



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 218 of 2005

NAKURU GIRLS HIGH SCHOOL

BOARD OF GOVERNORS ..... 1<sup>ST</sup> PLAINTIFF

AMOS KABIRU KIMEMIA ..... 2<sup>ND</sup> PLAINTIFF

JANET WANGARI MUIGAI ..... 3<sup>RD</sup> PLAINTIFF

ANDREW WANYOIKE GICHARU ..... 4<sup>TH</sup> PLAINTIFF

VERSUS

BOARD OF GOVERNORS

UPPER HILL MIXED SECONDARY SCH ..... DEFENDANT

JUDGMENT

The plaintiffs in this case are **Nakuru Girls High School, Board of Governors Registered Trustees**, 1<sup>st</sup> plaintiff, **Amos Kabiru Kimemiah**, 2<sup>nd</sup> plaintiff, **Janet Wangari Mungai**, 3<sup>rd</sup> plaintiff and **Andrew Wanyoike Gicharu** the 4<sup>th</sup> plaintiff respectively. They have instituted this suit against the Board of Governors Upper Hill Mixed Secondary School.

The plaintiffs filed this suit in the High Court at Nairobi on 14<sup>th</sup> January 1997. This file was transferred to Nakuru High Court by an order of **Ransley J** dated 18<sup>th</sup> July 2005. The hearing commenced on 25<sup>th</sup> July 2006. The second plaintiff, **Amos Kabiru Kimemia** gave evidence during the hearing on behalf of the other plaintiffs.

According to this witness, he is a founder member and Registered Trustee of Nakuru Girls High School as stated in the grant of certificate of incorporation that was issued by the Minister for Lands on 6<sup>th</sup> November 1985 under the Land (*Perpetual Succession Act Cap 164 of the Laws of Kenya*).

In that capacity, the plaintiffs applied to be allocated a plot of land by the Commissioner of Lands and after following the laid down steps which they were advised to take, one of which was to register a body under the **Perpetual Succession Act** so that they could be allocation land to start a Harambee Girls Secondary School. The 2<sup>nd</sup> plaintiff with other trustees after registration of the body known as Nakuru Girls High School trustees registered, petitioned the Minister for Lands and Settlement seeking to be

allocated ten (10) acres of land being reference number **Nakuru/Municipality/Block XVI 76**. The 1<sup>st</sup> plaintiff was allocated the land and a lease was duly issued to 1<sup>st</sup> plaintiff over **Nakuru Municipality/Block 16/6** on 8<sup>th</sup> January 1985.

The 2<sup>nd</sup> plaintiff testified that he and other trustees set out to develop a school and since they did not have enough money for running the school, they borrowed **Kshs.300,000/-** from Kenya Commercial Bank in 1987 for the construction of the school's building. The 1<sup>st</sup> plaintiff was unable to pay the said loan and by 1995 the outstanding loan was **Kshs.1,601,580/-**. The bank made several attempts to realize the security being land reference number Nakuru/Municipality Block 16/6 where the school is situated.

Besides the loan with the bank, the school also owes a further sum of **Kshs.568,698/90** to Nakuru Municipal Council for unpaid rates and the Council has also threatened to sell the school land in order to recover the rates.

In addition, the 1<sup>st</sup> plaintiff owes **M/s W. H. Sayer & Co. Ltd** over **Kshs.830,489/-** for construction works on the school which the company undertook in the year 1987. The said company has gone ahead and filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff being **H.C.C.C No.406 of 1991 Nakuru**.

The plaintiff's complaint is that the defendant constituted itself and illegally in 1995 and removed the registered trustees from the management of Nakuru Girls High School and went further to change the name of the school to Upper High Mixed Secondary School. The plaintiff's further took issue with the way the defendants changed the school to a mixed school which is contrary to the constitution. The 2<sup>nd</sup> plaintiff contended that the defendant is illegally in the management of the school as it neither replaced the trustees as registered trustees nor is it furthering the objects of Nakuru Girls High School. Also the school's current indebtedness cannot be reduced or resolved unless the plaintiffs are allowed to taken over the management of the school as the defendant has refused and or neglected to address itself to the said debts thereby exposing the students to great risks.

It is for the above reasons that the plaintiffs filed this suit and obtained an interim order of injunction against the defendant. However, the 2<sup>nd</sup> plaintiff testified that when he served the court order upon the defendants they invited the print media who reported that the 2<sup>nd</sup> plaintiff was trying to grab a public school.

The 2<sup>nd</sup> plaintiff therefore asked this court to grant the orders sought and a declaration that the defendant is illegally in management of Nakuru Girls High School.

The defendant entered appearance on the 24<sup>th</sup> March 1998 through the Attorney General on behalf of the defendant but never filed a defence to this claim. The defendant did not attend court during the hearing by way of formal proof when this matter came up for hearing. The evidence of the plaintiff is therefore uncontroverted and Counsel for the plaintiff urged this court to find that the *bonafide* owners of the Nakuru Girls High School are the plaintiffs who are duly registered under the trustees (**Perpetual Succession Act**) Counsel for the plaintiff further urged this court to take note of the decision by **Kimaru J** in **H.C.C.C No. 360 of 2004. The Attorney General –vs- Kenya Commercial Bank Ltd** and others where the court held that the Attorney General had no *locai standi* in law to purport to institute on behalf of a duly constituted Board of Governors. The court held that a Board of Governors of a school is duly mandated under **Section 10 and 11 of the Education Act (Cap 211 of the Laws of Kenya)** to sue and be sued. The attention of this court was further drawn to the Court of Appeal decision in the case of **Kenya Commercial Finance Co. Ltd Vs Afraha Education Society E.A.L.R 2001 I.E.A page 87** where the Court of Appeal set aside an order by the High Court granting an order of injunction to stop the sale of a public school by public auction on the grounds that the balance of convenience tilted in favour of the school for reasons that there was a school on the suit land and the court should not disrupt the education.

The court of held:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is**

- i. *whether the applicant has laid out a prima facie case with a probability of success*
- ii. *whether the applicant might suffer irreparable injury if the injunction is not granted and*
- iii. *(if there is doubt) whether the balance of convenience favours the applicant (See Geilla –VS- Cassman Brown & Co. Ltd [1973] E.A 358.)”*

I have considered the evidence adduced by the 2<sup>nd</sup> plaintiff and all the documents that were produced as exhibits the pleadings and submissions by Counsel for the plaintiff.

I have also taken into consideration that this matter was not contested by the defendant. The only issue is to determine whether the plaintiffs have been able to formally prove their case to the required standard. In the absence of defence, the plaintiffs’ case will only be considered against the plaintiffs’ evidence, the pleadings, the documents produced in evidence and the law.

According to the documents and in particulars the certificate of incorporation, the plaintiffs were registered as trustees of Nakuru Girls High School. To hold the property in trust of the 1<sup>st</sup> plaintiff. The certificate further states in paragraph 2 that

*“Each of the said trustees shall hold office for a period of three years subject to prior resignation or retirement or removal as provided in the deed of trust.”*

There is something that has not come clear from the plaintiff’s evidence that is the circumstances under which the defendants appointed a new Board of Governors who took over the management of the school. Was it through a coup or a normal election of board of Governors after the rotation that is envisaged under the certificate of incorporation?

Another issue that raises considerable curiosity from the plaintiff’s evidence are the prayers sought especially the order *“vesting the 2<sup>nd</sup> to the 4<sup>th</sup> plaintiff with the management of Nakuru Girls High School being the registered trustees thereof.”*

According to the trustees (**Perpetual Succession Act**), trustees are appointed for a particular purpose and their appointment has a tenure. The trustees are supposed to hold the office and the properties in trust for the benefit of the trust concerned with restrictions as found in the instrument of trust. (See **Section 3 of the Act**).

In my humble view, if the plaintiffs were voted out of office. It is not clear from the evidence how this was illegal. I am of the view that the positions they occupied as trustees does not entitle them to the property of Nakuru Girls High School, they are trustees and the property cannot be vested in them in their individual capacity and even if the plaintiffs were founder trustees, that was not a life time occupation.

Further the plaintiffs’ complained that there were various obligations that they undertook as trustees namely; a loan with Kenya Commercial Bank which was only **Kshs.300,000/-** but now there is a colossal sum of money owed to the bank and a contractor and rates payable to the Nakuru Municipal Council for the suit land.

My humble understanding of Registered Trustees under the **Trustees and Perpetual Succession Act** is that the trustees who assume the management, the Board of Governors who succeeded plaintiffs in the management of the school should assume the responsibility of discharging those obligations that remained unfulfilled. In the event of their failure to do so, the assets of the school or land will be at risk of being repossessed by the creditors.

All the documents in support of this case show that the plaintiffs were setting up a public school and further the said school was built on “*Harambee*” spirit.

Having analysed the evidence and the documents in support and also the law, I am of the view that this case is distinct from the case cited by Counsel for the plaintiff i.e. **The Attorney General –VS- Kenya Commercial Bank Ltd & 3 others (Suppra)** and the Court of Appeal case of **Kenya Commercial Finance Company Ltd –Vs- Africa Education Society**. In the first case, the school was owned by a limited liability company while the school in this case is held in trust by registered trustees, that cannot entitle them to the orders vesting the school to them, if they are the registered trustees they will continue holding the property in trustee and if they are not the Board of Governors of the school too bad. I am not satisfied that there is any material before this court to warrant the court to interfere with the management of a public school too bad. The debts that the plaintiffs is complaining about were incurred by the plaintiffs while in office if anybody has mismanaged the school it must be the plaintiffs for failing or neglecting to pay the obligations and the debts which they incurred while in office.

I am not lost to the fact that a court under the **Trustee Act Cap 167** can appoint new trustees for purposes of discharging the obligations of a continuing trust.

**Section 42(1)** provides:

***1) “The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee.***

***2) .....***

***3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.”***

It is clear from the trust deed or certificate of incorporation that the trustees are in office, there is no justification to warrant the interference by this court.

The other complaint that I can discern from the plaintiffs’ case is that the defendants have changed the name of the school to Upper Hill Mixed Secondary School and admitted both girls and boys. However, the plaintiff did not show which constitution of the school was bleached. The documents in support of the case clearly spell out that the public land which was to be held in trust was meant for building a school on “*Harambee*” basis.

The upshot of the above analysis is that I find the plaintiff has not been able to prove his case to the required standard and accordingly I hereby dismiss his case with no order as to costs.

It is so ordered.

**Judgment read and signed on 15<sup>th</sup> December 2006.**

**MARTHA KOOME**

**JUDGE**