REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 37 OF 2017

JOHNSON KAMAU NJOGO…….PLAINTIFF/APPLICANT

-VERSUS-

GEORGE THAIRU KINYANJUI.....DEFENDANT/RESPONDENT

RULING

1. Johnson Kamau Njogu (plaintiff) and **George Thairu Kinyanjui (defendant)** entered into a partnership on 16th January, 2017 to undertake the business of running **Marks Bahati Academy** and **Marks Silver High School.** Their partnership agreement appears to have broken down hence the present suit. The plaintiff seeks orders:-

a) Spent.

b) That the Honourable Court be pleased to grant a mandatory injunction and order and/or direct the respondent to forthwith to hand over all the school properties and the management to the plaintiff/applicant and to forthwith cease being a signatory to the school's bank account pending the hearing and determination of the application and suit.

c) That the court decides, upon hearing the parties, the mode of distribution of any jointly owned partnership assets;

d) The rendering of accounts.

2. The plaintiff (applicant) also filed the present application dated 22nd February, 2017 seeking orders:-

a) That the Honourable Court be pleased to certify this matter as urgent and that the same be heard ex parte in the 1st instance.

b) That the Honourable Court be pleased to grant a temporary injunction to restrain the defendant/respondent from entering into and/or remaining in the premises known as Marks Bahati Academy and Marks Silver High School or interfering in the management or running the affairs of the schools until the application and suit is heard and determined.

c) That the Honourable Court be pleased to grant a temporary injunction and direct the respondent to forthwith hand over all the school properties and the management to the plaintiff/applicant and to forthwith cease being a signatory to the school's bank account pending the hearing and determination of the application and suit.

d) That costs of the application be in the cause.

3. The application is brought on the grounds that the Ministry of Education had conducted an audit which revealed that the respondent was not qualified to manage a school and that the respondent had declined to cede such management putting the school at risk of not being registered.

4. The supporting affidavit of **John Kamau Njogu** sets out the background to the partnership. In various averments the applicant states that he initially owned Marks Bahati Academy in partnership with **Naomi Mugoiri** and that upon the exit of the latter, he entered into a partnership with the respondent. The respondent brought in 14 secondary school students while the applicant was to provide (let out) premises to the school and that both schools would be run together with the respondent being manager for the secondary section while the respondent would manage the primary section. Both parties would contribute funds and share profits equally.

5. The applicant further stated that with time the respondent took control of both sections and misappropriated and mismanaged the resources. That subsequently by an agreement dated 31st March, 2017, the applicant took over the management of the schools while the respondent was to assist. It was also agreed that the respondent refunds the money he had irregularly taken from the school. According to the applicant, the respondent later wrote a letter expressing his opposition to the diminished role he had agreed to play in the management of the schools and instead attempted to eject the applicant from the management of the schools.

6. The respondent has filed a replying affidavit sworn on 9th October, 2017. He acknowledged that he entered a partnership with the applicant. That he closed his 2 schools namely Golden Castle High School and University High School and joined Marks Bahati Academy previously owned by the applicant to form Marks Silver High School. That they both became proprietors of Marks Bahati Academy and Marks Silver High School. The respondent acknowledged that there were differences between him and the applicant in the management of the school but that the proper cause of action was to dissolve the partnership. He further admitted that he was not qualified to be a principal of the school but argued that the applicant was also equally not qualified.

7. The parties filed written submissions which counsel highlighted before the court. The gist of the applicant's submissions filed on 18th October, 2015 is that the applicant had satisfied the principles for the grant of injunction as set out in **Giella Vs. Cassman Brown 1973 E.A. 358**. The respondent's submissions filed on 8th December, 2017 on the other hand revolve around the partnership agreement and the management of the school. The respondent submits that the applicant was not entitled to an injunction unless the partnership was dissolved and further that the applicant had failed to demonstrate the irreparable loss or injury that he would suffer if the injunction was not granted.

Whether the applicant has a prima facie case.

8. A prima facie case has been defined as one "which on the material presented, a court properly directing itself can conclude that there exists a right which apparently has been infringed by the opposite party to call for an explanation or rebuttal from the latter." **See Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125.** It is not a case which must eventually succeed but one which has probability of success. **See Nguruman Limited Vs. Jan Bonde Nielson & 2 Others C.A. No.77 of 2012.**

9. In the present case, the applicant claims that the respondent was not qualified to manage the schools and yet the basis of the partnership agreement was the qualification to manage the school. That it turned out that the respondent was neither qualified nor honest as he had diverted school money to his own use. He submits that these were triable issues.

10. The applicant has stated in the supporting affidavit and the submissions that the Ministry of Education carried out an assessment of the school and found it wanting in some areas. It recommended that the respondent was not qualified to be principal. That the school now risked closure if the respondent did not cease being principal and manager. They submit that the mismanagement of the school would lead to instability which would not auger well for the K.C.P.E and K.C.S.E candidates in the two schools. On the other hand, the respondent argues that the real issue was the existence of a partnership agreement which would need to be looked into with the possibility of dissolving the partnership.

11. From the material before court, it is clear to the court that the issue between the parties was the partnership on the proprietorship and management of the two schools. The Ministry of Education Assessment report clearly points out a raft of measures that the schools need to undertake to meet the minimum standard for registration. The non-qualification of the respondent, it appears, was only one of the gaps. Under those circumstances, it is not clear to the court on the material available as to which party's rights are being infringed to justify an injunction against the other party. Neither of the parties has pointed the court to the available remedies under the **Basic Education Act (2017)** and regulations thereunder. It would appear to the court however that **Section 50 and Part X** of the **Act** gives the powers to the County Education Boards with respect to registration and quality assurance of schools and creates punishable offences. Such offences as are outlined in the Act cannot in the view of the court be settled vide an interlocutory application such as this. Needless to state, an injunction should issue only issue on the clearest of cases.

Whether the applicant shall suffer irreparable damage or injury not compensable with damages.

12. The applicant urged the court to consider the lower risk of injustice in considering whether or not to grant the injunction. They cited **Mabeya J in Hermannus Phillipus Stexin & 2 others (2012) eKLR**) and **Ojwang J** (as he then was) in **Suleiman Vs. Amboseli Resort Ltd (2004) eKLR 589** to buttress their submission. I have considered both authorities. In the context of the application, they submit that the plaintiff would suffer irreparable harm if the schools were closed by the Ministry of Education and that the learners too would be affected by the risk of the closure. The respondent on the other hand submits that the plaintiff has failed to demonstrate any irreparable loss and that the orders should not be granted as the same would affect the respondent and the students and parents of the schools. They urge the court to consider the partnership agreement between the parties.

13. No doubt this matter goes beyond the applicant and the respondent. This is because the two parties are according to the partnership agreement displayed and their respective averments, proprietors and managers of the two schools. Any action therefore must take into consideration the presence of the learners. However, it was a term of agreement at paragraph 20 of the partnership agreement dated 16th January 2016 that the parties would settle any dispute amicably and failing which they would refer to the chairman of the Chartered Institute of arbitrators to appoint an arbitrator. In their subsequent agreement dated 31st March, 2017 they stated at paragraph 8 that in the event of default by a party, the aggrieved party would be at liberty to opt to have the partnership dissolved. A dissolution of the partnership would follow a process that would take into account the interest of the parties.

14. My appreciation of the issues raised by the parties would only be clearly ventilated at the trial. It will take a trial to delve into the alleged mismanagement of the schools by the respondent. It would also require a deeper inquiry to know whether the respondent's non-qualification would lead to non-registration or deregistration of the school. As earlier stated, the Ministry of Education report exhibited a raft of findings and recommendations on the requirements that the schools must meet. In the light of this, it is not possible to attribute whatever loss or damage solely to the respondent. It is my considered view that the injury would neither be irreparable nor in compensable

in damages.

Whether the balance of convenience tilts in favour of the applicant

15. The third principle demands that in case of doubt then court should consider the balance of convenience. However as shown above, the applicant has not succeeded on the first two principles. If there was doubt however, I would, based on the material before me, find that the balance of convenience would tilt in favour of not granting the injunction

16. For the foregoing reasons, I find the application dated 22nd August 2017 not merited. It is dismissed. Costs shall be in the suit. This being a matter that would affect the education of children, the parties are directed to prepare the suit for hearing on priority basis.

Orders accordingly.

Ruling delivered, dated and signed in open court

This 28th day of February, 2018

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Biko holding brief for Mr. Chege for plaintiff

Ms. Chepngetich holding brief for Mongeri for defendant