

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Environmental & Land Case 4 of 2012

**PAULINE M. NYAMAWI t/a AMUKENI NURSERY
SCHOOL.....PLAINTIFF/APPLICANT**

-VERSUS-

**THE ESTATE OF THE LATE SAMUEL NGOMBO Thro' his wife JESSICA
MWAMBEGA.....DEFENDANT/RESPONDENT**

RULING

The plaintiff is running a nursery school called **AMUKENI NURSERY SCHOOL**. She has sued the defendant seeking injunction to stop the defendant from interfering with the running of the school. She filed an interlocutory application by a way of notice of motion dated 17th January 2012 which is the subject of this ruling. The plaintiff seeks an interlocutory injunction to stop the defendant interfering with the school and seeks an order to be joined as a party in **HCC MSA 394 of 2006 (OS)**. In the affidavit in support of the application, the plaintiff stated that she began to run the school on the land that was rented to her by the late Samuel Ngombo in 2004. She was paying a monthly rent of Ksh. 500 per month. The defendant is the wife of Ngombo (deceased). The plaintiff started the school to benefit orphans and children from poor families. She started with one mud-wall classroom which was holding 28 students. The school later increased the number of students to 84. Out of that number, 11 of them were orphans. In the year between 2006 and 2004, she was able to secure foreign financial assistance and was able to build more structures made of stone wall. Between the years 2007 and 2008, the defendant increased the rent firstly at Ksh. 1,500 and finally to Ksh. 5,000 per month. The plaintiff deposed in her affidavit that the family of the late Ngombo who include the defendant began to exhibit malice, jealousy and envy. They began to threaten her with eviction and demolition of the school. The matter was taken before the sub-chief for arbitration and the decision of the sub-chief was that the defendant should compensate the plaintiff for the development she had carried out at the school and then once that was done the plaintiff was to vacate. The defendant did not pay any compensation but instead proceeded to dig holes in the compound of the school with a view to putting up fencing material to keep away the students from the school. The defendant had also been seen with strangers surveying the school which caused the plaintiff to fear that the defendant was intending to sell the property. When the plaintiff sought legal advice over this matter, she was advised by the counsel that the land where the school is situated and the surrounding area was the subject of adverse possession case filed by those in occupation of the land. The defendant is one of the claimants. That is the basis upon which the plaintiff seeks to be joined in **HCC MSA 394 of 2006 (OS)**.

The defendant filed a short replying affidavit stating that the school was started by herself and her late husband in 1999. It was thereafter passed on to the plaintiff to manage it for the defendant. There was no document to support that deposition. The plaintiff does have documents to support what she has stated in her affidavit in support of the prayer for injunction.

The court finds that the plaintiff has satisfied the first principle of granting an injunction. That is she has shown a prima facie case with probability of success. See the case of **GiellavsCassman Brown[1973] E. A. 353**. The defendant has not shown by documentation that she owns the land where the school is located. It therefore remains that the plaintiff is the one in possession of the school and the land. It is for

that reason I find that the application for injunction is merited. Moreover, it is stated by the plaintiff and it was not contradicted by the defendant that the school is presently accommodating some 84 children. To fail therefore, to grant the plaintiff the injunction she seeks would undoubtedly affect the education of those children. The constitution of Kenya, 2010 under Article 53 (2) requires the interest of the children to be considered in all matters concerning children. That article provides:

“A child best interests are of paramount importance in every matter concerning the child.”

On plaintiff’s prayer that she be joined in **HCC MSA 394 of 2006 (OS)** I find that it cannot be granted in this action. I also do not consider that this matter can be consolidated with that action. The parties in both cases are not all the same and the issues for determination are different, the orders therefore that commends themselves in respect of the notice of motion dated 17th January, 2012 and which are hereby issued are as follows:

1. An injunction is hereby issued restraining the defendant, her servants, agents or anyone else acting on her behalf from interfering with the running of AMUKENI NURSERY SCHOOL built on plot No. 13/IV/MN Mtwapa pending the hearing and determination of this suit or for 1 year from today’s date whichever occurs first.

2. The plaintiff is awarded costs of the notice of motion dated 17th January, 2012.

DATED and DELIVERED at MOMBASA this 5th day of July, 2012.

Mary Kasango

JUDGE