REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Civil Suit 56 of 2012

MICHAEL MUTUA MUTUKU t/a SUNRISE SECONDARY SCHOOL.....APPLICANT

VERSUS

PHILIP MAKANGA c/o VICTORY FAITH MINISTRIES.....1ST RESPONDENT

THOMAS NYABUTO OMWANGE.....2ND RESPONDENT

RULING

On 28th February 2012, the Applicant took out a Notice of Motion under a certificate of urgency seeking in the main;

a) That the Respondent do hand over back the school running on the suit premises to Applicant pending the hearing and determination of this suit.

b) That a temporary injunction do issue restraining the Respondent/or their agents and/ or servant and/ or employee from interfering with Applicant and his management of the suit premises or any of the Applicant's schools and learning institutions pending the hearing and determination of this suit.

c) That the costs of the application be provided for.

The Applicant is the registered owner of Sunrise Secondary School; which is classified as a mixed day secondary school in the Certificate of Registration of Schools issued by the ministry of education, science and technology. The Applicant following the pleas of the students' parents to separate boys from girls in the school, decided to open another school for the girls which he christened Sunrise Girls High School. He leased a parcel of land where a school previously known as Esther Girls Mission School was situate, from the 1st Respondent. The school was erected on Land Parcel No. 337/1066 hereinafter referred to as "the suit premises "and which had been closed down by the 1st Respondent. The agreement between the Applicant and the 1st Respondent was that the Applicant would pay to the Respondent rent amounting to Kenya Shillings Ninety Thousand (Kshs 90,000/=) per month plus one month's deposit. He therefore paid Kenya Shillings One Hundred and Eighty Thousand (Kshs 180,000/=) in total on account of agreed rent.

The Applicant claims that the 1st Respondent failed to draw and execute a Lease in his favour despite his demands and requests to do so. On the other hand, the 1st Respondent through his submissions claims that

he called on the Applicant on several occasions to come and execute the Lease without success.

The Applicant then avers that he visited the 2nd Respondent in his capacity as the District Education Officer and lodged his complaint. The 2nd Respondent intervened and the 1st Respondent agreed to sign the lease. The lease however was never signed by either parties.

The Applicant further stated that, a meeting was convened on 7th February 2012 by the 2nd Respondent which meeting was attended by parents of the school. The meeting was held without the Applicant's consent. The 2nd Respondent did not explain to the Applicant the purpose of the meeting instead on that particular day he called the police who ejected the Applicant from the school compound, arrested him and ordered him to be reporting to the police station every week. The Applicant claims that there were no charges preferred against him by the police to this day even though he reports to the station weekly.

The 1st and 2nd Respondents then took over the running and management of the school and dismissed the then employed teachers and recruited new ones. The Applicant also stated that the 2nd Respondent collected fees and other monies from students and parents which fact was disputed by the 2nd Respondent. The Applicant further claims that the school has since been handed over to the 1st Respondent who is in the process of entering into a lease agreement with a third party with intention of selling the subject school as a going concern.

The 2nd Respondent in his replying affidavit dated 26th April 2012 claims that he got involved in the matter when a delegation of students from Sunrise Girls High School came to complain to him about the deplorable state of the school. The allegations then prompted him to instruct his subordinates to carry out investigations and report their findings to him. The 2nd Respondent claims that the Applicant had at total of seven (7) schools all registered in the name of Sunrise Secondary School which was issued with one certificate which is contrary to section 14 of the Education Act (Cap 211). He further stated that the teachers employed in the school lacked the requisite qualifications to teach in a Secondary School. Consequently, a meeting was convened on 22nd February 2012 by the District Education Board where it was decided that the unregistered schools should be closed. This fact is however disputed by the Applicant, who takes the view that the 2nd Respondent is in the process of leasing the suit premises to a third party and sell the school as a going concern. The school was however not closed.

The Applicant herein has through his application dated 28th February 2012 sought a temporary injunction to restrain the Respondent and or their agents and or servant and or employees from interfering with the Applicant and his management of the suit premises pending the hearing and determination of the suit.

He further prays that the Respondent hand back to him the school pending the hearing and determination of the suit.

The issue before the court is whether the applicant has satisfied this honourable court to issue an interlocutory injunction pending the hearing of the main suit. It is however, vital to note that, prayers (a) (b) and (d) have been overtaken by events, leaving prayer (c) (e) and (f) as the only prayer to be taken into account herewith.

The Law is quite clear on grounds in which an injunction would be issued. These grounds were set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358**; Firstly, the Applicant must show prima facie case with a probability of success. Secondly, that the Applicant will have to show that he will suffer irreparable injury such that an award of damages will not be adequate compensation. Thirdly, where the court is in doubt, it will decide the application on the balance of convenience.

Above all the parties need to understand that an injunction is a discretionary as well as an equitable remedy so that the conduct of the parties prior and subsequent to mounting of the application may come in focus.

I have gone through the application and the submissions of the counsels of the parties and I am convinced the Applicant has established a prima facie case and that failure to grant this temporary injunction would cause the Applicant to suffer irreparable injury as he will lose his investments and reputation therein. It is paramount to consider that the Applicant owns a couple of other six schools which would suffer greatly if the prayer sought is not granted. In any case, the 1st and 2nd Respondent have nothing to lose unlike the Applicant.

Taking into account the material presented before me, I am not inclined to grant prayer (c) on the fact of the application I. I may end up making an order in vain. In the circumstances I only grant prayers (e) of the application with costs to the Applicants.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30th JULY 2012.**

ASIKE- MAKHANDIA

JUDGE