



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 5 OF 2020**

**THERESA ORINA T/A ST. THERESA'S ORPHANS AND VULNERABLE**

**CHILDREN (OVC) CENTRE SECONDARY SCHOOL.....APPELLANT**

**VERSUS**

**WILMA JEAN NYAMBANE.....1<sup>ST</sup> RESPONDENT**

**LABAN NYAMBANE BOSIRE.....2<sup>ND</sup> RESPONDENT**

*{Being an appeal against the judgment of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 13<sup>th</sup> day of January, 2020 in the original Nyamira Chief Magistrate's Court Civil Case No. 74 of 2018}*

**JUDGEMENT**

By an amended plaint dated 6<sup>th</sup> August 2018 the Respondents sought judgment against the Appellant for: -

- (i) Payment of a sum of Kshs. 2,992,000/= on account of a workshop constructed by themselves in land belonging to the appellant.**
- (ii) Payment of the sum of Kshs. 522,984/= on account of assorted timber seized/confiscated by the Appellant.**
- (iii) Restoration of the moveable chattels/implements/tools which were in the workshop at the time of its closure at the instance of the defendant.**
- (iv) In the alternative to (iii) above payment of the chattels/implements/tools in the sum of Kshs. 718,993/= inclusive of shipping charges.**
- (v) Restoration/restitution of the assorted research books detained by the defendant or**
- (vi) in the alternative payment of their value in the sum of Kshs. 720,000/=.**
- (vii) Interest on (i), (ii), (iv) and (v) of court rates (14%).**
- (viii) Costs of the suit.**

Then Respondents' case was that sometimes in the year 2013 the Appellant approached them to be co-owners of her school known as St. Theresa's OVC Centre Secondary School and after they acceded to her request they constructed a workshop thereat at a cost of Kshs. 2,992,000/=. Thereafter they sourced tools and implements which they installed in the workshop for the purposes of commencing a carpentry business. They averred that they spent Kshs. 518,993/= to acquire the tools which sum they claimed together with shipping charges of Kshs. 200,000/=. It was also their case that the workshop was to be exclusively for their use and benefit and that they operated the same in the name and style of Kisii Organic Limited. They averred that they used the workshop to make beehives and other carpentry materials and that upon the closure of the workshop at the instance of the Appellant they made a loss in the sum of Kshs.1,116,000/=. It was also their case that in addition to the tools they purchased timber valued at Kshs. 522,984/= for purposes of the carpentry business and which was still in the workshop when it was closed by the Appellant. They also claimed to have procured research books worth Kshs. 720,000/= which remained in the workshop after they were chased away by the Appellant.

The claim was vehemently resisted. The appellant denied all the the averments by the Respondents and put them to strict proof.

After hearing and considering evidence from both sides the trial magistrate found in favour of the Respondents on all the prayers save for the one for payment of Kshs. 2,992,000/= for construction of the workshop being that the same was abandoned by the Respondents in their submissions.

Aggrieved by the judgment the appellant preferred this appeal. The appeal is premised on 23 grounds whose gist is that the findings of the trial magistrate were not supported by the evidence. By this appeal it is urged that this court do set aside or vary the judgment/decreed of the court below.

Counsel for the parties agreed to canvass the appeal through written submissions. In summary counsel for the Appellant submitted that the Respondents did not prove the case against the Appellant on a balance of probabilities; that the trial court ignored the evidence adduced by the Appellant and that moreover the Appellant was wrongly sued as St. Theresa's Orphans and Vulnerable children Centre Secondary School had a Board of Management (BOM) which was the proper entity to be sued. Counsel contended that the items claimed by the Respondents were a donation by the Respondents to the school and the same could not be recalled. To support this submission. Counsel cited the Court of Appeal in the case of **Twalib Hatayan & Another v Said Saggar A1 – Heidy & 5 others [2015]** where it allegedly held that: -

**“Once a donation was given the same could be recalled thereafter.”**

For the Respondents it was argued that the judgment of the trial court was based on the evidence before it; that the Appellant was properly sued and that the case of the Respondents was proved to the standard required. Counsel for the Respondents urged this court to dismiss the appeal with costs to the Respondents.

I have considered the grounds of appeal, the rival submissions and the cases cited thereat. I have also carefully reconsidered and analyzed the evidence before the lower court. The issues for determination can be paraphrased as follows:-

**(a) Whether or not the Appellant was properly sued.**

**(b) Whether the Respondents' claims against the Appellant were proved on a balance of probabilities.**

**(c) Who bears the costs of this appeal.**

On the first issue the Appellants contention is that St. Theresa's Orphans and Vulnerable Children Centre Secondary School was under the management of a board of management (BOM) in which she was but a member and it was not therefore clear why she was sued in her personal capacity. While the burden of proof in Civil cases generally lies upon the plaintiff. Section 109 of the Evidence Act provides that:

**“the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

**Section 107 (1) of the Evidence Act** also places the burden of proof on the existence of facts on the person who asserts that the facts exist. In other words, he who asserts must prove. The Appellant did not prove that in regard to the institution known as St. Theresa's Orphans and Vulnerable Children Centre Secondary School there was in place a Board of Management with the legal capacity to sue and to be sued. Whereas she annexed certificates that indicate that the entity was first registered under the Societies Act, then as a Community Based Organization(CBO) under the Ministry of Gender, Children and Social Development and thereafter as a Basic Education institution that is as far as it goes. In the premises this court is not persuaded that she was wrongly sued.

On whether or not the claims by the Respondents were proved to the standard required, which is proof on a balance of probabilities I find that it is evident from the evidence that the 1<sup>st</sup> Respondent entered into the arrangement with the Appellant not as a donor but as a business partner. She was to build/construct a workshop within the institution, equip it and run it as a business enterprise. She produced documents in support of her claims. The Appellant admitted that the 1<sup>st</sup> Respondent did in fact equip the workshop with tools and implements and that the 1<sup>st</sup> Respondent also brought books for research as claimed. While she contended that the tools/implements and books were a donation documents were tendered that prove that the books were given to the 1<sup>st</sup> Respondent but not to herself for a literary research project/program that the 1<sup>st</sup> Respondent was undertaking. Indeed, there is a letter/note dated September 25, 2015 in which one Don Howard, Scope Founder requests Teresa Orina (the Appellant) to release the books to the 1<sup>st</sup> Respondent. This was followed by a note sent to the 1<sup>st</sup> Respondent on Sep 22 at 9.22pm assuring her that the writer had spoken to the Appellant the day before and Appellant had promised to release the books to her. These are the same books the 1<sup>st</sup> Respondent lays claim to in the suit. Like the trial court it is my finding that 1<sup>st</sup> Appellant failed miserably to prove that the same were a donation to the school. The Respondents' also tendered evidence that proved that it was them who purchased and transported the timber in dispute. The Appellant alleged that the timber to which the Respondents laid claim is the subject of a criminal case and hence the reason she could not release the same to them. However, she did not exhibit any court order authorizing her to retain the timber or restraining her from releasing it to the Respondents. There was therefore nothing to stop her from complying with the order of the trial magistrate and in default to compensate the Respondents in the sum awarded. The sums claimed were specifically pleaded and strictly proved and they were therefore properly awarded.

In the upshot I find no merit in the appeal and the same is dismissed. Costs follow the cause and the trial magistrate did not err by awarding the costs of the suit to the Respondents. They shall also be awarded the costs of this appeal. It is so ordered.

**Signed, dated and delivered electronically at Nyamira this 11<sup>th</sup> day of February 2021.**

**E. N. MAINA**

**JUDGE**