REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 10 OF 2013

BETWEEN

1. MARY WANYAMA

2. MARY OSINYA

3. MOODY AWORI

4. SIRINDIRO WOMEN GROUP

5. ERNEST ACHIBO AWORI

6. WILFRED OUMA..............................APPELANTS

AND

JOHN OLUOCH OTIENO.................RESPONDENT

(Being an Appeal from the Ruling in Busia Chief Magistrate's Court Civil Case No.852 of 1997 by Hon. I.T Maisiba- Principal Magistrate).

JUDGMENT

1. The appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 852 of 1997. They were sued for a claim for general and special damages after the respondent sustained injuries while working as a mason in the premises of the appellants.

2. After the hearing of the case the respondent was awarded Kshs.100,000/= general damages and costs of the suit.

3. On 24th October 2012, there was an application by way of Notice of Motion filed Sirindiro Women Group. The application was seeking orders in the following terms:

a) That there be a stay of execution pending the hearing of the application inters partes.

b) That the court review the entire judgment and strike out the entire suit.

The application was heard and the ruling therein was delivered on 6th February 2013.

4. The appellants were aggrieved by the ruling and filed this appeal. They were represented by Hayanga & Company Advocates. In the Memorandum of Appeal the appellants set out three grounds of appeal as follows:

a) The learned trial magistrate erred in law and in fact in finding that the application dated 24th October 2012 was not merited.

b) The learned trial magistrate erred in law and in fact by dismissing the appellants' application when evidence and facts proved otherwise.

c) The learned trial magistrate erred in law and in fact by dismissing the appellants' application when the law and submissions were in support of the application.

5. The respondent was represented by Manwari & Company Advocates. He contended that the appeal lacked merit and prayed for its dismissal.

6. When the matter came for directions on 27th March 2017, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

7. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

8. There are two issues that emerge from the competing submissions of both parties herein. These are:

a) Whether or not the misdescription of the parties in the judgment of the trial court would vitiate the judgment; and

b) Whether execution was caught up by the provisions of the Limitation of Actions Act.

9. Before the judgment of 10th August 2000 was entered, there was an amendment by consent. The amendment added five other defendants to the suit. It was erroneous on the part of the learned trial magistrate to proceed in his judgment as if we had only one defendant. I have perused the proceedings and the disputed judgment. There was no doubt at any stage of the proceedings that the defendants knew that they were listed as such. They participated in the proceedings in that capacity. This misdescription of the parties cannot therefore be a basis of vitiating the judgment herein. In my view this is a proper case for invoking section 100 of the Civil Procedure Act which provides as follows:

> ***The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding****. [Emphasis added]*

10. It was contended for the applicants that the execution in this matter was time barred. It was contended that it was 12 years after the judgment contrary to the provisions of section 4 (4) Limitation of Actions Act which provides:

> ***An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.***

The judgment in issue was delivered on 10th August 2000. Twelve years expired on 9th August 2012. On 8th August 2012 a day before the expiry of the twelve years, the parties herein entered a consent and the judgment debtors were given 30 days within which to pay. Time therefore started to run afresh on 8th August 2012. The consent was entered within the twelve years. In the case of **Njuguna v Njau [1980] eKLR** Madan JA stated:

> ***I agree with Chanan Singh J who held in Mohamed v Sardar [1970] EA 358 that the word "Action" in Section 4(4) includes execution proceedings.***

My finding therefore is that the application for execution was not barred by effluxion of time.

11. From the foregoing analysis I find that the appeal lacks merit. I accordingly dismiss it with costs to the respondent.

DELIVERED and SIGNED at BUSIA this 28th day of November, 2018

KIARIE WAWERU KIARIE

JUDGE