



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 74 OF 2018

SACRED TRAINING INSTITUTE LIMITED.....PLAINTIFF

VERSUS

UNIVERSITY OF ELDORET.....DEFENDANT

RULING

The Applicant is a tertiary Institution registered under the Ministry of Education to offer middle level training courses within the Republic of Kenya. The Respondent is an institution of higher learning established through a charter by the President of the Republic of Kenya in March 2013 and was until March 2013 a constituent college of Moi University, then known as Chepkoilel University College.

The applicant's case is that on 13th February 2012 it entered into a Memorandum of Understanding to collaborate with the Defendant. One of the terms of the said MOU is that the Applicant was to admit students, teaches, sets and administers exams while the Respondent was to moderate the exams, prepare academic transcripts and awards diplomas and certificates to the successful students. In the year 2016, the Respondent informed the Applicant that collaborations that were the subject of MOU had been stopped by the government vide subsidiary legislation. They advised all collaborating colleges to wind up with the students already admitted under the programme. In a subsequent meeting of 10th March, 2017, it was agreed that in order to meet the cut off year of 2018, the last batch of students enrolled under the programme that regards the MOU, were to graduate from the collaborating colleges in 2018.

Collaborating colleges were to admit no more students and those who were already enrolled and had deferred their studies were allowed back to study and meet the deadline of the year 2018. Students who owed fees to the collaborating colleges would be allowed to graduate in 2017 and 2018 to clear the backlog. However they were to pay fees directly to the Respondent when ready, so as to be issued with certificates or transcripts. The applicant presented to the Respondent the last list of 118 students that were to graduate in the month of November, 2018. The Respondent declined to welcome them for the reasons that;

- (a) It had not moderated exams and scripts for the Applicant students since the year 2017.
- (b) The Applicant had not cleared all the fees owed to the Respondent.
- (c) The Applicant admitted students in the year 2016 and 2017 outside the said legislation.

The Applicant protested to the foregoing position on the reasons that:-

- (a) The agreement was that students would make payments directly to the Respondent before collecting their certificates.
- (b) The 2018 graduation is the last for students from collaborating colleges.
- (c) None of the students whose names were submitted by the Applicant on the 15th August, 2017 is on the list of graduands for 30th November, 2018.
- (d) Applicant students who graduated in 2016 and 2017 have been denied their certificates inspite of having paid fees or expressed will to pay directly to the Respondent.
- (e) Issues raised by the Respondent in their letter of 24th September and 9th October were new and had not been expressed before.

The Applicant averred that it had forwarded consolidated mark sheets to the Respondent for moderation but the Respondent maintained its earlier position of not processing the results from constituent colleges until the conditions were met.

The Applicant then filed a suit on 19th November, 2018 in which it prays that judgment be entered against the Defendant for:

- (1) An order of mandatory injunction compelling the Defendant to admit the one hundred and eighteen (118) students submitted for graduation by the plaintiff during the defendant's graduation scheduled for the 30th day of November 2018 or such later date as the defendant shall reschedule.
- (2) A declaration that the plaintiff's students who have graduated are entitled to collect their certificates from the Defendant upon payment of the agreed sum of Kshs. 26,000/-.
- (3) Cost of this suit.
- (4) Interest of 3 above.

Applicant also filed an application on the said date under certificate of urgency seeking orders that: -

- (1) A temporary injunction do issue restraining the defendant, its agents and/or employees from holding the defendant's graduation on 30th November, 2018 or on any other date unless the plaintiff's list of 118 graduating students is included in the defendant's graduation list for the year 2018.
- (2) Pending hearing and determination of the suit, the court do issue an order of injunction restraining the defendant, its agents and/or employees from holding the defendant's graduation on 30th November 2018 or any other date unless the plaintiff's list of 118 graduating students is included in the defendant's graduation list for the year 2018.
- (3) A mandatory injunction do issue compelling the defendant to admit the one hundred and eighteen (118) students submitted for graduation by the plaintiff during the defendant's graduation scheduled for the 30th day of November 2018 or such later date as the defendant shall reschedule.
- (4) Cost of the application be borne by the defendant.

The Respondent opposes this application on the grounds that the applicant failed to meet the three obligations of the MOU signed on 13th February, 2012. These are that;

- (a) It was to provide management and adequate resources and personnel to run all the programmes agreed as per Article 2.17 of the said MOU.
- (b) Organize the setting and marking of continuous assessment tests and final examinations and ensure procedures for moderation and marking of final examination and issuing of transcripts by the Defendant are followed – Article 2.25.
- (c) Pay all fees to the predecessor of the defendant – Article 2.28.

The Respondent submitted that the applicant had closed school and have brought up the suit and the application to cushion its failure. The Respondent did not participate in the admission, training or supervision of the 118 students and compelling it to graduate them and award academic certificates could sacrifice the quality of graduates released in the market. Further, the respondent averred that the power to evaluate candidates' qualification for award of a diploma is vested on the University Senate as per the University Charter, and the suit and the application aims to usurp the powers of the senate. Graduation is not an event but a process and the due process was not followed. It is also alleged that the applicant breached the MOU in its failure to remit to the Respondent fees to the tune of 5,666,700/-. The orders sought by the applicant are said by the respondent to be final, and cannot therefore be granted at the interlocutory stage. The applicant is accused of having continued to admit students in breach of the directive of the Government, and did admit some in the year 2017.

Issues for determination are:-

- (1) Whether the application meets the legal threshold for granting of a temporary injunction.
- (2) Whether the sought for orders can be granted on an application.

The legal threshold for granting a temporary order of injunction were well spelt out in the case of *Giella –vs- Cassman Brown Co. Ltd (1973) EA 358*. They are; -

- (a) Whether the Applicant has established a prima facie case with probability of success.
- (b) Whether the applicant stands to suffer irreparable loss which could not be compensated by an award of damages and
- (c) If the court is in doubt, the application be determined on balance of convenience.

On the first issue, it is evident and is not in dispute that the 118 students schooled in the Sacred Training Institute Ltd. They sat for exams. Whether they passed or not and their results submitted for moderation by the Respondent, that is an issue which can be deliberated in the

main suit. The established facts shows that they have established a prima facie case with probability of success.

On the second issue, the applicant alleges that the last batch of students from Sacred Training Institute Ltd are to graduate in 2018. However this does not mean that if they don't, they cannot graduate at any other time in future and probably after their rights are ascertained in the hearing of the main suit. The Respondent has an issue with their qualification for graduation and legitimacy of their admission. These are weighty issues which cannot be ascertained without calling of evidence in the suit. They are issues which need be fully ventilated and determined on. If the 118 students fails to graduate on 30th of November, 2018 they do not stand to suffer irreparable loss. The lost time can be adequately compensated by way of damages and the graduation effected on another year.

On the last consideration which is the balance of convenience, we must weigh what is at stake in the application. The respondent stated the graduation of 30th November, 2018 is already organized. Necessary services have been procured. Graduands who are 3,477 have been notified and some could already be on their way to the venue. Stopping the process at this stage will affect 3,477 graduands together with their relatives and friends set to witness and celebrate the student's achievement. Respondent on the other hand stands to suffer irreparable loss for if it eventually wins the suit the applicant may not be able to redress. Granting the order would be against public good. The balance of convenience tilts in favour of the Respondent.

Though mandatory injunction can be granted on an interlocutory application as well as at the hearing of the suit, in absence of special circumstances it will not be normally be granted. However, if the case is clear and one which the court think it ought to be decided at once, or if the act done is a simple and a summary one which can be easily remedied, or if the Defendant/Respondent attempted to steal a match of the plaintiff/Applicant, a mandatory injunction would be granted on an interlocutory application – See ***Vol. 24 of Halsbury's Laws of England***.

The issues in this application are not vividly established to warrant granting of the sought mandatory injunction.

In ***Noorh Mohamed Jan Mohammed –vs- Kassamali Virji Madhani (1953) 20 EACA***, the court held that a mandatory injunction should not be granted where there are innocent parties likely to be affected.

In this application as expressed earlier, if the graduation of 30th November, 2018 is stopped, 3,472 graduands who are not a party to the application and the suit would be adversely affected, as well as their relatives and friends. The procured service providers would also be adversely affected. It is not prudent and in interest of justice for a court of law to do such. I, for the foregoing reasons find the application unmerited and is dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of November 2018.

In the presence of:-

Mr. Githaiga for the defendant/Respondent

Mr. Barmao holding brief for Mr. Kiprono for Plaintiff/Applicant

Mr. Mwelem- Court clerk