



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 92 of 2006 (OS)

JOYCE KATHANJE NJERU PLAINTIFF

VERSUS

ASENATH KANJIRU MBAE DEFENDANT

RULING

This is an application expressed to be brought under Order 39 rules 1,2,3 and 9, Order 36 rule 8A of the Civil Procedure Rules and Section 63 (C) and (e) of the Civil Procedure Act.

In the main, it seeks an order of injunction to restrain the respondent either by herself or employees, servants and/or agents from running and/or dealing in any manner whatsoever with the school known as Itiri Primary School (the school) located on Mwimbi/Chogoria/239-1659, 1660 & 1661 pending the hearing and determination of this suit.

The application is grounded on the fact that the applicant being the widow of the deceased, Jotham Karanja Njeru, is the heir and therefore entitled to the school. She explains that in 1994 the respondent started a nursery school which had only 7 children.

Later in 1997 she recommended to the deceased to build the school and even obtained its registration. Between 1997 and 1999 the respondent and the deceased fell out and the respondent left the school to continue running of the nursery elsewhere.

In 2001 the school was shut down due to financial constraints. The deceased died on 29th November, 2002. In 2004 the school was reopened with 50 students. The respondent then re-joined the school and has been running it since. She has ignored the applicant in the affairs of the school, and has initiated developments in the school without involving the applicant.

The applicant has deposed that the school belongs to the deceased's estate. The respondent, in reply, filed a notice of preliminary objection and a replying affidavit in which she has averred that the applicant lacks capacity to bring this application and the originating summons as she does not have the grant of representation in respect of the deceased's property. The respondent has also denied allegations that the school and the land belong to the deceased.

Those, in brief, are the arguments in this application. It was canvassed *ex parte* as the respondent, despite service of the hearing date, did not attend the hearing. However, the respondent's replying affidavit and a notice of preliminary objection are on record and I am bound to consider them in this ruling.

Being an application for the equitable relief of injunction the court must, in the first place be satisfied that the applicant has a *prima facie* case in terms of the definition in Mrao Ltd V First American Bank(K) Ltd (2003) KLR 125.

Secondly, it must be noted that an injunction will normally not issue unless it is demonstrated that the applicant stands to suffer loss which is not capable of being compensated by an award of damages.

Finally, in case the court is in doubt, the application will be decided on a balance of convenience. See Giella V Cassman Brown & Co.Ltd (1973) EA 358. In considering whether or not the applicant has a *prima facie* case, the court is not called upon to decide with finality the rights of the parties.

I have curiously considered the applicant's claim which is based on the fact that the school belongs to her late husband and being the widow she is entitled to the proprietorship of the school.

First, she has not annexed to her application any documentary proof to show that indeed the school and the land on which it stands belong to her deceased's husband. The only document annexed, in respect of the school is an application for registration of an educational institution. It is merely an application. In it the deceased is referred to as the sponsor.

Secondly and the most fundamental aspect is that the applicant is seeking to deal with a property she alleges belongs to her husband, who is deceased without showing any legal capacity.

The applicant has not demonstrated that she has authority under the Law of Succession Act to bring the suit herein. It is now well-settled, on the authorities of Virginia Wambui Otieno V Joash Ougo and Another (1988) 1 KAR 1049 and Trouistok Union Int. V Jane Mbeyu that a widow, although the preferred choice under Section 66 of the Law of Succession Act, cannot lawfully act in respect of the deceased's estate before the grant of representation has been issued to her.

To that extent I find that the applicant has not demonstrated a *prima facie* case. I also find that the kind of loss, if any, that may be suffered by the applicant is, capable of compensation by an award of damages.

For the reasons stated above this application is dismissed with costs. For the same reasons I find the originating summons incompetent and the same is also struck out with costs to the respondent.

Dated and delivered at Meru this 11th day of October, 2007

W. OUKO

JUDGE