



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. 012 OF 2020**

**CHARLES NDWIGA NTHIMBA.....APPLICANT**

**VERSUS**

**HAMPTON IRERI NJERU.....RESPONDENT**

**RULING**

1. The applicant herein, **Charles Ndwiga Nthimba** filed the Miscellaneous Application dated 20<sup>th</sup> January 2020 under Article 23, 47 and 48 of the Constitution and section 7 of the Arbitration Act (hereinafter “**the Act**”) seeking the following orders:

**1. Spent**

**2. That pending arbitration and hearing of this application, the account opened by the respondent being K.C.B. Thika Branch Account No. 1267628995 be frozen and no further transaction on the same accounts do proceed.**

**3. That pending arbitration and hearing of this application, temporary injunction be granted restraining the respondent (HAMPTON IRERI NJERU) or any other person/agent from changing the school name and the school accounts of MSASA JUNIOR ACADEMY situated at plot No. CF 15 KANGUNDO ROAD UMOJA.**

**4. That pending arbitration and hearing of this application the school situated at plot No. CF 15 KANGUNDO ROAD UMOJA do continue as MSASA JUNIOR ACADEMY and it's school account KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 be used for the running of the school.**

**5. That pending arbitration and hearing of this application a temporary injunction be granted restraining the respondent and any person claiming under themselves from harassing, impeding the use of the applicant's office in MSASA JUNIOR ACADEMY pending the hearing and determination of this application.**

**6. That pending arbitration and hearing of this application, the respondent be prohibited from opening or purporting to open or changing the school account for MSASA JUNIOR ACADEMY from its current accounts being KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 to any other accounts.**

2. The application is supported by the applicant's affidavit sworn on the 20<sup>th</sup> January 2020 and is premised on the grounds that:

**1. That the applicant and the respondent entered into a partnership to start a school named MSASA JUNIOR ACADEMY.**

**2. That the partnership deed has provided arbitration as the jurisdiction clause.**

**3. That it's in the best interest of justice that the orders that the orders be issued in the interim/pending arbitration so as to protect the subject matter of the partnership.**

**4. That the respondent is currently changing the school name and the school accounts, which he started with the applicant as equal partner, in total breach of contract between himself and the applicant.**

**5. That the partnership deed states that the applicant and the respondent were equal partners in the school MSASA JUNIOR ACADEMY.**

6. *That the MSASA JUNIOR ACADEMY was registered under the physical address of plot No. CF 15 KANGUNDO ROAD UMOJA.*
7. *That the respondent has registered another school known as WHITES PREMIER SCHOOLS at the same location as the MSASA JUNIOR ACADEMY which has been in existence since 2010.*
8. *That ever since 2010 up until 31<sup>st</sup> December 2019 the school was MSASA JUNIOR ACADEMY.*
9. *That the respondent has been issued with a registration certificate of the impugned WHITE PREMIER SCHOOLS which has the same physical address as MSASA JUNIOR ACADEMY.*
10. *That the school MSASA JUNIOR ACADEMY is located at plot No. CF 15 KANGUNDO ROAD UMOJA, which is its official physical address as per the registration certificate and it's ambiguous for the respondent to open another good with the same physical address.*
11. *That the respondent wants to ride on the partnership agreement, by purporting to change the school's name and account number so as to divert all the MSASA JUNIOR ACADEMY clientele and funds.*
12. *That the respondent has issued notices to the parents informing them of the changes in the name of the school and the account number.*
13. *That the respondent didn't inform the applicant of his attention to change the school name or the school account number even though the applicant is an equal partner to the school.*
14. *That the respondent wants to solely benefit from the hard work of the applicant by changing the school's name and account and to benefit from the partnership.*
15. *That the respondent should be stopped from changing the school's name and the school account as this will lock out the applicant from the daily running of the school.*
16. *That if the respondent is not stopped the applicant will suffer injustice as parents will pay fees at the impugned account of the WHITE PREMIER SCHOOL and he will not be entitled to the profits.*
17. *That the school MSASA JUNIOR ACADEMY is the only source of income for the applicant as he quit his job to run the school being a teacher by profession.*
18. *That the school is located at plot No. CF 15 KANGUNDO ROAD UMOJA was known as MSASA JUNIOR ACADEMY up until 31<sup>st</sup> December 2019 but the respondent is purporting to change the name of WHITE PREMIER SCHOOLS.*
19. *That the respondent intended to solely benefit from the work of the applicant by rebranding the school so that he can have all the profits to himself.*
20. *That unless this honourable court issues orders against the respondent, the applicant shall suffer irreparable loss and he denied his right to justice.*

3. At the hearing of the application, **Mrs Mukala**, learned counsel for the applicant submitted that Section 7 of the Act vests this court with the jurisdiction to grant an interim measure of protection before or during arbitral proceedings.

4. Counsel submitted that the parties herein entered into a partnership deed that contained an arbitration clause which deed had not been dissolved and was still enforceable between the parties.

5. Counsel submitted that there is no suit pending before lower court since the said court had already determined that it lacks jurisdiction in CMCC No. 70 of 2020. Counsel cited the decision in **Future Way Limited v National Oil Corporation of Kenya** [2017] eKLR wherein Onguto J. held that the respondent's jurisdictional objection was without merit and that the court had jurisdiction to entertain an application for interim measure of protection and grant interim orders to secure and protect contractual obligations and rights.

6. It was submitted that the application meets the threshold set in **Giella v Cassman Brown & Company Ltd** [1973] E.A 360 for the granting of the interim orders of injunction.

7. The respondent opposed the application though his replying affidavit sworn on 23<sup>rd</sup> January 2020 wherein he concedes that he had a partnership agreement with the applicant for the running of a school known as Msasa Junior Academy from the year 2020 upto 31<sup>st</sup> December 2019 when the lease for the premises where the school operated lapsed.

8. He avers that prior to the expiry of the lease, disagreements arose between him and the applicant that prompted him to register his own school in the name and style of "**Whites Premier.**" He contends that after the termination of the lease, he personally negotiated a fresh lease for the same premises with the landlord for the new school (Whites Premier) under his sole administration and proprietorship.

9. He states that the applicant approached him for an audit of the books of accounts of Msasa Junior Academy with a view to dissolving the partnership and that the said audit revealed that the school had liabilities amounting to Kshs 4,656,913. He concedes that it was an express term of their partnership deed that disputes arising out of their engagements would be referred to arbitration under the Act, but that in contravention to the terms of their agreement, the applicant filed a suit before the lower court, being CMCC 70 of 2020 wherein the court directed that the matter be referred to arbitration.

10. At the hearing of the application **Mr. Mutemi**, learned counsel for the respondent submitted that the orders sought by the applicant should not be granted as the applicant had not taken any steps towards initiating the Arbitral proceedings.

11. Counsel submitted that the orders sought have been overtaken by events in view of the fact that the respondent has already registered a new school being **Whites Premier School** which is fully operational under a new lease agreement with the former landlord.

### **Analysis and determination.**

12. I have carefully considered the application filed herein the respondents response and the submissions presented by the parties. The main issue for determination is whether the applicant has made out a case for the granting of interim orders of protection pending arbitration.

13. Section 7 of the Act stipulates as follows.

#### ***Interim measures by court***

***(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.***

***(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”***

14. The purpose of an order of protection is to preserve assets or in some way maintain the status quo as the parties await the outcome of the arbitral proceedings.

15. In the case of **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)**, the factors to be considered before the granting the interim measure of protection were outlined as follows:

***i. The existence of an arbitration agreement.***

***ii. Whether the subject matter of arbitration is under threat.***

***iii. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?***

***iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision –making power as intended by the parties?***

16. In the present case, it was not disputed that the parties herein had a partnership deed for the establishment and running of a school Christened Msasa Junior Academy. It was also not disputed that the partnership contained an arbitration clause as follows:

***“In the event of any dispute or differences arising between parties with regard to the interpretation of the terms hereof or with regards to the duties of the partners or with regard to the conduct of the business or otherwise howsoever, whether during or after the partnership the same will be referred to arbitration under the provisions of the Arbitration Act and the decision of such Arbitration or Arbitrators as the case may be shall be final and binding upon the partners.”***

17. Both parties are in agreement that a dispute has arisen with regard to the running of the school that they operated under the partnership that requires the intervention of an arbitrator in line with provisions of partnership deed. While the respondent contended that it is the applicant to initiate the arbitration process, this court is of the view that there is no hard fast rule requiring an aggrieved party to initiate the arbitral process and that any party to the partnership contract can take steps to refer their dispute to arbitration.

18. Turning to the respondent’s claim that the application has been overtaken by events following the registration of a new school and the renewal of the lease for the school premises under a new lease agreement, I note that no material was placed before this court to show that alleged new school has been duly registered or that the respondent had entered into a new lease agreement with the landlord. Be that as it may and considering that the respondent admitted that he has set in motion the intention to register a new school in the same premises where the school the subject matter of the dispute was situated, I am persuaded that the subject matter of the dispute is under threat and that it is necessary to grant the interim measure of protection to preserve the said subject matter pending arbitration.

19. This court is of the humble view that the issue of whether the respondent can take over a 10 year old school that he established from scratch, jointly with the applicant, and register it under his sole proprietorship to the exclusion of the applicant, is one of the issues that will be deliberated upon by the arbitrator.

20. The principles governing the granting of orders of injunction were articulated in the oft cited case of *Giella v Cassman Brown and Company Limited* (1973) E.A 385, as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

21. In the present case, I am satisfied that the applicant has established a prima facie case against the respondent considering that the existence partnership deed was not disputed.

22. On irreparable loss, I am satisfied that having established that Msasa Junior Academy was and is still an ongoing concern, albeit under a alleged new name, the applicant stands to suffer a great deal in terms of loss of business and his investment in the event the orders sought in the application are not granted.

23. In the circumstances of this case, I find that the balance of convenience tilts in favour of the applicant. Consequently, I allow the application dated 20<sup>th</sup> January 2020 in the following terms:

***i. That a temporary order of injunction is hereby granted to restrain the respondent (HAMPTON IRERI NJERU) or any other person/agent from changing the school name and the school accounts of MSASA JUNIOR ACADEMY situated at plot No. CF 15 KANGUNDO ROAD UMOJA pending arbitration.***

***ii. That the school situated at plot No. CF 15 KANGUNDO ROAD UMOJA do continue as MSASA JUNIOR ACADEMY and its school account KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 be used for the running of the school pending arbitration.***

***iii. That a temporary injunction is hereby granted to restrain the respondent and any person claiming under themselves from harassing, impeding the use of the applicant’s office in MSASA JUNIOR ACADEMY pending arbitration.***

***iv. That the respondent is prohibited from opening or purporting to open or changing the school account for MSASA JUNIOR ACADEMY from its current accounts being KCB THIKA BRANCH ACCOUNT 1171885644 and FAMILY BANK ACCOUNT 069000014895 to any other accounts pending arbitration.***

***v. I make no orders as to costs.***

**Dated, signed and delivered in open court at Nairobi this 19<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mutemi for respondent.

No appearance for applicant

Court Assistant: Sylvia