



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL CASE NO. 28 OF 1998**

**NICODEMUS KEBASO.....PLAINTIFF**

**VERSUS**

**CHAIR MAN OF THE BOARD OF GOVERNORS MATONGO**

**LUTHERAN THEOLOGICAL COLLEGE.....DEFENDANT**

**RULING**

The plaintiff Nicodemus Kebaso sued the defendant seeking orders directing and compelling the defendants to re-admit and allow the plaintiff to continue with his studies, a permanent injunction to restrain the principal from disobeying orders to readmit the plaintiff as a student in the defendant institution, costs of the suit and such further or other relief this Court may claim fit to grant.

The matter proceeded by way of formal proof and judgment to that effect was given dated on 22/5/98 and read on 9/6/98. A decree was extracted with five items.

- 1) An order be and is hereby made directing and compelling the defendants to readmit and allow the plaintiff to continue and complete his studies subject to good behavior on his part.
- 2) The principal of the college be and is hereby ordered and directed to allow the plaintiff free ingress and egress to the college and accessibility to the college facilities including an ID card.
- 3) A permanent injunction be and is hereby issued to restrain the principal, his servants agents successors and whosoever claims through him from disobeying the court orders herein.
- 4) The plaintiff will have costs of the suit.
- 5) There be liberty to apply.

There were interlocutory applications made in the matter which were settled by a consent endorsed by the counsels on behalf of their clients and it has 4 items.

- a) That the said principal Osmo Harjula and the Chairman Board of Governors Matongo Lutheran Theological College expressly agree to comply with the decree of this court dated 1st September 1998 and will admit the plaintiff applicant to the defendant's college to begin his studies internship with effect from 2nd November, 1998 and to sign all documents and letters to authorize and facilitate learning by the plaintiff/ applicant.

b) That should the Chairman of the Board of Governors or any member of the Board of the defendant or the principal Osmo Harjula or any other agent of the defendant's Board by the decree fail to implement the terms of the decree and this order then, that offending party will be liable to immediate arrest without further order of the court.

c) The plaintiff to be at liberty to apply,

d) The plaintiff applicant will have the costs of this application.

It appears from the deponents of both sides that the plaintiff applicant went to the college and attended lessons together with others. When dealing with this application I will just take on a review off the general picture and outline of the surrounding circumstances because there is an application to arrest and commit the defendant's representatives being the Chairman and principal to civil jail for contempt of a court order and secondly there is an application filed by the defendant representatives to show cause why they should not be arrested and committed to jail for contempt which is still proceeding. That application and the current one were allegedly sparked off by the defendant's representatives informing the plaintiff that he will be awarded a General Certificate for Pastoral Training course and not a Diploma in Theology. Without going into great detail the plaintiff's stand is that when he was admitted back into the institution he was admitted to the diploma course, he has sat and attended lessons in the diploma course along side other diploma students, he has sat and qualified for an award of a Diploma in Theology and the defendant's representatives should be compelled to award him that diploma. The stand of the defendant's representative is that indeed the plaintiff was admitted into the diploma course, sat and took lessons on the said course and has also taken exams but that does not qualify him for an award of a Diploma in Theology and worse he has not even completed papers for the award of even the pastoral training course which they were offering. As stated that argument is subject of an application which is still pending and I will not give any comments on that further.

The class is due to graduate on 29/8/00. It is on this basis that the plaintiff has come to this Court under certificate of urgency by way of notice of motion under order 39 rules 1,2, and 3 of the CPR and section 3A of the CPA seeking among others orders that the defendant's respondents be ordered by way of mandatory injunction not to carry out graduation ceremony scheduled for 29th August, 2000 or any other date for the graduation without the name of the applicant plaintiff being on the Diploma DT 1 or DT 2 list of graduands, until further orders of this court.

2) That the respondents be equally restrained by way of mandatory injunction from awarding a certificate known as General Certificate to the applicant on 29/8/2000 or any other date until further orders of this court.

3) That should the defendant/respondent by any chance carry out the graduation then they be arrested and brought to the Court and be committed to prison for contempt of court.

The sum total of the grounds in support as set out in the body of the application, affidavit in support and oral submissions in Court are that there is a judgment in place and a consent between the parties enjoining the defendant's representatives to allow the plaintiff complete his studies and completion of studies include graduation, that as matters stand the plaintiff cannot graduate and if he does not graduate he will be greatly prejudiced and by the nature of the matters herein, the plaintiff cannot be compensated for by way of damages, that he belonged to the class that is going to graduate and it is only fair that the graduation be stopped or postponed until the status of the plaintiff is determined and he be made to graduate along side the other graduands.

The defendant respondents have opposed the application on the basis of the papers filed as well as a preliminary objection filed and the main ones are that this period being vacation period the applicant should have come under the relevant rules seeking leave of the Court to have the matter placed before the judge during the vacation, that the orders sought cannot issue as they are not based on any plaint, that the plaint, judgment, and the consent order do not have anything to do with graduation or award of a Diploma in Theology, and that they still maintain that the plaintiff has not qualified for the diploma course which

matter is still under adjudication and consideration by this Court and it is yet to be ruled upon and lastly that there are other third parties involved and they will be inconvenienced, that it is not fair that one person should inconvenience many.

On the Court's assessment of the facts in this application it is clear that there is no dispute that the Court is on vacation and the application was not first certified before the judge to make orders that the same be place before the judge during the vacation. Indeed this is a requirement but failure to do so in the circumstances of this case is not fatal as the file has already been proceeding before the judge during the vacation at the motion of the court. There was some urgency involved right from the start and that is why the matter was ordered to proceed during the vacation.

As for the issue of whether the orders sought are to be granted or not I wish to state that there is no doubt that there is a graduation ceremony scheduled for 29/8/00 sought to be stopped. It involves other graduands besides the plaintiff. The status of those other graduands is known and it is not in dispute. The status of the plaintiff is in issue here and it is yet to be ruled upon. It is also clear that as to whether the plaintiff, judgment and consent order envisaged graduation or not is also a matter to be ruled upon at a later stage as it touches on the certificate that is to be awarded to the plaintiff. But one thing which is however clear is that the issue of mandatory injunction is being mentioned for the first time. The circumstances under which such drastic orders can be issued are well known. I was referred to three authorities on the subject.

The case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 which is an authority on the ingredients for granting of an injunction namely that the applicant must show a *prima facie* case, it must be shown that damages will not be an adequate compensation and where the Court is in doubt it will grant the same on a balance of convenience. The defendants assert that the balance of convenience is in their favour as arrangements have already been set and that the applicant has not shown what damages he stands to suffer if the graduation proceeds. While the stand of the plaintiff applicant is that the issue touches on an award of a certificate, it is a matter touching on the education of the plaintiff and the loss or injury to be suffered by him cannot be measured up in damages as they are not capable of being quantified.

In the case of *Teresa Shitakha v Mary Mwamodo and Four others* [1982- 88] 1 KAR 965 where it was held *inter alia* that it would not be right to grant orders which would have the effect of paralyzing the national organization or bringing it to a halt both by restraining the holding of meeting, and by the organization of elections pending a decision on the main action or on the appeal from the interlocutory order. To do so would be out of proportion to the alleged wrongs suffered by the applicant and damages would be an adequate remedy for her if the allegations were proved. Accordingly the balance of convenience lay against the granting of the orders sought by the applicant. The case of *Belle Maison Limited v Yaya Towers Limited Nairobi* HCC No 2225/92 where my learned brother judge Mr Justice Bosire as he then was (now JA) where at page 4 of the said judgment quoting the case of *Noor Mohammed Jan Mohamed v Kassamali Virji Madhani* (1953) 20 EACA where it was held that a mandatory injunction should not be granted where innocent third parties are likely to be affected.

Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the plaintiff cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the plaintiff had it not been for the unfortunate situation that the plaintiff finds himself in. The Court tried to rule on his fate before the graduation day but this was not possible. It is the Court's considered view that just as the plaintiff joined another class in the course of his studies and since it has not been stated that there will be no more graduation in the college, it is only right and proper that the graduation scheduled for 29/8/00 be left to proceed as scheduled and it is so ordered. Prayer 2 of the application dated 21st August, 2000 and filed on 22.8.00 is therefore refused.

As for prayer 3 in view of the fact of whether the plaintiff at the end of his course has earned a Pastoral

Training Course General Certificate or a Diploma in Theology Certificate is pending decision it is only proper that a mandatory order be issued to restrain the defendants representatives, from including his name among the graduands may it be under the General Certificate of Pastoral Training or Diploma in Theology until the matter is ruled on and determined by this Court. This is so because if they proceed to include the plaintiff's name under either certificate they will be determining the pending proceedings and there will be nothing to continue to trial. The plaintiff's name should therefore be deleted from the list of graduands for 29/8/00. Prayer 3 is therefore granted.

Prayer 4 is also allowed but limited to prayer 3 and should the defendants fail to comply with prayer 3 above then they will be arrested and committed to civil jail.

2) Costs of the application will be in the cause.

**Dated and Delivered at Eldoret this 25th day of August 2000.**

**R.NAMBUYE**

**JUDGE**