



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 103 OF 2004**

**1. THE HEADMASTER KIEMBENI BAPTIST PRIMARY SCHOOL**

**2. MUNICIPAL COUNCIL OF MOMBASA.....APPELLANTS**

**VERSUS**

**THE PASTOR OF KIEMBENI BAPTIST CHURCH.....RESPONDENT**

**JUDGMENT**

This is an appeal against the judgment of Ms J. Kwena, Senior Resident Magistrate delivered on the 24<sup>th</sup> day of September 2004 in Mombasa CMCC No. 5465 of 2003 in which she allowed the Respondents' application for injunction and restrained the Appellants from running Kiembeni Baptist Primary School.

The genesis of the matter is this: Sometimes in 1986 Kiembeni (Bamburi) Baptist Church (the Church) purchased all that piece of land situated at Kiembeni in Mombasa Municipality comprising 3.96 acres or thereabouts and known as plot No. 811/11/M.N. (old plot No. 169/11/M.N.) (the land) and developed and established thereon *inter alia* a primary school known as Kiembeni Baptist Primary School (the school). It would appear the Church was unable to solely run the school. Through the Municipal Education Officer Mombasa it sought the assistance of the Ministry of Education (the Ministry) and it was given teachers from the Teachers Service Commission (TSC Teachers). At the commencement of this suit I am told the school had about 12 TSC Teachers including the Headmaster, Mr. Donald Kaindi, the first Appellant.

All appears to have gone well at the school until the year 2003 when the Government introduced free primary education and sent funds to the school for purchase of books and equipment. The control of those funds triggered the issue of who controls or runs the school, the Church or the Appellants and led to the institution of the suit from which this appeal arises. In that suit, filed by the Respondents as the officials of the Church, three orders are sought. The first one is:-

**“(a) An injunction restraining the defendant (sic), their agents and or servants from interfering in any manner with the running and or management of the said school and further be restrained (sic) from entering into, holding, resolving and/or in any way convening any meeting in the church compound.”**

The second prayer is for a declaration that the Ministry do expedite and make known its decision on the Church's application for the registration of the school as a private and the third prayer is for the costs of the suit. Contemporaneous with the filing of the suit the Respondents filed an application under Order L Rule 8 and Order 39 Rules 1 and 2 as well as section 3A of the Civil Procedure Act and sought an order

of injunction in the same terms and words as that sought in the plaint. That application was later amended along with the plaint and a further order directed to the Ministry, which we are not concerned with in this appeal was sought. The amended application was heard by Ms J. Kwena who found that as the school stands on privately owned land registered in the name of the Church, the Church's constitutional right enshrined in section 75(1) of the Constitution should be protected by allowing it to run the school. She therefore allowed the Application as prayed provoking this appeal.

Arguing the Appeal before me Mr. Mutubia, counsel for the Appellants, submitted that the impugned order of injunction is for all intents and purposes a permanent mandatory injunction which should not have been issued as the conditions for grant of such an order were not met. He further submitted that the order should not have been issued as the school has not been registered as a private school, the conditions for such registration having not been met by the Respondents.

On his part Mr. Gikandi, counsel for the Respondents submitted that the grant of an injunction being an exercise of the courts discretion it can only be set aside if it is shown that it was erroneous. In this case, he said, nothing of the kind has been shown and the appeal should therefore be dismissed.

Mr. Gikandi further submitted that the piece of land on which the school is built being privately owned by the Church, the Church constitutional right should be protected by allowing it to run the school. He said the Municipal Council of Mombasa has over the years issued permits to the Church to run the school as a private school and should not now be heard to say that the school is a public one.

In a short rejoinder Mr. Mutubia submitted that the Appellants are not trespassers. They should not be thrown out without being heard. The Government has posted 17 teachers to the school and the Respondents have employed only 4. He also said that the parents of the children who are and have gone through the school have always been charged building fund which does not happen in private schools.

I have considered these submissions. The Appellants have in their defence claimed that this is a public and counter-claimed for an order restraining the Respondent from interfering with its management. They had also filed an application for injunction which was heard along with the Respondents' seeking similar orders. In other words both the parties claim the right to run and manage the school. The Church claims that it owns the school and has all along managed it. The Appellants on the other hand claim that the Headmaster of the school and some 15 other teachers have been posted to the school by the Government and the school has all along been run as a public school.

In my view these are issues that can only be resolved after a full hearing of the case. The Respondents application sought a permanent injunction and that is what the learned Senior Resident Magistrate granted. That in effect conclusively decided the suit. That is wrong. When dealing with applications for injunction courts should not decide issues of fact – **Mbuthia – Vs – Jimba Credit Finance Corporation & Another (1988) KLR 1**. Issues of fact should be decided after hearing evidence.

I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also **Shah \_v – Shah (1981) KLR 374**.

In the circumstances I allow this appeal and set aside the Senior Resident Magistrates order of 24<sup>th</sup> September 2004.

The Appellants have prayed that I substitute the order set aside with one allowing their application for injunction which was heard together with the Respondents' and restrain the Respondents from interfering with their management of the school. Though they are not seeking for a permanent order one wonders whether that will not appear as going from one extreme to the other. While bearing that in mind I am alive to the fact that this is a school with hundreds of pupils. Their education should not be disrupted

because of the wrangling between the parties to this appeal. I did make that quite clear when I dealt with the application for stay of execution in March last year.

On the 1<sup>st</sup> March 2005 I stayed the execution of the ruling which I have just set aside. I suppose the school has since been and is still being managed by the Appellants. I order that the Appellants do continue managing the school until Mombasa CMCC No. 5465 of 2003 is heard and determined. I further order that that suit be heard and determined within six months to end the confusion in the school so that come next year all interested parties will have known who is the owner and manager of the school. To that end I direct that Mombasa CMCC No. 5465 of 2003 be mentioned on or before 10<sup>th</sup> February 2006 before any Magistrate with jurisdiction to hear the matter for purposes of taking a convenient hearing date. Each party shall bear its own costs of this appeal.

DATED and delivered this 27th day of January 2006.

**D. K. MARAGA**

**JUDGE**