**Kinini v Kiganjo**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 4 December 1974

**Case Number:** 43/1974 (2/75)

**Before:** Spry Ag P, Law Ag V-P and Musoke JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Chanan Singh, J

*[1] Partnership – Action – Receiver – May be appointed even when partnership denied – Principles.*

*[2] Equity – Receiver of partnership property – Principles on which appointment made.*

**JUDGMENT**

The following considered judgments were read. **Law Ag V-P:** The respondent to this appeal is the plaintiff in a suit instituted by plaint filed in the High Court of Kenya in which he claims against the defendant, who is the appellant in this appeal, an order for the dissolution of a partnership which is alleged to exist between them, that accounts to be taken and judgment entered for such amount as may be found due to him, and other relief. The appellant by his defence denied the existence of a partnership. He admitted that there were negotiations which subsequently came to nothing between the parties who contemplated entering into a single joint venture for the painting of a particular house, and that in the course of those negotiations the respondent brought to the appellant’s shop a quantity of paint and contributed a sum of Shs. 500/- which was subsequently refunded to him. The parties on 2 May 1973, had entered into a written agreement, signed by both of them, in which the respondent’s contribution is described as “67 gallons and 14 half-litres of paint . . . worth Shs. 2,410/-”. This document, on which the respondent relies as evidence of the alleged partnership, was exhibited as an annexure to an affidavit sworn by him in the interlocutory proceedings out of which this appeal arises. In that affidavit the respondent asserted that in fact he contributed Shs. 2,410/- in cash and not in kind, and this assertion is repeated in the plaint. As soon as the pleadings closed, the respondent applied to the High Court by notice of motion for a receiver to be appointed, under O. 40, r. 1 of the Civil Procedure (Revised) Rules, of the property of the alleged partnership. Affidavits were filed on both sides and the judge heard arguments addressed to him by counsel for both parties. This took a full day, at the end of which, after a short adjournment, the judge gave his decision. He correctly directed himself that, where the existence of a partnership is denied, the court will not normally appoint a receiver. In this case, however, as the suit might not be tried for a long time, the judge decided to look at the facts placed before him with a view to seeing whether they proved a partnership. After reviewing those facts, he held that it was clear that there was a partnership, that its existence was denied without cause, and he ordered that a named receiver be appointed to avoid damage to the business and he gave the respondent the costs of the application. The appellant now appeals. Mr. Mandavia for the appellant submitted that the judge erred in making express findings as to the existence of a partnership and the extent of the partners’ shares on the strength only of affidavit evidence. He relied on such old cases as *Rock v. Mathews* (1848), 64 E.R. 102 and *Norway v. Rowe* (1812), 34 E.R. 472 in support of his submissions that a denial of partnership precludes the appointment of a receiver, and that questions of title should not be tried on affidavits. He also relied on a dictum in Halsbury’s Laws of England, 3rd Edn., Vol. 32 at p. 403 that a court does not grant a receiver on an interlocutory application if it can only do so by prejudging the action itself. Mr. Gautama for the respondent drew our attention to the case of *Floydd v. Cheney*, [1970] Ch. 602 in which Megarry, J. reviewed the law and authorities on this point, and came out in favour of the opinion expressed by Long-Innes, J. in the Australian case of *Tate v. Barry* (1928), 28 S.R. (N.S.W.) 380: “. . . that the denial of an alleged partnership is merely one of the factors to be taken into consideration in each case, and does not, of itself, debar the court from appointing a receiver until that issue is determined.” I respectfully agree. But that issue – whether or not a partnership exists – is one for decision in the suit itself, in the light of all the evidence, and should not be decided, as appears to have happened in this case, in interlocutory proceedings when part only of the evidence is before the court, and that in the form of affidavit evidence. To decide the issue at that stage is to prejudge the main issue in the suit, and I have no doubt that in saying that he should look at the facts to see whether a partnership existed, and in holding that clearly it did, the judge misdirected himself. The correct test at an interlocutory stage is for the judge to ask himself whether a reasonable probability has been established that a partnership exists, or, in the words of Megarry, J. in *Floydd v. Cheney* (*supra*): “. . . that there is a strong *prima facie* case for the existence of a partnership,” and this court should, in my view, examine the position in this case in that light. The evidence as to the existence or not of a partnership available to the judge was, in my view, vague and contradictory in the extreme. The signed agreement to which I referred earlier was drawn up by laymen in the Kikuyu language and is capable of a number of different interpretations. It could refer to a partnership or to a single venture. It conflicts with the plaint as to whether the respondent’s contribution was in cash or in goods. The affidavits show that the parties disagree on almost every point. I do not see how any judge, on a proper direction, could have held on the evidence available that a reasonable probability existed, or that there was a strong *prima facie* case for the existence of a partnership. On that ground alone, I am of opinion that the application for a receiver should have been dismissed. This is sufficient to dispose of this appeal, which in my view must succeed. It is accordingly unnecessary to deal with the other matters raised by Mr. Mandavia, such as the lack of evidence that the assets of the partnership – if one is in due course found to exist – are in jeopardy. The respondent’s case is that his cash contribution was converted into paint, the appellant has always contended that this paint was available to the respondent whenever he chose to collect it, until the receiver was appointed. Presumably that asset is still intact, unless the receiver has disposed of it. Whatever the true position, I can see no evidence of irreparable damage. I would allow this appeal, and set aside the decision appealed from. I would give the appellant the costs of the proceedings in the High Court. As he was given leave to appeal in forma pauperis, I would make no order for costs on this appeal.

**Spry Ag P:** I agree with the judgment of Law, Ag. V.-P. I would only add one comment. In his notice of motion, the respondent sought the appointment of a receiver and asked that he be given power to sell the property alleged to be partnership property. The judge appointed a receiver, but gave him no power of sale. None the less, a formal order was extracted, which contained a power of sale. It appears that this was not done with the consent of the appellant. This was improper. The formal order must accord with the judge’s decision. The inference from that decision was that the power of sale had been refused. If it was thought that it had inadvertently been omitted, an application could have been made to the judge under the slip rule. There will be an order in the terms proposed by Law, Ag. V.-P.

**Musoke JA:** I have had the advantage of reading the judgment in draft of the Acting Vice-President. I agree and have nothing to add.

*Appeal allowed.*

For the appellant:

*GR Mandavia*

For the respondent:

*SC Gautama*