



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 6 OF 2018

BRIDGE INTERNATIONAL ACADEMIES.... PLAINTIFF

VERSUS

MWAKIO KALONDIDEFENDANT

CORAM: Hon. Justice R. Nyakundi

Mungai Victor Kimani Advocate for the Plaintiff

Richard Otara Advocate for the defendant

RULING

Background

The plaintiff through a plaint filed suit on 18th June, 2018 against the defendant for an injunction restraining him by himself, his agents, employees, and or proxies from operating the school known as **Covenant School** within 2 kilometres radius from the plaintiffs – **Takaye Bridge Academy** or within 2 kilometres from any of the plaintiffs' Academies and from soliciting the plaintiffs, pupils and parents from Takaye Academy and from passing off Covenant School as being affiliated to the plaintiff or its Takaye Bridge Academy.

On the 18th June, 2018 the plaintiff filed a notice of motion for interlocutory injunction in terms of Order 40 rules (1) 2, 3 and 4 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act seeking the following reliefs:

- 1. That this application be certified urgent and be heard ex-parte in the first instance and service thereof be dispensed with.**
- 2. That the defendant whether by himself, his partners, employees servants and/or agents and or proxies be restrained by an injunction until the hearing and determination of this application or further orders of this Honorable Court restraining them from (further) operating the school operating by the name of Covenant School located within Kilifi County, within the contracted two kilometer radius from the plaintiff's academy known as Takaye Bridge Academy.**
- 3. That the defendants whether by themselves their partners, employees servants and/or agents be restrained by an injunction until the hearing and determination of this application or further orders of this Honorable Court restraining them from (further) soliciting the staff, parents and or pupils/children previously and or currently admitted at the plaintiff's Takaye Bridge Academy located within Kilifi County, within the contracted two years management period.**
- 4. That the defendant whether by himself, his partners, employees, servants and/or agents be restrained by an injunction until the hearing and determination of this suit or further orders of this Honorable Court restraining them from (further) operating the school operating by the name of Covenant School located within Kilifi County, within the contracted two kilometer radius from the plaintiff's academy known as Takaye Bridge Academy.**

In support of the application is an affidavit by **Mr. Mugodo** and reasons stated in the body of the motion. The applicant also filed a further affidavit dated 17th October, 2018. The respondent opposed the application through his replying affidavit dated 25th June, 2018.

On record also are the applicant's written submissions in support of the application.

Analysis

An order of injunction being an equitable remedy as governed by order 40 Rule (1)(2) of the Civil Procedure Rules.

In determining whether an application has met the criteria for grant of an injunction Lord Diplock in **Siskena (Owners of Cargo Lately Laden on Board) v Distol Compania Naviera S.A. 1979 CAC 210 3 WLR 88** stated that:

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is incurable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and inconvenient to the pre-existing cause of action.

As to what conditions an applicant must establish to be granted an interlocutory order of injunction the test is now settled as can be declared from the case of Cassman Brown (1973) EA where it was held that:

- 1. The applicant must demonstrate existence of a prima facie case with serious and arguable triable issues.**
- 2. That the applicant if denied grant of the injunction he will suffer irreparable damage which would not be adequately compensated by an award of damages.**
- 3. That in the like event the applicant fails on the test of a prima facie case or irreparable loss the applicant be considered on a balance of convenience.**

These same principles have been clearly celebrated in the cases of **American Cyanamid Co. v Ethicon Ltd 1975 AC 396**, **Giella vs Cassman Brown (supra)** and **Nottingham Building Society v Eurodynamics systems PLC – FSR 468**.

Whether there is a prima facie case which raises serious issues to be tried at the main trial. See generally the principles in **Giella (supra) Mrao Ltd v First American Bank of Kenya Ltd & 2 Others {2003} KLR 125**, **Olympic Sports House Record & School Equipment Centre Limited {2012} eKLR** as each case depends on its own facts the strength of the principles enunciated in the above authorities are that whether one is applying for a temporary, prohibitive or mandatory injunction one has to demonstrate existence of a serious issue to be tried and if the relief is declined. There is likelihood of harm not remedial by way of damages.

So far as the condition on prima facie case is concerned, its necessary for the court to look at the competing rights and interests of the parties to the claim for the purpose of ensuring a course which appears to carry the least risk of injustice in the event it turns out the court was wrong in issuing or refusing the order for injunction.

In the case at bar I am of the view that a larger extent in reference to the question on prima facie case the application is defeated for reasons of effectiveness and comity. unquestionably, the applicants claim is based on contract, it has not been shown that damages would not be an adequate remedy for the applicant's injury or harm.

In the plaint the applicant has set out in detail the contract with the clause in restraint of starting a similar academy with that of the applicant. The court has therefore to decide matters of private rights in regard to step taken to honour the contractual obligations reduced into writing forming the basis of certain rights subject of this litigation.

The determinant question is where the applicant from the affidavit evidence has established a serious and arguable case at the trial to warrant grant of an injunction.

Most of the facts relied upon by the applicant and recited in this affidavits touch on the employment contract with the defendant. The applicant depones that by virtue of the terms of employment the defendant covenanted not to establish an educational institution with similar facilities and structures like the applicant. The gist of the legal and equitable interest averse the applicant is on the likelihood of confusion and protection of property rights which came into possession of the defendant by virtue of his employment with the applicant. That in breach of the aforesaid agreement the applicant avers that the respondent has gone further to establish a school in close proximity with the applicant institution therefore requiring an injunction to preserve further infringement of the acquired trademark right.

An affidavit by the respondent sworn by **Mwakio Kalondi** states that upon terminating services with the applicant's institution he was employed by Covenant School as a teacher as demonstrated by a copy a letter of appointed marked Exhibit MK1. It is further contended by the respondent that the averments that he owns Covenant School is false and no such evidence has been provided by the applicant. In addition, the respondent depones that the allegation of him soliciting students to move from the plaintiff school to Covenant is false and any such actions can only be attributed to the applicant management and performance. That argument for an injunction is predicated on the fact of post-employment contract between the applicant and the respondent.

As things stand, the heated argument is about educational services being offered by the applicant which apparently the respondent as a former teacher was prohibited from being a consultant, teacher or carry any other business in competition with the applicant.

In the circumstances of this case, there is not sufficient evidence before this court to warrant an interlocutory or interim mandatory injunction. This is more so when the court applies the exception to the general rule on injunctions that I should not engage in an extensive review of the merits of the case. It must also however be observed that for an applicant to obtain an injunction he or she is required to demonstrate existence of a legal right, that damages are an inadequate remedy and there is no other compelling or extenuating circumstances for the court not to exercise discretion to grant an injunction.

I have considered the applicant, arguments and affidavit evidence. My take is that the applicant has not established a prima facie case with a probability of success at the trial. The applicant has not demonstrated that it will be difficult to do complete justice at the main trial without this court granting the injunction in the first instance against the respondent.

And if then coming on the first test that he will suffer irreparable loss which cannot be compensated by way of damages.

As a result, the notice of motion to grant an interlocutory injunction is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER, 2019

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R. NYAKUNDI

JUDGE