



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Case 224 of 2008**

**KIBWEZI ECDE TEACHERS COLLEGE.....PLAINTIFF**

**VERSUS**

**JEREMIAH MUTHAMA MUTHEMBWA..... DEFENDANT**

**RULING**

1. The Chamber Summons dated 24.11.2008 is brought under Order XXXIX Rule 2 of the Civil Procedure Rules and the Plaintiff seeks an interlocutory injunction against the Defendant ***“to restrain him either by himself, his servants, agents and or employees from entering into the Plaintiff’s College premises and interfering in any manner whatsoever with the smooth running of the Plaintiff’s college pending the hearing and determination of this suit.”***
2. In her Supporting Affidavit sworn on 24.11.2008 and the annexures thereto as well as in submissions by her advocate, Anna Nzilani Kilonzo a director of the Plaintiff Company deponed that the Plaintiff was incorporated on 27.8.2008 but had received a Certificate of Registration of schools on 11.2.2008. That the shareholders of the Company are herself and one Joseph Nzibo Muthembwa and that the Defendant has no lawful interest in the college known as Kibwezi ECDF Teachers College. She further depones that the Defendant started a campaign using the mobile phone short text message service cautioning students against paying fees because the same would be allegedly misappropriated and that the Plaintiff was operating and was being managed illegally.
3. That the Defendant also sent the same message to one Anthony Mutinda Muthembwa and vowed to invade the college and invade the examinations that were scheduled for December 2008 and the loss to the Institution would have been irreparable since the examinations are conducted by the Kenya National Examination Council only once a year hence the need for an injunction as prayed.
4. In his Replying Affidavit sworn on 11.12.2008, the Defendant depones that he is a director of the institution in dispute and is unaware of any limited liability company called Kibwezi ECDE Teachers College Ltd and if it exists, then it was registered illegally and without his knowledge. Further, that Kibwezi ECDE College was registered on 10.1.2007 as a business entity under the Registration of Business Name Act, Cap 499 and the proprietors thereof were Joyce Wayua Nzibo, Jeremiah Muthamba Muthembwa and Nelson Muthama Mulinge. That Anna Nzilani Kilonzo was not one of the partners in the firm to manage the college and that she has no interest in the entity in dispute.
5. The Defendant has also deponed that CMCC NO. 937/2008 (Machakos) was instituted to recover Kshs. 1 million allegedly misappropriated by Joyce Wayua Naibo and that the issues in contest in that suit

are similar to those in the present suit. He urges that the Application be dismissed with costs.

6. For my part, it is clear to me that sometime in 2007, a business firm called Kibwezi ECDE College was established with the Defendant as one of the partners. ECDE is an acronym for Early Childhood Development and Education and from a letter dated 19.2.2007, the college was to train nursery school teachers.

7. It would also seem that without the business firm being dissolved or converted into a limited liability company, another entity styled Kibwezi ECDE Teachers College Ltd was registered under the Company's Act, Cap 486 with different directors but like the business firm, it too was to be situated in Makueni and of interest is that they shared the same address i.e "**P.O. Box 202 Makueni.**" The parties herein have been less than candid about their past relationship but there must have been one before a fall out. In any event, the Defendant and one of his erstwhile partners, Joyce Wayua Nzibo fell out hence the claim against her in CMCC 937/2008 (Machakos). It is unclear where Nelson Muthama Mulinge stands in the dispute and it is unclear, if at all, what relationship exists between Joyce Wayua Nzibo and one Joseph Nzibo Muthembwa, now a director in the Plaintiff Company and what relationship if at all, he has with the Defendant.

8. With that background in mind, has the Plaintiff met the conditions for grant of an interlocutory injunction? Those conditions centre on the subject viz Giella vs Casman Brown & Co. Ltd [1973] E.A. 358, and they are ; -

**a. "an applicant must show a prima-facie case with a probability of success;**

**b. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;**

**c. when the court is in doubt, it will decide the application on the balance of convenience."**

9. In this case, what is sought in the Plaintiff is a permanent injunction in the words set out elsewhere above. Has the Plaintiff established a prima facie case with a probability of success? I think not. It is clear to me that the Defendant prima facie is not a stranger to the college as is alleged. He was certainly one of the brains behind it and it is clear to me that there is only one college called Kibwezi ECDE College. When was he eased out and why? How did Anna Nzilani Kilonzo and Joseph Nzibo Muthembwa come in? If the college was registered on 11.2.2008 with the Ministry of Education why was the Plaintiff itself registered on 27.8.2008, some six months later while the Defendant's entity had been registered prior to the Ministry's registration? It seems to me that only with the registration of the business in 2007 could the Ministry of Education identify the College's proprietors. Otherwise who then were its proprietors if the Plaintiff was by then non-existent?

10. Further, the complaint in the Application related to fear of disruption by the Defendant of the 2008 December examination. Reference is made to a short text messages to one Nyalita Benedict Muema, Muoka Florence and Anthony Mutinda Muthembwa. None of these persons swore affidavits to authenticate these claims neither are the exact words used clearly reproduced. Where then is the evidence that any offending words and threats were made by the Defendant? I see none and I see no evidence before me that the Defendant threatened to disrupt learning activities at the college. The latter is a criminal offence. Where is evidence that a report was made to any Police Station but that no action was made? It may well have happened but where is the evidence for me to firmly hold that this is so? I see none.

11. On the second condition, I see no loss that the Plaintiff will suffer which cannot be compensated in damages if the injunction is not issued. The December 2008 examinations have long passed and any other threat of disruption, if at all, can be dealt with in the criminal justice system.

12. On a balance of convenience in any event, my mind is tilted towards not granting the interlocutory injunction as prayed.

13. The Application before me is without merit and is best dismissed as I hereby do with no order as to costs.

14. Orders accordingly.

Dated and delivered at Machakos this **19th** day of **May, 2009**.

**Isaac Lenaola**

**Judge**

In the presence of; No appearance for parties.

**Isaac Lenaola**

**Judge**