



Church Army in East Africa Academy & 2 others v Visions People Mission Limited (Civil Appeal 37 of 2012) [2022] KEHC 13957 (KLR) (Civ) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 13957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 37 OF 2012
JK SERGON, J
OCTOBER 19, 2022**

BETWEEN

**CHURCH ARMY IN EAST AFRICA ACADEMY 1ST APPELLANT
STEPHEN KAGUNDA ALEX 2ND APPELLANT
RICHARD MAYABI 3RD APPELLANT**

AND

VISIONS PEOPLE MISSION LIMITED RESPONDENT

(Being an appeal against the judgment decree of Hon. L. M. Njora (Mr.) Principal Magistrate, dated and delivered on 27th January 2012 in Milimani CMCC No. 8533 of 2009)

JUDGMENT

1. The respondent who was the plaintiff in CMCC no 8533 of 2011 instituted the suit vide against the appellants through an amended plaint dated January 9, 2010 seeking for the sum of Kshs 899,348/= as well as costs of the suit and interests.
2. The respondent pleaded in his plaint that he had lawfully entered into a contract with the appellants in which they hired a bus registration Number KAS xxx M from him for use as a school bus by their Academy known as Church Army Academy.
3. The respondent further pleaded that the said contract provided that the sum of Kshs 140,000/= was to be paid to the plaintiff on or before the September 5, 2009 and the same was paid through a cheque very late on September 18, 2009 in total breach of the contract, subsequently the next payment which was due on or before October 15, 2009 the appellants paid late through a cheque on October 27, 2009 further breaching the said contractual provisions.



4. It was pleaded that the last cheque the appellants paid before unlawfully and unprocedurally terminating the contract was due on November 15, 2009 and the same was paid late on November 25, 2009 and since then no any other payment has ever been made to the respondent.
5. It was also pleaded that on or about December 3, 2009, the 3rd appellant served the respondent with a letter that they have terminated the said agreement/contract, in total disregard to the agreement / contract dated the July 28, 2009 which provided a termination clause that either party can terminate the agreement upon giving the other party a three months' notice or pay the other party three months the amount of lease agreement *in lieu of* notice.
6. The appellants filed their statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 560,000/ = plus costs of the suit and interests.
7. The appellants being aggrieved preferred this appeal and put forward the following grounds:
 - i. That the learned Magistrate erred in law in entering judgment in favour of the respondent against the appellants without having due regard to the pleadings and the evidence before the court.
 - ii. That the learned Magistrate erred in law in apportioning full liability upon the appellants contrary to the evidence led at the trial.
 - iii. That the learned Magistrate erred in law in failing to find that the 1st appellant was non-suited and had no capacity to sue or be sued.
 - iv. That the learned Magistrate erred in apportioning liability upon the 2nd and 3rd appellants while they were not privy to the hire agreement dated 2 July 28, 2009.
 - v. That the learned Magistrate failed to consider and take into account the appellants had repeatedly sought the respondent to pick the subject hired bus after termination of the contract which overtures were rebuffed by the respondent.
 - vi. That the learned Magistrate failed to appreciate and or consider the implied terms upon which the parties entered into the hire agreement dated July 28, 2009.
 - vii. That the learned Magistrate erred in failing to appreciate that the hired bus was not in a good condition for the purpose for which it was hired.
 - viii. That the learned Magistrate erred in awarding reliefs that were not sought in the re amended plaint.
 - ix. That the learned Magistrate erred in law in awarding costs to the respondent.
 - x. Consequently the learned Magistrate's decision occasioned a miscarriage of justice.
8. On their part, the respondent filed a memorandum of cross-appeal dated February 28, 2012 against the whole of the said judgment and decree on 5 grounds the gist of which is that the learned trial Magistrate erred and:
 - a. Misdirected herself by failing to appreciate the terms of the agreement that was between the plaintiff and the defendant.
 - b. Misdirected herself by failing to appreciate that the defendants did not serve sufficient notice of termination of the agreement on the plaintiff.



- c. Misdirected herself by failing to appreciate that the defendants did not serve sufficient notice of termination of the agreement on the plaintiff.
 - d. Misdirected herself by failing to appreciate that the defendants were liable for the repairs on the bus Registration no KAS xxxM Isuzu.
 - e. Misdirected herself by failing to appreciate the defendant's liability and making an erroneous assessment on the award of damages.
9. The respondent/cross-appellant prayed that the appellants' appeal be dismissed, the cross-appeal be allowed and the whole of the judgment and decree to be set aside and the same be substituted with an order dismissing the respondent's defence and entering judgment for the plaintiff in full as prayed for in the plaint.
 10. The appeal and the cross-appeal were canvassed by way of written submissions which were filed and exchanged between the parties. The appellant's submissions were filed by Ochieng, Onyango, Kibet & Co Advocates while those for the respondents/cross-appellants were so filed by Farrah Munoko & Advocates.
 11. I have also considered the rival written submissions. The issues for determination put forward by both parties revolve around the following issues:
 - a. Whether the appellants were rightfully sued in the honourable trial court
 - b. Whether the contract was validly terminated by the appellants
 - c. Whether there were any implied terms under the contract and whether the respondent breached the same.
 - d. Whether the cross appeal is merited and what other appropriate orders ought to be made by this honourable court.
 12. The appellants submitted that in its amended plaint, the respondent herein stated that the 1st appellant was an educational institution established in Kenya under the auspices of the Church Army in East Africa; as a result, the 1st appellant lacked the legal capacity to be sued because it lacked a separate legal personality endowed with the authority to sue or be sued. It cannot be sued against the 1st appellant since it is not a body corporate nor did it have legal personality.
 13. The appellant relied on the case of *Football Kenya Federation v Kenyan Premier League Limited & 4 others* (2015) eKLR this court cited with approval the case of *Simu Vendors Association, Eritrea Orthodox Church and Macfoy v United Africa Co Ltd* (1961) 3 ALL ER 1169 where it was held that a suit brought by or against a person without legal capacity to be sued is fatally defective.
 14. The respondent on the other hand submitted that DW-2 the headmaster of the 1st appellant stated that the 1st appellant got into an agreement to hire the bus for school purposes but if at all the appellants are contesting their capacity to be sued then how did they have the capacity to enter into a contract with the respondent in the first place.
 15. The respondent further submitted that the above contention was never challenged at the lower court cannot form part of the substantive grounds in the appeal as the appellants had the opportunity to challenge the jurisdiction of the Honourable Trial court as regards misjoinder of parties but comfortably sat on their rights to do so.



16. I am in agreement with the respondent that indeed the appellants did not raise any preliminary objection to this aspect and that they should be estopped from turning back on a contract and allege that they are not duty bound to enforce or comply with the same under the jurisdiction of this court.
17. I also associate myself with the provisions of order 1 rule 3 of the [Civil Procedure Rules 2010](#) which expressly provide that all persons may be joined as defendants against whom any right to relief in respect of or arising out the same act or transaction or series of acts or transactions is alleged to exist or against whom any question of law would arise.
18. On the second issue, the appellants submitted that the agreement alluded to the fact that a proper mechanical service of the bus would be done under the maintenance clause to that effect it was implied that the bus would be delivered in a usable condition. That the respondent failed to respond to queries, which inferred that the respondent chose not disclose the fact that the bus had defects.
19. The respondent has disputed the fact that the appellants utilized the said bus between July 2009-December 2009 and even after the termination period to July 2010 hence they cannot and or are estopped from alleging that the said bus was not road worthy.
20. The respondent draws the attention of this court to the maintenance clause under the contract which expressly under the contract which expressly required that the bus be handled over after valuation and necessary repairs put in place but the appellants who assumed possession of the said bus absent the said valuation report waived their right to enforce this particular clause hence they are estopped by conduct from back tracking on the agreement to claim a breach that was never occasioned by the respondent herein.
21. It is clear that the appellant are wholly estopped from claiming and or alleging fault on the part of the respondent yet they did not bring this alleged fault to the attention of the respondent and neither have they presented to this court nor the trial court any evidence to the contrary.
22. I also rely on the case of [Bamburi Special Products Limited v Remax Construction Limited](#) (2018) eKLR the court defined estoppel by conduct to mean;

“estoppel by conduct, otherwise known as estoppels in pais, arises where a person has by words of conduct made to another clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person understand that a certain representation of fact was intended to be acted upon and the other person has acted upon such representation and thereby altered his position. The estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. Estoppel by conduct is generally regarded as a rule of substantive law....”
23. In the case of [Serah Njeri Mwobi v John Kimani Njoroge](#) (2013) eKLR, where the Court held that:-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”
24. On the third issue, the respondent submitted that the respondent in its re-amended laint dated 9th August, 2009 claimed for the following damages from the appellants being the Kshs 210,000/= for the three months payment in lieu of Notice, Kshs 5,568/= being valuation costs, Kshs 4,000 Insurance costs, Kshs 140,780/= being costs for spare parts & repairing the bus and Kshs 539,000/= payment of



December 2009 – July 2010 when the bus was in the custody of the appellants .the respondents claims the above sums under this head which were equally ignored by the trial magistrate.

25. On this issue, I am in agreement with trial court that since it is very clear in the agreement terms as to who was to do repairs and maintenance and since the respondent was in possession, he should shoulder his costs of repairs and maintenance bearing in mind of the date of 21st July, 2010 when the contract was fully terminated.
26. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
- i. Both the appeal and the cross-appeal are hereby dismissed accordingly;
 - ii. Each party shall bear its own costs of the appeal and the cross-appeal;

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the 1st Appellant

..... for the 2nd Appellant

..... for the 3rd Appellant

.....for the Respondent

