



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1523 OF 2010**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> June, 2017)**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS,**

**HOSPITALS AND ALLIED WORKERS..... CLAIMANT**

**-VERSUS-**

**MARY NJOKI MUREITHI.....1<sup>ST</sup> RESPONDENT**

**BEATRICE WANJIKU CHOMBA .....2<sup>ND</sup> RESPONDENT**

**FLORA NJERI KIARIE (NATIONAL**

**COLLEGES WITH PUBLICITY AS**

**UNIVERSAL CENTRAL ACADEMY).....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Claimant filed suit on 14<sup>th</sup> December, 2010, seeking damages for unfair termination of its members against the Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have indicated that they had no hand in running of the 3<sup>rd</sup> Respondent School. This Court ordered that parties make submissions on ownership of the school before the main hearing could commence.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are alleged to have been the widows of the late Christopher Kariuki Mureithi and Fowas Ndung'u Gatimu respectively. That the Respondents did not have any knowledge of the kind of business relationship that existed between their husbands nor did they operate any school together.

3. They aver that they only learnt of the existence of Universal Colleges sometime in the year 2007/2008 when the late Augustine Kiarie approached 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent seeking to dispose off the property to a third party.

4. The Respondent reiterate that they were not partners in the management of the National Universal Central Academy and neither did they by their conduct deal with the employees of the school in a manner likely to suggest that they were partners in the said school. They rely on the case of **Jane Wanja**

**Gahiengo vs. David Wanjohi Kamau & Another (2014)eKLR** where it was stated:

***“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”.***

5. They maintain that the late Augustine Kiarie Githae was registered as sole proprietor of the college ran it by himself as evidenced in the Business Name Registration Certificate dated 28.2.1977. It is for such reasons that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seek to be struck off the suit.

6. The 3<sup>rd</sup> Respondent on the other hand submits that all the claims by the Claimants are pre-1977 and as such the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are estopped to use the registration certificate of 28.2.1977 to deny existence of a business relationship between their husbands and the 3<sup>rd</sup> Respondent. The third Respondent has attached minutes dated as early as 1965 to a statement of facts by the son of the 3<sup>rd</sup> Respondent which shows that there was a business relationship between the Respondents’ husbands and the college.

7. Further the 3<sup>rd</sup> Respondent states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Applicants have not disclosed to the Court that when land parcel 4953/968 where the school stood was sold, proceeds were shared equally between the registered proprietor of the 3<sup>rd</sup> Respondent and the Respondent’s husbands. They are of the view that in the same manner profits were shared, liabilities should be shared.

8. From the submissions made before me, it is apparent from the letter from the Department of Registrar General, Universal Central Academy was registered on 28<sup>th</sup> February 1977 and Registration No. given was BN71075, the name of the Proprietor was given as Augustine Kiarie Githae husband to Flora Njeri Kiarie (now deceased). Before his death, Augustine Kiarie Githae had written a statement in this case stating that this college was established in 1964 1<sup>st</sup> September and the Directors were Christopher Kariuki Mureithi, Fowas Ndungu, James Muchiri Chege and Augustine Kiarie Githae. He had annexed a list of documents showing minutes and occurrence book in respect of the operation of the National College. These are dated 5<sup>th</sup> July 201.

9. Minutes of a meeting held on 3.1.1965 show the above 4 mentioned in a meeting termed “Partners meeting”. The minutes are signed by all the 4 on 3.1.1965.

10. There is another meeting held on 10/2/1965 where all the 4 were present and their deliberations penned down.

11. There are a series of meetings held subsequently on 19.4.1966 and 2.4.1972 and all these meetings are attended by the 4 named ‘Partners’ and also signed accordingly.

12. After 1972, there are no minutes annexed. It means that what existed prior to 1977 did not progress successfully hence the now new registration by Augustine Kiarie in 1977 as a sole proprietor for Universal Central Academy and he confirmed running this institution alone.

13. On 11-11-2008, there is annexed a sale agreement signed by 1<sup>st</sup> and 2<sup>nd</sup> Respondents as widows and personal representation of the deceased Christopher Kariuki Mureithi and Fowas Ndungu with Augustine Kiarie, selling parcel No. 4953/968 on LR 23189 with its developments. The land was sold to liquid cash limited for 26,750,000. The agreement is signed by 1<sup>st</sup> and 2<sup>nd</sup> Respondent an Augustine Kiarie and the 3<sup>rd</sup> Respondents herein avers that the proceeds of the sale were divided amongst all the three of them.

14. The 3<sup>rd</sup> Respondent contends that since 1<sup>st</sup> and 2<sup>nd</sup> Respondent shared in proceeds of the sale of the land, they should share in the liabilities too.

15. Having considered the above facts, I will now turn to the law. The issue is whether there was a

partnership between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, all the Respondents being administrators of their late husbands' estate.

16. A partnership is defined in Blacks Law Dictionary 9<sup>th</sup> Edition at page 1230 as follows:

***“A Voluntary Association of two or more persons who jointly own and carry on a business for profit”***

17. At page 1229, a partner is defined as:

***1) “One who shares or takes part with another, especially in a venture with shared benefits and shared risks, an associate or college;***

***2) One or two or more persons who jointly own and carry on a business for profit ...”.***

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have cited **Jane Wanja Gahiengo vs. David Wanjohi Kamau & Gerald Maina Kagwanyo CA No. 98/2008, Visram, Koome & Odek JJA**; where the learned Judge in upholding the judgement and findings of the High Court (J. Kimaru) found that a partnership as defined by Halsburys Laws of England 4<sup>th</sup> Edition (Re issue) Vol. 35 at paragraph 2 as follows:-

***“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 as 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”.***

19. The Learned Judges went on to cite Section 4 of the Partnership Act (repealed) which provides parameters to aid in determining whether a partnership does or does not exist. There are the parameters:

***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 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.”*

20. In **J. K. Kinoti vs. G. J. Kibanga C.A No. 343 of 2010** also confirmed the position that conduct of parties to a business determine whether there exists a partnership.

21. Having considered the law as it is, it is then for this Court to determine whether there existed a partnership between the 3 Respondents. I have already referred to their initial meetings way back in 1964 when they agreed to form a partnership. The minutes read as follows:

*“The College opened on 1<sup>st</sup> September, 1964 in the Plot No. 597/5 Thika township in the Sixth Shop of the building at the rent of 400/= per month.*

-----  
-----

*Mr. J. P. Muchiri .... He aided the business with:*

- 1) Blue table*
- 2) Type writer*
- 3) Record player*

*Mr. F. Ndungu with whom I started having arrangements as early as in June 1964 .... I had to take him at first as my senior employee for book-keeping but owing to his patience and organisation as this 3<sup>rd</sup> day of January 1965 to my discretion I believe he should join in the partnership of the business .....no material or financial gain to this day.*

*Mr. A. K. Githae ..... I have contributed 863/90 shillings. Material contribution:*

*Two basins*

*1 blanket*

*1 folding bed*

*1 table and three chairs*

*Stools*

*Motor cycle KGJ 120 BSA 350*

*Opening account of the business shall have three different joint Accounts:*

- 1) Post Office Savings Account*
- 2) Current Account (Standard Bank)*
- 3) Savings Account (Barclays Bank)*

*The Accounts shall have the title of THE NATIONAL GENERAL SERVICES*

*P.O. BOX 558, THIKA*

*The initials of the drawers shall be:*

*1) Post Office Account - M. C Kariuki*

*J. P. Muchiri*

*2) Current Account – F. Ndungu*

*J. P. Muchiri*

*3) Savings Account – A. K. Githae*

*M. C. Kariuki*

*No withdrawal shall be done by any of the two initiate employees unless with consent of any three of the partners”*

*From these minutes and conduct of the ‘Partners’ present namely:*

*A. Kiarie Githae*

*J. P. Muchiri Chege*

*M.C. Kariuki*

*F. Ndungu Gatimu*

*The aim was to run a partnership.*

22. On 10.2.1965, the 4 partners in a meeting recommended that Mr. M.C. Kariuki be recommended as the Manager of the business but the partnership was to remain the same. The partners continued to share profits as per the minutes of 19/4/1966. There is no indication as to when this partnership was dissolved but in 1977 Mr. Kiarie Githae is registered sole proprietor of this same business.

23. The business seemed to have grown because we later see the 3 gentlemen owning land LN 4953/968 Thika Municipality. This land is sold on 11.11.2008 and sale agreement is signed by 3 Respondents.

24. Looking at the conduct of the parties herein, they seem to have had a silent understanding that the business was for the three of them but was run by Githae as the dormant/active partner. Being a man of his word in 2008, he didn't do anything for the detriment of the widows of his co-partners and that is why they shared the sale proceeds from the land where this National College with publicity as Universal Central Academy was being run.

25. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent agreed to share in the proceeds of this land – shared in the profit but now do not wish to share in the liabilities. It is my finding that their conduct shows a joint venture where they benefited from the proceeds of the sale of land and so should also share in the liabilities if any.

26. In that case, this case will proceed against all the three Respondents.

Read in open Court this **29<sup>th</sup> day of June, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

George Gwako holding brief for Ngunjiri for Claimant

No appearance for the Respondent