



Willtrue Education Center Limited t/a Willtrue High School v Steward Riko t/a Mindhill High School Charles Ziro Luganje; Ministry of Education & 3 others (Interested Parties) (Civil Suit E010 of 2021) [2023] KEHC 18564 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT E010 OF 2021
SM GITHINJI, J
MAY 9, 2023**

BETWEEN

WILLTRUE EDUCATION CENTER LIMITED T/A WILLTRUE HIGH SCHOOL PLAINTIFF

AND

STEWARD RIKO T/A MINDHILL HIGH SCHOOL CHARLES ZIRO LUGANJE DEFENDANT

AND

MINISTRY OF EDUCATION INTERESTED PARTY

COUNTY DIRECTOR OF EDUCATION INTERESTED PARTY

COUNTY QUALITY ASSURANCE AND STANDARDS OFFICER INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. This Ruling is in respect of an application by the Plaintiff dated June 15, 2022 brought under Certificate of Urgency. The application sought the following orders:
 1. Spent.
 2. That this honourable court be pleased to issue mandatory interim orders directing and compelling the 1st defendant/ respondent herein to deposit in court Seventy Eight (78) K.C.S.E Results Slips for the year 2021 examination in respect of the plaintiff's/ applicant's students who sat for the said examination which result slips are in the custody of the 1st defendant/ respondent after he maliciously collected the same from the Sub County Director o Education



Marafa Education Office or deliver the same to the plaintiff/ applicant pending inter-partes hearing of the instant application.

3. That this honourable court be further pleased to issue interim mandatory orders directing and compelling the 1st defendant/ respondent to surrender and deliver to the Plaintiff: school furniture, laboratory equipment and apparatus, school course books and Teacher's guide pending inter- partes hearing of the instant application.
 4. That upon inter-partes hearing this honourable court be pleased to issue mandatory interim orders directing and compelling the 1st defendant/ respondent herein to deposit in Court Seventy Eight (78) K.S.C.E Results Slips for the year 2021 examination in respect of the plaintiff's students who sat for the said examination which result slips are in the custody of the 1st defendant/ respondent after he maliciously collected the same from the Sub-County Director of Education Marafa Education Office or deliver the same to the plaintiff/applicant pending the hearing and determination of this suit.
 5. That this honourable court be further pleased to issue interim mandatory orders directing and compelling the 1st defendant/ respondent to surrender and deliver to the Plaintiff: school furniture, laboratory equipment and apparatus, school course books and Teacher's guide pending the hearing and determination of this suit.
 6. That this honourable court be further pleased to order and direct that the plaintiff's/ applicant's name which was maliciously, illegally and fraudulently changed from Wiltrue High School to MindHills High School by the 1st defendant/ respondent be reinstated to its original name being Wiltrue High School.
 7. That upon granting prayer (4) above, this honourable court be pleased to order and direct the 1st interested party's Director of Education Kilifi County to cancel the Certificate of Registration for Basic Education Institutions of MindHills issued on December 5, 2016 and which was maliciously and fraudulently obtained by the 1st Defendant/ Respondent and do reinstate and re-issue the plaintiff with a Certificate of Registration for Basic Education Institutions in the name of the plaintiff being Wiltrue High School.
 8. That upon granting prayers (2) and (3) above, this honourable court be pleased to issue a temporary injunction restraining the 1st defendant/ respondent by himself, his agents, servants, representatives, assignees or any other person acting or claiming under him from interfering with the smooth running of the plaintiff, from forcefully or in any manner entering into the plaintiff's compound from removing and taking away any properties belonging to the Plaintiff pending the hearing, determination and final disposal of the main suit.
2. The application is supported by the affidavit sworn by William Gitenge Ondieki on the 15th day of June, 2022. He asserted that he is the founder and owner of Wiltrue High School; that due to the malicious and fraudulent acts of the 1st defendant the name of his school was changed to MindHills High School and a Certificate of Registration for Basic Education Institutions was obtained. That the matter was referred to arbitration but did not yield results as the 1st defendant became uncooperative, and as they were waiting for directions and the way forward, the 1st defendant maliciously stormed into the school with hired goons, removed and took away all the school furniture, laboratory equipment and apparatus as well as school course books and Teacher's guide and other stationaries.
 3. He deposed that the students were assisted by members of the community, well-wishers and sponsors to enable them sit their K.C.S.E Examination for the year 2021. That after the results were released he



together with the school principal, collected the nominal results and after three weeks, they realized that the 1st defendant had already collected the result slips and signed for the same purporting to be the school principal. He also deposed that the 1st defendant is now using the said result slips to solicit money from parents and if the application is not allowed the students and their parents will suffer irreparable loss and damage.

4. In response the 1st defendant Stewart Danda Riko filed a replying affidavit sworn on the 21st day of September, 2022. He deposed that there was never a change of name or any name at all as asserted by the applicant as the plaintiff's certificate of registration as an examination center was revoked by the Kenya National Examination Council. He also deposed that mediation was duly conducted and parties agreed that the 1st defendant would vacate the school premises at the end of the 2021 academic year and surrender the premises and be at liberty to continue using his registered institutional name elsewhere.
5. He contended that he is the proprietor of the 1st defendant and he admitted to having collected the 2021 Form Four Examination Results for Mindhill High School from the Sub- County Director in his capacity as the duly recognized agent of the school. According to him, he was harassed by the applicant who demanded for the results after which he returned the results to the Sub-County Director upon consultation with the respective education stakeholders.

Submissions

6. The applicant filed submissions on the 24th day of October, 2022 through the firm of A.M. Omwancha & Company Advocates.
7. Counsel submitted and identified the following issues for determination; whether the 1st defendant re-named the Plaintiff institution without authority and with intention to defraud, whether the 1st defendant acted properly in confiscating the results despite not being the Principal for the school and the Plaintiff he is entitled to the reliefs sought in the application. On the 1st issue for determination, he submitted that the 1st defendant only decided to change the name of the school in order to make it appear a new entity and the personal property of the 1st defendant.
8. On whether the application ought to be allowed, counsel submitted that the court ought to exercise its discretionary powers in order to do justice upon the parties citing article 23 which provides that the high court has jurisdiction, in accordance to article 165, to hear and determine applications for redress of a denial, violation or infringement of, or a threat to, a right or fundamental freedom in the bill of rights.
9. The 1st defendant on the other hand filed submissions on the 30th day of November, 2022 through the firm of Lumatete Muchai & Company Advocates. Counsel identified the following issues for determination; whether interim mandatory injunction sought by the Plaintiff can be granted and whether the plaintiff has satisfied the conditions for grant of injunction. Counsel submitted that the compelling orders sought in prayer 2,3,4,5,6 and 7 of the application are of a mandatory injunctive nature and should only be granted in clear and exceptional circumstances and that the plaintiff has not met the threshold for grant of such orders. He relied on the case of *Kenya Breweries Ltd and another vs Washington Okeyo* (2002) 1 E.A. 109 where court held that such orders ought to be issued only in clear cases where the court thinks that the matter ought to be decided at once. He also relied on the case of *Daniel Kirimi Mutua & another v Patrick Kamenchu Robert & 2 others* (2020) eKLR.
10. On whether the compelling orders sought by the plaintiff are premature, counsel submitted that the allegations of fraud raised in both the instant application and the plaint are contested issues of fact



which demand to be ventilated at a full hearing of all parties before the court can make a decision on the same. That the orders sought in prayer number 6 and 7 of the application are premature for determination and issuance at this stage.

11. On whether the plaintiff has satisfied the conditions for grant of injunction, counsel submitted that the 1st defendant is no longer in possession of the institution nor has he entered therein and there is no proof that the plaintiff has a right which has been or is threatened with violation and as such, the applicant has failed to establish a prima facie case with probability of success. He also submitted that an injunction will not normally be granted unless the applicant will suffer loss which will not be compensated in damage. That the plaintiff has failed to demonstrate that unless the restraining order is granted against the 1st defendant's entry of which he contemplates, he will suffer loss not compensable by damages.

Analysis and Determination

12. I have considered the application before me, the response as well as the submissions and authorities relied on by counsels.
13. I have evaluated and sufficiently analysed the Eight (8) prayers being sought in the application and the prayers are premised on whether the applicant ought to be granted mandatory injunction orders. The crux of the application is on the basis that the 1st defendant is in possession of Seventy-Eight (78) K.C.S.E results slips for the year 2021, that the 1st defendant obtained a change of name of the subject educational institution and that the 1st defendant took away school property including school furniture, laboratory equipment and apparatus. I wish to point out that the issue of release of the result slips has since been overtaken by events as the applicant acknowledged that the certificates have since been surrendered. What is for determination in my view is whether the applicant has met the threshold for grant of the mandatory orders being sought.
14. I am guided by the principles in *Kenya Breweries Ltd & Another v Washington O. Okeya* (2002) eKLR. The Court of Appeal on the requirement of a mandatory injunction held:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or existence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a sample and summary all which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that on the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
15. In granting mandatory orders, the court must first be satisfied that it is a case of compelling circumstances for interim mandatory injunction to issue. In this regard, it may happen if one of the parties to the agreement has taken steps not to perform certain obligations necessary for the purpose of preserving evidence or the assets. In order to prevent a breach of obligation it is nevertheless mandatory to grant an injunction to compel performance of the requisite acts which are likely to occasion prejudice or injustice before the dispute is fully determined.
16. In the instant case it is alleged that one party parted with assorted items including school furniture, laboratory equipment and stationaries. In my view the above issue goes to the heart of ownership which prayer has been pleaded in the amended plaint filed by the applicant. The applicant has rightly pleaded fraud in the main suit and upon perusal of the application, I am of the view that the issues both in



the application and the main suit particularly of fraud, ought to be heard and determined at a full hearing of the matter. This court cannot be called upon at this point to grant orders in the nature of mandatory injunctions in a matter where the facts in issue are to be determined in the main suit. I am not persuaded that the applicant has exhibited any special circumstances for the orders that are being sought. I wish to rely on the case of *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR a decision of the Court of Appeal held as follows:

“It is trite Law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

17. On whether the applicant ought to be granted a temporary injunction against the 1st defendant, three traditional factors have to be satisfied before grant of such a relief: Prima facie case, Irreparable loss and Balance of convenience. The important question to be answered is whether the applicant’s property in dispute is in danger, it is being wasted, or is damaged or it is being alienated or threatened to be sold or disposed of by the 1st defendant. I am equally not satisfied that the applicant has presented before this court evidence that his right has been or is threatened with violation.
18. In the end, I do not find merit in the Notice of Motion application dated June 15, 2022 and the same is hereby dismissed. Cost be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

Parties absent. They be served with the Ruling.

1. Mr Kazungu for the 1st Defendant
2. Mr Omwancha for the Applicant (absent)

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S.M. GITHINJI

JUDGE

9.5.23

