



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 2258 of 2007**

ERIC LUMOSI ASILIGWA.....1<sup>ST</sup> PLAINTIFF  
RICHARD SANG SALAT.....2<sup>ND</sup> PLAINTIFF  
**VERSUS**  
PETER FELIX BAUMGARTNER.....DEFENDANT  
**RULING**

**The Application**

1. The application before court is the Notice of Motion dated 16/01/2009 brought by L.M. Mbabu & Associates Advocates on behalf of the Plaintiffs. The application is brought under Sections 3A, 27 and 63 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules and all other enabling provisions of the Law for **ORDERS:—**

1. **THAT** the Order made and/or the Judgment entered herein by the Deputy Registrar of this Honourable Court awarding the Defendant costs of this suit be set aside and the same be substituted with an Order denying the Defendant costs of this suit or with such other Order as this Honourable Court may deem fit and just to make in the circumstances of this suit.

2. **THAT** in the meantime, the taxation of the Defendants Bill of Costs dated 23<sup>rd</sup> September 2008 be stayed until this application is heard and determined.

3. **THAT** an appropriate Order for costs of this application be made.

2. The application is premised on the grounds that

(a) The Plaintiffs filed this suit in order to seek Orders restraining the Defendant from engaging in the running of Gentiana Primary School.

(b) This suit was withdrawn by the Plaintiffs previous Advocates and an Order or Judgment for Costs was entered by the Deputy Registrar of this Honourable Court.

3. There are also two affidavits sworn by each of the two Plaintiffs respectively in support of the application. Mr. Erick Lumosi Asiligwa's is dated 16/01/2009 and in it he depones that the Defendant herein is a citizen of Switzerland and that he (Defendant) was running Gentiana Primary School and Gentiana Self Help Centre contrary to section 13(2)(f) of the Immigration Act, Cap 172 Laws of Kenya, namely working without a work permit and pass. The rest of Mr. Asiligwa's depositions are contained in the Plaintiff's written submissions to which I shall turn shortly. The second affidavit in support of the application is sworn by Richard Sang Salat, the 2<sup>nd</sup> Plaintiff and is dated 16/01/2009. Mr. Salat affirms the averments made by Mr. Asiligwa and prays that the order awarding costs of this suit to the Defendant be set aside and the same be substituted with an order denying the Defendant any costs or with such other order as this Honourable Court may deem fair and just in the circumstances of this suit.

4. The application is opposed. The Defendant, through the firm of Sichangi & Company Advocates, filed a Replying Affidavit dated 4/3/2009. The Defendant says that he has been in this country lawfully and that the allegations made by the Plaintiffs against him have no basis. The Defendant says that he is not a criminal as alleged by the Plaintiffs and that he is entitled to the costs of the suit which the Plaintiffs filed against him without cause.

**The Facts of the Case**

5. The Plaintiffs filed this suit on 7/11/2007 seeking injunctive orders to restrain the Defendant, his agents and or servants from engaging in the running of Gentiana Primary School located at Dagoretti/Waithaka/1460. The Plaintiffs' claim against the Defendant can be gleaned from paragraphs 4 to 7 of the plaint dated 7/11/2007 which read:—

“4. *In the year 2007, the Plaintiff registered a group known as Gentiana Self-Help Centre with Ministry of Gender, Sports and Social Services.*

5. *The said Gentiana Self-help Centre established a Primary (sic) called Gentiana Primary School located at Dagoretti/Waithaka/1460.*

6. *The Defendant was later invited as a sponsor and he consequently took up his role in co-ordinating the sponsorship of the school.*

7. *However in September 2007, the Defendant arbitrarily, unilaterally and forcefully attempted to take control of Gentiana Primary School contrary to his role and mandate of co-ordinating the sponsorship of the school.”*

6. The Plaintiffs prayed for judgment against the Defendant for:—

(a) *An injunction does issue restraining the Defendant, his agents and/or servants assuming control managing and in anyway dealing with Gentiana Primary School.*

(b) *An injunction does issue restraining the Defendant, his agents and/or servants from evicting, dispossessing or in any way interfering with the co-founder members Plaintiff's positions as the trustees of Gentiana Self-Help Centre which manages Gentiana Primary School.*

(c) *Cost of this suit*

(d) *Interest on (a) and (b) above the court rates.*

(e) *Any other relief that this Honourable Court deems fit to grant.*

7. On the 13/11/2007, the Defendant's advocates M/s Sichangi & Co. filed a Notice of Preliminary Objection to the Plaintiffs entire suit, saying that the suit and the application as filed were based on an illegality, namely the breach of section 22 of the Non-Governmental Organization Co-ordination Act. The Defendant urged the court to find that the application for injunction was incompetent. The Plaintiffs had simultaneously with the suit filed a Chamber Summons application dated 7/11/2007 seeking similar orders of injunction pending the hearing and determination of the suit.

8. By a ruling dated 19/11/2007, the court (Ang'awa J) upheld the Preliminary Objection raised by the Defendant against the Plaintiff's Chamber Summons application dated 7/11/2007. The application for injunction was struck out with costs to the Respondent/Defendant. The main suit was left intact, giving the Plaintiffs/Applicants the opportunity to amend the same, file and serve summons to enter appearance with the amended plaint within 14 days otherwise they would require leave of the court to amend.

9. From the record, the firm of M/s B.N. Kiptoo & Company Advocates who were on record for the Plaintiffs did not appear on 19/11/2007 to take the ruling on the Preliminary Objection. They were summoned to appear in court on 20/11/2007 to show cause why they failed to attend court. M/s B.N. Kiptoo & Co. Advocates appeared gave reasons for failure to attend court on 19/11/2007; and the explanation Mr. Kiptoo advocate gave was accepted by the court.

10. Following the striking out of the application dated 19/11/2007, the Plaintiffs appointed another firm of Advocates, M/s Mogire & Company Advocates to come on record. The said firm of advocates filed their Notice of Change of Advocate dated 30/11/2007 on the 4/12/2007. Together with the Notice of Change, M/s Mogire & Company Advocates filed a NOTICE OF WITHDRAWAL OF SUIT dated 30/11/2007. By the said notice the Plaintiffs withdrew their entire suit and claim against the Defendant herein. Thereafter, the Deputy Registrar entered judgment for costs for the Defendant on the 24/11/2008 upon request by Defendant's counsel dated 4/11/2008. It was that judgment of 24/11/2008 that has given rise to the instant application.

### **The Plaintiff's Submissions**

11. The Plaintiffs have raised two questions in their submissions, that is to say—

(a) *Whether a party to a suit can enforce obligations alleged to arise out of a transaction which is illegal and criminal? Should the court aid such a party?*

(b) *Any final views?*

12. On the first issue, learned counsel for the Plaintiffs argued that the Defendant's activities of running Gentiana School were criminal and illegal from the start as he did not have a work or business permit from the Government of Kenya as required of foreigners by section 13(2) of the Immigration Act, Cap 172, Laws of Kenya. Learned counsel argued further that because of the breach of section 13(2) of Cap 172 by the Defendant, the Defendant was arrested, charged and convicted on his own plea of guilty to breaching the said section. The Plaintiffs contend that if the Plaintiff's Bill of Costs is allowed to be taxed and costs paid to the Defendant this court will be abetting in an illegality. The Plaintiffs' position is that any party who was engaged in the illegal agreement or transaction is precluded from suing upon it and that the courts will not and should not lend a hand to such person so as to enable him to benefit from his own illegality.

13. Counsel for the Plaintiffs relied on the case of **Scott v Brown, Doering, McNab & Co. Ltd.(3) (1892) 2QB 724** where the court said the following at page 728:—

*“no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the party proves the illegality the court ought not to assist him.”*

The above maxim known as *ex turpi causa non oritur action* was applied by the then Court of Appeal for East Africa in the case of **Mistry Amar Singh v Kulabuya [1963]1 EA 408 at page 414** who said that where all the transactions were illegal and where both parties knew that such transactions were illegal, then none of the parties comes to court with clean hands. In the case of **Taylor v Chester (1869), LR 4QB 309**, (applied in the **Mistry Amar Singh case** (above) the court said at p 314 that:—

*“The true test for determining whether or not the Plaintiff and the Defendant were in pari delictor is by considering whether the Plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.”*

14. Quoting from **Bowmakers Ltd –vs- Barnet Instruments Ltd, [1945] IKB 65** at p 71 the Court of Appeal in the **Mistry Amar Singh case** at page 408 said,

*“In our opinion , a man's right to possess his own chattels will as a general rule he enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the Defendant's possession by reason of an illegal contract between himself and the Plaintiff, **provided that the Plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim**” (emphasis added).*

#### **The Defendant's Submissions**

15. According to learned counsel for the Defendant, M/s Sichangi & Co. Advocates, the two issues for determination by the court are whether

(a) *the alleged activities complained of by the Plaintiff in the plaint filed on 8<sup>th</sup> November 2007 are illegal and criminal activities;*

(b) *the subsequent charge and conviction of the Defendant on 25/09/2008, one (1) year down the line covers/applies to the alleged activities/complaints in the plaint.*

16. These submissions by the Plaintiff are based on the Replying Affidavit sworn by the Defendant on 12/11/2009 and filed in court on the same date. Learned counsel for the Defendant contended that the Plaintiffs' complaints that the Defendant attempted to take control of Gentiana Primary School and to interfere with the Plaintiffs' positions as Trustees of Gentiana Self-help Centre do not amount to a criminal offence under the Immigration Act and that in any event, as per their pleading at paragraph 6 of the plaint the Defendant was a sponsor of the group and was invited to coordinate the sponsorship of the school. Counsel submitted that the

Plaintiffs are bound by their pleadings. On this point, I wish to bring out the Defendant's averments at paragraph 8 of the affidavit sworn by the Defendant on 14/11/2007 in opposition to the Plaintiffs' application for injunction dated 7/11/2007. The Defendant said,

*"8. THAT it is true that I was approached by the Plaintiff for support in the opening of **Gentiana Primary School**, that my level of participation and support included the sourcing of donor funds necessary to set up the school and also cater for its operational budget and further under this arrangement, I have the overall responsibility of managing, overseeing the day to day operations of the school."*

The Defendant went on to say that he paid for the purchase of the land on which the school stands and that later he set up Gentiana Development Network, an NGO of which he was the Chairman to run, and manage the operations and affairs of Gentiana Primary School. The Defendant questioned the Plaintiffs claims of ownership of the school.

17. As regards the plea of guilty recorded by the court, counsel for the Defendant submitted that the court did not record the facts to which the Defendant pleaded guilty. With all due respect to the Defendant's counsel, there was an avenue open to the Defendant to question that plea through the criminal process and the Defendant having opted not to pursue such avenues, he cannot be heard to raise the complaints against his conviction at this stage. The Defendant should have appealed, like what happened in the case of **Zablon Ochieng Senge – vs- Republic, High Court of Kenya at Kakamega Criminal Appeal No. 265 of 2003 (G.B.M. Kariuki J)**. The Defendant herein admits that he is not appealing against the conviction while he wants this court to find that the Plaintiff's instant application is based on serious misconceptions of criminal law jurisprudence and above all, the Constitution for the reasons that —

(i) *In the particulars of the offence of 18<sup>th</sup> September, 2009, it is not shown whether the 2007 complaints are covered,*

(ii) *In the facts after the change of plea, (there are no facts on record), there is no mention/reliance on the 2007 complaints*

(iii) *The Plaintiffs have failed to set out the 2007 complaints and why they are offences under the Act*

(iv) *In view of the foregoing, the court cannot now **assume** and **speculate** (to paraphrase the Decision above) that the matters of 2007 which were omitted in the charge **consisted of matters to do with ..... matters in 2008 that led to the conviction!***

(v) *The totality of the above is that the application based on serious misconception of criminal law jurisprudence and above all the constitution that a charge in respect of an offence committed on 18<sup>th</sup> September, 2008 can be stretched back and wide enough to cover the life of the Defendant.*

18. Counsel for the Defendant also contended that the Defendant was issued with work permits, that is to say class K entry permit No. 843714 for a period of 3 years issued on 29/04/2005 and Class A entry permit No.867068 issued for a period of two (2) years issued on 21/01/2009. Counsel argued that as at 2007, the Class K Entry Permit was still valid and that the Defendant was thus lawfully and rightfully in Kenya. Counsel argued further that the Plaintiffs in this case have not bothered to prove beyond reasonable doubt that

(i) *there was no permit*

(ii) *the Defendant's circumstances did not fall under Class K requirements*

(iii) *that the Defendant was engaged in paid employment*

19. For clarity, the Class A and K Entry Permits reads as follows:—

*"Class A:*

*A person who is offered specific employment by a Specific employer, who is qualified to undertake that employment and whose engagement in that employment will be of benefit to Kenya'*

*Class K:*

*A person who:-*

(a) *Is not less than thirty five years of age, and*

(b) *Has in his own right and at his full and free disposition an assured annual income of not less than the prescribed amount, being an income that is assured, and that is derived from sources other than any such employment, occupation, trade, business or profession as is referred to in the description of any of the classes specified in the schedule and being an income that either—*

(i) *Is derived from sources outside, and will be remitted to Kenya; or*

(ii) *Is derived from property situated or a pension or annuity payable from, sources in Kenya; or*

(iii) *I will be derived from a sufficient investment capital to produce such assured income that will be brought into and invested in Kenya, and (sic)*

(c) *Undertakes not to accept paid employment of any kind should he be granted an entry permit of this class.*

*And whose presence in Kenya will be of benefit to Kenya.”*

For the reasons above given, the Defendant says the Plaintiff's application has no merit and urges this Honourable Court to dismiss the same with costs.

20. The Defendant's counsel relied on the Civil Procedure Act, the Immigration Act and the case of **Zablon Ochieng Senge** (above). I have already considered these authorities in the previous pages of this ruling.

21. I have now considered the application as filed and the other pleadings on the record. I have also considered the respective submissions and the issues raised by each party. The main issues for determination are whether (a) the Defendant was guilty of criminal and illegal activities at all times material to the matter before the court and if the answer to (a) above is yes, (b) can he (Defendant) be allowed to enforce obligations arising out of such criminal and illegal activities.

22. After considering the contending submissions made to the court and the law and the authorities cited, the court is satisfied that the Defendant was guilty of criminal and illegal activities involving the running and management of Gentiana Primary School. There is evidence on record and as admitted by the Defendant himself at paragraph 8 of his affidavit sworn on 14/11/2007 that the Defendant had “the overall responsibility of managing [and] overseeing the day to day operations of the school. One can only oversee an activity if they are working. The Defendant did so while knowing that he did not have a valid work permit. He also became the Chairman of Gentiana Development Network, an NGO, without a valid Work Permit to engage in such activity. Infact from the Defendant's own admission, he was the man both at Gentiana Primary School and Gentiana Development Network. The Defendant pleaded in his Preliminary Objection dated 13/11/2007 that the suit and application herein dated 7/11/2007 were based on an illegality and that the same was in breach of section 22 of the Non-Government Organization Co-ordination Act. It is trite law that a party is bound by its pleadings. The Defendant in this case is also bound by his pleadings. The Defendant admitted that what he did not regard to Gentiana Primary School was an illegality. There is also evidence on record that the Defendant has been implicated in the illegality through the conviction on his own plea of guilty in Nairobi Chief Magistrates Criminal Case No. 1517 of 2008 (Republic –vs- Peter Felix Baumgartner) for engaging in the business of Gentiana Primary School as an administrator contrary to section 13(2)(f) of the Immigration Act.

23. In the premises, it would be unconscionable for this court to allow itself to be made an instrument of enforcing the obligation of paying costs to the Defendant when the transaction out of which the suit arose was an illegality. It is clear in my mind that if the Defendant had not attempted to and actually interfered with the running of Gentiana Primary School when he knew he had no authority to do so, the Plaintiffs would not have filed the suit. The Defendant's hands are soiled by that illegality.

24. For the reasons above given I would allow the Plaintiffs' application dated 16/01/2009 in terms of prayer (1) thereof, that is to say

(1) **THAT** *the order made and/or the judgment entered herein by the Deputy Registrar of this Honourable Court awarding the Defendant costs of this suit be and is hereby set aside and the*

*same be and is hereby substituted with an Order denying the Defendant costs of this suit.*

(2) **THAT** each party in this suit shall bear their own costs.

**Delivered and Dated at Nairobi this 15<sup>th</sup> day of January, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Miss Kimeto (present) for the Plaintiff/Applicant

Mr. Karanja for T. Liko (present) for the Defendants/Respondents

Weche – court clerk