



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**

**E. L.C CASE NO. 168 OF 2013**

**ORDER OF ST. AUGUSTINE KENYA**

**REGISTERED TRUSTEES.....PLAINTIFF**

**VERSUS**

**ALFRED OTIENO..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OUMA OCHIENG’.....2<sup>ND</sup> DEFENDANT**

**RECILA NEKESA PAMBA..... 3<sup>RD</sup> DEFENDANT**

**MARGARET ONGOMA ANDENJE.....4<sup>TH</sup> DEFENDANT**

**BENSON NYANG’OR JUMA.....5<sup>TH</sup> DEFENDANT**

**WYCLIFFE OCHIENG’.....6<sup>TH</sup> DEFENDANT**

(BEING THE OFFICIALS OF SUPPORT AFRICAN CHILD NETWORK)

**RULING**

Coming before me for determination is the Notice of Motion dated 4<sup>th</sup> February 2013 in which the Plaintiff/Applicant seeks for this court to issue orders of a temporary injunction against the Defendants restraining them from interfering, entering and managing Blessed Teresa of Calcutta High School situate in Ruaraka, Nairobi County (hereinafter referred to as the “School”) pending the hearing and determination of this suit, a temporary injunction restraining the Defendants from accessing the School’s funds whether directly from the School’s bank accounts or from the students and that the court do direct that the management of the School be vested solely in the Plaintiff as well as costs.

The same is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of Father Dominic Kipkosgei sworn on 4<sup>th</sup> February 2013 in which he stated that by their letter dated 14<sup>th</sup> December 2006, the Defendants invited the Plaintiff for the launch of the School and that vide their letter of 26<sup>th</sup> January 2007, the Defendants asked the Plaintiff to allow the School to be registered as a church sponsored school which the Plaintiff accepted. He further indicated that the Defendant’s subsequently

requested the Plaintiff to sponsor the School which the Plaintiff accepted. He further averred that by an email dated May 2008, the Defendants requested the Plaintiff to take over the School. He further averred that to this end and after several discussions with the Defendants, the Plaintiff agreed to pay for the purchase of 8 plots of land being sub-divisions from title number L.R. 31/17 Ruaraka, Nairobi where the School is situate and paid an amount of Kshs. 400,000/- for this. He further stated that by his letter dated 23<sup>rd</sup> October 2008, the Defendants undertook to register the School under the Plaintiff's name and hand it over to the Plaintiff and that subsequently, on 12<sup>th</sup> April 2009, the Defendants signed a Deed of Assignment assigning the plots to the Plaintiff in consideration of the payment by the Plaintiff of the balance of the purchase price. He then stated that in blatant and unlawful disregard of the said Deed of Assignment, the Defendants refused to hand over the School and the Letters of Allotment of the said plots to the Plaintiff and have further embarked on serious mismanagement of the School funds resulting in the School's bank account running into an overdraft of nearly Kshs. 500,000/-.

The application is contested. The Defendants filed the Replying Affidavit of Alfred Onyango sworn on 7<sup>th</sup> March 2013 who stated that he is the Chairman of Support Africa Child Network ("SACNET"). He further stated that in the year 2003, the Defendants formed SACNET for the purpose of offering assistance to needy children within Ruaraka area especially those affected and/or infected by HIV. He further stated that SACNET was further registered as a community based organization on 3<sup>rd</sup> February 2005 with offices at Lucky Summer Estate and that in the year 2006, they organized a fundraiser for the purpose of starting the School which they did and raised Kshs. 60,000/- . He further stated that in the year 2007, they rented premises for starting the School with an initial admission of 48 students in Form 1. He further averred that in the year 2008, they bought 4 plots at Lucky Summer Estate from Kariuki Gathecha Resources Limited which was the registered proprietor of L. R. No. 31/17 where the 4 plots were situated. He further stated that in the same year 2008, SACNET received a donation of €40,000 from the Order of St. Augustine Cork Ireland which was channeled through the Applicant which SACNET used for building a school complex together with other funds from other donors like De La Rue. He conceded having requested the Applicant to allow them to register the School as a church sponsored school due to the difficulties they were facing registering the School as a community based organization. He further indicated that they allowed Father Denis of the Applicant to register the School using the Plaintiff's certificate of incorporation temporarily as they were in the process of incorporating a company to have both the School and the land registered in their name. He further denied that the Plaintiff ever purchase the land or developments thereon from the Defendant. He further denied that the Plaintiff ever paid Kshs. 400,000/- for the plots. Instead, he averred that the Defendant paid Kshs. 600,000/- for the plots. He further denied that the Defendant has ever agreed to hand over the School to the Plaintiff and that the Plaintiff has never run the School since its inception. He further stated that the Plaintiff, who is a mandatory signatory to the School's bank account, has refused to sign cheques for running the School. He further indicated that the only connection between the Plaintiff and the Defendant is that the Plaintiff was used for registering the School and Father Denis is a member of SACNET as Chaplain by his own free will.

The Plaintiff filed the Supplementary Affidavit of Father Dominic Kipkosgei sworn on 25<sup>th</sup> March 2013 in which he stated that the Plaintiff's involvement with the School was not as a well-wisher but as a sponsor with intentions of wholly taking over the running of the School from the Defendants. He further stated that the funds for the purchase of the said plots came from the Plaintiff. He further stated that the Defendant through its officials agreed to hand over the School to the Plaintiff by the end of December 2010. He further stated that all financial decisions made by Father Denis regarding the School were made in his capacity as an agent of the Plaintiff. He further stated that it is because of its authority over the running of the School that the Plaintiff had one of its own as a mandatory signatory to the School's bank account. He further stated that it was because of the Defendants mismanagement of the School that the School's bank account ran into an overdraft necessitating intervention of the Plaintiff. He indicated further that it is for this reason that the Plaintiff seeks the court's intervention to order the immediate hand over of the School and the Plots to the Plaintiff and further grants restraining orders as the School now faces imminent risk of closure.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out

in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”***

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, 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 latter.”***

Looking at the facts of this case, the Plaintiff has shown that it was involved in the setting up of the School as a sponsor and through the use of its Certificate of Incorporation for the registration of the School with the Ministry of Education. The information availed by both parties reveals that the involvement of the Plaintiff with the establishment and running of the School since inception to date was merely as a facilitator rather than as an owner. The Plaintiff has not been able to demonstrate any ownership rights over the School or the land on which the School stands that is capable of being upheld by this court. It is also true that the Defendants have also not managed to achieve this but this is the Plaintiff’s case. In the absence of documents indicating its ownership of the land upon which the School stands and further of the School itself leads to the conclusion by this court that the Plaintiff has failed to establish a prima facie case with high chances of success at the main trial. That being my finding, I see no need in further interrogating whether the Plaintiff has met the other two conditions for the grant of an interlocutory injunction set out in the **Giella** case cited above.

Accordingly, I hereby dismiss this application with no order as to costs.

**SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup>**

**DAY OF SEPTEMBER 2013**

**MARY M. GITUMBI**

**JUDGE**