IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 158 OF 2009

BETWEEN

DR. MATHEW A. AJUOGA .....1st APPELLANT

MILCAH AOKO AJUOGA ….....2nd APPELLANT

WILLIAM NYAM OPOT .....3rd APPELLANT

CHURCH OF CHRIST IN AFRICA …..... 4th APPELLANT

AND

BEDROCK HOLDINNGS LIMITED .....RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at

Kisumu (J. R. Karanja, J) dated 27th March 2009

in

KISUMU HCCA No. 115 OF 2007)

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JUDGEMENT OF THE COURT

By a Plaint filed at the Chief Magistrate's Court, Kisumu, on 9th June, 2005 the respondent Bedrock Holdings Limited (as plaintiff) sued the appellants Dr. Mathew A. Ajuoga, Milcah Aoko Ajuoga and William Nyaim Opot as officials of Church of Christ in Africa (as defendants) for Kshs. 857,667/30 stated to be the sum due from the defendants to the plaintiff in respect of security and guard services rendered to the defendants. The defendants filed a defence denying liability. The suit was heard by the learned Chief Magistrate (H. I. Ongudi (as she then was)) who found it to have no merit and dismissed it. The plaintiff was dissatisfied with those findings and appealed to the High Court of Kenya at Kisumu (J. R. Karanja, J) who after hearing submissions from both parties allowed the appeal in a judgement delivered on 27th March, 2009. The original defendants who were now found liable to the original plaintiff were dissatisfied with those findings which provoked this appeal.

The appellants filed four grounds of appeal which are the following:-

> **"1. The Learned Judge erred in law in finding that there was a partnership between the Appellants and an establishment known as M/s Soteni Kenya when the evidence before him did not support such conclusion and in law there could have existed no such partnership so as to bind the Appellant to meet the obligations of M/s Soteni Kenya to the Respondent.**
>
> **2. The Learned Judge erred in law in failing to correctly evaluate the evidence adduced before the trial Magistrate and in finding that the Appellants were liable to the Respondent in the sum set forth in his Judgment.**
>
> **3. The Learned Judge erred in law in fact (sic) in making award that had not been sought by the Respondent in the appeal before him.**
>
> **4. The Learned Judge came to a conclusion that was inconsistent with his findings of fact and law".**

This is a second appeal and we are mandated in law to consider only issues of law and not matters of fact which have been considered by the two courts below and findings made - See Section 72 of the Civil Procedure Act Cap 21 Laws of Kenya which provides that:-

> **"Except where otherwise expressly provided in this Act or by any other law for the time being in force an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-**
>
> **(a) the decision being contrary to law or to some usage having the force of law;**
>
> **(b) the decision having failed to determine some material issue of law or usage having the force of law;**
>
> **(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits**
>
> **(2) An appeal may lie under this section from an appellate decree passed ex-parte."**

The Court of Appeal of Uganda in **Mutazindwa v Agaba & others [2008] 2 EA 265** held that the duty of a second appellate court is not to re-evaluate the evidence but to consider whether the first appellate court properly carried out the functions of reappraisal of the evidence. See also this courts judgement in **Mary Githanga Mbugua v Mary Waceke Gachuru Civil Appeal No. 294 of 2004 (ur).**

What, then are the matters of law that can be gleaned from this appeal calling for our consideration?

It was alleged in the Plaint but denied in the defence that the respondent entered into contract with the appellants in 2005 for provision of security and guard services. The respondents case was through the evidence of its managing director who stated inter alia that the respondent entered into contract with the 1st appellant Mathew A. Ajuoga, the Archbishop of the 4th appellant Church of Christ in Africa. That the initial approach was made by a Legal Officer who represented both the 4th appellant and an organization called Soteni Kenya Garden Estate ("Soteni"). That the respondent supplied guards to the appellants' premises but no payment was made hence the suit before the court. The witness testified further that when it came to invoicing for services rendered the appellants instructed the respondent to address the invoices to the said organization called Soteni. He produced several documents as part of evidence including a contract made on 3rd February, 2005 between Soteni and the respondent ; a letter

dated 15th February, 2005 on the letterhead of the 4th appellant signed by "Moses J. A. Orengo, LEGAL OFFICER SOTENI CCA" to the respondents Managing Director for provision of security services; invoices by the respondent to "Soteni CCA"; letters by the respondent to the appellants demanding payment; and a letter dated 6th May, 2005 by the 1st appellant to the respondent titled "Appreciation and Commitment".

The appellants called the 1st and 2nd appellants as witnesses. They essentially confirmed that the church had received security services from the respondent but claimed that it was the responsibility of Soteni to pay for the services. They denied any partnership between the Church and Soteni while admitting that there was a relationship between the two.

The learned trial magistrate found the following as facts: that a contract for provision of security services was entered into by the respondent and Soteni ; that invoices were addressed to Soteni on instructions of the church ; that the church undertook to make payment for services rendered if Soteni did not pay; that there was no clause in the contract where the church was to meet payments should Soteni default in payment; that there was no partnership between the appellants and Soteni, that an undefined relationship existed between the appellants and Soteni and for all these reasons the learned magistrate found that the respondent's suit was unmerited and dismissed it.

The learned Judge on first appeal reconsidered and re-evaluated the evidence as it was his duty to do and was alive to the principles in **Selle & Another v Associated Motor Boat Co Ltd & others** [1968] EA 123 and **Ephantus Mwangi & Another v Duncan Mwangi Wambugu** [1982-88] LAR 278.

On whether there was a contract between the appellants and the respondent creating obligations between the parties the learned Judge expressed himself thus in the judgement:

> **"In essence, the contract (DEX1) was made between an outfit known as Soteni Kenya Garden Estate and the Appellant.**
>
> **It would appear that the said Soteni Kenya Garden Estate is the one referred herein as Soteni (K) Ltd or simply Soteni. It is referred in the contract (DEX1) as the client while the Appellant is referred to as the contractor.**
>
> **Clause 7 of the Agreement provided for the payments for services rendered. It clearly shows that the client (Soteni) was responsible for payments.**
>
> **Clause 16 provided for termination of services for non-payment by giving notice to the client.**
>
> **The notices to terminate services dated 28th April 2005 (PEX 3) and 1st May 2005 (PEX 4) were given not to the client (Soteni) but the Respondents. However, the payment invoices (PEX 2 a-e) were issued to the client (Soteni or Soteni CCA).**
>
> **It is quite evident that on the basis of the operating agreement (DEX1) the party responsible for the payment of the outstanding amount is the client (i.e. Soteni) and not the Respondents even though they were the ultimate beneficiaries of the services provided by the Appellant.**
>
> **The contract was a meeting of the minds between the Appellant and Soteni to the exclusion of the Respondents. It would therefore be absurd to ask the Respondents to meeting (sic) the obligation of a contract in which it was not a party but was only benefiting from the philanthropic efforts of one of the parties to the contract."**

The judge quoted the definition of a partnership in Blacks Law Dictionary which is said to be a voluntary association of two or more persons who jointly own and carry on a business for profit. While

holding, therefore, that there was no partnership between the Church and Soteni the judge went on to find that a partnership could be express or implied. Let the judge speak for himself.

> **"The evidence showed that the fourth Respondent and Soteni were not involved in carrying on a business for profit. Rather, Soteni whose legal status was not even made clear was linked to the fourth Respondent for purposes of assisting by way of monetary and material donations. This relationship was strictly not a partnership in terms of the aforementioned definition (see also S. 3 (1) of the Partnership Act CAP 29 L.O.K.)**
>
> **However, a partnership may be express or implied. A partnership may be implied by law when one or more persons represent themselves as partners to a third party who relies on that representation. This is also called partnership by estoppel (See "Black's Law Dictionary pg 1153) where it is also indicated that a person who is deemed a partner by estoppel becomes liable for any credit extended to the partnership by the third party"). The question arising is whether the letter dated 6th May, 2005 from the fourth Respondent through the first Respondent (DW2) to the Appellant (i.e. PEX5) created a partnership by estoppel between the Respondents and Soteni?"**

The Judge therefore came to the conclusion that although the relationship between the appellants and Soteni was not based on a profitable commercial venture it could be construed as a partnership by estoppel because the appellants had represented to a third party – the respondent - as being in partnership with Soteni for purposes of procurement and provision of security services. For this, the judge held that the appellants were liable to pay the debt due to the respondent.

This appeal came for hearing before us on 12th June, 2013 when the appellants were represented by learned counsel Mr. David Otieno while the respondent was represented by learned counsel Mr. Richard Onsongo. Learned counsel for the appellant abandoned ground 3 of the appeal and urged that the appeal be allowed because the learned judge erred in finding existence of a partnership between the church and Soteni; and that parties to a contract were bound by its terms . Learned counsel for the respondent on the other hand argued that the first appellant had written a letter undertaking on behalf of the appellants to pay for services rendered. He submitted further that definition of partnership in the Partnership Act should be construed broadly and not narrowly and urged us to find that there was a partnership based on the conduct of the parties.

It will therefore be seen that the facts of the case as found by the trial magistrate were approved by the learned Judge on the first appeal, the difference being that whereas the trial magistrate constructed the contract between the respondent and Soteni strictly the judge disagreed and found that there was an implied partnership between Soteni and the appellants due to their conduct. The learned Judge in effect applied a broad and purposeful interpretation in reaching his findings.

In the course of the proceedings the 1st appellant who, as we have stated gave evidence before the trial court is recorded as stating:-

> **"I am familiar with PEX BI. I saw it when Mr. Ololo of Bedrock came to me for payment. I met Ololo severally. This was in May 2005..... I can see this document PEXB5. I wrote it when people were demanding for money salaries and Angira had run away. This letter was to Bedrock we had no agreement with Bedrock. By partnership I meant we were working together.**
>
> **….."**

And the same witness stated as follows during cross examination:

> **"I was thanking Bedrock in PEXB5. They guarded us and guarded our premises. These services were rendered to us as a church. Yes I said in my letter that when we contracted Bedrock we were in partnership with Soteni. We accepted the value of the**

services rendered. Yes I said we were pursuing Soteni. Yes I accepted to pay by installment if Soteni failed. I do not know if Soteni has paid..."

The learned Judge on first appeal considered and held the letter by the appellants to the respondent to be of importance to the appeal before him. He indeed quoted it in full. Like the learned judge we are of the view that the letter is central to the issues that fall for our consideration and we reproduce it in this judgement:

" CHURCH OF CHRIST IN AFRICA

Archdiocese of Johera Masogo

P. O. Box 782, KISUMU. Tel: 41833

E-mail: dala@ yahoo.com

Our Ref: CCA/LO1/05

Your Ref: BHL/CLT/SGE/13/OW Date: 6th May 2005

THE OPERATIONS DIRECTOR

BEDROCK HOLDINGS LTD

P. O. BOX 1004

KISUMU

Dear Sir,

RE: APPRECIATION AND COMMITMENT

We take this chance to thank your firm for the services rendered to us in the last three (3) months and six days. Your guards were good and delivered the services as expected.

When contracting your firm, we were in partnership with SOTENI KENYA. Todate SOTENI KENYA has kept on promising through the Director Mr. Martin Erick Angira to make payments in vain.

We accept the total cost is Kshs. 812,667.33 (Eight Hundred and Twelve Thousand Six Hundred and Sixty Seven and Thirty Three cents (sic) that is due to your firm.

We are pursuing SOTENI KENYA and their failure to make payment we will send our General Secretary and Archdiocesan Treasurer to met you and work out an acceptable modality of payment by installments.

May God bless you.

Yours faithfully,

Dr. A. Mathew Ajuoga

Archbishop

cc

Moses James Orengo

Advocate

P. O. Box 6179, KISUMU

general Secretary

CCA p. o. Box 782

KISUMU

Archdiocesan Treasurer

P. O. Box 782

KISUMU

Onsongo & Co Advocate

P. O. Box 879

KISUMU

Office Bearers God is Love Nyasaye en Hera. Mungu ni Upendo

(1 John 4:16

The Archbishop of the Church - The most Rev. Dr. A. Matthew Ajuoga – Archdiocese of Johera Masogo

Archdiocesan Gen. Secretary - Mrs. Milcah Aoko Ajuoga

Archdiocesan Treasurer - Mr. William Nyaim Opot"

Although the contract subject of the original dispute was entered into by the respondent and Soteni it is common ground that the services were rendered and consumed by the appellants. This is fully acknowledged and accepted by the appellants in the evidence of the 1st appellant cited in this judgement and the letter we have reproduced. The appellants not only accepted that position but they undertook to meet payment for services rendered to them.

Section 18 of the Partnership Act makes liable persons "holding out" and provides that:

> **"S 18. Any person who, by words spoken or written or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to anyone who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."**

The character and conduct of the appellants in dealing with the respondent gave a direct indication that the appellants considered themselves on behalf of their church as having a relationship with Soteni. The learned judge held that although the relationship was not based on a profitable commercial venture it was capable of being construed as a partnership by estoppel in that the appellants represented to a third party – the respondent – that they were in partnership with Soteni for purposes of the security services rendered to them by the respondent. It was observed by this court in **Mworia & Another v Kiambati** [1988]

KLR 665 at 668 that:

> **"In some cases, partners establish their business by entering into a deed. In many cases, 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."**

A useful discussion on the liability of partners will also be found in Halsbury's Laws of England 4th Edition Volume 35 where it is stated:

> **"<u>General liability in tort.</u> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act and where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it, or where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss."**

Like the learned judge we are persuaded that the appellants held themselves out as being in a partnership relationship with Soteni. They dealt on behalf of Soteni and undertook to pay the respondent for the services they had received. The respondent believed that the appellants and Soteni were partners. The respondent was entitled to such belief which arose from the conduct of the appellants. The appeal has no merit and we consequently dismiss it with costs to the respondent who will also have costs of the courts below.

Dated and Delivered at Kisumu this 26th day of September 2013

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

<u>DEPUTY REGISTRAR</u>