



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. NO. 142 OF 2010

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CYLUS OMULA NDEZWA

T/A FORT SMITH HIGH SCHOOLPLAINTIFF/APPLICANT

V E R S U S

ONDIEGI FRANCIS AUKA1ST DEFENDANT/RESPONDENT

ADAN AHMED2ND DEFENDANT/RESPONDENT

R U L I N G

It is not in dispute that sometimes in 2006 the Plaintiff and the Defendants agreed to enter into a partnership to run and manage a school known as Fort Smith High School situated in Uthiru, Kabete and had registered under **The Registration of Business Names Act (Cap. 499)** a business name on 16th February, 2007. The Plaintiff states that he contributed KShs. 200,000/= towards the venture while the 1st Defendant contributed KShs. 24,000/= and the 2nd

Defendant contributed KShs. 100,000/=. The Defendants stated that all the funds to start and run the school business came from the 2nd Defendant, and that the 1st Defendant, who had a teaching background, was to be the Principal and the Plaintiff, who had no such background, was to be its manager. The Plaintiff has not challenged the averments by the Defendants that he had no teaching background.

The Defendants stated that the 1st Defendant was indeed the Principal of the school until he quit that position following disagreements with the Plaintiff. Their case is that the 1st Defendant quit only as Principal but continued being partner. The letter "CON 2 (b)" dated 18th January, 2008 from the Plaintiff to the 1st Defendant acknowledges that the 1st Defendant was the Principal of the school. This letter and the 1st Defendants' letter dated 5th December, 2007 "CON 2 (a)" were relied on by the Plaintiff to say that the 1st Defendant quit from the partnership and also from being principal. The resignation from the partnership has been denied by the Defendants. They allege that the letter "CON 2(b)" relied on by the Plaintiff and allegedly authored by the 1st Defendant is a forgery as he did not author it.

The Plaintiff stated that in May 2008, the 2nd Defendant quit the business as partner and asked the Plaintiff to pay him off in the sum of KShs. 200,000/= which he was paid vide cheque No. 000018 drawn on Cooperative Bank and marked "CON 3". The 2nd Defendant's case is that this was his business and there is no way he could have quit as alleged, or at all. He is supported by the 1st Defendant. They say that the amount was a reimbursement for chairs he had purchased for the school using his own funds.

There is no dispute that, despite the alleged withdrawal from the business, the 2nd Defendant continued to be a signatory to the school account. The Plaintiff says the 2nd Defendant was retained as such because he was his advocate. The 2nd Defendant is an advocate practicing with Wetangula, Adan, Makokha & Co. Advocates. The Defendant says he continued being a signatory because he was the owner of the school.

The Plaintiff states that in December 2009 the 2nd Defendant suddenly developed interest in the school and begun plotting to oust him as the principal. He recruited another principal whom the Plaintiff did not recognize. On 16th February, 2010, Plaintiff continued, he went to

the 2nd Defendant's offices to have him sign a cheque to register students for KCSE. He wanted KShs. 454,750/=. The 2nd Defendant instead became violent and snatched his bag which contained school documents, diary and personal documents and used his staff to violently assault and eject him. The Plaintiff reported the incident to Central Police Station vide OB No. 36/16/02/10 "CON 4" but that police took no action, despite his taking them to the Defendant's offices. Instead, on the following day CID officers went to the school and arrested him for allegedly stealing by director and was charged at Kibera Court. The Defendants' version is that, following complaints, it was discovered that the Plaintiff was operating parallel accounts at Post Bank and Kenya Kenya Commercial Bank, when the school's account was at Cooperative Bank. They had an audit done subsequent to which it was found KShs. 6,500,000/= had been embezzled by the Plaintiff. The matter was reported to police which led to the charging of the Plaintiff at Kibera Law courts vide Criminal Case No. 1148 of 2010. In the annexed charge sheet "AAN" the Plaintiff faces the main charge of stealing by director under **section 282 of the Penal Code** in which he alleged stole KShs. 6,500,000/= belonging to the school. He faces 4 charges of forgery and one charge of altering a false document. The case is pending.

The Plaintiff filed this suit on 10th March 2010 seeking a permanent injunction to restrain the Defendants, their servants and their agents from entering in L.R. No. Dagoretti/Uthiru/1176 or interfering with the management and running of the school situated on the premises. This is the rented premises on which the school runs. The 2nd Defendant filed a defence and counterclaim. He denied the allegations in the plaint and counterclaimed for a permanent injunction to restrain the Plaintiff from entering into or remaining in the premises or interfering in by manner whatsoever in the management and running of the school. He sought the dissolution of the partnership after taking accounts and an order directing the Plaintiff to account for the monies received by the School. With the Counterclaim was filed an application under **order 39 rules 1 and 2 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act** for a temporary injunction to restrain the Plaintiff from entering into and/or remaining in the premises or interfering in the management or running the affairs of the school until the suit is heard and determined. Also sought was a mandatory injunction to compel and or direct the Plaintiff to forthwith hand over all the school properties and the management to the 1st Defendant and to forthwith cease being a signatory to the school's bank account no. 011-2993465600 pending the hearing and determination of the suit. The

application was supported by the 1st Defendant but opposed by the Plaintiff.

The court received submissions from Mr. Kimondo for the 2nd Defendant, Mr. Wachira for the 1st Defendant and Mr. Njiru for the Plaintiff. I have considered them, and have also considered the authorities relied on.

An application for interlocutory mandatory injunction can only be competently brought by motion under **section 3A**, and not by summons under **Order 39 (BELLE MAISON LTD .V. YAYA TOWERS LTD, HCCC No. 2225 of 1992 at Nairobi)**. In so far as the application is seeking a mandatory injunction by summons under **Order 39** it is not competent.

The principles governing the grant of interlocutory injunction have been settled since the decision in **GIELLA .V. CASSMAN BROWN & CO. LTD (1972) EA 358**. The applicant has to demonstrate a *prima facie* case with a probability of success; that he will suffer injury or loss that damages may not adequately compensate; and, if the court is in doubt, it will decide the matter on balance of convenience. The question is whether the 2nd Defendant has made a case for the grant of interlocutory injunction.

The three parties agree that they formed a business venture to operate the school. The Defendants are at one that the money to open and run the business came from the 2nd Defendant alone, whereas the Plaintiff says each made a contribution. It would appear the Plaintiff had no teaching background and that is why the 1st Defendant was made the Principal and the Plaintiff as the manager. The Plaintiff and the 2nd Defendant were made account holders. The Plaintiff says the Defendants have withdrawn from the partnership which they deny. I have considered the averments contained in the affidavits of the parties and the supporting documents. My preliminary view is that the 2nd Defendant has a *prima facie* case with a probability of success.

There is the fact that the Plaintiff has been charged with misappropriating Kshs.6,500,000/= belonging to the partnership and the school. I appreciate that the charges amount to mere allegations that the state shall be called upon to prove beyond doubt, and that the Plaintiff has in his favour the presumption of innocence. The relevance of the charges, however, is that the Defendants have questioned the integrity and honesty of the Plaintiff in relation to the management of the school and its finances. Even for perception reasons only, the

Plaintiff would be expected to step aside to allow for the charges to be heard and the matter determined one way or the other.

The allegation that the Plaintiff has opened a separate account at Post Bank and another at Kenya Commercial Bank through which he is running the school to the exclusion of the Defendants was not challenged. The 2nd Defendant fears that the school funds will be embezzled through the accounts if the injunction is not granted.

I am satisfied that, even if it was to be said that the first two principles have not been met, the balance of convenience would tilt in favour of restraining the Plaintiff from handling the accounts of the school or operating or managing the school until the suit is heard and finalized. This is the reason why I allow the application filed on 19th May 2010 in terms of prayer 4. Costs shall be borne by the Plaintiff.

DATED AND DELIVERED AT NAIROBI

THIS 29TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE

J U D G E