



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 247 OF 2013

NAIROBI CITY COUNCIL.....APPELLANT

- V E R S U S -

PAUL GITAU CHOMBA

VICTOR S. OGETO (Suing as officials and trustee

Of Christ Co-workers Fellowship, Kayole Church.....RESPONDENT

(Being an appeal from the whole judgment of Hon. Principal Magistrate S. Atambo (Ms) delivered on 19th April 2013 in Nairobi CMCC No. 6329 of 2009)

JUDGEMENT

1. Paul Gitau Chomba and Victor S. Ogeto suing in their capacities as officials and trustees of Christ Co-workers Fellowship, Kayole Church, the respondent herein, filed the amended plaint dated 25.9.2008 before the Chief Magistrate's Court, Nairobi against the City Council of Nairobi, the appellant herein. In the aforesaid plaint, the respondent sought for specific performance and or damages for breach of contract plus costs and interest. The appellant filed a defence to deny the respondent's claim. The appellant denied the existence of any contract between it and the respondent. The trial court eventually and after hearing the parties entered judgment in favour of the respondent and against the appellant as prayed in the amended plaint. Being aggrieved, the appellant filed this appeal seeking to impugn the decision.

2. On appeal, the appellant put forward the following grounds in its memorandum:

- 1. THAT the learned magistrate erred in law and in fact in granting the respondent prayers in the amended plaint dated 25th September 2008 without any reason or merit to do so whatsoever.***
- 2. THAT the learned magistrate erred in law and in fact in finding that there was existed a binding contract between the appellant and the respondent.***
- 3. THAT the learned magistrate erred in law and in fact in imposing obligations for specific performance to the appellant who was not privy to the contract between the respondent and the vendor stemming from the sale transaction.***
- 4. THAT the learned trial magistrate erred in law and in fact in finding that a beacon certificate to be a document of ownership conferring rights upon the respondent.***
- 5. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the***

respondent had no locus standi to stake a claim in the manner set out in the suit.

6. THAT the learned trial magistrate was blatantly biased and took favour with the plaintiff's case in unclear circumstances completely unsupported in law.

7. THAT the learned trial magistrate's judgment is personalized and unreasoned to arrive at the decision made.

8. THAT the learned magistrate erred in law and in fact in and did not consider the law and submissions of the defendant and if she had done so she wouldn't have arrived at the decision she made.

9. THAT the learned trial magistrate erred in law and in fact in denying the defendant the right to be heard by refusing to include, consider or allow submissions of the defendant both in writing or oral submissions thereby disenfranchising the defendant.

3. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions.

4. I have re-evaluated the evidence that were presented before the trial court. I have also taken into account the rival written submissions plus the case law relied upon. Though the appellant put forward a total of 9 grounds, the following issues (grounds) commend themselves for the determination of this court.

5. **First, is whether the respondent was deserving of the prayers granted.** It is the appellant's submission that the respondent was and is still not entitled to any damages since there was no privity of contract between the appellant and the respondent. The respondent on the other hand pointed out that it presented evidence showing that the appellant allocated plot no. 40A to one Mary Kaluhi who later sold it to the respondent with the knowledge and concurrence of the appellant. It is argued that the appellant admitted in writing that it made a mistake by later allocating the same plot to Jehovah's Witness church instead of allocating it to the respondent. The respondent further submitted that upon realizing its mistake, the appellant offered the respondent church plots no. 29A, 45 and 45A which again were found to have been earlier allotted to third parties. Having examined the evidence presented before the trial court, it cannot lie in the mouth of the appellant to state that there was no privity of contract. This ground is found to be without merit.

6. **Secondly, is whether the respondent had the requisite locus standi to file the action.** It is the submission of the appellant that the respondent did not tender credible evidence to establish the relationship between Paul Gitau Chomba, Victor Ogeto and Christ Co-workers Fellowship, Kayole Church. It is argued by the appellant that the respondent had failed to produce in evidence the registration documents to prove the respondent's registration status.

7. The respondent urged this court to reject the argument claiming that all relevant and registration documents were tendered in evidence. I have on my part perused the record and it is apparent that the respondent had presented in evidence its certificate of incorporation of the Trust. That piece of evidence clearly established the nexus between the respondent and Paul Gitatu Chomba and Victor Ogeto. Again this ground crumbles. The respondent therefore had the *locus standi* to file the action.

8. **The third issue is whether there existed a binding contract between the respondent and the appellant.** It is the submission of the appellant that no contract existed between the parties contrary to the provisions of Section 3(3) of the Law of Contract Act which clearly states that a contract should be in writing. The respondent admitted that there was indeed no agreement in writing over plot no. 40A. The respondent urged this court to critically examine the documents and the correspondences exchanged and make inference that an agreement existed. I have re-evaluated the evidence taken before the trial court. The documents and correspondences issued by the appellant to the respondent as well as Jehovah's witnesses church shows that it double allocated the respondent's subject plot. I am satisfied that the

aforesaid documents and the correspondences exchanged clearly show the intention of the parties. Equity cannot allow the appellant to benefit from its misdeeds of double allocation or misnumbering of the plots in dispute. The appellant is estopped by virtue of the doctrine of promissory estoppel doctrine.

9. The final ground is the question as to whether there existed any privity of contract.

According to the appellant, there is no privity of contract which damages can flow. The appellant was of the view that the respondent should have instead filed an administrative action in court. The respondent is of the view that once the appellant acknowledged the mess it created relating to the subject plots and committed itself to resolve the same, it cannot turn around and talk about privity of contract. With respect, I agree with the submissions of the respondents. The appellant is estopped by its own actions from denying the constructive existence of a privity of contract binding the parties.

10. In the final analysis, the appeal is found to be without merit. It is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent