



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 5 OF 2014

DAVID MEMUSI NANGARA

(Trading as Macac Academy)PLAINTIFF/APPLICANT

VERSUS

JOHN KAILA MPURKOI..... 1ST DEFENDANT/RESPONDENT

GABRIEL MPURKOI 2ND DEFENDANT/RESPONDENT

JACKSON KUNTAI 3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiffs have sought by notice of motion dated 17th February 2014 for:-

1. Interim orders of injunction restraining the defendants/respondent (either by themselves, their agents, servants, family members and/or employees from:-

a. Engaging in any acts or omissions that may put the legal rights and education of the applicant's pupils learning in Macac Academy in danger;

b. Interfering with or changing the name of the applicant's business known as Macac Academy, be it by re-Registration or otherwise;

c. Preventing the applicant from managing and running all the affairs of his Macac Academy a private primary school; and

d. Collecting any funds from the applicant's parents or the public at large (in the name of Macac Academy) and if any amount has been collected so far, the same be accounted for and deposited in the applicant's school account with Co-operative Bank of Kenya, Kilgoris Branch.

2. That pending the hearing and determination of this suit, the honourable court be pleased to grant Orders of injunction restraining the defendants/respondents (either by themselves, their agents, servants, family members and/or employees) from:-

a. Engaging in any acts or omissions that may put the legal rights and education of the applicant's 283 pupils learning in Macac Academy;

b. *Interfering with or changing the name of the applicant's business known as Macac Academy, be it by re-Registration or otherwise;*

c. *Preventing the applicant from managing and running all the affairs of his Macac Academy a private primary school; and*

d. *Collecting any funds from the applicant's parents or the public at large (in the name of Macac Academy) and if any amount has been collected so far, the same be accounted for and deposited in the applicant's school Account with Co-operative Bank of Kenya, Kilgoris Branch.-*

3. *Costs of this application be borne by the defendants/respondents*

2. The application is brought under **Order 40 Rules 1, 2 and 10** of the **Civil Procedure Rules, Section 3A, 63 (c)** and **(e)** of the **Civil Procedure Act Cap 21 Laws of Kenya** and **Section 22** of the **Children's Act 2001**.

3. The grounds for the application as set out on the face thereof are:-

i. *Due to the respondents' illegal acts, the applicant's 283 pupils' basic education is in danger (see Article 53 (1) (b) of the Constitution and section 7 of Children Act 2001.)*

ii. *The said pupils are in danger of losing their protection from physical and psychological abuse and/suffering due to the respondents' illegalities (See section 13 (1) of Children Act 2001).*

iii. *The respondents' actions of running Macac Academy to the exclusion of the applicant who is the Sole-Registered Proprietor, taking unilateral decisions, seeking Re-registration of the Academy and misusing and misappropriating the school's funds are not in the best and paramount interests of the 283 children learning in Macac Academy (See Article 53 (2)).*

iv. *The respondents have no color of right and/or lawful cause to, exclusively, manage the educational affairs of Macac Academy to the complete exclusion of the applicant herein.*

v. *The applicant has a Prima facie case with overwhelming chances of success.*

vi. *The respondents' illegal actions are bound to occasion irreparable losses to the applicant, which losses, no amount of atonement can remedy.*

vii. *The balance of convenience tilts in favour of the applicant herein.*

viii. *It is in the interest of justice and those of the 283 children learning in Macac Academy that this application be heard and allowed expeditiously.*

4. The application is supported by the affidavit of David Memusi Mangara, who states that he is a businessman and solely owns a private primary school known as Macac Academy situated in Oltanki Zone near Oltanki primary school in the outskirts of Kilgoris Town within Transmara West District, Narok County.

5. He states that he registered the said academy better known as Maasai Christian Academy Centre which was duly registered in his name on 4th March 2009 and he has annexed **"the certificate of registration of business names marked "DMN-1."** That on 17th December 2010 the Ministry of Education Science and Technology issued him with a certificate of registration of schools which is marked as annexure **"DMN-2"** which was forwarded to the provincial director of education Rift Valley Province by the Permanent Secretary, Ministry of Education with instructions to among others transmit the original to his head teacher. The letter has been annexed and marked as **"DMN-3."**

6. He states further that since the 17th December 2010 he has been solely operating his private school until 31st December 2013 when the 1st and 2nd Respondents maliciously and oppressively took over management of the same to his exclusion. He states that on the 31st December 2013, he allowed the 1st Respondent to impart spiritual nourishment to the young learners in view of the fact he (1st respondent) is a reverend with Pentecostal Assemblies of God (P.A.G.) within Kilgoris Town. The applicant also avers that he invited the 2nd respondent being an Education Officer working with Ministry of Education and based at Langata Osaen Zone in Transmara West District within Narok County, for purposes of providing to the young learners with proper guidance on educational matters and government policies affecting primary schools including Macac Academy.

7. He further states that upon assumption of their specific duties and/or roles in Macac Academy, the 1st and 2nd respondents assumed the work managing the school to the plaintiff's/applicant's exclusion have completely shut him out of the day to day running of the school by ensuring that he does not access records of the institution. He states that on the 16th January 2014 the respondents herein unilaterally commissioned the District Education Officer, Transmara West District to prepare a Standard Assessment Report for them with the sole ill-motive of cancelling registration of his private school and re-registering it (Annexure marked "DMN-4". On the 31st January 2014, they (Respondents) unilaterally commissioned the public health officer Kigoris Division who prepared a sanitary inspection Report for Macac Academy with the sole aim of re-registering his school with a new name called Kilgoris Christian Academic Center (Annexure "DMN-5." He states further that the 1st and 2nd respondent have proceeded to employ (among many others) the 3rd respondent herein as a bursar without his (plaintiff's/applicant's) consent and/or his participation.

8. The plaintiff/applicant contends that the Respondents used undue influence on him to gain control and management of Macac Academy and further in pursuit of their ill-intentions and bad motives they misled the District Education Officer Transmara West District to wrongly and erroneously recommend that the said school should seek re-registration. The court has been referred to page 2 and 12 of annexure DMN-4, being the Ministry of Education Standards Assessment Report justifying re-registration of the school.

9. He states that the respondents are determined to defraud him of his investment in the school and that if that were to happen, there would be a negative impact on the 283 pupils learning at the school. He complains that parents of the school have been made to pay fees in cash instead of depositing the money into the school account and as a result thereof, the 1st and 2nd respondents are misappropriating huge amounts of money so received. The applicant claims that because of these actions on the part of the respondents, the school has fallen into a mismanagement crisis and further that the respondents are not considering the best interests of the 283 children.

10. The application is opposed vide the replying affidavit sworn by John Kaila Mpurkoi, the 1st respondent herein on behalf of himself and on behalf of the 2nd and 3rd respondents. He depones to the following matters in the affidavit dated 21st February 2014:-

- *The idea to set up a Christian Education Centre for the benefit of orphans and other disadvantaged children was conceived jointly by the deponent, the plaintiff/applicant and 2nd respondent herein, with the first meeting towards actualizing the concept taking place on 6th December 2014.*
- *The school was to be known as Kilgoris Christian Academic Centre and subsequently, serve International Ministries came in to give with monetary assistance to establish the centre.*
- *The sponsor donated U\$ 10,000 (equivalent of Kshs.719861.25 only) and amount duly received and acknowledged by the plaintiff, deponent and 2nd defendant/respondent.*
- *The money so donated was used to purchase land to construct the centre.*
- *The plaintiff was mandated by the deponent and 2nd defendant/respondent to pursue the process of registration of the centre.*
- *Instead of registering the school as Kilgoris Christian Academic Centre, the plaintiff secretly*

registered the school as Maasai Christian Academic Centre (MACAC) in the plaintiff's own name and was issued with a registration certificate.

- Upon realization that plaintiff had registered the centre in his own name, the deponent and sponsor decided, with the knowledge of the plaintiff decided to change name of school from MACAC to the original name of Kilgoris Christian Academic Centre.
- Thereafter, other persons were co-opted into the school management with the deponent and 2nd defendant/respondent being given the mandate to manage the school as well as becoming signatories to the bank accounts.
- The plaintiff/applicant is not being candid with the information he has given to the court in his pleadings and as such he is not entitled to the equitable reliefs that he seeks from the court.
- The parcel of land upon which the school stands does not belong to the plaintiff/applicant and he therefore does not have any lawful and/or bona fide claim to the name Maasai Christian Academic Centre and that he is in breach of trust given to him.
- The plaintiff/applicant will not suffer any loss that is not compensable in monetary terms and that in any event, the plaintiff/applicant does not have a prima facie case with probability of success.

11. To support his averments in the Replying Affidavit, the deponent has annexed copies of minutes of various meetings held both before and after registration of the school including a minute on bank signatories.

12. The instant application was canvassed by way of written submissions which were duly filed and exchanged between the parties. It is contended on the part of the plaintiff/applicant that he has met all the conditions for the granting of an injunction as set out in the case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358**. He submits that the applicant together with the 283 children of the school together with their parents will suffer irreparably if the order of injunction is not granted. The applicant says he solely depends on the school for his livelihood as well as that of his family. He also says the replying affidavit is full of concoctions intended to hoodwink the court into believing that it is the plaintiff/applicant who is at fault in this matter. The plaintiff/applicant is represented by the firm of Bigogo Onderi & Co. Advocates.

13. M/s Oguttu Mboya and Co. filed submissions on behalf of the respondents herein on the 7th May 2014. The following issues were isolated for determination by this court:-

- a. Whether the plaintiff/applicant had a prima facie case against the defendants/respondents;*
- b. Whether the defendants/respondents had a right and or a bona fide claim over the institution;*
- c. Whether the plaintiff/applicant shall suffer irreparable loss;*
- d. Whether the notice of motion application herein amounts to abuse of the process of the court.*
- e. Whether the orders of temporary injunction can issue in the circumstances.*

14. On the first two issues they submit that the plaintiff/applicant has not disclosed and/or established a prima facie case whatsoever to warrant an order of temporary injunction.

15. On the third issue it is submitted that having failed to tender evidence of the irreparable loss which at any rate does not exist the plaintiff's/applicant's application herein cannot by any figment of imagination be said to have any sufficient cause and/or basis to enable the orders sought to be granted.

16. On the fourth and fifth issue it is submitted for the defendants/ respondents that to the extent that the plaintiff/applicant did not come to court with clean hands, the plaintiff/applicant is not entitled to partake of and/or benefit from the equitable discretion of this honourable court.

17. I have read the application together with the supporting affidavit by the plaintiff/applicant herein, the annexures contained therein, the response and the submissions by both counsel and the authorities relied

upon.

18. Injunctions are equitable remedies that are granted at the discretion of the court. The principles for granting such injunctions were laid down in the celebrated case of **Giella v-s- Cassman Brown & Co. Ltd.** (supra) where the Court held at page 360 as follows:-

“First an applicant must show a prima facie case with a probability of success. Second an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

19. From the material placed before court, I do find that the plaintiff/applicant has met the first condition of **Giella –vs- Cassman Brown** (supra). He has shown to this court that he is the registered proprietor of Macac Academy (DMN-1” and DMN-2”). He has also shown that the defendants herein are intent on the re-registration of the said school to reflect new status with new directors. The applicant says that the defendants'/respondents' intended actions are not well meaning.

20. Further from the evidence before court it is clear that the plaintiff has been running the said school since 17th December 2010. In my view if an injunction is not granted the injury the plaintiff/applicant may suffer namely being deprived of a livelihood may not be compensated with an award of damages. Moreover since these are issues involving children and their education and being acutely aware that the welfare of children is always paramount, an interim measure of protection ought to be granted to the plaintiff/applicant. Because of the nature of the dispute herein, this matter shall be mentioned on the /10/2014 for taking directions as to hearing dates.

21. Having made that finding I do grant prayers (3) and (4) of the application.

Delivered, dated and signed and delivered at Kisii this 24th day of September, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Bigogo (present) for Applicant

Mr. Moracha for Oguttu Mboya for Respondents

Mr. Bibu - Court Assistant