



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 145 OF 2011**

**EARLYDAYS DAY CARE AND KINDERGATEN  
LTD.....PLAINTIFF**

**V E R S U S**

- 1. NDIRANGU MAINA**
- 2. JOTHAM ODERO MUNDA**
- 3. JACINTA GAKURU**

**(OFFICIALS OF FEDHA ESTATE RESIDENTS'  
ASSOCIATION).....DEFENDANTS**

**R U L I N G**

The dispute in this case involves an enclosed middle-class residential estate called **Fedha Estate** situated in the Embakasi area of Nairobi. The Plaintiff has established in a house within the estate a day-care centre. The residents' association of the estate called **Fedha Estate Residents Association (FERA)** is opposed to the Plaintiff business.

The Plaintiff's suit as pleaded in its plaint **dated 18<sup>th</sup> April, 2011** is that it leased the **house on L.R. Number 97/1539** in the estate on 13<sup>th</sup> November, 2010 to establish a day-care centre; that it duly obtained the necessary permission from the residents of the estate (including the Defendants) and permits from the City Council of Nairobi to run the day-care centre; that the Plaintiff then invested over KShs. 1.5 million in setting up the day-care centre; and that the day-care centre did not require any licensing from the Ministry of Education as it does not offer any formal curriculum.

The Plaintiff has further pleaded that on or about 10<sup>th</sup> March, 2011 the Defendants, without any cause, unlawfully instructed their agents to deny the Plaintiff's clients access to the day-care centre; that this was notwithstanding that the day-care centre does not cause any nuisance whatsoever to the residents of the estate who are in fact happy with establishment of the day-care centre; and that the Defendants action is causing great loss and injury to the Plaintiff's business which has over 27 children who are being adversely affected.

Together with the plaint the Plaintiff filed **chamber summons dated 18<sup>th</sup> April, 2011**. It sought the main order under **Order 40, rules 1 and 2 of the Civil Procedure Rules** (the **Rules**) of temporary injunction to restrain the Defendants from denying the Plaintiff's clients access to the day-care centre pending determination of the suit.

The application is supported by two affidavits. The first one is sworn by one **Simon Kamau Mwangi** who has described himself as a director of the Plaintiff. To this affidavit are annexed various documents. These documents include an opinion poll of residents of the estate in which the residents appear to have been overwhelmingly in favour of the day-care centre. The second supporting affidavit is sworn by one **Alan Mahasi Ayodi**. He has described himself as a neighbour of the day-care centre with which his house shares a common wall. He has deponed categorically that the day-care centre does not cause any nuisance to him, and that he has no objection to its operation.

The Defendants have been sued as the officials of FERA. They have opposed the application. There are two replying affidavits. The first one is sworn by the 1<sup>st</sup> Defendant. To it are annexed a number of documents. The main grounds for opposition emerging from this affidavit are as follows:

1. That the Plaintiff's director unduly influenced the residents' opinion poll in favour of the day-care centre.
2. That the residents of the estate are overwhelmingly opposed to the day-care centre.
3. That in any event the day-care centre is an illegal business for being in contravention of provisions of various statutes, including the **Physical Planning Act, 1996** and the **Education Act**.

The second replying affidavit is sworn by one **Ahmed Christopher**. He erroneously thinks that he is a party in the suit as 4<sup>th</sup> Defendant. He is not, and appears to have sworn the affidavit on behalf of the Defendants as a resident of the estate. He depones that he is opposed to the day-care centre on grounds of nuisance.

There is yet another "replying" affidavit. It is in fact a further replying affidavit filed on 31<sup>st</sup> May, 2011 with leave of the court granted on 4<sup>th</sup> May, 2011. It is sworn by the 1<sup>st</sup> Defendant. It depones to a previous suit between the same parties over the same subject-matter (**Nairobi HCCC No. 108 of 2011**) where an order had apparently been entered to the effect that the Plaintiff was obliged to obey regulations of FERA for smooth running of the estate. This suit was subsequently struck out on 14<sup>th</sup> April, 2011. Naturally, any interim or interlocutory orders made in that suit lapsed upon it being struck out.

I heard this application on 14<sup>th</sup> of June, 2011. I have considered the submissions of the learned counsels appearing. No authorities were cited.

The principles governing applications for temporary injunction pending disposal of suits are now well established. An applicant must first establish a *prima facie* case with a probability of success. Secondly, the applicant must demonstrate that he stands to suffer irreparable loss unless the order sought is granted. If the court is unable to decide the application upon those two principles, it must do so upon a balance of convenience.

### **Prima facie Case**

The issue whether or not the Plaintiff's business is illegal under the Physical Planning Act or the Education Act must await trial of the action. The particular issue taken by the Defendants with regard to the Physical Planning Act is that no change of user of the premises in question (which are admittedly residential) has been sought or obtained from the relevant authority. Such change of user, if necessary in the context of this case, would be sought from the City Council of Nairobi which is the local authority charged with administration and enforcement of physical planning laws within its jurisdiction.

The same City Council of Nairobi has granted the Plaintiff necessary licences to conduct the business of day-care centre. If change of user were necessary, no doubt the City Council of Nairobi would have pointed this out to the Plaintiff. On their part the Defendants have not pointed out to any condition attached to the title of the property in which the Plaintiff's conducts its business that requires a change of user for such business to be conducted therein.

In any event, a day-care centre, taking care of toddlers and young children while their parents are away at work, would probably be best conducted in a home atmosphere rather than a school atmosphere.

There is an issue whether the Plaintiff's business is purely a day-care centre or whether it is also a nursery school. The material now before the court appears to lean towards it being a day-care centre and not a formal nursery school. However, that issue will be best resolved at the trial of the action.

Regarding the Education Act, the City Council of Nairobi has expressly pointed out that a day-care centre does not require any licensing under the Education Act as it does not offer a formal curriculum education.

More importantly, a residents' opinion poll was conducted before establishment of the day-care centre. The results appear to have been overwhelmingly in favour of the day-care centre. The Defendants have alleged that those results were unduly influenced by the Plaintiff's director. That is an issue for trial; it cannot be decided at this stage upon affidavit evidence and submissions.

I am satisfied upon the material now before the court that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

### **Irreparable loss**

It is true that the Plaintiff has quantified the amount it has so far spent on the business (KShs. 1.5 million). But in this case we have to look beyond the immediate financial ramifications. The Plaintiff obviously has contracts with the parents of the children it has already enrolled. The Plaintiff also has contracts of employment with its 6 or 7 employees. What happens if its business must suddenly stop? It will run the risk of various suits from parents and its employees. The long-term financial implications to the Plaintiff are thus not immediately quantifiable. I find that the Plaintiff stands to suffer irreparable loss unless temporary injunction is granted.

### **Balance of convenience**

I will also consider balance of convenience. As already seen, the residents of the estate were overwhelmingly in favour of the day-care centre in a poll conducted prior to establishment of the centre. The centre is up and running with about 27 or 30 children. There are 6 or 7 employees who are deriving their livelihood directly from the day-care centre. One resident of the estate who owns a house which shares a wall with the day-care centre and lives in that house has deponed that the day-care centre causes no nuisance at all in terms of noise or other inconvenience. On the part of the Defendant, a resident who lives in a house which is several houses removed from the day-care centre has deponed to such nuisance.

I find that the balance of convenience clearly tips in favour of maintaining the *status quo* pending disposal of the suit.

In the circumstances, I find merit in the application by chamber summons dated 18<sup>th</sup> April, 2011. Prayer 3 thereof is hereby allowed. The temporary injunction is granted upon the following conditions:-

1. The Plaintiff shall within 14 days of delivery of this ruling file an appropriate undertaking as to damages.
2. The Plaintiff shall expeditiously prosecute its case. In this regard, parties shall have liberty to apply.
3. Costs of the application shall be in the cause.

Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JULY, 2011.**

**H.P.G. WAWERU**  
**JUDGE.**

**DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY, 2011**