



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 81 OF 2012

1. KAZUNGU KITS AO MLEWA RONDO

2. JULIA ANNE PERRY

3. WILLIAM KOMBE YERI

4. DAVID NYANTIKA (*suing for and on*

behalf of Trustees, Parents, Sponsors and Charitable

Organization of INDI ACADEMY) PLAINTIFFS/APPLICANTS

VERSUS

IBRAHIM DAUDI OSMAN.....DEFENDANT/RESPONDENT

RULING

1. The plaintiffs' application filed on 23rd May, 2013 seeks a temporary order to restrain the defendant from inter alia interfering with the plaintiffs' access and use of the facilities and buildings described as the property of INDI PROJECT (U.K), a charity project. The application was expressed to be brought under Order 40 rule 1 and 2 of the Civil Procedure Rules and is supported by the affidavit of the 2nd plaintiff described as "the co-director, manager, principal and trustee of INDI ACADEMY".
2. Grounds 2 to 5 on the face of the application constitute the key grounds in support of the application, and are amplified in the supporting affidavit of Julia Anne Perry the 2nd plaintiff. The grounds are as follows:

"2. THAT the defendant has arbitrarily taken over the INDI ACADMEY together with the property belonging to INDI PROJECT (UNTIED KINGDOM) to the exclusion of the co-directors, co-trustees and sponsors to the extent that he has leased the land and all the permanent structures therein to a third party.

3. THAT the third party has proceeded to register his own school and has changed what was INDI ACADEMY to PROGRESSIVE SCHOOL and BIN-AUF SCHOOL and has enrolled new students to the detriment of students sponsored at INDI ACADMEY.

4. THAT as a result the student show were schooling and receiving sponsorship at INDI ACADMEY have had to be transferred temporarily together with their teachers to Showers

of Blessings Academy by their sponsor INDI PROJECT (UNITED KINGDOM).

5. THAT Showers of Blessings Academy's facilities are overstretched and cannot accommodate any more students and further students transferred from INDI ACADMEY are now psychologically affected we are apprehensive that their academic performances will be dismal."

3. In his replying affidavit filed on 17th June, 2013 the defendant opposes the application and denies the allegations of the 2nd plaintiff. He states that he has not denied access to other directors, or students or taken the unilateral action of leasing the premises without the authority of other directors. He stated that the 2nd plaintiff voluntarily abandoned the school and that some students voluntarily transferred to another school by the name Showers of Blessing. He asserts that INDI ACADEMY is a limited liability company in which he and the 2nd plaintiff own shares but dismisses the other plaintiffs as strangers.
4. The application was heard by way of written submissions. The defendant's submissions were not filed as proposed on 25th February, 2014. For their part the plaintiffs filed their submissions on 17th February, 2014. I have considered the submissions in light of the respective affidavits sworn in respect of the application.
5. The principles governing the grant of interim injunctions have been settled since the case of **Giella vs Cassman Brown & Co. Ltd 1973 EA**. A successful party must establish a prima facie case, as defined in **Mrao Ltd Vs First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter."

6. He must also show that damages will not be adequate compensation if the order sought is denied. If in doubt, the court will consider the balance of convenience. Of the allegations raised in the supporting affidavit the one that stands out relates to the alleged leasing of the premises which are admittedly not the exclusive property or at all of the defendant, by the said defendant to one Rashid Odhiambo. Annexure JAP.4 describes the defendant as the registered owner of the suit property and buildings thereon. In many ways, this annexure puts to doubt the denials in paragraph 9 of the replying affidavit.
7. The lease agreement is for the entire property according to Clause 1. It may well be, as propositioned by the defendant that the former pupils of INDI ACADEMY left of their own free will for Showers of Blessing and/or that the applicants had abandoned the school. This could not be justification for the defendant to appear to take matters in his own hands and to enter into any transactions regarding the property as if he was its sole proprietor. According to the plaintiffs he is only a trustee. The 2nd plaintiff said that former students of INDI ACADMEY were currently temporarily accommodated at Showers of Blessing.
8. In my considered view, these students ought not to be adversely affected by the wrangling between the parties herein. The defendant not objecting to their return, in keeping with the patent original purposes between the parties, I think that it is prudent to issue an injunction to restrain the defendant as prayed so that the impugned alleged lease does not take effect and thereby sabotage the operations of the school. This being an Environment and Land Court matter whose value falls within the jurisdiction of the Senior Principal Magistrate's Court, it is to be transferred to the Environment and Land Court registry in the Senior Principal Magistrate's Court, Malindi so that early hearing dates may be taken.

Delivered and signed at Malindi this **28st** day of **March, 2014** in the presence Mr. Gekanana holding brief for Mr. Cheruyiot for plaintiff/applicant, Mr. Matini for defendant/respondent

Court clerk – Samwel

C. W. Meoli

JUDGE