



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

**Civil Case 78 of 2005**

**WINFRED MUTAVE ALI ..... PLAINTIFF**

**VERSUS**

**1. SECRETARY TO THE BOARD**

**2. BOARD OF GOVERNORS**

**NGELANDI AGRICULTURAL HIGH SCHOOL ..... DEFENDANTS**

*(Being an application for Injunction)*

**RULING OF THE COURT**

1. The application before the court is the Chamber Summons dated 25/10/2005 by which the applicant seeks two substantive orders under prayers 2 and 3 thereof. She seeks an order of prohibitory injunction to restrain the defendants by themselves, their agents and/or servants from using or disposing of the nine (9) computers that are the subject matter of the suit until the suit is heard and determined. She also seeks a mandatory injunction against the defendants directing them to hand over and/or restitute to the plaintiff the nine (9) computers that have already been delivered to the defendants.
2. The application is expressed to be brought under Order 39 rules 1 (a), 2, 2A (1) and 3(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application was filed under Certificate of Urgency on the same 25/10/2005. Interim order of injunction was granted on 26/10/2005.
3. The application is premised on eight (8) grounds on the face thereof:-
  - a. on 22<sup>nd</sup> July 2002, the plaintiff entered into a written agreement with the defendants, whereby it was agreed that the plaintiff would supply the defendants with a total of ten (10) computers, five before the end of the year 2002, and the remaining five during the 2003/2004 year (of the contract.)
  - b. under the terms of the said contract, the said computers were to be used in teaching computer studies to the students of Ngelani Agricultural High School, by a computer teacher employed and posted to the said school by the plaintiff.
  - c. the defendants were required (under the said contract) to pay to the plaintiff a sum of Ksh.150,000/= per each (learning) term; 70% of the said sum was payable during the first three (3) weeks of each term and 30% during the last three (3) weeks of each term.
  - d. it was a term of the said contract that upon the expiry of the four (4) years contractual period, the plaintiff would pull out of the computer training project, and hand over the computers in issue to the

defendants.

e. the defendants constantly breached the said contract by failing to make payments to the plaintiff as per the terms of the contract.

f. on 22<sup>nd</sup> November 2004, the defendants wrote a letter to the plaintiff purporting to terminate the said contract, contrary to clear terms of the contract.

g. the defendants have refused to release to the plaintiff the nine (9) computers delivered to them by the plaintiff as at the time of the purported termination.

h. the said computers are being unlawfully used by the defendants in teaching computer studies, and are being subjected to irreversible wear and tear. The plaintiff stands to suffer irreparably unless the said computers are restituted/given back to her by the defendants.

4. The applicant swore a supporting affidavit dated 25/10/2005 in which she gave a history of the dispute between herself and the defendants, basically reiterating the grounds in support of the application. Annexed to the affidavit and marked "WMA1" is a copy of the contract entered into between the plaintiff and the defendants. The contract was executed on 22/07/2002. Annexure "WMA2" is a copy of a letter dated 9/09/2004 by which the 1<sup>st</sup> defendant complained that the plaintiff had not met her part of the bargain. Annexure "WMA3" is a copy of another letter written by the Principal of the 1<sup>st</sup> defendant complaining that the plaintiff had not fully met the terms of the contract and terminating the contract. Annexure marked "WMA4" is a bundle of banking slips for payments received by the plaintiff from the defendants while annexure marked "WMA5" is a copy of a demand letter from the firm of Nzei & Co. Advocates to the defendants. Annexure marked "WMA 6" is a copy of a letter from the Principal State Counsel dated 24/02/2005 in response to "WMA5".

5. At some point during the proceedings, an issue arose as to whether the Hon The Attorney General should appear for the defendants in this matter. The issue was ably canvassed before Onyancha J, and a ruling delivered on 9/06/2006 allowing Mr O'Mirera, the Principal State Counsel, Machakos to appear for the defendant in order to protect the public interest in the defendant.

6. The application is opposed. Though Mr O'Mirera who appeared for the defendants had filed both grounds of opposition and Replying Affidavit, he opted to rely on the Replying Affidavit sworn by Richard Barake Mokaya on 7/11/2005. Mr Mokaya was the then Principal and Secretary to the Board of Governors of Ngelani Agricultural High School. The gist of Mr Mokaya's affidavit is that the plaintiff/applicant was in breach of the terms of the contract dated 22/07/2002 and that in the circumstances, the defendants were right in terminating the contract. He said that the plaintiff's breach of contract had adversely affected the defendants' performance during the 2004 KCSE computer examinations. He denied that the defendants were illegally using the computers supplied by the plaintiff since, according to him, the defendants had paid a total of Kshs.1,149,000/= as adequate purchase price for the computers. The payment and receipt of the sum of Kshs.1,149,000/= is not denied by the applicant.

7. At the hearing of the application, Mrs Nzei appeared for the applicant and canvassed the applicant's case with zeal and preparedness. She basically reiterated the grounds in support of the application and the averments of the sworn affidavit of WINFRED MUTAVE ALI. She said that pursuant to the terms of the contract, the applicant supplied seven (7) computers and also posted a computer teacher to the defendants, but that the defendants were in constant breach of the terms of the contract and eventually terminated the same. She argued that on the basis of the facts deposed to by WINFRED MUTAVE ALI, the applicant had established a prima facie case with a probability of success and that if the orders of prohibitory injunction is not issued as prayed, the applicant is likely to suffer irreparable damage. She argued further that if the computers are not returned to the applicant, the same being the applicant's tools of trade, then the applicant will lose income.

8. Regarding the Replying Affidavit, Mrs Nzei submitted that the same was contradictory, saying in

one and the same breath that there was no valid contract between the parties and acknowledging that such a contract existed. She also argued that termination of the contract by the defendants was illegal because the minutes – Annexure “RBM3” were neither signed nor authenticated by the relevant authorities. Mrs Nzei also argued that the sum of Kshs.1,149,000/= if it was ever paid at all was for services rendered and not for purchase of the computers. To support her arguments, Mrs Nzei cited the following case law for the court’s assistance.

– **Njenga vs Njenga (1991) KLR 401**

– **Court of Appeal at Msa – C.A. No. 124 of 1997 EA Building Society Ltd vs A.C.A D’Souza & Another.**

9. In the Njenga Case (above) the applicant, who was one of the wives of the respondent commenced an action against him and concurrently therewith sought an interlocutory injunction seeking to restrain the respondent from charging their matrimonial home to secure a borrowing from an insurance company. The applicant who contended that the land was purchased jointly with the respondent was apprehensive that if the land was charged by the respondent, he would be unable to repay the loan and cause the land to be sold thereby rendering the family homeless. After considering the facts of the case and after noting that by the very fact that an application for injunction is of an interlocutory nature, thus placing the onus on the applicant to satisfy the court that it should grant the injunction, the court held inter alia that:-

i. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

ii. The tests for granting an injunction are well settled. Firstly an applicant must show he had a prima facie case with reasonable probability of ultimately succeeding upon trial. Secondly, that in the event that the injunction be refused he stands to suffer loss or damage of such nature and magnitude that damages will not adequately compensate him. Thirdly, that the comparative mischief likely to result to him should the injunction be refused outweighs that which results to the opposite party should the injunction be granted.

iii. The jurisdiction of the court to grant an order under Order XXXIX is specific. It can only be exercised where it is shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree.

10. In addition to the above and as held in Giella vs Cassman Brown & Co. Ltd (1973) EA 358, if the court is in doubt, it will decide the case on a balance of convenience.

11. Mr O’Mirera for the respondent sharply disagreed with Mrs Nzei’s submissions. He questioned the terms of the contract which he said did not provide for a definition of the “year” thus leaving each party to its own suitable interpretation. He also contended that the contract having failed to indicate the total consideration thereunder, the same became void ab initio and further that the contract was not duly executed because the Chairman of the Board of Governors did not sign it. According to the contract annexed to the Supporting Affidavit and marked “MAI”, and as admitted by the applicant, the same was executed on 22/07/2002, but without an expiry date and was not signed by the BOG Chairman. To this, Mrs Nzei replied that the Secretary’s signature was sufficient.

12. In his further submissions, Mr O’Mirera contended that the respondent had to terminate the contract because the applicant was perpetually in breach of the same, namely that the deliveries were not made on time and also that the servicing agreement was not complied with by the applicant. He also submitted that the applicant cannot turn around and claim the computers because the contract provided that once payments were made the computers would remain the property of the respondents; and that the acknowledged payment of Kshs.1,149,000/= was sufficient consideration for the seven computers.

13. Mr O’Mirera also submitted that on the basis that the applicant had not complied with the terms of the contract which she now sought to enforce through this application, she had failed to meet the

conditions for granting of injunctions, and in particular that the applicant was not entitled to a mandatory injunction. He relied on the case of Matalinga & Others - vs – Attorney General (1972) EA 518. That case dealt with the issue as to whether or not a mandatory injunction can be made against a government official and it was held that such an order could not issue against the defendant. Mr O’Mirera contended that the BOG Secretary in this case is a public servant against whom a mandatory injunction cannot issue.

14. Further, Mr O’Mirera submitted that the applicant’s injury if any, is compensable by damages and that in the circumstances no substantial or irreparable loss would accrue to the applicant if the orders sought are not granted.

15. Finally, Mr O’Mirea referred the court to section 10 of the Education Act which provides that claims by or against BOGs shall be reported to the Minister as the appointing authority and also referred to sections 12 and 16 of the Government Proceedings act which he said cushioned the respondents in this case against the applicant’s claims. Mr O’Mirera cited a number of authorities on this issue among them Tanzania Breweries Ltd vs Kibo Breweries Ltd & Another (1999)/EA 341 in which the conditions to be fulfilled for the granting of injunctions were reiterated.

16. When all is said and done, the issue that arises now is whether the applicant in this case has satisfied the three conditions for the granting of the orders sought. I shall start with the prayer for prohibitory injunction. After carefully weighing all the circumstances surrounding this dispute, I am not satisfied that the applicant has demonstrated to this court that there is a serious question to be tried on the facts alleged by her nor has it been shown that any injury suffered by the applicant is such that it would be irreparable. From a glance at the contract and from a reading of both the affidavit in support and the replying affidavit, the applicant cannot cry foul when there is reasonable evidence that she did not meet her part of the bargain within the time specified. If at the end of the day judgment is entered for the applicant, the value of the computers would be easily quantifiable and payable to her. I also find and hold that it would be draconian to stop the respondents from using the computers after they have paid out the sum of Kshs.1,149,000/= to the applicant. To do so would greatly interfere with the learning process at the respondent’s school.

17. Even if this application were to be decided on a balance of convenience, I am convinced that there will be greater hardship to be suffered by the respondents than by the applicant if the order of prohibitory injunction is issued against the respondents. The balance of convenience thus tilts in favour of the respondents and accordingly, I decline to grant prayer (2) of the application.

18. As regards the prayer for an order of mandatory injunction, I am unable to exercise this court’s discretion in favour of the applicant for the reason that such an order would bring the respondents onto their knees and jeopardize the learning of the respondents’ students. I also note that, the respondents have already paid out Kshs.1,149,000/= to the applicant. It is also clear from the contract that termination before expiry of the contract period is punishable by “a three months payment in lieu of notice without stopping the training.”

19. Having made the above findings, I do not find it necessary to consider the provisions of both the Education Act (Cap 211) and the Government Proceedings Act (Cap 40) that were raised by the respondents’ counsel. I believe that those issues will be best dealt with at the main hearing of this suit.

20. The upshot of what I have said above is that the applicant’s application is without merit. The same is dismissed in its entirety. I make no order as to costs.

21. It is so ordered.

Dated and delivered at Machakos this 29<sup>th</sup> day of January, 2008.

**R.N. SITATI**

**JUDGE**