



REPUBLIC OF KENYA



KENYA LAW
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**Attorney General v Mungania & 17 others (Civil Case
E002 of 2023) [2023] KEHC 3033 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E002 OF 2023
EM MURIITHI, J
APRIL 6, 2023**

BETWEEN

HON. ATTORNEY GENERAL PLAINTIFF

AND

JOSEPH NGULU MUNGANIA 1ST DEFENDANT
LAWRENCE KOBIA KINYUA MUNGANIA 2ND DEFENDANT
GERALD KUBAI MUNGANIA 3RD DEFENDANT
JOHN MUTURIA MUNGANIA 4TH DEFENDANT
CHARLES KIBURI BAARIU 5TH DEFENDANT
LUCY NKOYAI 6TH DEFENDANT
JUSTUS KARITI MUNGABIA 7TH DEFENDANT
AMBROSE KITHIA MUNGANIA 8TH DEFENDANT
ZAKAYO MUGAMBI BAARIU 9TH DEFENDANT
GRACE NGULU 10TH DEFENDANT
CHRISTINE KINYUA 11TH DEFENDANT
JOHN MUTUA KANYORO 12TH DEFENDANT
PERIS MBAYA BARIYU 13TH DEFENDANT
PAULINE KENDI KATHEMBERE 14TH DEFENDANT
FAITH MAKENA 15TH DEFENDANT
NICHOLAS KAUMBUTU KARET 16TH DEFENDANT
DUNCAN KILIUNGA 17TH DEFENDANT



RULING

1. Before the court is a notice of motion under certificate of urgency dated 28/2/2023 pursuant to order 40 rules 1, 2, 3 of the Civil Procedure Rules, sections 1A, 1B, 3, 3A and 63(c) and (e) of the Civil Procedure Act, section 29 of the Children Act, sections 3 and 28 of the Basic Education Act and all the enabling provisions of the law, where the applicant seeks that:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - (a) Pending hearing and determination of this suit, this Honourable Court do grant an order restraining the use of tea sale proceeds from Micimikuru Tea Company Ltd. of KTDA Ltd. in the grower name of Kirimancuma Primary school Account NO. xxxx/xxxx from being used to settle any loan taken by the defendants/respondents.
 - iv. Pending the hearing determination of this suit, this Honourable court be pleased to grant an order restraining the 9th, 10th, 13th, 14th, 15th and 16th Defendants/Respondents by themselves, their agents, servants, legal representatives or any other of the board of Kirimancuma Primary through them from interfering with or entering the school premises/compound.
 - v. Pending the hearing and determination of this suit the 2nd and 4th Defendants (former Board Members) to hand over and return all records, documents and property held by which include; School enrollment reports, financial & accountable documents, Audited School Accounts, KTDA Ltd Tea Proceeds payslips & tea sale records slips and accounting reports, Statements of financial position of the school.
 - vi. Pending the hearing and determination of this suit, this Honorable Court be pleased to grant an order of restitution and/or specific performance by ordering the 4th, 5th, 8th, 12, 17th and 18th Defendants/Respondents to refund all the money they withdrew from the account number Kirimancuma Primary School Account-xxxx/xxxx at Dhabiti Sacco as a loan from the school account amounting to Kshs 270,000.
 - vii. Pending the hearing and determination of this suit the Honorable Court be pleased to issue an injunction against the Defendants/Respondents by themselves, their agents, servants, legal representatives or any other person claiming membership of the Board of Kirimancuma Primary or through them from interfering with or in any way dealing with the administration or property of Kirimancuma Primary School.
 - viii. The costs of this Application be awarded to the Plaintiff/Applicant.

The Plaintiff's case

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Oliver Kanyi, the Tigania Central Sub County Director of Education sworn on even date. The current members of the Board of Management of Kirimancuma Primary appointed with effect from February 5, 2022 for a term of 3 years, are represented by the Attorney General, the Applicant herein. The previously appointed members of the Board of Kirimancuma Primary opposed



the said appointment without reasonable grounds and resorted to violence and threats against the current board of management.

3. The main purpose of this suit is stated to be to uphold the Kirimancuma Primary School children right to education which is threatened by the division and interference by the defendants. The said acts of violence include interference with the school management and property, blocking the current board from accessing their offices hence preventing any meetings from being held, causing pain and injury to members of the current board. The Respondents connived to challenge the appointment of the said board at Tigania Law Courts but later withdrew the suit upon realizing that the suit lacked merit. In the process of asserting their control and dominance over the Board of Management, the 4th, 5th, 8th, 12th, 17th and 18th Defendants without authority and legal mandate jointly and severally misrepresented minutes and documents of the Board of Management fraudulently signed documents and further presented the said minutes to the Bank Manager Dhabiti Sacco to illegally access free primary school funds, borrow loans on behalf of the school proceeds without proper and authorized Ministry of Education approvals and thereafter leaving the school in debts.
4. It was averred that the Respondents had been illegally withdrawing funds from Kirimancuma Primary School Account-xxxx/xxxx at Dhabiti Sacco on different dates between 17-19th February 2022. On 22/9/2022, they illegally borrowed money/a loan in the name of Kirimancuma Primary School for Kshs. 270,000 and illegally withdrew the same periodically on different dates, yet they fully knew that they are not members of the Board. Unless the Respondents are barred from interfering with and/or entering the school premises, the Applicant and the students at Kirimancuma Primary School stand to suffer irreparable loss, damage and their fundamental right to education will be violated.
5. The Plaintiff urges that the Respondents have refused and/or neglected to stop from interfering with the school operations and other unlawful acts, despite several requests and demands to desist from doing so. The application is brought in good faith and as such, no prejudice shall be suffered by the Respondents if it is allowed.

The defendant's response

6. The defendants/respondents opposed the application through their replying affidavit sworn by the 1st defendant/respondent on 17/3/2023. He avers that they have never handled any money and/or administrative affairs of the school, as alleged by the Applicant. He avers that the 2nd and 4th Respondents are not in custody of any documents to hand over, the 3rd Respondent is just a teacher in Tharaka Nithi County, the 4th, 5th, 8th, 10th and 12th Respondents have never been board members of the school and the 9th, 14th, 15th and 16th Respondents are mere parents of the school. There was no board meeting on 17/11/2022 as the board of management was inaugurated on 23/11/2022. He urges the court to find that the Respondents are wrongly sued as they have never been members of the board of management and/or been involved in the activities of the school. He avers that the application is incompetent and abuse of the process of the court as the machinery for solving the dispute have not been exhausted.

Further Affidavit in support

7. Purity Kaugiria, the head teacher of Kirimancuma Primary School swore a further affidavit filed on 24/3/2023 in support of the application. She avers that the 1st, 4th, 5th, 8th, 12th, 17th and 18th Respondents as signatories to the school account at Dhabiti Sacco have been withdrawing tea proceeds and they even took a loan from the said account in their personal capacities. The 8th Defendant is a former teacher at the school who also served as the secretary in the immediate former Board of



Management, while the 2nd Defendant served as the chair of that Board, and they never handed over anything. The 6th, 14th and 16th Respondents were illegally harvesting tea leaves from the school tea farm, without the authority of the school management but they were arrested and charged at Tigania Magistrates Court Case No. E100 of 2023.

8. On 27/3/20223, the Applicant filed a notice of withdrawal of suit against the 14th, 17th and 18th Defendants with no orders as to costs.

Analysis and Determination

9. The singular issue for determination is whether the orders sought should be granted. The court has considered the principles for the grant of interlocutory prohibitory injunction established by *Giella v. Casman Brown* (1973) EA 358 and for interlocutory mandatory injunction set out in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 where Megarry, J. held that-

“On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

10. The new Board of Management as per the letters of appointment dated 1/2/2022 consists of Ambrose Kithia, the 8th Respondent herein, Jack Ngera Mitu, Purity Karambu, John Muturia, the 4th Respondent herein, David Ncubiri, Beatrice Kathao, Mercy Karimi, Allan Mawira, Joshua Mugambi, Rosemary Gakula, Amos Chokera, Charles Kithinji, Peace Gatwiri and Thiaine Peter Gakule.
11. It is clear from the Bank Statement of Kirimanchuma Primary School Account No. xxxx/xxxx at Dhabiti Sacco that the 4th, 5th, 8th, 12th and 17th Respondents have withdrawn funds from the said account on varied dates between 17/2/2022-24/10/2022. The 4th and 12th Respondents are still members of the current Board of Management of the school. If the Applicant is aggrieved by the re-appointment of the 4th and 12th Respondents as members of the current Board of Management of the school, it ought to have appealed to the Education Appeals Tribunal as stipulated under section 85 of the *Basic Education Act*.
12. Moreover, as urged by the Counsel for the Respondents, there is nothing to stop the School Board from presenting to the Bank the new particulars of the valid signatories for the school accounts to replace the old signatories and this can be done without any action on the part of the Respondent.
13. The Court notes the charge sheet on record where the 6th, 14th and 16th Respondents are facing theft of farm produce before a Tigania Court.

Whether clear and prima facie case has been established

14. Whereas the Applicant contends that the 1st, 4th, 5th, 8th, 12th, 17th and 18th Respondents are signatories to the school account at Dhabiti Sacco and the 2nd Respondent was a secretary to the previous Board of Management, the Respondents have denied any involvement in any school activities because they were never members of the Board of Management. The only people who participated in the withdrawal of the funds from the school account are the 4th, 5th, 8th, 12th and 17th Respondents. There is nothing on record to show that the other Respondents were ever involved in the school daily business as they were neither Board Members nor signatories. There was also the submission by the Defendants that



- there was no withdrawal of money subsequent to the swearing into office of the current Board of management, and an issue of validity of complaint of fraudulent withdrawal of money as a loan arises.
15. The burden of proving the involvement of the Respondents in the cited illegalities in the school was on the Applicant as required by the provisions of section 107 (1) of the *Evidence Act* that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
 16. On the balance of probability test the court does not find that the plaintiff has proved that the defendant/Respondents unlawfully withdrew funds from the school accounts after they were removed from office and a new Board sworn into office as to be a clear basis of the prayer for ‘restitution or specific performance’ which are the very final orders sought at paragraphs (C) and (D) of the Plaint dated 28th February 2023. It is trite law that final orders sought in the main suit, which must await full hearing on the merit, cannot be made at interlocutory stage of proceedings.
 17. Moreover, on the principle of *Shepherd Homes Ltd v Sandham*, followed by the Court of Appeal in *Kamau Mucuba v Ripples Ltd* [1993] eKLR, among others, interlocutory mandatory injunction as sought herein will rarely be granted, save in exceptional and clear cases. On the evidence, the court does not find a clear case for the grant of the mandatory injunction orders at this interlocutory stage.
 18. It is not necessary to grant the relief sought in Prayer No. (iii) (a) of the Notice of Motion that “Pending hearing and determination of this suit, this Honourable Court do grant an order restraining the use of tea sale proceeds from Micimikuru Tea Company Ltd. of KTDA Ltd. in the grower name of Kirimancuma Primary school Account NO. xxxx/xxxx from being used to settle any loan taken by the defendants/respondents” because the action sought to be restrained therein may only be done by the valid signatories of the school account, a matter squarely within the control of the Plaintiff through the present School Board of Management by change of signatories.

Orders

19. Accordingly for the reasons set out above, and in view of the pending criminal charges against some of the defendants at Tigania Law Courts, this Court orders that the prevailing status quo be maintained pending the hearing and determination of this suit.
20. For this purpose, the Defendants shall be restrained by an order of interlocutory injunction from accessing or interfering by any acts of violence and other interference with the school management and property, blocking the current board from accessing their offices and therefore preventing any meetings of the Board presently constituted pending hearing and determination of the Petition.
21. The Court, therefore, grants prayers nos. (iv) and (vii) of the Notice of Motion dated 28/2/2023 to the effect and extent only that the Defendants are restrained from interfering with, or dealing with, the meetings of the Board of Management, the administration of the property of Kirimancuma Primary School.
22. For avoidance of doubt, the orders of interlocutory injunction granted herein do not bar the defendants as parents and or stakeholders of the School from entering or accessing the School compound for related purposes, and the Plaintiff is at liberty to change signatories for the school accounts to correspond with the present membership or constitution of the Board.
23. The reliefs sought in Prayers nos. (v) and (vi) of the Notice of Motion dated 28/2/2023, which are final and mandatory in nature are declined at this interlocutory stage of the proceedings, and they are declined. Prayer no.(iii)(a) of the Notice of Motion dated 28/2/2023 is declined for redundancy.



24. However, the interests of the children in the proper administration of their School and its property commands priority hearing of the Plaint, the date whereof will be fixed in consultation with the Counsel for the parties.

25. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Mwiti for Mr. Wachira Nguyo State Counsel for the Plaintiff.

Mr. Omari Advocate for the Respondents.

