



**Kip Mcgrath Education Centres Limited v Makworo (Civil Case 224 of 2018)  
[2024] KEHC 12488 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 224 OF 2018  
PM MULWA, J  
OCTOBER 17, 2024**

**BETWEEN**

**KIP MCGRATH EDUCATION CENTRES LIMITED ..... PLAINTIFF**

**AND**

**GEORGE WESLEY O MAKWORO ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed the plaint dated May 25, 2018 stating that by a Franchise Agreement made on the November 9, 2011 between the Plaintiff and the Defendant, the Plaintiff granted the Defendant the right to carry on, within the Territory, as defined, a tutoring business under the Business name "KipMcGrath Education Centres (Westlands)" for a term of six (6) years commencing on November 9, 2011.
2. It was the Plaintiff's averment that the Defendant has been in breach of the said Franchise Agreement for reasons that the Defendant refused to pay the Franchise Fees of Kshs. 57,600.00 for the month of November 2016 notwithstanding the Plaintiff's demand and persists in such refusal.
3. Further, the Defendant refused to remove the signage with the Plaintiff's name erected on 3<sup>rd</sup> Parklands Avenue, Nairobi, notwithstanding the termination or expiry of the Franchise Agreement. In addition, the Defendant also refused to give the materials listed in schedule 2 of the Franchise Agreement to the Plaintiff notwithstanding various demands including a demand letter dated December 22, 2016.
4. Lastly, the Defendant refused to cease engaging the Plaintiff, its employees and Associates in endless abusive emails, WhatsApp messages, text messages and telephone calls notwithstanding various demands that any communication be channelled through the Plaintiff's Advocates offices.
5. Consequently, the Plaintiff prayed for orders against the Defendant for:



- a. An order restraining the Defendant from engaging the Plaintiff and its Associates in endless abusive correspondence, emails, WhatsApp messages, text messages and telephone calls.
  - b. An injunction compelling the Defendant to remove the signage with the Plaintiff's name erected on 3<sup>rd</sup> Parklands Avenue Nairobi.
  - c. An injunction compelling the Defendant to give the materials listed in Schedule 2 of the Franchise Agreement signed between the Plaintiff and the Defendant on November 9, 2011 to the Plaintiff.
  - d. An injunction compelling the Defendant to submit the Student's Enrolment Forms and Files together with the Parent's contacts to the Plaintiff.
6. The Defendant responded to the plaint vide a Statement of Defence and Counterclaim dated July 24, 2018. The Defendant denied the claims made against him by the Plaintiff and added that there were two other and/or additional agreements that underpinned the contractual relationship between the Plaintiff and Defendant, namely, the Agreement of Sale and Assignment of Goodwill dated November 7, 2011 and a Franchise Agreement Class 1A dated November 9, 2011.
7. In the counterclaim, the Defendant sought judgment against the Plaintiff for: a declaration that the Plaintiff did not validly rescind the Franchise Agreement; the sum of Kshs.121,794,662.00 for loss of business income; damages; damages for fraudulent misrepresentation among other prayers.
8. However, the court takes notice that the Defendant filed a Notice of Withdrawal of Counterclaim dated February 15, 2023 and on July 18, 2023 the counterclaim was withdrawn.
9. The court has carefully considered the Plaintiff's case, the Defendant's response, the evidence adduced as well as the written submissions filed by the parties herein and frames the following issue for determination:
- Whether an injunction should issue:
- i. restraining the Defendant from engaging the Plaintiff and its Associates in endless abusive correspondence, emails, WhatsApp messages, text messages and telephone calls
  - ii. compelling the Defendant to remove the signage with the Plaintiff's name erected on 3<sup>rd</sup> Parklands Avenue Nairobi.
  - iii. compelling the Defendant to give the materials listed in Schedule 2 of the Franchise Agreement signed between the Plaintiff and the Defendant on November 9, 2011 to the Plaintiff.
  - iv. compelling the Defendant to submit the Student's Enrolment Forms and Files together with the Parent's contacts to the Plaintiff.
10. It was the Plaintiff's case that the franchise agreement was terminated in accordance with Clause 22 pursuant to the Defendant's default in remitting monthly payments. In summary the Clause provided that the Franchisor or its agent may terminate this Agreement and the Franchise by written notice to the Franchisee when a Default Event occurs. Such default event occurs when the Franchisee does not pay any amount payable to the Franchisor within 7 days of the due date such as in this case.
11. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of*



*Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

12. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

13. It is not in dispute that the Plaintiff's master franchise Aanza Today Kenya Limited terminated the Defendant's contract vide a letter dated December 5, 2016. In the said letter the Plaintiff was to collect goods and materials relating to Kip McGrath on December 6, 2017 which PW1 argued was a typo and was supposed to be 2016.
14. The Defendant on its part argued that the Plaintiff terminated the agreement on December 6, 2016 contrary to what was stated in the termination letter. Further, that there was no follow up termination letter to correct the error alleged by PW1. The Defendant averred that the termination was unfair.
15. Contrary to the Defendant's allegation that there was no follow up letter to correct the error; it is notable that after the initial termination letter, the Plaintiff's Advocate followed up with a demand letter dated December 22, 2016. On January 31, 2017, the Plaintiff's advocate wrote to the Defendant demanding the return of all the educational materials.
16. On the main prayers sought by the Plaintiff regarding an order of the injunction sought against the Defendant, compelling the Defendant to remove the signage with the Plaintiff's name erected on 3<sup>rd</sup> Parklands Avenue Nairobi, PW1 on cross examination confirmed that the signage is no longer erected at 3<sup>rd</sup> Parklands Avenue Nairobi.
17. Secondly, on whether an order should issue restraining the Defendant from engaging the Plaintiff and its Associates in endless abusive correspondence, emails, WhatsApp messages, text messages and telephone calls - PW1 also confirmed that there is no longer any communication between the Plaintiff and the Defendant.
18. Lastly, should an injunction issue compelling the Defendant to give the materials listed in Schedule 2 of the Franchise Agreement signed between the Plaintiff and the Defendant on November 9, 2011 to the Plaintiff? According to the wording of the termination letter dated December 5, 2016, the Plaintiff was to collect the materials on December 6, 2017.
19. On various occasions through various emails and letters the Defendant had indicated that the Plaintiff is free to arrange and pick all the goods and materials as soon as the settlement on his claim was made.
20. It is therefore the court's considered view that there is no objection from the Defendant with regard to the Plaintiff collecting the said materials as evidenced by the withdrawal of the counterclaim by the Defendant on July 18, 2023.
21. In light of the above, the court makes the conclusion and finding that the franchise agreement was validly terminated and the Defendant should make available the materials to enable the Plaintiff arrange for their pick-up. Each party will bear their own costs of the suit.



Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Otieno for Plaintiff

Ms. Onyiego for Defendant

Court Assistant: Carlos

