



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. 012 OF 2020**

**CHARLES NDWIGA NTHIMBA.....APPLICANT**

**VERSUS**

**HAMPTON IRERI NJERU.....RESPONDENT**

**RULING**

**Introduction**

1. Through a partnership deed dated 13<sup>th</sup> November 2010 the applicant and the respondent agreed, as equal partners, to start a school Christened **Msasa Junior Academy** under the physical address of Plot No. CF 15 Kangundo Road Umoja.
2. It is alleged sometime in early 2020, the respondent registered a new school known as **White Premier Schools** on the same physical address as **Msasa Junior Academy** thus triggering a dispute that led to the filing of an earlier application dated 20<sup>th</sup> January 2020 wherein the applicant, in a ruling delivered on 19<sup>th</sup> February 2020, obtained the following orders: -

*i. That a temporary order of injunction is hereby granted to restrain the respondent (HAMPTON IRERI NJERU) or any other person/agent from changing the school name and the school accounts of MSASA JUNIOR ACADEMY situated at plot No. CF 15 KANGUNDO ROAD UMOJA pending arbitration.*

*ii. That the school situated at plot No. CF 15 KANGUNDO ROAD UMOJA do continue as MSASA JUNIOR ACADEMY and its school account KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 be used for the running of the school pending arbitration.*

*iii. That a temporary injunction is hereby granted to restrain the respondent and any person claiming under themselves from harassing, impeding the use of the applicant's office in MSASA JUNIOR ACADEMY pending arbitration.*

*iv. That the respondent is prohibited from opening or purporting to open or changing the school account for MSASA JUNIOR ACADEMY from its current accounts being KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 to any other accounts pending arbitration.*

**Applications**

3. No sooner had the aforesaid orders been issued than the respondent filed an application dated 25<sup>th</sup> February 2020 seeking the stay of execution and review of the orders of 19<sup>th</sup> February 2020. The application is supported by the respondent's affidavit and is premised on the following grounds: -

*1. That a critical document that is sufficient enough to warrant review and which was not availed in court at the when the decree was passed is now available.*

*2. That the said document being a lease agreement in respect of Plot No. CF 15 Umoja Innercore off Kangundo Road between one Mr. Antony M. Kamau and Whites Premier Schools is critical in determining the continuing existence of Msasa Junior Academy in the aforementioned plot.*

*3. That the said order, if allowed to remain in force will adversely affect the lease agreement between Antony M. Kamau and Whites Premier School who is not a party to the proceedings before this honourable court.*

**4. That the application herein has been brought without unreasonable delay which application is based upon the grounds aforesaid, the affidavit of the applicant and Antony M. Kamau and on such further grounds and reasons to be adduced at the hearing hereof.**

4. The applicant opposed the respondent's application through his replying affidavit sworn on 28<sup>th</sup> February 2020 wherein he avers that the respondent went behind his back to renegotiate and renew the lease agreement with the landlord with the intention of solely benefitting from the school that they opened together as partners, to wit, **Msasa Junior Academy**.

5. He further states that **Whites Premier School** is not registered with the Ministry of Education and that the KCPE students are still registered under the name **Msasa Junior Academy**. It is the applicant's case that the respondent cannot purport to unilaterally renegotiate a new lease with the landlord while their partnership is still valid.

6. It is the applicant's case that the respondent has not shown any good reason why the impugned orders or 19<sup>th</sup> February 2020 should be reviewed or stayed.

#### **Application dated 28<sup>th</sup> February 2020**

7. The applicant also filed an application dated 28<sup>th</sup> February 2020 seeking the following orders: -

**1. Spent.**

**2. That pending arbitration a neutral party/manager be appointed for the running of the School Msasa Junior Academy located at plot No. CF 15 KANGUNDO ROAD UMOJA.**

**3. That O.C.S nearest police station do ensure that the orders are fully followed.**

**4. That pending arbitration, the account opened by the respondent K.C.B. THIKA BRANCH ACCOUNT NO. 1267628995 be frozen and no further transactions on the same accounts do proceed.**

**5. That personal summons to attend court be issued to the respondent HAMPTON IRERI NJERU.**

**6. That a notice to show cause for Warrants of Arrest be issued against the respondent.**

**7. That K.C.B Bank be compelled to issue a bank statement of the account K.C.B. THIKA BRANCH ACCOUNT NO. 1267628995.**

**8. That costs of this application be borne by the respondent.**

8. The application is supported by the applicant's affidavit and is premised on the grounds that despite the ruling of 19<sup>th</sup> February 2020, the respondent has continued to lock out the applicant from the school offices and has continued to single handedly operate school account under **Msasa Junior Academy**.

9. The respondent opposed the application through his replying affidavit sworn on 4<sup>th</sup> March 2020 wherein he avers that **Whites Premier School** is a separate and independent school that is not related to **Msasa Junior Academy**.

10. He further states that he complied with the court's earlier orders and has not denied the applicant access to the school. He states that the tenancy of the school changed hands after the lease lapsed on 31<sup>st</sup> December 2019 and that **Whites Premier School** is duly registered with the Ministry of Education. He adds that the KCPE Roll of Candidates was prepared in September 2019 which registration is not affected by the change in the school names.

11. He contends that he has not disobeyed the orders of 19<sup>th</sup> February 2020 so as to warrant the issuance of arrest orders for warrant of arrest or court summons. He maintains that the application is an afterthought and is intended to counter his application of 25<sup>th</sup> February 2020.

12. This court summoned the parties to appear before it for examination on 19<sup>th</sup> October 2020 over the issue of the respondent's alleged disobedience of the earlier court order. During the examination, the respondent stated that he had not barred the applicant from gaining access to **Msasa School** premises which, he stated, was still intact. He further stated that he was fully aware of the earlier orders and had complied with them.

13. The applicant on the other hand stated that the respondent had not complied with the court's orders as he had barred him from setting foot in the school premises and further threatened him with dire consequences if he dared step inside the school premises. He further stated that all the school fees received by the school was wired to the respondent's account and that the school logo/name had been changed.

14. I have considered the two application, the parties' statements made in court, together with their written submissions. I find that the nature of the two applications requires that the court first deals with the issue of disobedience of this court's earlier orders as a finding on the issue of contempt of court will have a bearing on the respondent's application of 25<sup>th</sup> February 2020.

15. The gravamen of the applicant's case is that the respondent is in contempt of this court's earlier orders and should therefore show cause why warrants of arrest should not be issued against him.

16. On his part, the respondent denied the claim that he disobeyed the court orders and argued that the applicant is free to gain access to **Msasa Junior School**.

17. This court notes, with grave concern, that the respondent appears to be blowing hot and cold at the same time over the issue of the existence of a new school, Whites Premier Academy. It was the respondent's statement that he entered into a new lease agreement with the landlord over the very plot that the housed Msasa Junior Academy and that he thereafter registered a new school in the same premises. This court had, in its earlier ruling held that the issue of existence of a fresh lease agreement over the said premises was not established and further, that the issue of whether or not the respondent could purport to enter into such a new lease agreement is one of the issues that was to be determined at the arbitration.

18. I further note that the respondent did not come clean on whether he is still running the new outfit, **Premier White Schools** in the exact same premises where the **Msasa Junior Academy** ought to be. Indeed, the respondent seemed to justify the existence of Premier Whites Schools while arguing that since the lease of **Msasa Junior Academy** had expired, he entered into a fresh lease for the new school.

19. I find that the respondent's argument and position goes contrary to the clear orders issued on 19<sup>th</sup> February 2020 that restrained him from changing the school name and directed that **Msasa Junior Academy** continues to operate in the same name and under the same bank accounts pending arbitration. The said orders have not been varied or set aside. The respondent did not demonstrate that **Msasa Junior Academy** is still an ongoing concern being run and managed by him and the applicant as ordered by the court. I therefore find that the respondent is in contempt of court orders having acted in outright and blatant disregard of the said orders. My that the applicant has made out a case for the granting of some of the orders sought in the application dated 28<sup>th</sup> February 2020.

20. The applicant also sought orders to compel K.C.B Thika Branch to issue certain bank statements and for the appointment of a neutral manager to run the Msasa Junior Academy. My take is that the duty of this court, in the present proceedings, is only limited to the issue interim measures of protection pending arbitration which role should not extend to definitive findings on the issues that will be in dispute before the arbitrator. I am therefore not persuaded that the said prayers can be granted at this stage in the proceedings and in this forum.

21. Having found that the respondent is in contempt of this court's orders, I further find that he is not entitled to the right of audience of this court in respect to his application dated 25<sup>th</sup> February 2020, unless he first purges the contempt. For this reason, I dismiss the application dated 25<sup>th</sup> February 2020 with costs to the applicant.

22. For the above reasons, I make the following final orders: -

- a) That the respondent is hereby found to be in contempt of the court orders of 19<sup>th</sup> February 2020.
- b) That the respondent is directed to purge the contempt by: -
  - i) complying with the orders of 19<sup>th</sup> February 2020;
  - ii) reinstating the management and operations the school known as Msasa Junior Academy to its former status as at 1<sup>st</sup> December 2019;
  - iii) availing all the school's financial records to this court.
- c) That failure to comply with order (b) hereinabove, within 14 days from the date of this order, a notice to show cause and warrants of arrest do issue against the respondent.
- d) Mention on 10<sup>th</sup> December 2020 for further directions/orders.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 19<sup>th</sup> day of November 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Okello for Mutemi for defendant.

Miss Mukala for the plaintiff.

Court Assistant: Sylvia