complaint was laid before the judge on an application to review the judgment but the court overlooked this vital allegation that vitiates the judgment. It was upto the court, when it was pointed out in an application for review that judgment was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and judgment should be set aside."**

In this case, the learned Judge had before him an affidavit sworn by the appellants seeking to file the defence in which the appellant clearly referred to the replying affidavit having been filed. The Judge himself issued orders on directions and adopted the same affidavit as defence. He referred to it in his ruling dismissing the application to file defence. It was clearly a lapse of memory that made the proceedings be concluded without the input of the appellants. We have a duty to ensure that fair play is accepted in the game and we have no alternative in this case, but to accept that the superior court's judgment delivered on 26th February, 2003 was a nullity. It cannot stand.

As a result of what we have stated hereinabove, we need not consider the other grounds of appeal lest we prejudice the fair hearing of this case.

In the result, this appeal is allowed. The judgment delivered on 26th February 2003 is hereby set aside, and the suit is remitted to the superior court for hearing afresh. We take judicial notice of the fact that the learned Judge has retired and so there is no need to order fresh hearing before another Judge. The appellants will have the costs of this appeal. Judgment accordingly.

Dated and delivered at Kisumu this 15th day of December, 2006.

E.O. O'KUBASU

…….

JUDGE OF APPEAL

E.M. GITHINJI

…….

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR