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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT No. 579 OF 2012**

ABUBAKER WALAKIRA ::: PLAINTIFF

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VERSUS

ABUBAKER WALUSIMBI ::: DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

JUDGMENT

By a Deed of Partnership dated 23rd July, 2008, the plaintiff and the defendant entered into a business association wherein the plaintiff offered his land comprised in Busiro Block 438 Plot 1273 at Abayita Ababiri, for the partnership business and it was agreed that the defendant was to put up developments on the said land for purposes of the business. It was further agreed that the plaintiff was entitled to 40% shareholding while the defendant was entitled to 60% shareholding in the business.

20 In 2012, the plaintiff brought this suit against the defendant seeking for the dissolution of the partnership, for the defendant to render accounts in respect of the business, an order for valuation of the business and payment of the profits apparently due to the plaintiff, a permanent injunction restraining the defendant from interference with the partnership property, general damages and costs of the suit. It was the plaintiff’s case that the defendant had breached his obligations under
25 the Partnership Deed, had taken over sole management of the business, banked all the profits on his personal account and failed to pay the plaintiff his entitlements of the proceeds from the business.

On the other hand, the defendant filed a written statement of defence and contended that the Partnership agreement was breached by the plaintiff when he refused to vacate the land in order
30 to pave way for development as had been agreed and that ever since the establishment of the Partnership, the plaintiff was in sole management and control of the business. Further, that

sometime in March 2012, the plaintiff and the defendant mutually agreed to cease the operation of the Partnership and the same was replaced by Jazbridge Hotel Limited which took over the ownership and management of the Partnership business and property to the present day.

At the scheduling conference, the following issues were framed for determination;

- 5 1. *Whether in the circumstances, the Partnership still exists and is operational.*
2. *Whether there was a breach of the terms of the Partnership Deed by any of the parties.*
3. *What remedies are available to the parties.*

ISSUE 1: ***Whether in the circumstances, the Partnership still exists and is operational.***

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The plaintiff (PW1) testified that some time in 2007, the defendant approached him with the view of doing hotel business with him on his land comprised in Busiro Block 439 Plot 1273, Abayita Ababiri. Further, that the defendant informed him of his personal Advocate Scola Nafuna (DW3) who was to put their intentions in writing. On the 23rd July, 2008, and in the presence of the said Advocate, the plaintiff and the defendant executed a Partnership Deed. It was his testimony that he ceded a considerable portion of his land to the business and would occasionally supervise the activities owned and undertaken by the business.

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However, that the business, and in particular the defendant were not paying him any entitlements for quite a long time and when he raised concerns about the nonpayment, the defendant became suspicious and began treating him as a non member/partner. It was his testimony that the business was currently managed by the defendant and his family members to the plaintiff's exclusion and detriment.

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On the other hand, the defendant (DW1) testified that in 2007, his wife Harjara Walusimbi (DW2) informed him that her mother and uncle (the plaintiff) had issues concerning their kibanja in Kitubula LC1, Abayita Ababiri which they had acquired through inheritance. Further, that DW2 informed him that her mother and the plaintiff needed his assistance in their intentions of purchasing a Mailo interest of their Kibanja and a meeting was arranged. Upon the discussions, it was agreed that they should start a business of operating a restaurant/ hotel / recreational services

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on the defendant's land that was to be regularized into Mailo and that the subsequent negotiations and understandings would be between the plaintiff and the defendant.

For purposes of formalizing their intentions, that the plaintiff and defendant approached Scola Nafuna of Nafuna & Co. Advocates and informed her of their intentions as had been previously
5 agreed. Subsequently, a Partnership Deed was executed between the parties and thereafter business was commenced.

It was the defendant's further testimony that upon completion of a building and pending completion of other facilities that were then underway, the plaintiff proposed a meeting to consider transformation of the Partnership into a Company. Further, that upon the request of the
10 plaintiff, the defendant paid DW2's mother UGX 15,000,000/= and she forfeited her share in the Partnership to the defendant. The defendant testified that the plaintiff proposed that a company in the names of Jazbridge Hotel Limited be incorporated to take over the business and all developments, which was done. It was his contention that upon incorporation of the company,
15 the Partnership was treated by both the plaintiff and the defendant as having ceased to exist and no further business was conducted under the Partnership.

DW3, Scola Nafuna, was the Advocate who drafted the Partnership Deed in the present matter and witnessed the execution of the same. It was her testimony that in the year 2011, the plaintiff and the defendant returned to her chambers and informed her that they had obtained a certificate
20 of title to the land and commenced business thereafter, but that they had conceived the idea of incorporating a company under the names Jazbridge Hotel Ltd and then cease to operate as a partnership. They apparently informed her that after the incorporation of the company, the title to the subject land would be transferred into the name of the company and the entire business would then be operated under the company name.

It was her further testimony that following the above instructions, she prepared the Memorandum
25 and Articles of Association, and upon their execution, Jazbridge Hotel Limited was incorporated. She indicated that the plaintiff's shares constituted 35% in the land and 25 shares in the Company.

Counsel for either party filed written submissions in support of and in opposition of the claim respectively.

Counsel for the plaintiff submitted that there was no express documentation signed by the parties to signify dissolution of the partnership relationship between the plaintiff and the defendant. Counsel contended that the plaintiff's and DW3's evidence that the parties ceased to carry on business at the incorporation of Jazzbridge Hotel Limited was oral evidence which was intended
5 to mislead Court on the status of the partnership. Further, that the dealings between the plaintiff and the defendant were usually reduced into writing as evidenced by the Partnership Deed and in that regard, that no oral evidence could be adduced to vary or contradict the clear terms of the Partnership Deed. Counsel relied on ***Golf View Inn (U) Ltd Versus Barclays Bank (U) Ltd, High Court Civil Suit No. 358 of 2009***, to support the above submission.

10 Counsel further submitted that the defendant's evidence fell short of the facts to prove dissolution of the partnership. He made reference to the evidence of DW3 in cross examination that she had never filed a notice of cessation of business on behalf of the plaintiff and the defendant. Counsel was of the view that in the absence of a formal minute authorizing the transfer of the partnership business and operations to Jazzbridge Hotel Ltd, it was improper to
15 allege that such business and operations was ever transferred.

It was Counsel's further submission that where an individual ceases to carry on business, it was law that they ought to notify the Registrar of Companies by notice and that then the Registrar could then remove the name of the business from the Register in accordance with **Section 14** of the **Business Names Registration Act**. Counsel submitted that the above was not done in the
20 present case.

Further, that the dealings of Jazzbridge Hotel Limited have no bearing on the partnership business and that the shareholders in both associations are distinct. Further, that the defendant was a non member of Jazzbridge Hotel Limited and was therefore estopped from bringing any matters concerning the company to Court.

25 In reply, Counsel for the defendant cited **Section 2(1)** of the **Partnerships Act** where a partnership is defined as the relationship which subsists between or among persons not exceeding twenty in number, who carry on a business in common with a view to making profit. Counsel submitted that in the circumstances of this case, there was no longer an existing partnership in existence or in operation. Counsel contended that the plaintiff's contention that

the partnership was still in existence and operational was premised on the fact that a Partnership Deed was executed and that the plaintiff contributed a portion of his land and made financial contributions. Counsel submitted that existence of a partnership may be express or implied from the conduct of the parties, and not necessarily existence of a partnership deed.

- 5 It was Counsel's further submission that the Partnership Deed did not prevent the plaintiff and the defendant from making arrangements that would by conduct terminate the partnership and give rise to a new business relationship.

In regard to the submission of Counsel for the plaintiff that oral evidence could not be admitted considering that there was a Partnership Deed, Counsel submitted that what was in dispute was
10 the subsequent arrangements between the parties and not the contents of the Partnership Deed. Further, that the evidence in issue should have been objected to at the time of trial and not in the course of submissions. Counsel contended that the existence and operation of the partnership was not evidenced by mere production of a partnership deed and the reading of the contents thereof; the plaintiff had the duty to prove that there was a joint business being run in common among the
15 partners with a view of making profits. Further, that the plaintiff had admitted that the business on the land was being run under the name Jazbridge Hotel Limited in which the plaintiff was a shareholder.

Counsel contended that while Counsel for the plaintiff had cited **Section 14** of the **Business Names Registration Act** for the contention that in case an individual ceases to carry on business
20 they must notify the Registrar by notice, in the present case, there was no proof that there was a business name registered under which the business was being carried out. In that regard, that there was no need to file a notice of cessation of business. Counsel relied on *Proline Soccer Academy Vs Lawrence Mulindwa & Others High Court Miscellaneous Application No. 459 of 2009*, and submitted that the plaintiff was incapable of founding any claim on the Partnership
25 Deed.

In rejoinder, Counsel for the plaintiff submitted that the submission of Counsel for the defendant that the parole evidence rule did not apply to the Partnership Deed herein and that a Partnership was not only evidenced by mere production of a Partnership Deed was legally

untenable. Further, that the argument that the partnership property was transferred to Jazzbridge Hotel Limited was not supported by evidence and was also legally untenable.

I have carefully considered the evidence adduced by the parties, the law and the submissions of Counsel in regard to this issue.

5 It is not in dispute that the plaintiff and the defendant, with a view carrying on business jointly, executed a Partnership Deed dated 23rd July, 2008. While the plaintiff contends that the partnership is still in existence and business is still being carried on using partnership property, the defendant contends that the partnership business, on the agreement of both the plaintiff and the defendant, was brought to an end and a company in the names of Jazzbridge Hotel Limited
10 was incorporated and it took over the partnership business and all its developments. The defendant contends that the partnership ceased to exist then.

It is also apparent that the Partnership Deed did not have a clause in relation to the dissolution or mode of dissolution of the partnership. Counsel for the plaintiff submitted that in view of that and considering that there was no express provision for dissolution of the Partnership, no oral
15 evidence could be admitted to vary or contradict the clear terms of the Partnership Deed.

According to **Section 92** of the **Evidence Act**, a contract in form of a document and any other matter required by law to be in form of a document has to be proved by production of that document itself, and that no extrinsic evidence shall be given in proof of its contents. In ***General Industries (U) Ltd Versus Non. Performing Assets Recovery Trust (Supreme Court Civil***
20 ***Appeal No. 5 of 1998***, Mulenga, JSC as he then was, stated as follows:

“The main rationale behind the exclusion rule in s. 91, is, stated in PHIPSON ON EVIDENCE, (10th Ed. At p.720 paragraph 1782,): to be:

*‘that when the parties have deliberately put their agreement into writing it is conclusively presumed that they intend the writing to form a full and final statement of their
25 intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.*

The rule is founded on a presumption that what is written in the contract reflects fully what the parties agreed to be bound by. It seeks to protect those agreed terms from unwarranted alteration and unnecessary disputes”

In the present case, the facts as stated by the defendant indicate that the partnership relationship was ended years after the execution of the Partnership Deed. The Partnership Deed defined the relationship between the parties but did not provide for the event of the partnership coming to an end. I agree with the submission of Counsel for the defendant that in such an event, the subsequent existence of the partnership could not be perceived from the Partnership Deed but from extrinsic evidence and from the conduct of the parties.

10 The definition of a partnership in the **Partnerships Act** is instructive in determining whether a partnership still subsists between the parties. **Section 2(1)** of the Act states as follows;

“Subject to subsection (2), a partnership is the relationship which subsists between or among persons, not exceeding twenty in number, who carry on a business in common with a view to making profit”.

15 It appears to me, from the above, that in order to say that a partnership is in existence and operational, there must be business being carried on by the partners. **David.J Bakibinga** in his **Partnership Law in Uganda**, states as follows, and I agree:

“The High Court of Nothern Nigeria (as it then was) held that no partnership existed between the parties. The court further stated;

20 *... the existence of partnership depends on the carrying on of business in partnership and not on the agreement to form a partnership ... if the parties have begun to carry on business (though prematurely) they will be regarded as partners.*

*In similar tone, Jones S.P.J. thus observed in **Bank of the North Vs Dabare 1976 NCLR 448** (High Court of Kano) (see Bakibinga supra pg 37).*

25 *The question of whether a partnership exists is one of mixed law and fact. The law is contained in ss.1 and 2 of the Partnership Act, 1890 of the United Kingdom. The facts are*

the common business activities of the parties as provided by their words and actions including if one exists, a written partnership agreement”

It was the evidence of both the plaintiff and the defendant that upon the execution of the Partnership Deed, the business was commenced. However, the defendant led evidence that the parties ceased to carry on business upon incorporating a company that took on all the businesses of the partnership. It appears to me that upon incorporation of Jazzbridge Hotel Limited, business started to be carried on under the name Jazzbridge. The documents and receipts tendered in evidence all bear the name Jazzbridge.

I have taken into consideration the submission raised for the plaintiff that a company is a separate legal entity and that the defendant could not bring any matters which concerned the Company to court. However, I find that the existence of the company at the location where the partnership business was being carried on is relevant in determining the existence and operations of the partnership.

There is no proof that the partnership had registered a business name so as to be compelled to file a notice of cessation of business with the Registrar, in accordance with **Section 14** of the **Business Names Registration Act**. Even then, the wording of the said section does not imply that in case the parties do not file a notice of cessation of business, then the business is to be presumed as being in existence even when it was ended by the parties.

It is my finding that in the circumstances of this case, the plaintiff and the defendant ceased to carry on business under the partnership.

This issue is therefore answered in the negative.

ISSUE 2: *Whether there was a breach of the terms of the Partnership Deed by any of the parties.*

It was the plaintiff’s evidence that the Partnership Deed was explicit on the obligations of either of the parties and as to what each party had contributed towards the business and the shareholding thereof. Further, that he would occasionally supervise the activities owned and undertaken by the business, but all matters pertaining to cash collections and expenses were duly taken over by the defendant through his authorized agents. It was his further testimony that the

business, and in particular the defendant, were not paying him any entitlements yet the business was making profit; upon raising those concerns to the defendant, the defendant started treating him as a non member/partner of the business.

On the other hand, the defendant (DW1) testified that upon commencing business, he paid for the regularization of the kibanja and obtained a certificate of title to the land which was registered in his names and in the names of the plaintiff as tenants in common. However, that the plaintiff retrieved the certificate of title from the office at the business premises and retained the same. Further, that the defendant, with the knowledge of the plaintiff, sourced for funds and the money was used to enable construction and developments on the land. The plaintiff was supposed to vacate the entire piece of land to enable expansion of the business, but had refused to do so, to date. It was his further testimony that the plaintiff had not disclosed the liabilities incurred by the partnership before the cessation of business and those incurred by Jazzbridge Ltd.

In his submissions, Counsel for the plaintiff submitted that the evidence on record indicated that the defendant failed to pay the plaintiff his due entitlements or profits as per the Partnership Deed. Further, that the plaintiff was excluded from the management of the business and was being treated as a non member/partner by the defendant.

Counsel cited *DFCU Bank Ltd Versus Ndibaza Naima & Anor, Civil Suit No. 80 of 2012*, where it was held that breach of contract arises where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract. Counsel contended that based on the breaches committed by the defendant which the plaintiff had stated in his evidence, this court ought to answer this issue in the affirmative.

It was Counsel's further submission that the defendant was in charge of management of the business and the Company, and that it was on his personal account that proceeds of the business were deposited yet he did not bring any proof to assist court to ascertain the expenditures and profits of the business or any payments made to the plaintiff as was his entitlement. Further, that the allegations that the plaintiff had refused to vacate the land were just an afterthought by the defendant to cover up his breaches.

In reply, Counsel for the defendant submitted that the plaintiff had not demonstrated what the respective obligations of the parties were and whether he fully complied with his part of the bargain. Counsel further submitted that a party could not seek to enforce contractual terms against another where he had failed to perform the condition precedent that would facilitate
5 performance by the other party. Further, that it would be unfair for the plaintiff to be rewarded for his breach of contract by being paid profits from a contract which he had frustrated.

In regard to the above, Counsel made reference to the defendant's evidence that the plaintiff had refused to give vacant possession to enable expansion of the business and that the defendant had mismanaged and failed to account for profits made by the partnership when he was managing the
10 business.

I have considered the evidence on record and the submissions of Counsel in relation to this issue.

The relationship between the plaintiff and the defendant was stipulated under a Partnership Deed. I agree with submission of Counsel for the plaintiff that a partnership deed, like any other contract creates contractual obligations on the parties.

15 In the present matter, obligations of each party were stated under the Partnership Deed, and these included:

1. In consideration of the defendant herein developing the land, the plaintiff agreed to enter into a tenancy in common with the defendant for the land. (Clause 1.0).
2. The defendant would develop the land by constructing on the land and by demolishing,
20 rebuilding or altering the existing houses/ buildings on the land. (Clause 2.3).
3. The plaintiff would upon the execution of the Partnership Deed deliver vacant and undisputed possession of the land to the defendant. (Clause 6.0).

From the evidence on record, the title to the land was acquired and the plaintiff and defendant were registered as tenants in common on the same. It also appears that indeed the defendant put
25 up a building on the land and other structures. However, the plaintiff did not deny that he did not vacate part of the land and he stays there with his family to date. During cross examination, he denied knowledge of the clause that required him to vacate the land. However, I do not find him truthful in that regard. Taking into consideration the circumstances leading to the entering into

the partnership, the plaintiff was at all material times aware that he had the obligation of giving vacant possession of the entire piece of land in order to allow the business to be expanded. I find that in that regard, the plaintiff breached his promise to deliver vacant possession of the land entirely as was his promise under the agreement.

5 In addition to the above, it is obvious that the parties entered the above agreement on the belief that they would make profits, and the plaintiff was entitled to 40% while the defendant was entitled to 60% of the profits. The plaintiff contended that in breach of his obligations under the agreement, the defendant took on complete management of the business while cutting out the plaintiff and that he was denied his entitlement to his 40% share of the profits under the business
10 by the defendant.

First, the plaintiff did not challenge the defendant's evidence that the parties intention to open a joint account was frustrated by the fact that the plaintiff's passport had expired and that he did not have a valid identity card and other requirements that were required for the purpose. I have also looked at the deposit slips for money banked on the defendant's account apparently as
15 proceeds from the business and all deposits were made by the plaintiff. Further, he testified in cross examination that the defendant would give him his ATM card to make withdrawals from the account. He testified as follows:

*“What shows that that money used to be deposited I have the payslips and I used to deposit myself in Orient Bank. When time reached to withdraw money he gave me the
20 ATM and directed me to get money and use it. But I don't want him to say that I was the manager, the manager we had was called Namungala Samuel. My work was to deposit the money in the bank and other duties assigned to me. And he gave me the ATM to be withdrawing money from the account for use.”*

In view of the above, I am not convinced that the plaintiff was left out of the day today
25 management of the business and that he did not share in the profits of the business.

I find that the plaintiff had access to the funds on the account and he knew how the money was being utilized. It appears from the documents on record that even the payment of bills and other expenses in the business were all being carried out by the plaintiff. The defendant was also in

control of the business and funds were being deposited on his personal account because the business did not have an account of its own.

In view of the above, I find that the plaintiff has failed to prove that the defendant was in breach of his obligations under the partnership before it ceased to carry on business.

5 This issue is, therefore, answered in the negative.

ISSUE 3: What remedies are available to the parties.

The plaintiff sought for this Court to make the following orders:

1. An order for dissolution of the partnership,
2. An order to render an account in respect of the business from inception to date.
- 10 3. An order for payment of the plaintiff's due share of the profits of the partnership,
4. An order for valuation of the business with the view of splitting the same on the agreed proportion.
5. A permanent injunction restraining the defendant from any interference with the partnership property, business and accounts.
- 15 6. Appointment of an independent auditor to enable the auditing of the business accounts from the date of inception of the business to date.
7. General damages.

Counsel for the plaintiff submitted that the partnership had never been dissolved and that the Partnership Deed did not provide for a termination clause. In Counsel's view, the dissolution of
20 the Partnership was left in this Court's discretion, pursuant to **Section 37 of the Partnerships Act**. Further, that both the plaintiff and the defendant had indicated that they were no longer interested in working together.

Counsel further submitted that a valuation of the business by a competent and qualified valuer ought to be carried out to ascertain the value of the business. Further, that the same should be
25 divided into proportions of 40% and 60% to the plaintiff and the defendant respectively, and that the land should be valued and divided into equal shares of 50 % for each party. It was Counsel's further submission that the defendant ought to account for proceeds of the business. Counsel also prayed for the plaintiff to be awarded general damages.

In reply, Counsel for the defendant submitted that the order sought for the dissolution of the partnership was academic because there was no partnership in existence for dissolution.

Further, that while the plaintiff had prayed for incidental remedies like accountability, and the sharing of property, Counsel submitted that entitlement to relief would arise if the plaintiff had
5 proved that he duly performed his part of the contract. Counsel contended that in the present case, the plaintiff had not granted vacant possession of the land, and thus, he was not entitled to compensation.

On the claim for general damages, Counsel for defendant submitted that the same should not be granted because no evidence had been adduced to prove the same. Counsel relied on **Bishanga**
10 **Silagi Vs Bataha Joselin, High Court Civil Sui No.15 of 2011**, where the court cited the decision in **Bonnarm Carter Versus Hyde Park Hotel Ltd (1948) 64 TLR 17745**, where it was held as follows:

*“On the question of damages, I am left in an unsatisfactory position. The plaintiff must understand that if they bring an action for damages, it is for them to prove their damages.
15 It is not enough to write down the particulars and so to speak throw them at the head of the court saying: This is what I lost; I ask court to give me these damages. They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory.”*

Counsel contended that the present case was the same as the above because they plaintiff had merely prayed for general damages without giving proof for the same.

20 I have already made a finding above that the partnership between the plaintiff and the defendant ceased to exist on the agreement of the parties and upon incorporation of Jazzbridge Hotel Limited. In that regard, no order can be made for the dissolution of the partnership. I also made a finding above that both the plaintiff and the defendant were actively involved in the running of the business. Therefore, I shall not make an order for the defendant to render accounts or to pay
25 any monies to the defendant as his entitlement to profits which were apparently not paid to him by the defendant during the pendency of the business.

However, it appears to me that before the parties ceased to carry on business under the partnership, there was some property that was originally brought into the business. The main

major piece of property was the piece of land which was originally owned by the plaintiff but was subsequently registered into the names of both the plaintiff and the defendant as tenants in common. The Partnership deed stipulated that the land was to be held by the parties as equal tenants in common with each party entitled to 50%.

5 While it is apparent that Jazzbridge Hotel Limited was operating business on land on the said property, there is no proof that the title was ever transferred from the plaintiff and the defendant's names to Jazzbridge Hotel Limited. In that regard, the law presumes that the property still belongs to the said tenants in common.

I have considered the defendant's arguments that when the parties had perceived the idea of
10 incorporating Jazzbridge Hotel Limited, the plaintiff and his sister convinced him to pay UGX 15,000,000/= in consideration for further shares in the business. However, there is no proof of such dealing having been made to alter the stipulations in the Partnership Deed with regard to share holding.

With regard to the adjoining land which was apparently acquired upon incorporation of
15 Jazzbridge Hotel Limited and was previously owned by a one Natukunda having purchased the same from the plaintiff and his sister but without completing payment. I find that this property was not acquired in the course of the partnership business because it had already ceased to exist.

It is my finding that the plaintiff and the defendant are each entitled to a 50% share in the land that was owned in common. In his witness statement, the plaintiff prayed that the portion of land
20 where his house is situate and where he has been staying should be left in his possession. In the circumstances of this case, I order that an independent valuer agreeable to both the plaintiff and the defendant should be hired at the expense of both parties to value the said property so that each party can get an equal share in the property thereof. I also order that the plaintiff shall retain part of the land where he is resident right now and the defendant shall be entitled to take
25 the part of the land with a building where the hotel business was being carried on.

For avoidance of doubt, the property that originally belonged to Natukunda was not part of partnership property and is not subject for sharing by the parties.

In conclusion, this suit is partially allowed. Considering that the matter is between close family members and also taking into account that the suit has been partly allowed, I find it fair and in the interests of justice that each party should bear their own costs.

I so order.

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B. Kainamura

Judge

10 **10.10.2016**