



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 68 OF 2017

GODFREY OCHIENG JUMA.....PLAINTIFF

VERSUS

MAKARIAS MAKWATA.....DEFENDANT

RULING

1. What is before me for determination is a Notice of Motion dated 3/5/2018 and filed on the same date. It was brought under Order 51 Rule 1 of Civil Procedure Rules, 2010 and Sections 3 and 3A of the Civil Procedure Act (cap 21). The Applicant – **GODFREY OCHIENG JUMA T/A IMMACULATE HEART SCHOOL** – desires to get the following orders at this stage:

Prayer 3: That the Applicant is allowed to access, withdraw and/or utilize funds held and/or deposited in account No. 01020038860400 at National Bank of Kenya, Busia, and file a report of accounts thereof in court.

Prayer 4: That costs of this application be in the cause.

2. The Respondent – **MAKARIUS MAKWATA** – is opposed to the application and responded by filing a replying affidavit and a notice of preliminary objection. The response of the Respondent elicited a response by way of supplementary affidavit. The affidavit was filed on 25/5/2018.

3. On 22/5/2018, both sides agreed to canvass the application by way of written submissions. The Applicant's submissions were filed on 19/6/2018 while the Respondent's submissions had come earlier on 13/6/2018.

4. I have considered the application, the response made and the rival submissions. The overarching concern in this case is compliance with the order of taking accounts already in force. I do not intend to delve much into the contents of representations by both sides in this application because first things should come first. I will explain: there was an earlier application for taking accounts filed by the Respondent herein. The court heard the application and ordered that accounts be taken. The court did not specify that particular accounts are the ones to be affected. The taking of accounts should involve all accounts including the one herein. That should be done first before anything else.

5. I need to point out that the taking of accounts enhances transparency and accountability. This is especially crucial in this matter because though the Applicant claims sole ownership of the School, the Respondent also claims entitlement. If and when accounts are taken, one expects that a picture will emerge concerning how responsible the Applicant herein has been in handling School finances.

6. From the records availed by the Respondent, the account referred to has some funds amounting to 2 million shillings or thereabouts. In the application brought by the Applicant, it is not clear how much of that money the Applicant wants to withdraw. If the application is allowed before taking of accounts, that would amount to interference with an account targeted for the exercise of taking accounts. It would also mean giving a free hand to a person whose track record of handling school finances is unknown to the court.

7. The account however will not remain dormant forever. It should be active and operational so that the school benefits. All what is required is that accounts be taken first so that a clear state of affairs emerges concerning the financial standing of the School. The court would be minded to grant access to the account if accounts are taken first and the Respondent is thereafter shown to remain recalcitrant in the matter of operating that account.

8. For the reasons stated here, the application is found unmerited and is hereby dismissed with costs.

Dated, signed and delivered at Busia this 31st day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: