



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 250 OF 2008**

**IYALE**

**ACADEMY.....PLAINTIFF**

**VERSUS**

**JIM MUGAMBO MBUGUA**

**JAMES N. MBUGUA**

**JOHN KARUMBA CHEGE (Sued as officials of the Gospel Disciplines Society).....DEFENDANTS**

**RULING**

1. On 13<sup>th</sup> May, 2014, Counsel for the defendants/applicants filed contempt proceedings against Paul Msabaa (hereinafter referred to as the respondent) as the proprietor of the plaintiff school. The defendants seek the following orders:-

- (i) That the respondent, Paul Msabaa be committed to prison for a maximum period of six (6) months for contempt of the order issued on 1<sup>st</sup> November, 2013;
- (ii) That the respondent Paul Msabaa pays a fine to be imposed by the court commensurate with the gravity of the contempt shown to its lawful court order; and
- (iii) Costs of the contempt proceedings be borne by the respondent, Paul Msabaa.

2. The application is predicated on the grounds on the face of it and the affidavit of James N. Mbugua filed on 13<sup>th</sup> May, 2014. The respondent's Counsel filed a replying affidavit on 11<sup>th</sup> July, 2014 to oppose the application. Counsel for the applicants filed his written submissions on 8<sup>th</sup> September, 2014 whereas the respondent's Counsel filed his on 23<sup>rd</sup> June, 2015.

**APPLICANTS' SUBMISSIONS**

3. Mr. Njoroge, Learned Counsel for the applicants submitted that the order breached is for an injunction issued on 1<sup>st</sup> November, 2014 restraining the respondent, Paul Msabaa from carrying out construction or changing the character of the suit premises. In Mr. Njoroge's view, the catch words are "***changing the character of the suit premises***". Counsel submitted that the order which was served on the respondent and his counsel contained a penal notice. While initially there was Iyale Secondary School on the suit

premises, the respondent removed the secondary school and set a primary and nursery school. Mr. Njoroge relied on the affidavit filed on 13<sup>th</sup> May, 2014 in which they attached copies of photographs of the suit premises. It was his contention that although the respondent had lingering doubts about the meaning of the words “**changing the character of the suit premises**”, he took the risk and only sought interpretation of the said phrase after the event, through an application dated 15<sup>th</sup> May, 2014.

4. Counsel for the applicants sought the court’s finding on whether the character of the suit premises has been changed. He further stated that although the issue of school children who will be affected by their removal from the premises has been raised, in his view the respondent will have to purge the contempt. He asked for a committal period of six (6) months in prison and payment of a fine of Kshs. 500,000/=.

## **RESPONDENT’S SUBMISSIONS**

5. Mr. Mwakisha, Learned Counsel for the respondent relied on the affidavit of Paul Msabaa. Counsel submitted that the application was misconceived. He referred the court to the application filed by the applicants on 25<sup>th</sup> September, 2013 and more specifically to prayers No. 1, 2 and 3 where there was no mention of the words “**changing the character of the suit premises.**”

6. Mr. Mwakisha referred the court to the Trust Deed attached to the replying affidavit dated 3<sup>rd</sup> October, 2013 which granted a lease to Iyale Mikindani Junior Academy run by the respondent and Victoria Msabaa. This gave rise to the new entity known as Iyale Junior Academy.

7. Counsel for the respondent contended that starting a junior school does not encompass the changing of the character of the property. He added that the substantive application did not have a complaint on the nature or type of the school that was being run. He submitted that the junior school was running at the time the application dated 25<sup>th</sup> September, 2013 was heard and determined. The application before court then was about excavation that had commenced on the said property. He submitted that no trees were cut and if the court’s intention was to prohibit the change of use of the property, the court would have stated so.

8. Counsel relied on the case of **Republic vs Commissioner of Lands & 12 Others & Another** [2004] eKLR at page 4. In Mr. Mwakisha’s view, the matters complained of in the application cannot form the basis of contempt proceedings. He added that the interest of 3<sup>rd</sup> parties, the pupils, has to be taken into account and that the court that granted orders previously did not state anything about the pupils in the said school.

## **ANALYSIS AND DETERMINATION**

The issues for determination are:-

- (i) If the respondent has changed the character of property GK2/1551 Mikindani/Chaani or any structure on that land; and
- (ii) If the respondent is in contempt of court.

9. The genesis of the present dispute is the application that was filed on 25<sup>th</sup> September, 2013 under certificate of urgency. Some of the orders sought then were as follows:-

- (i) That the plaintiff be restrained by way of a temporary injunction from damaging, wasting, alienating or in any other manner grading and or digging up the grounds, carrying out any constructions (sic) or demolitions (sic) and or in any other manner whatsoever in changing the character of the buildings and the grounds at plot No. GK2/1551 at Mikindani pending the hearing of the application interpartes;
- (ii) The plaintiff be restrained by way of an injunction from damaging, wasting, alienating or in any

other manner grading or digging up the grounds, carrying out any constructions (sic) or demolitions (sic) and/or in any other manner whatsoever in changing the character of the buildings and the grounds at plot No. GK2/1551 at Mikindani pending the hearing and determination of the suit.

10. The applicants were granted interim orders in terms of prayer (i) above on 25<sup>th</sup> September, 2013. The application was thereafter heard interpartes and Kasango J. on 1<sup>st</sup> November, 2013 issued orders in the following terms:-

(1) An injunction is hereby issued restraining Paul Msabaa his servants and agents or anyone acting on his behalf **from carrying out any construction or changing the character of the property GK 2/1551 Mikindani/Chaani or any structure on that land until the final determination of this suit or until further orders of this court.** (emphasis added).

11. The applicants allege that the respondent has contravened the above orders by changing the character of the property by replacing the secondary school that existed before with a primary and nursery school. The respondent is also said to have cut down trees at the suit premises.

12. The applicants depose through the affidavit of James N. Mbugua sworn on 6<sup>th</sup> May, 2014 that the respondent on 21<sup>st</sup> March, 2014 was personally served with the orders of 1<sup>st</sup> November, 2013. His Advocate, Mr. Mwakisha was equally served with the same on 19<sup>th</sup> March, 2014.

13. In paragraph 11 of the said affidavit the deponent states that on 20<sup>th</sup> November, 2013 he visited the suit premises and saw that the school sign post had been changed to read Iyale (MJ) Academy, a primary school and there was a banner advertising a primary school. The deponent had two (2) photographs of the site taken which were attached to his affidavit. In paragraph 12, thereof, the deponent avers that he noticed that trees at the suit premises were being cut down and felled contrary to the court order. He had two (2) photographs taken which he attached to his affidavit. On 22<sup>nd</sup> November, 2013 he visited the school once again and found a graduation ceremony underway. He attached photographs of the same to his affidavit. The deponent in paragraph 22 of his affidavit deposes that he visited the suit premises on 1<sup>st</sup> April, 2014 and confirmed that the respondent was still running a nursery and primary school. Three (3) photographs were taken of the suit premises which were attached to his affidavit.

14. It was the applicants contention that the respondent has deliberately disobeyed the court order thereby bringing into disrepute the rule of law and lowering the dignity of the court. In paragraph 24 of the said affidavit, the deponent states that the respondent should be held in contempt until he purges the contempt. The hardships and inconvenience he will cause the parents and pupils in the school are of his own making and can be ameliorated by absorbing them (students) in his neighbouring school.

15. The respondent in his replying affidavit dated 11<sup>th</sup> July, 2014 deposes in paragraph 5 that at the time the application of 28<sup>th</sup> September, 2013 (sic) was filed, he and his wife Victoria Msabaa had already commenced operating on the premises the primary school known as Iyale Mikindani Junior Academy as opposed to the secondary school previously operated on the premises by himself and his erstwhile partners. He attached to his affidavit copies of the certificate of registration and singles business permit of Iyale Mikindani Junior Academy marked as exhibits "A" and "B". The latter was issued by the County Government of Mombasa for the year 2013.

16. In the said paragraph, the respondent states that it was subsequent thereto that the applicants first directed their complaint to them through a letter attached his affidavit and marked as exhibit "C" and thereafter the applicants moved to court and obtained the orders of 1<sup>st</sup> November, 2013.

17. On the issue of cutting down of trees at the suit premises, the respondent deposes that the trees were cut before the application for injunction was filed in court. This is contained in paragraph 11 of his affidavit. He further states that he ceased operating the secondary school at the end of the year 2012 and that the nursery and primary school was operating by early 2013. He further deposes that the sign post

claimed to have been photographed on 20<sup>th</sup> November, 2013 had been in place long before the applicant filed the application of 28<sup>th</sup> September, 2013 (sic). With regard to the photographs taken of the pupils he states that they were taken at the school's prize giving day on 23<sup>rd</sup> November (sic).

18. In paragraph 13, the respondent has deposed that he believed that the complaint by the applicants did not relate to the type or nature of school but rather on physical alterations and/or works that might be undertaken on the premises.

19. The law governing contempt of court was at the time of filing the present application provided in section 5(1) of the Judicature Act, Cap 8 Laws of Kenya. It provides that:-

***“The High Court and Court of Appeal shall have the same power to punish for contempt of court as if for the time being possessed by the High court of justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”***

20. The procedure for contempt of court in England is stipulated in Part 1 on (applications and proceedings in relation to contempt of court) and rule 81.4 of the Civil Procedure (Amendment No. 2 rules, 2012 of England.

21. In addition, Order 40 rule 3(1) of the Civil Procedure Rules, 2010 stipulate as follows:-

***“In case of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in person for a term not exceeding six months unless in the meantime the court directs his release.”***

22. The provisions of section 5(1) of the Judicature Act must be read together with the provisions of section 63(c) of the Civil Procedure Act that provides:-

***“In order to prevent the ends of justice from being defeated, the court may, if it so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”***

23. The catch words in the present application for contempt of court are to be found in the ruling of Kasango J. of 1<sup>st</sup> November, 2013, that is, ***“changing the character of the property GK2/157/Mikindani/Chaani or any structure on that land until the final determination of this suit or until further orders of the Court.”*** Did the change of the type of the school that was being run in the suit premises from a secondary school to a primary and nursery school amount to changing the character of the property? Through perusal of the pleadings on record, this court has established that when the application for an injunction was filed by the applicants on 25<sup>th</sup> September, 2013, the bone of contention was that the respondent was grading and excavating the property without the permission of the applicants.

24. It is worth noting that in the affidavit in support of the said application in paragraph 24, the deponent, James Njenga Mbugua deposes thus:-

***“Iyale secondary school that was started by the plaintiff at the suit premises ceased operations on November, 2012 and the last students left on or about November, 2012. Since then our property remains unoccupied as a school but the plaintiff refused to hand over vacant possession.”***

25. In paragraph 27 of the said affidavit, the deponent states that with the closure of the secondary school, the plaintiff may never be able to pay the defendants the amounts claimed, let alone compensate the defendants (applicants) for the degradation and wasting of the premises.

26. The replying affidavit of the respondent filed on 11<sup>th</sup> July, 2014 in paragraph 11 is indicative of the fact that the secondary school ceased to exist as at the end of the year 2012. It therefore follows that as of

25<sup>th</sup> September, 2013 when the applicants were granted an injunction on the exparte application, Iyale secondary school was not in existence. This is evident from the foregoing excerpts from both the applicants and the respondent.

27. It is my considered view that it cannot be construed that the respondent changed the character of the suit premises by running a primary and nursery school as opposed to a secondary school. The respondent attached to his affidavit filed on 11<sup>th</sup> July, 2014 a certificate of registration of Iyale Mikindani Junior Academy, a mixed day nursery primary. The date of registration was 11<sup>th</sup> May, 2009. I find the said certificate to be of no probative value to the present application as the year of registration of the said school is not relevant to show if the character of the property was changed or not. The single Business permit of Iyale Mikindani Junior Academy issued on 28<sup>th</sup> March, 2013 gives the business physical address as plot No. 837 Mikindani. In the said permit, the proprietors of the said school are indicated as Paul Msabaa and Victoria Msabaa. The single business permit gives a different physical address for the said Academy.

28. The respondent explained the establishment of a primary and nursery school at the suit premises in his replying affidavit of 3<sup>rd</sup> October, 2013, where he states in paragraph 6 that owing to the need for Iyale Mikindani Junior Academy to expand, he entered into a tenancy agreement with Trustees of Gospel Disciples Society Trust which granted them a 15 year lease to operate on the suit premises. A copy of the lease agreement marked as PM2 was attached to the said affidavit. It was signed on 23<sup>rd</sup> August, 2013 and was to become effective on 1<sup>st</sup> October, 2013.

29. When issuing the injunctive orders against the respondent, Kasango J. stated as follows in her ruling of 1<sup>st</sup> November, 2013:-

***“What is clear to the court is that even if there is change of the party in possession of the premises, there is one person in common to those who are alleged to be in occupation. That person is Paul Msabaa. He and wife Victoria Msabaa seem to have signed the lease with Gospel Society Trust. In my view in the interest of justice it is to Paul Msabaa that the injunction order should be directed. The court will hold the said Msabaa responsible personally if the character of the premises is in any way changed from the date when this injunction is granted.”***

30. In the case of **Mutitika vs Baharini Farm Limited** [1985] KLR, the Court of Appeal stated thus on the burden of proof in contempt of court cases:-

***“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature.”***

31. The position as regards contempt of court is encapsulated in the case of **Hadkinson vs Hadkinson** [1952] 2 ALL ER 56, where the Court of Appeal held thus:-

***“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he has purged his contempt.”***

32. In order to determine if the respondent contravened court orders, I have resorted to the definition of the word **“character”**, in the Concise Dictionary, 21<sup>st</sup> Edition. The said word is defined as **“The combination of traits and qualities distinguishing the individual nature of a person or thing.”**

33. After considering the context within which the application dated 25<sup>th</sup> September, 2013 was made and after paying due regard to the totality of the evidence adduced by both parties, it is my finding that the establishment of a primary and nursery school in the suit premises did not contravene the orders of Kasango J. of 1<sup>st</sup> November, 2013. The application of 25<sup>th</sup> September, 2013 addresses issues relating to excavation, digging up, damaging, wasting, alienating, grading, undertaking construction or demolition and changing the character of buildings and grounds of the suit premises. I am in agreement with Mr. Mwakisha that the words “**changing the character of the suit premises**” did not extend or cover the change of user of the suit premises. The establishment of a primary and nursery school in my view, did not interfere with the traits and qualities distinguishing the property. As indicated earlier, the secondary school was not in existence as of 25<sup>th</sup> November, 2013.

34. With regard to the issue of cutting down of the trees at the suit premises, this court was not in a position to establish the year when the photographs depicting the trees that had been cut were taken. The photographs bear the numerals 11.20.201, the last digit which would have shown the year they were taken cannot be deciphered from the photographs. In the said circumstances, this court cannot establish if the photographs were taken on 20<sup>th</sup> November, 2013 as alleged by the applicants or if they were taken at an earlier date before the application dated 25<sup>th</sup> November, 2013 was filed, as asserted by the respondent.

35. In view of the high burden of proof required in applications of contempt of court, I find that the applicants have failed to establish their case to the required standard. For the foregoing reasons, I find the respondent not guilty of contempt of court. I award costs of the application to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 9<sup>th</sup> day of February, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Benjamin Njoroge for the applicants

No appearance for the respondent

Oliver Musundi - Court Assistant