



**Were & 2 others v Republic & 4 others (Miscellaneous Criminal Application E004 of 2024) [2024] KEHC 14199 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024**

**G MUTAI, J  
NOVEMBER 12, 2024**

**BETWEEN**

**SARAH WERE ..... 1<sup>ST</sup> APPLICANT  
JAN FRANCOIS ..... 2<sup>ND</sup> APPLICANT  
KEBENE CHILDREN'S HOME AND GROUP ROTARACT  
GLOBAL ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT  
OCS DIANI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT  
ANNE BRUYN ..... 4<sup>TH</sup> RESPONDENT  
TABASAMU SCHOOL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The applicants filed this miscellaneous cause on 8<sup>th</sup> February 2024. *Vide* the said cause, they sought the following orders: -
  - a. Spent;
  - b. Spent;
  - c. That the 1<sup>st</sup> Respondent be compelled to submit the images of the children that are in her possession to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents pending interpartes hearing and final disposition of this application;



- d. That the 4<sup>th</sup> and the 5<sup>th</sup> Respondents be compelled to cease the use of the children's images under the 3<sup>rd</sup> Applicant's care without the Applicant's consent pending interpartes hearing and final disposition of this application;
  - e. The 4<sup>th</sup> and 5<sup>th</sup> Respondents be directed to take down the images of the 3<sup>rd</sup> Applicant's children from their school website, social media pages and/or any other form of digital and/or print media pending interpartes hearing and final disposition of this application;
  - f. The costs of this application be provided for.
2. The basis of the application, as stated in the affidavit of Ms Sarah Were, sworn on 7th February 2024, is that Ann de Bruyn, the 4th Respondent, previously worked for the 3<sup>rd</sup> Applicant as a volunteer. During her time of service, she took photographs of the children under the 3rd Applicant's care, which she used to solicit money from well-wishers so that she could set up her own children's home, the 5<sup>th</sup> Respondent herein. She averred that the 4<sup>th</sup> Respondent did, in fact, set up the school and poached 3 members of the 3<sup>rd</sup> Applicant's staff to join her.
  3. Ms Were deposed that the 4<sup>th</sup> Respondent opened the 5<sup>th</sup> Respondent with malicious intent to unjustly enrich herself and not to help children. She accused the 4<sup>th</sup> Respondent of passing herself off as one of the directors of the 3<sup>rd</sup> Applicant using the photographs that she had taken while a volunteer with the 3<sup>rd</sup> Applicant.
  4. The 4<sup>th</sup> Respondent was accused of defaming and defrauding the 3<sup>rd</sup> Applicant and causing it to lose sponsors.
  5. The 4<sup>th</sup> and 5<sup>th</sup> Respondent opposed the application. The 4<sup>th</sup> Respondent filed a Replying Affidavit sworn on 8<sup>th</sup> March 2024. She averred that she became a volunteer with the 3<sup>rd</sup> Applicant in July 2021 and was with them until July 2022, when its founder, Pasci Priscen, expelled her.
  6. Ms de Bruyn deposed that she took photographs of the children under the 3<sup>rd</sup> Applicant's care with the permission of its founder, who encouraged volunteers and sponsors to take as many photographs as possible since it would help in sourcing donations and that she accused of unlawfully doing so, once she left the 3<sup>rd</sup> Applicant.
  7. The 4<sup>th</sup> Respondent denied being the owner of Tabasamu School and averred that she is a sponsor like many others. She denied that the children in the supporting affidavit are in the 3<sup>rd</sup> Applicant's school and averred that they are, in fact, with the 5<sup>th</sup> Respondent. Ms de Bruyn deposed that the 5<sup>th</sup> Respondent is the only school helping needy children in Kwale County and that its closure will be detrimental to the less privileged children's education.
  8. Ms Sarah Were swore a Supplementary Affidavit on 16<sup>th</sup> April 2024, reiterating the contents of her earlier affidavit. She stated that Mwana Tabasamu Christina Academy was owned by John Ogam, who previously worked for the 3<sup>rd</sup> Applicant but still pretended to be its employee. In her view, Mwana Tabasamu Christina Academy was founded to defraud Belgian nationals who wished to support charitable causes. Ms Were referred to the fact that Tabasamu is registered as a trust /non-profit organization in Belgium but that its local affiliate was a for-profit business, registered as a business name called Mwana Tabasamu Christina Academy, which she stated was done so as to solicit funds from Belgian nationals and to defraud them. She deposed that the 4th and 5th Respondents were obtaining money by false presence contrary to Section 312 as read with Section 313 of the [Penal Code](#).
  9. The matter was canvassed by way of written submissions. Only the Applicants filed written submissions.



10. The submissions of the Applicants are dated 22<sup>nd</sup> August 2024.
11. The Applicant's counsel identified two issues for determination, one of which was whether the 4<sup>th</sup> and 5<sup>th</sup> Respondent wrongly used the images of the minors under the 3<sup>rd</sup> Applicant's care.
12. Mr Mogaka, learned counsel for the Applicants, urged that the 4<sup>th</sup> and 5<sup>th</sup> Respondents used the images of children under the care of the 3<sup>rd</sup> Applicant for commercial activities and exploitative purposes.
13. He urged that the images of the children were used without permission of the body/institution with the care and custody of the children. It was urged that it was not in the children's best interest that their images were used for exploitative purposes. For that reason, it was urged that the 5<sup>th</sup> Respondent should be deregistered and that the 4<sup>th</sup> and 5<sup>th</sup> Respondents be compelled to take down the images of the 3<sup>rd</sup> Applicants' children from their school's website, social media pages and or any other form of digital and/or print media.
14. Based on the foregoing, it was argued that the orders sought should issue.
15. I have considered the application dated 7<sup>th</sup> February 2024, the replying affidavit of the 4<sup>th</sup> Respondent, and the written submissions of the Applicants and must now determine if the application is one that should be allowed.
16. As this is a matter about children the court must consider the best interest of the children.
17. Article 53 (2) of the Constitution of Kenya, 2010 states that:-
  - “(2) A child's best interests are of paramount importance in every matter concerning the child.”
18. The Constitutional imperative is given effect by section 8(1), (2) and (3) of the Constitution which provides as follows:-
  - “(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
    - (a) the best interests of the child shall be the primary consideration;
    - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
  - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
    - (a) safeguard and promote the rights and welfare of the child;
    - (b) conserve and promote the welfare of the child; and
    - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.



- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.”
19. Children are entitled to the right to privacy under Article 31 of the *Constitution* of Kenya, 2010, which provides as follows:-
- “Every person has the right to privacy, which includes the right not to have—
- (a) their person, home or property searched;
  - (b) their possessions seized;
  - (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.”
20. Under the *Data Protection Act* 2019, personal information about children, including photographs, cannot be processed without the consent of the child's parent or legal guardian and may only be processed, where there is consent, in a manner that protects and promotes the child's rights and best interests.
21. The Applicants aver that the 4<sup>th</sup> and 5<sup>th</sup> Respondents have used photographs of children in the 3<sup>rd</sup> Applicant's home to solicit sponsorships and for commercial or exploitative purposes. This was denied by the 4<sup>th</sup> Respondent in her affidavit. The Respondent named the three children whose photographs were in the application and claimed that they were schooling in the 5<sup>th</sup> Respondent. As this matter is contested, and there being no corroboration one way or another, the Court cannot determine where the truth lies.
22. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents failed to respond to the application. As the duty bearers in the justice sector, their responses would have helped this Court unravel the mystery. As things stand, this court is unable to tell whether the rights of the children under the applicable laws were infringed or if the 3<sup>rd</sup> Applicant and the 4<sup>th</sup> and 5<sup>th</sup> Respondents are engaged in unlawful activities. In the circumstances, the court cannot grant prayers 1 to 3 of the Notice of Motion dated 7<sup>th</sup> February 2024.
23. The Court notes with concern the reference in the application to “investors” and “sponsorships”. To the Court's mind, these terms reek of commercial activities rather than non-profit work. The animosity between the 4<sup>th</sup> Respondent and the directors of the 3<sup>rd</sup> Applicant is quite concerning and further calls into question the activities they are undertaking.
24. To my mind, to protect the children in the 3<sup>rd</sup> Applicant school, and in the interest of justice, I allow prayers 4 and 5. I do so as the 4<sup>th</sup> Respondent admitted that she shared photographs of the children on her social media pages without the permission of the parents or guardians of the children concerned. It does not matter that, in her view, she shared the photographs for a worthy cause.
25. As it is likely that the 3<sup>rd</sup> Applicant and the 4<sup>th</sup> and 5<sup>th</sup> Respondents may be engaged in unlawful commercial activities involving children, I order the Inspectorate Department of the Ministry of Education, at its Kwale Office, and Department of Children Services, Kwale County to carry out the inspection of the 3<sup>rd</sup> Applicant and the 5<sup>th</sup> Respondent and establish:-
- a. If the said schools are licenced;
  - b. If the said schools are compliant with the laws relating to children, their education and data protection and whether or not they engage in child trafficking; and



- c. Whether their staff have the necessary permits to undertake the activities they are carrying out.
26. I order that the reports of the Ministry of Education and the Children's Department be filed with this court within 1 month of the date hereof.
27. With the reports, the court will determine if further orders should be issued.
28. There will be no orders as to costs.
29. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 12<sup>TH</sup> DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Mogaka, for the Applicants;

No appearance for the 1, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents;

Ms Kimani, for the 4<sup>th</sup> Respondent; and

Arthur- Court Assistant.

