



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.655 OF 2003**

**NALIN KHIMJI VORA & 2 OTHERS.....PLAINTIFF**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI .....DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 7th January, 2013. The application is brought under Article 22(2) and 95 of the Constitution of Kenya, Order 40 Rule 1 & 2(1) of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act Cap 21 Laws of Kenya.
2. The applicant seeks the following orders;
  - i. Spent
  - ii. That Hon. Gidion Mbuvi Kioko be joined as an interested party in this suit.
  - iii. That pending the hearing and determination of this suit interim injunction be issued against the plaintiff's, their agents, their representatives restraining them from closing, prohibiting, converting, alienating, transferring, divesting or in other way interfering with the management of Visa Oshwal primary school, Trust parcel of land i.e. Shree Visa Oshwal primary School, Trust Parcel of land no. 209/5996 from the control land consent of the defendants or otherwise in any manner.
  - iv. Permanent injunction against the plaintiffs, their agents, their representatives restraining them from closing, prohibiting, converting or alienating, transferring, divesting or in any other way interfering with the management of the trust property. i.e. Trust Parcel of land no. 209/5996 from the control land consent of the defendants or otherwise in any manner.
  - v. The O.C.S Parklands Police Station to assist in execution of the Order of the plaintiff from interfering with the trust property, closing, prohibiting, converting, alienating, transferring, divesting or in any other way interfering with the management of the Trust property i.e. Shree Visa Oshwal Primary School, Trust Parcel of land no. 209/5996 from the control land consent of the defendants or otherwise in any manner.
  - vi. That costs be provided for.
3. The application is based on the grounds that the applicant is an honourable member of parliament of Makadara constituency under whose area the trust property is situated; that the plaintiff's filled suit against the parents association whose interest were properly defended and ascertained by the

3<sup>rd</sup> and 4<sup>th</sup> defendants, but later circumvented the judicial process by abandoning this suit for HCCC 1474 of 2005 which orders are being used to forcefully take over the management of the school; that the issue in this case is in regards to management of trust property and not ownership as misrepresented in HCCC 1474 of 2005 thus necessitating this honourable court to bring to order for the smooth operation of the trust property; that the plaintiff obtained orders barring the continued running of the trust property as a public school to the detriment of the children who began their learning with the assistance of Government funds is at risk of being denied; that all along the school has been a public school and thus the restraining orders are necessary to prevent injustice of the children being denied their right of education; that the plaintiff's mischief in filing and obtaining orders without the knowledge of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant is an abuse of the court process; that the rights of the intended party to be enjoined in this suit is enshrined under Article 22 of the Constitution that the same is inalienable and his right to defend his constituents and seeks the injunctive relief in the interest public interest; that issues pending determination in this suit is the classification of the trust property as community land converted to, public or private land; that it is only fair that the plaintiffs are restrained from taking any adverse action that will be detrimental to the smooth running of the school as has been since its inception pending the hearing and determination of the this suit; that the children represented by the 2<sup>nd</sup> defendants shall suffer immense and irreparable loss not compensable by way of award of damages if he is not restrained from closing, prohibiting, converting, alienating, transferring, divesting or in any way interfering with the management of the trust property in issue Trust Parcel of land Title no. 209/5996.

4. The application is supported by the sworn affidavit of Gidion Mbuvi Sonko dated 3<sup>rd</sup> July, 2013. The application was opposed and there are grounds of opposition filed and a replying affidavit sworn by Dhirajlal Devchan Shah dated 22/1/2013.
5. The application is supported by the sworn affidavit of Gidion Kioko Mbuvi where he reiterates the grounds on the face of the application and further depones that; the plaintiff is in abuse of the court process by filing multiple suits all aimed in denying the defendant a right to being heard; that the opening of the school is being hindered and the education of hundreds of students attending the school is being affected as the plaintiff seeks to forcefully take over management of the school he urged the court to accede to the same in the interest issues raised in this suit relate to in the interest of justice.
6. The application was opposed and there are grounds of objection filed by the 3<sup>rd</sup> and 4<sup>th</sup> defendant dated 15<sup>th</sup> July, 2013; that the application is a non-started; that the application has been overtaken by events; that the suit which the application has been brought has already been adjudicated upon and final orders made; that the application was brought late in the day and an afterthought; that the issues raised in this application ought to have been canvassed during the haring of HCCC 1474 of 2005; that the 3<sup>rd</sup> defendant has already handed over the school to the plaintiff; that the applicant does not demonstrate any capacity to bring the present application and more particularly to be enjoined in the suit which has already been concluded and that there must be an end to litigation.
7. There is a replying affidavit sworn by Simon Ndubi Atebe dated and filed on 11<sup>th</sup> March 2013. He depones as follows; that he is the Chairman of the parent's Association at Shree Visa Oshwal Primary School; that the matter arose in 2003 when the plaintiff sought to privatize the school; that it was only in December 2012 that they were informed that the plaintiff had taken over the school and locked up the premises pursuant to a Court order issued in HCCC 1474 of 2005; that they were not party to the said proceedings and the 2<sup>nd</sup> defendant's attempts to be enjoined in the said suit was not successful and hence they could not participate in the said proceedings and that this was done in a bid to circumvent the judicial process having initially abandoned the same; that the orders issued without the court having all the material facts disclosed; that the teachers are from TSC and subordinate staff are from city council which is evident that Government funds are being utilized in running the school. He urged the court to issue orders sought for the interest of justice and that the plaintiff will not suffer any prejudice and the same will enable the suit to be determined conclusively with all facts before the court; that if the order sought are not granted the

students at Visa Oshwal stand to suffer prejudice.

8. There is also a replying affidavit sworn by Andrew Mwanthi dated 22<sup>nd</sup> July, 2013. He depones that he was the director, City Education of the City Council; that the matters in the present application were adjudicated upon in HCCC 1474 of 2005 where the Honourable Court ruled that the suit premises belonged to Visa Oshwal Community; that following that decision the 3<sup>rd</sup> defendant handed over the management of the suit premises to the plaintiffs; that he is advised that the current application is *res judicata* for reasons that; issues raised in the present application were raised in HCCC No. 1474 of 2005 and fully adjudicated upon and that there must be an end to litigation; that the applicant's remedy only lies with an appeal not an application which he has brought too late in the day; he urged the court to disallow the application as granting the orders will not serve any purpose.
9. The plaintiff filed their submissions on 17<sup>th</sup> April 2013. It was submitted that it is a cardinal rule that what is *res judicata* remains so and matters that have been adjudicated on cannot be resuscitated as the proposed interested party is attempting to do by his application dated 7<sup>th</sup> January, 2013; that Lady Justice Nambuye as she then was dismissed an application by the City Council seeking to set aside orders made on 2/3/2007; that the PTA sought to review of the orders of Justice Nambuye and also to be enjoined as interested parties. That an application for stay pending appeal by the PTA was also dismissed by Justice Odunga. They sought to rely on the case of *Arya Pratinindhi v Sabha E.A*, where it was held that

*“No provision of the Educations Act can be invoked to override the petitioner’s constitutional right to ownership of the property.”*

It was further submitted that the plaintiff did not conceal any facts and the suit HCCC 1474 was disclosed in the plaint and that the application by the intended interested party was an abuse of the court process.

10. Parties highlighted their submissions on 23/7/2013. Mr. Mbichire took issue with the affidavit sworn by Andrew Mwathi and indicated that there was no authority for him to swear the same from the 3<sup>rd</sup> defendant and further indicated that Mr. Murage had no authority to represent NCC and also added that he did not have a practising certificate for 2013 as he only indicated that State Counsels are the only ones exempted from taking a practising certificate. Mr. Murage in response sought to rely on Section 10 of the Advocates Act. He further stated that Mr. Mwathi is the director of City education department dealing with public schools and since he could not get the director he had to get an alternative. Mr. Shah sought to support Mr. Murage and indicated that no prejudice would be occasioned as Counsel filed submissions similar to the affidavit. Miss Mwatsama indicated that Counsel was given time to file his response 2 months earlier but failed to do so. She indicated that the replying affidavit comes 1<sup>st</sup> before the submissions and sought from the Court if he sought leave of Court to file as he did Counsels agreed to deem the Replying affidavit as properly filed.
11. Mr. Mbichire reiterated the grounds of the applicant's application and indicated that no prejudice would be occasioned if the applicant was enjoined as an interested party being that the property in question is in Nairobi County and the residents of Nairobi are the ones affected. He further submitted that the reason that the applicant wants to be enjoined is because the plaintiff wants to acquire and convert the school to a private school; that the plaintiff abandoned current suit and filed another HCCC 1474 of 2005 that the parents and director of education were not involved and as such the plaintiff obtained orders from the court for NCCC to give the plaintiff vacant possession. He argued that in HCCC 655 of 2003 the issue arising were on possession while in 1474 issue was management and as such the application raised was not *res judicata* and that the orders sought will preserve the property to be held as it has also been. Miss Mwatsama for the parents association indicated that they did not oppose the application and indicated that no prejudice would be occasioned to any of the parties if the interested party is enjoined; that the case

hasn't been determined and issues raised by the plaintiff and 3<sup>rd</sup> and 4<sup>th</sup> defendant are not related and thus the issue of *res judicata* does not arise, she added that the parties in the two cases are different as the 2<sup>nd</sup> defendant could not be enjoined in HCCC 1474 of 2005 hence their issues could not be canvassed then.

12. Mr. Murage for the plaintiff sought to rely on their written submissions and indicated that the present suit has already been heard and determined on merit; that the said application was brought too late in the day the suit having been lodged way back in 2003 and that the applicant has not demonstrated that he has locus to be enjoined as a party in this suit and as such the court cannot issue orders in vain; that it goes without saying that the orders sought cannot be granted; that the 3<sup>rd</sup> defendant upon the determination of the suit the management of the school was handed over to the plaintiff and as such the 3<sup>rd</sup> defendant has no interest in the school; that it is not in dispute that the suit premises is owned by the plaintiff and the management of the same was handed over to it and hence the alleged public interest the applicant seeks to protect does not exist hence the application should fail; that the suit having been adjudicated upon, which fact is on record and not denied, it follows that the issue being raised are *res judicata*; they also sought to adopt and rely on the plaintiff's submissions.

13. Mr. Shah referred the court to the holding of Justice Nambuye and further submitted that the application seeking to set aside the said judgment on an application by the Council. He further indicated that the suit is not concerning the Ministry of Education but the City Council of Nairobi and as such he has no locus standi; that what the application seeks to do is overrule the orders given by J. Nambuye and J. Odunga.

14. Mr. Mbichire in reply indicated that the judge had not made a decision but the same was still pending; that the school was still under the Ministry of Education and no appeal has been preferred he reiterated that the applicant seeks to protect public land.

15. Issues for determination

- i. Whether the applicant should be enjoined as a party in the said suit.
- ii. Whether the application is *res judicata*
- iii. Whether the applicant has qualified for grant of temporary injunction as sought.
- iv. Whether the applicant qualifies for permanent injunction as sought.

16. I have considered the pleadings, affidavits, annexures and submissions by all parties.

- i. On the question as to whether the applicant should be enjoined as an interested party to the suit. In my view what the Court should look at is whether the intended party is a necessary party. Joinder of parties is provided for under Order 1 Rule 10 of the Civil Procedure Rules. In the case of ***Central Kenya Limited vs Trust Bank Ltd and Others Civil Appeal No.222 of 1998***, wherein the court of Appeal stated that;

*“the paramount consideration in an application under Order I Rule 10(2) of the Civil Procedure Rules, is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit”.*

I find that the applicant being enjoined as a party serves no purpose as he is not a necessary party in the determination of this matter. More so he made his application too late in the day.

- ii. On whether the current application is *res judicata*

Section 7 of the Civil Procedure Act which provides as follows;

*'No court shall try any suit or issue in which the matter directly and substantially in*

*issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'*

The application seeks temporary and mandatory injunction against the plaintiff and mainly deals with the management of the school in issue. The cause of action arose when the NCC sought to convert the said school into a public school and took up management of the same. I have carefully perused the file HCCC 1474 of 2005, and it is clear the issue of possession and management was dealt with by Justice Nambuye as she then was in HCCC 1474 of 2005. Where she held that

*"The defendants give vacant possession of the suit premises and in default execution to issue."*

In the case of ***Kotak Ltd –vs- Vallabhdas Kooverji Dar-es-Salaam High Court Civil Appeal Number 15 of 1968 (1969) EA 295*** where it was held that:

*"The purpose of the doctrine of res judicata is that there should be an end to litigation. Where a court has investigated an application and has concluded that whatever be the merits, the law provides no remedy, it cannot really be said that the application has not been determined on its merits. Re-filing the application is a way of seeking a different ruling from a court of equal jurisdiction, and avoiding her mechanism of an appeal. Any other view would make nonsense of the doctrine. There would be no end to litigation as one could continue filing identical applications until one found a magistrate prepared to hold that the Act was not retrospective. Once it is decided that a particular rule of law is applicable to a particular factual situation between the parties then as far as these parties are concerned in the identical factual situation, the fact of applicability of the rule is res judicata and can be challenged only on appeal."*

In the case of ***Mwangi Njangu vs Meshack Mbogo Wambugu and Another, HCCC 2340 of 1991- (Unreported)*** where it was held

*"to allow this suit to go on will allow the plaintiff to embroil the entire judicial system-by all court levels-into an interminable litigation warfare over the same one acre of land, between the same parties or their privies for as long as theirs ingenuity will carry them. They will come in all guises. They will ask for declarations at one time; injunction at another or simultaneously damages; transfer of title; nullification thereof, eviction. They will sue in singles; they will sue in plural. They will add anyone coming into contact with this land. Title to this one acre of land will forever be in question. The same question will be gone into over and over again by tribunals of competence. If a litigant were allowed to go for ever re-litigating the same issue with the same opponent, before courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see what use the doctrine of res judicata plays."*

17.NCC indicated that it had already handed over the management of the school to the Shree Visa Oshwal Community in compliance with the orders of Justice Nambuye issued on 20<sup>th</sup> June, 2008 and as such the application seeking to be enjoined and temporary and mandatory injunction comes after the fact. I therefore find no merit in the applicant's application on the reasons given. This application is dismissed with cost to the plaintiff.

Orders accordingly

Dated, signed and delivered this      **16<sup>th</sup>**      day of      **April** 2014.

**R. E. OUGO**

**JUDGE**